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Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media

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I. Introduction

In 1978, the United States Supreme Court upheld the authority of the Federal Communications Commission (FCC) to order divestiture of some newspaper-broadcasting combinations located in the same geographic market. The Court's decision in *FCC v. National Citizens Committee for Broadcasting (NCCB)*[1] was based in part on an important premise: The first amendment provides "powerful reasons" for attacking combinations which "restrain trade in news and views."[2] The Court ruled, however, that court-ordered divestiture for all co-located newspaper-broadcasting combinations would be improper.[3] Thus *NCCB* fails to implement fully another important first amendment premise: the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[4]

NCCB illustrates the difficult and perplexing problems the Court faces in identifying the structures and types of conduct that "inhibit"[5] mass media markets, and in determining the extent of government intervention that will be necessary to promote competition in those markets.[6] Government intervention in mass media

1. 436 U.S. 775 (1978), *rev'g in part*, National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977).

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

3. 436 U.S. at 803.

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

5. The Court has stated in a nonantitrust context that it "is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added). This Article distinguishes between an economic marketplace and a marketplace of ideas. *See* note 7 *infra*. If the Court's belief in an uninhibited marketplace of ideas were applied literally to the economic marketplace, the press would be subjected to very different and much more stringent antitrust standards than those applied to other forms of business. Antitrust law does not assume that all market inhibitions are illegal. *See generally* A. Neale, The Antitrust Laws of the United States of America (2d ed. 1970).

6. Writing shortly after three very important decisions concerning government intervention in mass media markets, Associated Press v. United States, 326 U.S. 1 (1945), United States v. Crescent Amusement Co., 323 U.S. 166 (1944), and National Broadcasting Co. v. United States, 319 U.S. 190 (1943), Professor Zechariah Chafee noted that employing the antitrust laws to prevent concentration in mass communications was the most important problem discussed in his book, and the most difficult. Z. Chafee, Government and Mass Communications 537 (2d ed. 1965). Professor Robert Bork notes that courts have been unable to distinguish between exclusionary practices that are beneficial to competition and those that are not. He claims that practices, such as vertical market division, that have been attacked under the antitrust laws should be lawful because they are beneficial to consumers. R. Bork, The Antitrust Paradox 297 (1978).

7. A market is defined as "a closely interrelated group of sellers and buyers. Therefore, we may define a market as including all the sellers in any individual industry, and all the buyers to whom [in common] they sell." J. Bain, Industrial Organization 7 (1959).

markets[7] interferes with freedom of the press to some extent.[8] If, however, such intervention results in diversifying market structure or in preventing anticompetitive conduct, it can foster freedom of expression.[9] Thus, application of the antitrust laws to the press raises important first amendment questions as well as questions of economic policy.[10]

The Court has often referred to a marketplace of ideas, a sphere in which intangible values such as ideas compete for acceptance. Advocates of the marketplace of ideas often assume that truth will inevitably triumph over falsity in an open encounter. For example, John Milton stated:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

J. MILTON, *Areopagitica*, in GREAT BOOKS OF THE WESTERN WORLD: JOHN MILTON 409 (R. Hutchins ed. 1952). Justice Holmes pursued a similar line of thought when he stated:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

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

While this Article assumes that the possibility for competition among ideas is enhanced when economic markets are free of unreasonable restraints on trade and have a diversified ownership structure, it is not assumed that truth will always dominate falsehood in such competition.

8. Justice Murphy stated that government action when directly aimed at the methods of collection or distribution of news is an interference with the press, although differing in degree from government restraints on written or spoken utterances. Associated Press v. United States, 326 U.S. 1, 51 (1945) (Murphy, J., dissenting).

9. For general discussions of the government's affirmative role in protecting and fostering freedom of expression, see Z. CHAFEE, *supra* note 6; T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966).

10. While Professor Jerome Barron and other access advocates advance a policy which they believe would diversify expression without altering market structure, there are strong reasons for modifying market structure. The antitrust laws, as Professor Chafee noted, are instruments which are too crude to insure that individual mass communications firms will have greater "openmindedness." Z. CHAFEE, *supra* note 6, at 624. The antitust laws can, however, insure that entry conditions in markets are not restricted by unreasonable restraints imposed by existing firms, that firms are not damaged by illegal combinations or attempts to monopolize, and that markets are not controlled by monopolistic firms. In a concentrated market structure, the opportunity to damage weaker firms or to exclude competition is far greater than in a competitive market structure. Alteration of market structure may induce entry of new firms, and/or encourage strong economic competition for advertising revenue. Such alteration may also lead to diversification of the information available to the public.

Professor Barron rejects the premise that diversification of ownership will lead to diversification of ideas, and states that "[t]he theory may be flawed. Multiplicity of ideas will not inevitably flow from multiplicity of ownerships if all the ownerships are captives of the same economics—or think they are." J. BARRON, FREEDOM OF THE PRESS FOR WHOM? (1973). *See also* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Professor Barron oversimplifies a complex phenomenon by implying that similar economic

This Article examines the Supreme Court's attempts to foster open markets by altering either the structure or the conduct of mass media enterprises.[11] Structure and conduct are the two main determinants of market performance. Market structure "means those characteristics of the organization of a market that seem to exercise a strategic influence on the nature of competition and pricing within the market."[12] Some characteristics of market structure include degree of buyer concentration, degree of seller concentration, degree of product differentiation, and entry conditions. Market conduct, on the other hand, comprises the practices, policies, and devices which firms employ in adjusting to changes in their markets. Structure can have an impact on conduct, and conversely, conduct can affect structure. Thus, when the Supreme Court addresses the structure of mass media enterprises, their conduct and performance can also be affected, and vice versa.

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constraints lead to homogeneous content. In the literature on viewer program choice, it has been shown that programming will be highly similar among competitors when there is a small number of firms. Although each firm is subject to the same economic restraints, however, diversity is significantly enhanced when there are many competitors. *See, e.g.*, R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 49-53 (1973) [hereinafter cited as R. NOLL]. Diversity in ownership will not necessarily result in diversification of content, but the potential for heterogeneous content is certainly enhanced when there are many competing firms. For an example of structural change resulting in diversification of content, see text accompanying notes 302-03 and note 327 *infra*.

The idea of a right of access did not originate with Professor Barron; it was criticized by Professor Chafee in the 1940's. *See* Z. CHAFEE, *supra* note 6, at 149-95. Professor Chafee believed that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." *Id.* at 633. The Supreme Court reached the same conclusion in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *But cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (a government-imposed access obligation on broadcasting stations does not violate the first amendment). For an extensive critique of the recent literature on access, see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973). For commentary on a case in which access was used to limit discussion of important public issues, see F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT (1976).

11. For general discussions of the extent to which mass communications markets are concentrated and controlled by a few firms, see W. BAER, H. GELLER, J. GRUNDFEST & K. POSSNER, CONCENTRATION OF MEDIA OWNERSHIP (1974); M. ERNST, THE FIRST FREEDOM (1946); B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION (1975); B. RUCKER, THE FIRST FREEDOM (1968). Literature which is germane to a particular form of mass communication will be cited in the appropriate section of this Article.

Professor Bruce Owen's book typifies one segment of the literature dealing with the structure and conduct of mass communications. His interpretation of the first amendment overemphasizes its affirmative aspects and underplays its restraints upon government intervention. While claiming a "libertarian" underpinning for his book, Professor Owen proposes large scale government intervention, such as transforming newspaper printing and delivery facilities into quasi-public utilities, and one questions whether he really understands what the term "libertarian" means.

12. J. BAIN, *supra* note 7, at 7.

The total mass media marketplace includes such diverse media as newspapers, books, periodicals, recordings, broadcasting stations, and motion pictures. Enterprises in each medium compete not only against each other but also against enterprises in other media as well. This Article will discuss several media separately because conditions for entry, competitive practices, and other factors differ among mass communications industries. Moreover, the Supreme Court has formulated distinct first amendment standards for each medium it has confronted.[13] This Article explores first whether the Court's antitrust decisions promote open market conditions for mass media. Second, this Article analyzes the important first amendment problems that are posed by such cases. Finally, this Article will argue that the Court should apply uniform antitrust and first amendment standards for all media.

II. Regulating the Structure and Conduct of the Newspaper Industry

The newspaper industry, as Judge Learned Hand wrote, "serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible."[14] Newspapers have been found guilty, however, of diminishing the flow of news from different sources by attempting to preclude competition[15] and to damage existing competitors.[16] Newspapers and news agencies have argued that the first amendment shields them from liability under the antitrust laws, but the Supreme Court has held consistently that while freedom to publish is guaranteed by the first amendment, freedom to combine to keep others from publishing is not.[17]

13. The Court stated in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952), that "[e]ach method [of expression] tends to present its own peculiar problems." For examples of the distinct first amendment standards that have been developed, compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (newspapers) with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (broadcasting) and Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (motion pictures).

14. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

15. Associated Press v. United States, 326 U.S. 1 (1945).

16. Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

17. Associated Press v. United States, 326 U.S. 1, 20 (1945). Only cases involving inter-newspaper or newspaper-broadcasting competition are discussed in this section. For a case dealing with competition *within* a newspaper's distribution system, see Albrecht v. Herald Co., 390 U.S. 145 (1968). Because *Albrecht* does not involve practices that have a significant impact on the flow of information from diverse sources, it is not discussed in this Article. Similarly, while antitrust activity in fields such as newsprint production and printing equipment manufacturing has an impact upon the newspaper industry, it is beyond the scope of

A. *Competition in Advertising Lineage*

(1) An Inauspicious Beginning: Combination Rates and *Farmer's Guide*

The Supreme Court first applied the Sherman Act[18] to newspapers in *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*[19] Although this early case did not present first amendment issues, it is nonetheless significant because the Court for the first time applied its fundamental *Standard Oil Co. of New Jersey v. United States*[20] rule to the newspaper industry, holding that a restraint of trade or an attempted monopolization may violate the Sherman Act even though it does not have a nationwide impact on the relevant industry or market.[21]

The publishers of seven farm newspapers in seven midwestern states formed the Midwest Farm Paper Unit in 1928 to procure advertising at a combination rate less than the rate offered for placement in each newspaper separately. Following implementation of the combination rate, the total advertising lineage of the Unit's member newspapers increased substantially.[22] At the same time, the advertising lineage of a competing non-Unit newspaper, *The Indiana Farmer's Guide,* declined.

The publisher of the *Farmer's Guide* brought an action against the publishers of the Unit newspapers in federal district court alleging that the combination rate violated sections 1 and 2 of the Sherman Act. The Unit newspapers responded that the placement of advertising did not involve interstate commerce,[23] and that the

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this Article. For a case involving competition in the printing field, see United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971).

For a discussion of concentration in the newspaper industry, see Nixon & Ward, *Trends in Newspaper Ownership and Inter-Media Competition,* 38 JOURNALISM Q. 3 (1961); Nixon, *Trends in Daily Newspaper Ownership Since 1945,* 31 JOURNALISM Q. 3 (1954); Nixon, *Concentration and Absenteeism in Daily Newspaper Ownership,* 22 JOURNALISM Q. 97 (1945). A wealth of information on antitrust aspects of the newspaper industry is contained in *The Newspaper Preservation Act: Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. (1969); *The Failing Newspaper Act: Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 90th Cong., 1st & 2d Sess. (1967-1968).

18. 15 U.S.C. §§ 1-7 (1976).

19. 293 U.S. 268 (1934).

20. 221 U.S. 1, 61 (1911).

21. 293 U.S. at 279.

22. From 1928 to 1932, the advertising lineage carried by the Unit papers increased from 44.37% to 66.92% of the total advertising lineage for an eight state territory in which the newspapers were circulated. *Id.* at 278 n.2.

23. *See* note 24 *infra;* Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436 (1920).

combination rate merely enabled them to compete more efficiently with national farm newspapers through scale economies. At the close of evidence, the district court granted defendants' motion for a directed verdict,[24] and the Seventh Circuit affirmed.[25] Although conceding that the *Farmer's Guide* had lost some advertising as a result of the combination rate, the Seventh Circuit held that the combination did not materially affect the farm journal advertising business on a nationwide scale.[26] The United States Supreme Court reversed,[27] holding that sections 1 and 2 of the Sherman Act have "both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce."[28]

In *Farmer's Guide,* the Court applied to the newspaper industry a principle that fosters open markets. If the Court had agreed with

24. Farmer's Guide Publishing Co. argued before the Supreme Court that the directed verdict was based on a failure to show that interstate commerce was involved. While the record is ambiguous, the Supreme Court cited the district judge's instructions to the jury which stated in part that there had been a "failure on the part of the plaintiff in this case to show that there has been any restraint of trade as between the different states . . . . That being true, this court would not have jurisdiction to entertain the case at all. . . ." 293 U.S. at 274. The Supreme Court believed that the court of appeals "impliedly assumed that petitioner's business does include interstate commerce," *id.* at 277, and held that there was sufficient evidence for the interstate commerce issue to go to the jury. *Id.* at 276.

25. Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 70 F.2d 3 (7th Cir. 1934).

26. *Id.* at 5. Such a requirement, the court of appeals explained was established by Standard Oil Co. of Ind. v. United States, 283 U.S. 163 (1931), and Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

27. 293 U.S. 268 (1934).

28. *Id.* at 279. The Court drew heavily upon Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911). Writing for a unanimous Court, Justice Butler stated that *Farmer's Guide*'s right to recovery does not "depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever published or circulated." 293 U.S. at 279. Justice Butler also stated that the court of appeals had misread the *Standard Oil of Indiana* and *Appalachian Coals* decisions. *Id.* at 280. The Court ordered a new trial, and did not address the question whether the combination rate was an unreasonable restraint of trade. *Id.* at 281.

On retrial, *Farmer's Guide* won a judgment of $10,000, which when trebled including attorney's fees totaled $37,000. The Seventh Circuit affirmed the award, believing that the Supreme Court had found sufficient evidence to prove that a restraint of trade or conspiracy existed. Prairie Farmer Publishing Co. v. Indiana Farmer's Guide Publishing Co., 82 F.2d 704 (7th Cir. 1936), *rev'd per curiam,* 299 U.S. 156 (1936). In reversing the court of appeals, the Supreme Court explained that it had stated no opinion on whether there was a conspiracy or restraint of trade. On reconsideration, the court of appeals found a lack of sufficient evidence that the combination rate was an unlawful restraint or that the Unit newspapers had conspired to restrain trade. 88 F.2d 979 (7th Cir. 1937), *cert. denied,* 301 U.S. 696 (1937).

the Seventh Circuit that a practice must affect an industry on a nationwide scale, it would have effectively barred antitrust prosecutions directed at practices that have only local or regional impact. The absence of that barrier is essential in promoting open newspaper markets, because such markets tend to be highly localized.[29] Furthermore, *Farmer's Guide* recognized that the Sherman Act applies to "classes of things."[30] Thus, to violate the Sherman Act, a restraint need not affect an entire mass media market, but only a specialized submarket such as newspapers.

Despite the absence of first amendment issues in *Farmer's Guide,* combination rates have far-reaching implications for freedom of the press. If, for example, the Unit's combination rate had been designed solely to bring about economies of cost, and only indirectly or incidentally made the *Farmer's Guide* a less favored competitor, then freedom of expression would not have been impaired significantly. If, however, the purpose or effect of the combination rate was to draw advertisers away from the *Farmer's Guide* so that it would be unable to continue publishing, diversity in farm newspapers would have been diminished.

(2) The *Times-Picayune* Unit Plan: The Tie That Binds

In *Times-Picayune Publishing Co. v. United States,*[31] the Supreme Court erroneously reversed a lower court's finding that a publisher had violated the Sherman Act. While *Times-Picayune* did not promote open market conditions, it is important because of the Court's recognition therein that restrictive practices can have legitimate business justifications.

In 1933 the *Times-Picayune,* the dominant morning newspaper in New Orleans, purchased the *Daily States,* an afternoon newspaper. After a competing morning newspaper ceased publication in 1941, only three daily newspapers remained in New Orleans: the morning *Times-Picayune* and two afternoon newspapers, the *States* and the *Item,* the latter of which was published independently. In 1950 the Times-Picayune Publishing Company implemented a unit plan for general advertising that required advertisers to purchase space in both the *Times-Picayune* and the *States.*[32] The United States filed suit in 1950, alleging that the unit plan violated sections

29. B. OWEN, *supra* note 11, at 50-51.

30. 293 U.S. at 279.

31. 345 U.S. 594 (1953). *See generally* Barber, *Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy,* 24 LA. L. REV. 503 (1964); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50 (1958).

32. The publishing company had adopted a unit plan for classified advertising in 1935.

1 and 2 of the Sherman Act.[33] The Times-Picayune Publishing Company defended the practice on the basis of economic efficiency, claiming that there could be no "tying" of products because the *Times-Picayune* and *States* were different editions of the same newspaper,[34] not separate newspapers.

The district court found that the newspapers were separate products and that the unit plan was an illegal tying agreement.[35] Before the Supreme Court, the Times-Picayune Company argued that the district court had erred in its finding,[36] and criticized its failure to appreciate the difference between selling news to readers and selling readers to advertisers. Only readers viewed the company's editorial products as being distinct, the company explained; advertisers were interested only in reaching readers, whether they were generated by the *Times-Picayune* or the *States*. Because of this, the company argued, a tie-in would be present only if readers were required to subscribe to both newspapers.[37] The United States

33. The United States also attacked the 1933 acquisition of the *States*, a unit plan for classified advertising, and coercion of news vendors to discontinue sales of the *Item*. Complaint at 6-7, United States v. Times-Picayune Publishing Co., 105 F. Supp. 670 (E.D. La. 1952).

34. United States v. Times-Picayune Publishing Co., 105 F. Supp. 670, 673 (E.D. La. 1952). The Court defines a tying arrangement "as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

35. United States v. Times-Picayune Publishing Co., 105 F. Supp. 670, 678 (E. D. La., 1952). The Supreme Court believes that tying agreements serve little purpose beyond suppressing competition. Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949). *But see* R. BORK, *supra* note 6, at 375-81.

Data for 1950 show an average daily circulation of 188,402 for the *Times-Picayune*, 114,660 for the *Item*, and 105,235 for the *States*, 345 U.S. at 599 (1953). Based on the *Times-Picayune*'s monopoly of the morning field, and its "enormous advantage" in circulation, the district court concluded that advertisers who wanted to cover the New Orleans market must use the *Times-Picayune*. 105 F. Supp. at 674. Because the intent of the plan was to diminish the competitive vigor of the *Item*, the district court enjoined use of the unit contracts. The district court did not find that the other aspects of the government's complaint, *see* note 33 *supra*, violated the Sherman Act. 105 F. Supp. at 680.

36. Brief for Appellant at 24, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

37. *Id.* at 36. The company also argued that the unit plan was adopted primarily as a means of achieving cost economies and that the plan did not act as a restraint upon the *Item*. *Id.* at 14, 58. The Times-Picayune Publishing Company's position was supported by a large group of newspapers which claimed that unit plans were widely accepted in the industry. Brief on Behalf of 98 Newspaper Publishers as Amici Curiae, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). One commentator noted that if the newspaper industry wanted to avoid government regulation, it should avoid implementing discriminatory pricing policies, forced combination advertising rates, and other practices that may constitute "targets" for antitrust prosecution. Ray, *Economic Forces as Factors in Daily Newspaper Concentration*, 29 JOURNALISM Q. 31, 42 (1952).

argued that the tying product (space in the *Times-Picayune)* clearly had the leverage that attaches to monopoly power and position.[38] The United States also claimed that the tying contract limited competition in the tied product (space in evening New Orleans newspapers) more drastically than did ordinary tying contracts because the full impact of the injury fell on a single competitor—the *Item.*[39]

The Supreme Court reversed, holding that the morning and afternoon newspapers did not constitute distinct markets,[40] that the unit plan had not handicapped the *Item* unduly,[41] and that the unit plan was motivated by legitimate business aims.[42] Justice Clark's opinion in *Times-Picayune* recognized the important role a "vigorous and dauntless press . . . [plays in] feeding the flow of democratic expression and controversy which maintains the institutions of a free society,"[43] but treated the issues as though only commercial practices were involved.[44]

Tracing the decline of daily newspapers in the twentieth century, Justice Clark noted that of the 598 daily newspapers that began publishing between 1929 and 1950, only 38% were still publishing in 1950. Of these newspapers, forty-six competed against established dailies that utilized unit rates, and by 1950 forty-one of these forty-six had collapsed. Thus, a newcomer in the daily newspaper business could calculate his chances of survival as 11% in cities where unit plans were in effect.[45] Despite this data, the Court refused to view the Times-Picayune Publishing Company's unit plan as an illegal tying agreement.

38. Brief for the United States at 24, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

39. *Id.* The government also argued that the unit plan was highly similar to block-booking in the motion picture industry, which the Supreme Court had declared to be illegal in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). *See* text accompanying note 318 *infra.*

40. 345 U.S. at 613.

41. *Id.* at 619.

42. *Id.* at 622. Specifically, unit plans significantly reduce the cost of production for two newspapers printed in the same plant.

43. *Id.* at 602.

44. This contrasts with Justice Frankfurter's concurring opinion in Associated Press v. United States, 326 U.S. 1, 29 (1945). *See* text accompanying notes 101-04 *infra.*

The briefs for the Times-Picayune Publishing Company and the United States did not argue the importance of preserving a diversified newspaper market or other first amendment values. Unit plans, however, can have an impact on independent newspapers which compete with a publisher that prints two newspapers in the same plant. Coupled with other factors, a unit plan could lead to the demise of an independent newspaper in such circumstances.

45. 345 U.S. at 604. This observation should not be read as placing the entire blame for the failure of the 41 newspapers on unit plans. A host of other factors, such as market size, probably played an important part in the newspapers' demise.

The Court held that a tying agreement violates section 1 of the Sherman Act when the seller enjoys a monopolistic position in the market for the "tying" product and when a substantial volume of trade in the "tied" product is restrained.[46] Discussing the first part of its test, the Court concluded that the newspaper advertising market in New Orleans should be treated as a whole, not as distinguishable morning and afternoon markets. If each of the New Orleans newspapers shared equally in the total volume of lineage, each would have approximately 33% of the advertising. Since the *Times-Picayune* had only about 40% of the general and classified advertising lineage, the Court held that there was no market dominance as required by the first part of the test.[47] Furthermore, the Court found that the product bought by advertisers in each of the newspapers was identical "fungible customer potential."[48] Thus, because there was no market dominance and there was no difference between the "tying" and the "tied" products, the Court concluded that the unit plan was not an illegal tying agreement.[49]

The Court's analysis is fundamentally incorrect. Because it was the only morning newspaper in New Orleans, with the largest circulation, the *Times-Picayune* was essential to many advertisers. By declaring that the *Times-Picayune*'s 40% share of advertising lineage did not constitute dominance, the Court ignored the power of the *Times-Picayune* to compel use of the *States*.[50] The *Times-Picayune* had a complete monopoly on access to morning readers and used that monopoly to restrain unreasonably the competition between the *States* and the *Item*.[51] Moreover, combining the lineage of its morning and evening newspapers, the Times-Picayune Publishing Company controlled about 70% of the total general and clas-

46. *Id.* at 608-09; *see* International Salt Co. v. United States, 332 U.S. 392 (1947).

47. 345 U.S. at 612-13.

48. *Id.* at 613.

49. *Id.* at 614.

50. As Justice Burton stated in a dissenting opinion in which Justices Black, Douglas, and Minton joined, the complaint should not be dependent upon the relation of the Times-Picayune to the entire market. *Id.* at 628.

51. *Id.* Justice Burton stated:

> The complaint is that the Times-Picayune enjoys a *distinct,* conceded and complete monopoly of access to the morning newspaper readers in the New Orleans area and that it uses that monopoly to restrain unreasonably the competition between its evening newspaper, the New Orleans States, and the independent New Orleans Item, in the competitive field of evening newspaper advertising. Insistence by the Times-Picayune upon acceptance of its compulsory combination advertising contracts makes payment for, and publication of, classified and general advertising in its own evening paper *an inescapable part of the price of access to the all-important columns of the single morning paper.*

Id. (emphasis added).

sified advertising lineage available in New Orleans. This presents far greater market dominance than that obtained by considering the *Times-Picayune*'s lineage alone.[52]

The Court's analysis of the second part of its test—the product being sold by the different newspapers—is similarly superficial. Only in a very broad sense were the newspapers selling the same product—readers. The Court assumed that the newspapers' readers were identical in all respects, such as income level, and thus ignored the fundamental distinctions newspapers draw between their readers and the readers of other newspapers when competing for advertising.[53] Moreover, the record showed that some general advertisers preferred to use the *Item* instead of the *States* because they believed that the *Item* did not duplicate the readership of the *Times-Picayune* to the degree the *States* did.[54] Thus, the segment of the total New Orleans newspaper readership which was delivered by the *Item* was considered by many advertisers to be distinct from that delivered by the *Times-Picayune.*[55]

Having rejected the rationale of tying cases, the Court proceeded to test the unit plan under the Sherman Act's general prohibitions of unreasonable restraints of trade and found that the plan had not "unduly handicapped" the *Item.*[56] This finding is consistent with the evidence, although it was based on data for only one year.[57] The Court made a significant departure from the evidence, however, when it found that the unit plan had been adopted solely to produce economies of operation.[58] The record reveals that the unit plan for general advertising was adopted in 1950 because the *Item* had become significantly more competitive with the *States* in 1949.[59] The

52. Professor Donald Turner has noted that if morning and afternoon advertising were separate products—a necessary assumption when asking whether the dominance test of tie-ins has been satisfied—then the *Times-Picayune* had a 100% monopoly of the former. Turner, *supra* note 31, at 55 n.21.

53. For example, *Newspaper Rates and Data,* published monthly by the Standard Rate and Data Service, commonly contains advertisements by newspapers stressing the distinctive characteristics of their readers.

54. Record at 285, 357, 393-94, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

55. In fact, the readers of the *Times-Picayune* and the *States* were clearly distinguishable groups. *Id.* at 1484.

56. 345 U.S. at 619.

57. Professor Richard Barber's analysis of the data indicates that the *Item* may have benefited to a limited extent from the unit plan. Barber, *supra* note 31, at 528-31. Due to different expiration dates on existing contracts, the full impact of the unit plan would not have been revealed in the data for 1950 alone.

58. 345 U.S. at 623; *see* note 42 *supra.*

59. Barber, *supra* note 31, at 521-22, 534.

unit plan was clearly designed to inhibit the *Item,*[60] but the Court found that there was no specific intent to monopolize.[61]

Although the Court did not determine that unit plans may be lawful in other circumstances,[62] its position that different products were not involved raises a significant barrier to tying agreement attacks on local newspaper unit plans.[63] While correct in finding that the *Item* had not been harmed by the unit plan, at least for one year, the Court failed to recognize the intent behind the plan, the distinct products involved, and the power of the *Times-Picayune* to compel purchase of space in the *States.* That recognition would have fostered essential first amendment values because it might have promoted tying agreement attacks on other unit plans that threaten to eliminate independent newspapers.[64]

(3) Advertising Boycotts: The Implications of *Lorain Journal*

The Court in *Times-Picayune* faced the difficult problem of assessing the harmful effects of a unit plan. In *Lorain Journal Co. v. United States,*[65] however, the clarity of the issues and the evidence easily supported the Court's decision against a newspaper publisher who had attempted to modify market structure through anticompetitive conduct. *Lorain Journal* presents substantial first amendment problems and illustrates the use of the antitrust laws to further first amendment values.

The *Lorain Journal* was the only daily newspaper in Lorain, Ohio, and because of its coverage of the Lorain market, it was a

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60. Times Picayune Publishing Co. v. United States, 105 F. Supp. 670, 678 (E.D. La. 1952).

61. 345 U.S. at 627.

62. *Id.*

63. In a case decided shortly after *Times-Picayune,* however, the Eighth Circuit held that two Kansas City newspapers, the morning *Times* and the evening *Star* were two separate newspapers with distinct and separate uses for advertisers. Kansas City Star Co. v. United States, 240 F.2d 643, 658 (8th Cir. 1957).

64. The independent *Item* continued to publish for a few years following the decision in *Times-Picayune.* In 1958, the *Item* merged with the Times-Picayune Publishing Company's *States* to form the *States Item.*

Professor Keith Roberts considers combination rates to be pernicious and has urged that the Court reexamine them. Roberts, *Antitrust Problems in the Newspaper Industry,* 82 HARV. L. REV. 319, 345 (1968). Professor Owen, however, concludes that *Times-Picayune* was not an important decision in terms of its effects on the long term structure of the industry. B. OWEN, *supra* note 11, at 53. Insofar as unit plans are not a major factor in the demise of a particular independent newspaper, Professor Owen is correct. He ignores, however, the way in which the result in *Times-Picayune* was reached. In certain cases in which a unit plan may be a significant factor in the demise of an independent newspaper, the Court's approach to the product issue in *Times-Picayune* would deter prosecution under a tying agreement theory.

65. 342 U.S. 143 (1951).

"must buy" for local advertisers.[66] From 1933 until 1948, the *Journal's* "commanding and overpowering" position was virtually unchallenged by other local mass media.[67] In 1948, however, the FCC licensed a radio station, WEOL, to operate in Elyria, eight miles south of Lorain. To eliminate the threat of competition from the station, the publishers of the *Journal* developed a policy that advertising from merchants who either advertised on WEOL, or proposed to do so, would be rejected by the *Journal*. The United States brought a civil action, alleging that the *Journal* was engaging in a combination and conspiracy in restraint of trade violating section 1 of the Sherman Act, as well as engaging in a conspiracy to monopolize and attempting to monopolize in violation of section 2.[68] The district court found that the *Journal* had violated section 2, and enjoined any further attempt to do so.[69] The evidence was quite clear, the district court stated, that "the policy was as uncomplicated in purpose and as lacking in subtlety as the profit motive itself; the Journal sought to eliminate this threat to its pre-eminent position by destroying WEOL."[70] At trial the *Journal* asserted that the first amendment prohibited the district court from enjoining the refusal of advertising, because an injunction would involve a prior restraint upon freedom to publish, or to refuse to publish, whatever the publishers desired.[71] The district court concluded, however, that liberty of the press was not a license to suppress other sources of information.[72]

Before the Supreme Court, the *Journal* again argued that the Sherman Act does not empower a court to enforce a prior restraint on the press.[73] The United States argued that the district court injunction recognized the differences between news and advertising, as well as various reasons for rejecting advertising:

66. The newspaper reached 99% of the families in Lorain. United States v. Lorain Journal Co., 92 F. Supp. 794, 796 (N.D. Ohio 1950).

67. *Id.* The Journal Company also attempted unsuccessfully to obtain a radio station in Lorain. *See* Lorain Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950).

68. Complaint at 5, United States v. Lorain Journal Co., 92 F. Supp. 794 (N.D. Ohio 1950).

69. United States v. Lorain Journal Co., 92 F. Supp. 794 (N.D. Ohio 1950).

70. *Id.* at 797. The Journal Company told advertisers who questioned the policy that it was designed to give "radio a 'fair'—that is an exclusive—trial or they were informed that the policy was designed to 'protect' the Lorain merchants by preserving the integrity of the Lorain market." *Id.* at 796. The district court commented that this was unworthy of belief. *Id.* at 797.

71. *Id.* at 800.

72. *Id.* at 801.

73. Brief for Appellant at 11, Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

> The judgment in no way circumscribes the freedom of appellants to publish news as they desire it published, to enforce editorial policies of their own choosing, and to exercise the right to reject advertising because it is offensive in substance or because the advertisers are not the sort of persons with whom they wish to deal. The judgment properly prohibits appellants from refusing to deal with an advertiser where the *basis* for such refusal is the desire to force the advertiser not to have business relationships with other advertising media.[74]

The Supreme Court unanimously affirmed and held that the injunction did not restrict freedom of the press.[75] In reaching this result, the Court determined clearly the scope of a publisher's freedom to refuse to deal with certain advertisers. Justice Burton, explaining that a publisher's "right" to refuse advertising was neither absolute nor exempt from regulation, held that in the absence of any purpose to create or maintain a monopoly, a publisher is free to exercise his independent discretion to deal with whom he will.[76] The Court was concerned primarily with the effect of the *Journal's* policy on the public and WEOL, not on advertisers. The publisher's conduct was aimed directly at eliminating WEOL and any diversity the station brought to the marketplace.[77] The Court believed that unless protected by law, the "consuming public" would be at the mercy of restraints and monopolizations of interstate commerce.[78] The *Lorain Journal* decision supports an open market concept and affirms the use of the Sherman Act as a means of preserving a diversified market structure. The public interest in media diversity through the continued existence of WEOL was placed in a preferred position to the publisher's "right" to refuse advertising from whomever it desired.[79]

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74. Brief for the United States at 26.

75. Lorain Journal Co. v. United States, 342 U.S. 143, 155-56 (1951). The Journal Company had argued that the Sherman Act could not apply to its activities because no interstate commerce was involved. Brief for Appellant at 13-14. The Court, however, found that interstate commerce was involved. 342 U.S. at 152. Moreover, building upon *Farmer's Guide, see* text accompanying note 37 *supra,* the Court stated that the "reference in section 2 to an attempt to monopolize 'any part of the trade or commerce among the several States' relates not merely to interstate commerce within any geographical part of the United States but also to any appreciable part of such interstate commerce." 342 U.S. at 151 n.6.

76. *Id.* at 155. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

77. 342 U.S. at 150. The Journal Company was subsequently held liable for treble damages because of its policy against WEOL. *See* Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 298 F.2d 356 (6th Cir. 1961).

78. 342 U.S. at 152.

79. "The word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358 (1921).

B. *Wire Services and the Sale of News: The* Associated Press *Case*

The Court's most important application of the Sherman Act to further first amendment values occurred in *Associated Press v. United States,*[80] a case that stemmed from an attempt by the Department of Justice to diversify the distribution of news. A complaint, filed on August 28, 1942, against the nation's largest wire service, the Associated Press (AP), charged violations of sections 1 and 2 of the Sherman Act. The heart of the complaint alleged that two provisions of AP's bylaws which prohibited AP members from selling news to nonmembers, and gave each member the power to block its nonmember competitors from membership, had the purpose and effect of protecting AP members against competition.[81] The complaint argued that by prohibiting its members from selling news to nonmembers, AP restrained the flow of news and restricted the freedom of newspapers.[82] Furthermore, the complaint alleged that the power of each member to block a competitor's membership impeded the entry of new newspapers into markets where AP members were established.[83]

The district court, on a motion for summary judgment, found that the bylaws restricted commerce and that they had hindered and impeded the growth of competing newspapers.[84] Judge Learned Hand explained that the interests of the newspaper industry were not conclusive because the public's general interest in receiving news from many different sources was involved. In oft-quoted language, Judge Hand stated:

> That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are

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80. 326 U.S. 1 (1945). For general background on *Associated Press,* see Swindler, *The AP Anti-Trust Case in Historical Perspective,* 23 JOURNALISM Q. 40 (1946).

81. Complaint at 27, United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943). The bylaws on admission of new members provided that AP's board of directors could admit prospective members, except those who competed with an AP member. In that case, the board would have to obtain the member's consent before admitting the competing applicant. In the absence of such consent, the competing applicant faced three obstacles to admission. First, the applicant had to pay AP 10% of the total fees AP had collected since 1900 from the applicant's competitors. In New York City, for example, an evening competitor would have had to pay $575,003.49 to gain AP membership. United States v. Associated Press, 52 F. Supp. 362, 367 n.1 (S.D.N.Y. 1943). Second, the applicant had to relinquish any exclusive rights it may have had to any news or news picture services when requested by an AP member competitor. Finally, the applicant had to receive a majority vote of the regular AP members. *Id.* at 365; *see* note 86 *infra.*

82. Complaint at 8.

83. *Id.* at 9. The Complaint considered the service of a news agency to be essential to the operation of any newspaper. *Id.*

84. United States v. Associated Press, 52 F. Supp. 362, 368 (S.D.N.Y. 1943).

> more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.[85]

The district court enjoined AP from observing the bylaws and from adopting new bylaws which had a similar purpose or effect.[86]

Before the Supreme Court, AP and some of its members argued that the bylaw prohibiting the sale of news to nonmembers was a reasonable ancillary restraint.[87] AP also claimed that the district court, by basing its decision on the public interest in the widest possible dissemination of news, subjected the press to special and peculiar obligations which violated the first amendment policy that the press be as free as possible from discriminatory administrative control.[88] The *Chicago Times* argued that the first amendment precluded application of the Sherman Act to newspapers.[89] The United States challenged the contention that the press was immune from the antitrust laws, noting that a similar first amendment defense had been rejected in *Associated Press v. National Labor Relations Board.*[90] The antitrust laws do not interfere with the editorial process, the government claimed, and the objectives of the first amendment would be furthered by removing the barriers that were erected by a private combination to block access to reports of world news.[91]

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85. *Id.* at 372.

86. *Id.* at 375. AP's original bylaws, a part of which were held to be in restraint of trade in Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N.E. 822 (1900), provided members with an absolute veto over competing applicants. The district court noted that the amended bylaws, *see* note 81 *supra,* liberalized admission, but provided members with a conditional veto. *Id.* at 370.

87. The *Chicago Tribune* in its brief stated:

> When AP "admits an applicant to membership" it thereby concomitantly "agrees to sell its services to the applicant." Ancillary to the purchase and sale of products, it has always been held legal for the seller synchronously to restrict his freedom of action by agreeing not to sell the same in the restricted community of the purchaser for a limited space of time, save with the purchaser's consent—in the absence of monopoly or attempted monopoly or of a scheme to stifle competition, or unless the seller is a public utility or engaged in a public calling.

Brief for Appellant Tribune Co. at 9.

88. Brief for Appellant Associated Press at 42.

89. Brief for Chicago Times, Inc. as Amicus Curiae at 49.

90. 301 U.S. 103 (1937). The Supreme Court in that case held:

> The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws.

Id. at 132-33. *See also* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-93 (1946); Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946).

91. Brief for the United States at 54. The Government was not seeking indiscriminate distribution of news; rather, it sought to "have the member papers free themselves from the

The United States Supreme Court affirmed.[92] The majority opinion by Justice Black held that the district court's summary judgment had not injured AP, because newspaper publishers were not entitled to a different and more favorable trial procedure than that accorded other persons under the Sherman Act.[93] Justice Black also rejected the argument that the first amendment affords the publisher a constitutional sanctuary in which he can with impunity violate laws that regulate his business practices.[94] He explained that the government has an affirmative obligation to protect first amendment freedoms, and that the Sherman Act was an appropriate method of doing so.[95] Central to the majority opinion in *Associated Press* is the concept of a market which is free from restraints which either destroy competition or the initiative which brings newcomers into a field.[96] Justice Black noted that inability to buy news from the largest news agency, or from any of its members, can have

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agreement whereby they have precluded individual freedom of contract with respect to the distribution of such news." *Id.* at 134. The Government was particularly interested in attacking the bylaw which prevented AP members from sharing news with nonmember newspapers. This provision was not illegal in itself, but was an illegal means of implementing and enforcing the exclusionary agreement that restrained competition. *Id.* at 47. Basing its argument on Montague & Co. v. Lowry, 193 U.S. 38 (1904), and Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941), the Government argued that a combined refusal to deal which excludes others from the market is an unlawful restraint of trade. Brief for the United States at 47-48. The Government also argued that a restraint does not have to put a competitor out of business or make successful operation impossible to be illegal. Nor was it necessary to show that every member of an industry suffers from an agreement, or that the agreement suppresses all competition. *Id.* at 61; *see* Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930); text accompanying notes 177-85 *infra.*

92. 326 U.S. 1 (1945).

93. *Id.* at 6. Professor Bork believes that AP was entitled to a trial. R. BORK, *supra* note 6, at 340; *see* text accompanying note 108 *infra.*

94. 326 U.S. at 7.

95. *Id.* at 20. Justice Black stated:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. *The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary* . . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

Id. (emphasis added, footnotes omitted). Justice Black's failure to qualify the word "restrain" in this passage should not be read as permitting attacks on all exclusionary practices. The thrust of Justice Black's opinion was that only unreasonable restraints are not permissible.

96. *Id.* at 13.

serious effects on the publication of competitive newspapers, both those published presently and those which but for the restrictions might be published in the future.[97] Because the bylaws restrained the sale of interstate news to nonmembers who competed with members,[98] and impeded the growth of competing newspapers,[99] the Court agreed with the district court that they violated the Sherman Act. Perhaps more significant, however, is the Court's belief that the bylaws also violated the spirit of the first amendment. In oft-quoted language, Justice Black stated that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[100]

In his concurring opinion, Justice Frankfurter suggested that the press should be subject to different antitrust standards than other businesses. He claimed that in addition to being a commercial enterprise, the AP had a relation to the public interest unlike that of other profit-making enterprises,[101] because the press "sold" information.[102] Thus, he concluded that the presence of rival agencies that could supply newspapers with a product similar to AP's was irrelevant,[103] and that the bylaws were unreasonable because they offended "the basic functions which a constitutionally guaranteed free press serves in our nation."[104] Like the majority opinion, Justice Frankfurter's concurring opinion was based upon the concept of a market which is free of unreasonable restraints. Justice Frankfurter,

97. *Id.*

98. *Id.* Professor Bork, in criticizing the *Associated Press* decision has accused Justice Black of equating the word "competition" with "access to a particular source of supply rather than with effectiveness of rivalry in the general marketplace." R. BORK, *supra* note 6, at 340. *See also* 326 U.S. at 34-47 (Roberts, J., dissenting). Justice Frankfurter's concurring opinion explained why a restraint upon access to a particular supply of news was an unreasonable restraint upon the marketplace. *See* text accompanying notes 101-04 *infra.*

99. 326 U.S at 12.

100. *Id.* at 20.

101. 326 U.S. at 27-28 (Frankfurter, J., concurring).

102. *Id.* at 28. Justice Frankfurter explained that:

> A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. *And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.*

Id. (emphasis added).

103. *Id.; see id.* at 17-18.

104. *Id.* at 29.

however, found that the unreasonableness test for the press was less stringent than for other businesses.

Justice Murphy's dissent expressed concern that the majority view would lead to excessive government regulation of the press.[105] Although noting that the press was not immune from application of the Sherman Act,[106] Justice Murphy called for "clear and unmistakable" evidence before the press is subjected to the sanctions of the Sherman Act.[107] Moreover, because freedom of the press was involved, Justice Murphy concluded that the case deserved more than summary judgment.[108] If relaxed antitrust standards were applied to the press, Justice Murphy warned, the "path [would] be made clear for dangerous governmental interference."[109]

The Court, however, did not foresee any first amendment hazards in mass media antitrust actions. The ideal of an open market set forth in *Associated Press* is supported by both the antitrust laws and the first amendment. This ideal would play a critical role in later cases involving newspaper mergers and acquisitions.

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105. *Id.* at 50. Justice Roberts seriously miscast the effect of the decision, claiming that the Court's action would transform AP into a public utility and require it to serve all on equal terms. *Id.* at 45-46 (Roberts, J., dissenting). Justice Douglas answered this contention in his brief concurring opinion:

> The decree which we approve does not direct Associated Press to serve all applicants. It goes no further than to put a ban on Associated Press' practice of discriminating against competitors of its members in the same field or territory. That entails not only a discontinuance of the practice for the future but an undoing of the wrong which has been done.

Id. at 24-25.

Although prohibited from discriminating against firms which compete against AP members, the AP bylaws still hamper the entry of new newspapers. *See generally* Roberts, *supra* note 64.

106. 326 U.S. at 51.

107. *Id.* at 52. For a detailed discussion of the shortcomings of the evidence in the case, see *id.* at 34-49 (Roberts, J., dissenting).

108. *Id.* at 59.

109. *Id.* Justice Murphy issued a cautionary admonition:

> We stand at the threshold of a previously unopened door. We should pause long before opening it, lest the path be made clear for dangerous governmental interference in the future . . . . If unsupported assumptions and conjectures as to the public interest and competition among newspapers are to warrant a relatively mild decree such as this one, they will also sustain unjust and more drastic measures. The blueprint will then have been drawn for the use of the despot of tomorrow.

Id. Cf. id. at 49 (Roberts, J., dissenting) (regulation of news, in light of the constitutional guarantee of free speech, should be examined closely by the courts).

Shortly after *Associated Press,* a bill was introduced in Congress which would have exempted news-gathering agencies such as AP from the Sherman Act. *See* H.R. 4665, 79th Cong., 1st Sess. (1945). A similar response, although far more successful, followed the decision in Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). *See* note 148 *infra.*

C. *Newspaper Mergers and Acquisitions: Prima Facie Violations and the Failing-Company Defense*

(1) The Prima Facie Violation in *Times Mirror*

The widespread acquisition of independent newspapers by newspaper chains or multimedia firms has been a significant factor in the decline of independent newspapers.[110] In *Times Mirror Co. v. United States,*[111] the Supreme Court encouraged government attacks on concentrated markets by holding that the acquisition of competing newspapers by the publisher of the *Los Angeles Times* was a prima facie violation of the Clayton Act.[112]

In 1964, the Times Mirror Company acquired the Sun Company, which published morning, afternoon, and Sunday newspapers in San Bernardino County, Los Angeles County's neighbor to the east.[113] With the acquisition, the Times Mirror Company's share of circulation in San Bernardino County rose from 10.6% to 54.8% of total weekday circulation, from 23.9% to 99.5% of total morning circulation, and from 20.3% to 64.3% of total Sunday circulation. The United States sought an order for divestiture, charging that the acquisition unreasonably restrained commerce in violation of section 1 of the Sherman Act, and that the effect of the acquisition might substantially lessen competition in violation of section 7 of the Clayton Act.[114]

The Times Mirror Company defended the acquisition against the section 7 charge on the ground that there could be no appropriate product market[115] that included both the *Los Angeles Times* and the *San Bernardino Sun.* There was no cross-elasticity of demand for the two newspapers, the Times Mirror Company argued, because they were not generally regarded by readers to be substitutes for one another.[116] The district court ordered divestiture solely on the basis

110. During the past five years, newspaper chains have acquired independent dailies at the rate of 55 a year. Approximately 50% of the nation's daily newspapers are owned by firms that control more than one newspaper. *See generally* Louis, *Independent Dailies are an Endangered Species,* FORTUNE, June 19, 1978, at 160.

111. 390 U.S. 712 (1968), *aff'g per curiam,* 274 F. Supp. 606 (C.D. Cal. 1967).

112. 15 U.S.C. §§ 12-27 (1976).

113. The acquisition was stimulated by the Sun Company owner's estate planning. Heavy estate taxes have been a key factor in the sale of independent dailies, which are often family owned, to chains. To stem this trend Rep. Morris Udall (D. Ariz.) sponsored the Independent Local Newspaper Act, a bill which provides special relief from taxes for family owned newspapers. *See* H.R. 2770, 96th Cong., 1st Sess. (1979).

114. United States v. Times Mirror Co., 274 F. Supp. 606, 609, 618 (C.D. Cal. 1967), *aff'd per curiam,* 390 U.S. 712 (1968).

115. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

116. 274 F. Supp. at 615. While it is not clear whether the Times Mirror Company

of the section 7 charge, and held that where two products complement each other there is no barrier to section 7 if the merger may have anticompetitive effects.[117] Because the size of the merger was "inherently suspect,"[118] however, the district court held that it was a prima facie violation of the Clayton Act. Thus, delineation of anticompetitive effects was found to be unnecessary.[119] The district court was nevertheless concerned with two anticompetitive aspects of the merger that have important first amendment implications—increased concentration and barriers to entry. The district court found initially that there was heavy concentration of daily newspaper ownership in southern California, with four publishers accounting for 71% of all weekday daily circulation.[120] Moreover, there had been a steady decline of independent newspapers in southern California; in the greater Los Angeles market (Los Angeles and four surrounding counties) in 1952, 63% of all daily newspapers were independent, while in 1966 only 22% were independent.[121] The acquisition of the *Sun* was thus particularly anticompetitive because it eliminated one of the few independent morning newspapers in southern California[122] and raised a barrier to newspapers seeking entry to the San Bernardino County market.[123]

Although the parties raised no first amendment arguments in *Times Mirror,* the Supreme Court's affirmance can be seen as supporting the first amendment principles of *Associated Press v. United States:*[124] the widest possible dissemination of information from diverse sources is essential to the welfare of the public, and

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argued that advertisers distinguished between the newspapers, the court found that the newspapers competed for national advertising. *Id.* at 618.

117. *Id.; see* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (any merger, whether it is horizontal, vertical, conglomerate, or product extension, violates section 7 if it may substantially lessen competition).

118. United States v. Continental Can Co., 378 U.S. 441, 458 (1964).

119. 274 F. Supp. at 618.

120. *Id.* at 621.

121. *Id.*

122. *Id.* at 622. The court found that traditionally most southern California newspapers were evening papers, partially because the *Los Angeles Times'* circulation throughout southern California was extremely strong. The *Times* accounted for 70% of southern California's morning circulation. *Id.*

123. *Id.* The district court believed that because the market was "closed tight" no publisher would risk the expense of starting a new daily newspaper therein. *Id.*

The term "barriers to entry" is quite vague and the district court did not specify exactly what it meant. Professor Bork suggests that the definition be limited to "artificial" entry barriers. R. BORK, *supra* note 6, at 311. Professor Bork claims that capitalization requirements, to which the district court may have been referring, are not artificial barriers to entry. *Id.* at 320-24. *See also* R. POSNER, ANTITRUST LAW 92 (1976).

124. 326 U.S. 1 (1945).

freedom to publish means freedom for all and not for some.[125] Although actions under section 7 of the Clayton Act can attack only mergers which threaten these principles, the trend toward horizontal and conglomerate mergers of mass media firms makes *Times Mirror* an important precedent. Moreover, the principles which have been developed in section 7 litigation make it a useful tool for preventing concentration. Where the market is already greatly concentrated, the importance of preventing even slight increases in concentration and thus preserving the possibility of eventual deconcentration is great.[126] Where concentration is low but independent competitors are declining, acquisitions can violate the Clayton Act.[127] Unless the merger is of such magnitude as to constitute a prima facie violation of the Clayton Act, however, it must be analyzed on the basis of probable economic harm—a standard that ignores the social harm of diminished diversity in the marketplace of ideas.[128] Furthermore, definition of the relevant geographic market[129] poses difficult problems for section 7 cases involving the acquisition of independent newspapers by newspaper chains.[130]

(2) The Failing-Company Defense in *Citizen Publishing*

When a firm is failing and has no prospective purchaser other than a competitor, acquisition of the firm by the competitor is permitted under section 7 of the Clayton Act.[131] In *Citizen Publishing Co. v. United States*,[132] decided shortly after *Times Mirror*, the Supreme Court held that the "failing company" defense had not been met, and that the acquisition of the *Tucson Star* by the *Tucson Citizen* violated section 7. Moreover, in *Citizen Publishing*, the Court found that the profit pooling, price fixing, and market alloca-

125. *Id.* at 20.

126. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 365 n.42 (1963).

127. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

128. *See* Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927, 931 (1968).

129. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320-21 (1962).

130. One commentator has noted:

> Under existing antitrust laws there is little the government can do to halt the concentration of ownership by large newspaper chains. If the trend is to be stopped, it will have to be a result of congressional action. Specifically, Congress should provide guidelines for the definition of the geographic dimension of relevant market areas as it pertains to newspaper chains.

Comment, *Antitrust Malaise in the Newspaper Industry: The Chains Continue to Grow*, 8 ST. MARY'S L.J. 160, 174 (1976). *See also* McIntosh, *Why the Government Can't Stop Press Mergers*, COLUM. JOURNALISM REV., May/June 1977, at 48.

131. *See* International Shoe Co. v. FTC, 280 U.S. 291, 302-03 (1930).

132. 394 U.S. 131 (1969).

tion effects of a "joint operating agreement"[133] were per se violations of the Sherman Act because they inhibited entry of new newspapers and diminished competition between existing newspapers.

In 1940, the two competing newspapers in Tucson, Arizona, the *Star* and the *Citizen,* entered into a joint operating agreement which provided that, although each newspaper would retain its own news and editorial departments, the production, distribution, and business affairs of the newspapers would be managed by a jointly owned corporation. The purpose of the agreement was to end commercial competition between the newspapers and inhibit entry of other newspapers in three ways: (1) price fixing—advertising and subscription rates would be jointly set; (2) profit pooling—all profits would be distributed to the two newspapers in an agreed ratio; (3) market control—none of the stockholders, officers and executives of the newspapers would be permitted to engage in any other publishing business in the county. The agreement also provided that if either newspaper were offered for sale, the other newspaper would have an option to purchase.[134]

In 1965, the stockholders of the *Citizen* exercised their option and acquired the *Star.* The United States charged that the acquisition violated section 7 of the Clayton Act, and that the operating agreement violated sections 1 and 2 of the Sherman Act.[135] On a motion for summary judgment, the district court held that the price fixing, profit pooling, and market allocation provisions of the agreement were per se violations of section 1 of the Sherman Act.[136] After trial, the court concluded that the newspapers monopolized in viola-

133. Under joint operating agreements, competing newspaper publishers merge segments of their operations, such as printing, business, and advertising, and maintain separate editorial identities. Markets with joint operating agreements range in size from Franklin-Oil City, Pennsylvania to San Francisco, California. For a detailed discussion of joint operating agreements, see *The Newspaper Preservation Act: Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. (1969); *The Failing Newspaper Act: Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 90th Cong., 1st & 2d Sess. (1967-1968). *See* note 148 *infra.*

134. The agreement appears in the Record at 30-47, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

135. Complaint at 25-28, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

136. United States v. Citizen Publishing Co., 280 F. Supp. 978, 993 (D. Ariz. 1968). The district court also found that the operating agreement had the purpose of eliminating all commercial competition between the Tucson newspapers, *id.,* and that the stock agreement controlled entry into the Tucson market. *Id.* at 983. For a discussion of per se violations, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 2),* 75 YALE L.J. 373 (1966); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 1),* 74 YALE L.J. 775 (1965).

tion of section 2,[137] and violated section 7 of the Clayton Act.[138] The district court ordered divestiture and enjoined the newspapers from continuing price fixing, profit pooling, and market allocation practices under the joint operating agreement.[139]

Citizen Publishing argued before the Supreme Court that in light of the rapid decline of competing dailies, particularly in cities the size of Tucson, the operating agreement could be sustained by the rule of reason as the only reasonable means of preserving news and editorial competition in Tucson.[140] The United States argued that agreements which extinguish all economic competition between newspapers and inhibit entry of new newspapers hardly comport with the underlying purposes of the Sherman Act or the first amendment.[141] Furthermore, the Government claimed that even if one of the newspapers had been a failing company at the time the joint operating agreement was established, the failing-company defense could not be extended to agreements between ostensibly independent competitors whose purpose and effect is to eliminate commercial competition between them.[142]

The United States Supreme Court affirmed,[143] holding that the requirements of the failing-company defense had not been met and sustaining the divestiture order.[144] Most significant, however, was Justice Douglas' statement that the restraints had no support in the first amendment,[145] indicating that the Court in *Citizen Publishing* acknowledged the ideal of a market free of unreasonable restraints upon existing firms[146] and upon the entry of new firms.[147]

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137. 280 F. Supp. at 993.

138. *Id.*

139. *Id.* at 994.

140. Brief for Appellants at 36-37, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). In its amicus curiae brief, the American Newspaper Publishers Association suggested that inherent differences between the daily newspaper publishing business and other industries would require the application of a reasonableness standard under which antitrust policies favoring competition would be balanced against the political and social values of competition and diversity of editorial voices. Brief for American Newspaper Publishers Ass'n as Amicus Curiae at 4. In its brief, the United States argued that joint operating agreements are not likely to encourage the vigorous competition in news gathering that ordinarily exists between competing independent newspapers. Brief for the United States at 44.

141. Brief for the United States at 42-43.

142. *Id.* at 24.

143. 394 U.S. 131, 135 (1969).

144. *Id.* at 137-40. In dissent, Justice Stewart noted that the district court, in rejecting the failing-company defense, made no finding that the company was salable. He would have vacated and remanded the case to the district court for a determination of this question. *Id.* at 145-46.

145. *Id.* at 139.

146. The Court found that the section 1 violations were "plain beyond peradventure." *Id.* at 135. Specifically, the profit pooling was described as reducing incentives for advertising

In light of current newspaper economics, the *Citizen Publishing* Court arguably failed to promote news and editorial diversity in Tucson because the only way that the two newspapers could exist in that market was by violating the antitrust laws. Had the Court found that the first amendment interest in having two newspapers justified the restraints, however, it would have permitted the persistence of an artificial barrier to entry.[148] That would have limited the first amendment rights of prospective publishers. Because the nexus between the first amendment and antitrust policy is that the market shall not be unreasonably restrained, the result in *Citizen Publishing* was correct.

D. *The First Amendment, the Antitrust Laws, and the Newspaper Industry*

Justice Murphy's call, in *Associated Press,* for clear evidence in media antitrust cases, evinced his awareness of first amendment hazards in newspaper antitrust cases.[149] Such expressions of concern, however, are rare in the Court's opinions. Although a chilling

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and circulation competition. *Id.* Price fixing is illegal per se. *See* United States v. Masonite Corp., 316 U.S. 265, 276 (1942).

147. The Court found that the stock agreement foreclosed entry of competing publishers because it prohibited the stockholders, officers and executives of the *Star* and *Citizen* from engaging in other publishing businesses in the greater Tucson market. 394 U.S. at 134. It is unlikely that this provision, by itself, would foreclose entry of all publishers. The Court did not explain whether this provision artificially restrained entry of all competitors.

148. Shortly after *Citizen Publishing,* the Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-1804 (1976)), was enacted. The Act permits newspapers operating under joint operating agreements to take joint action with respect to printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business departments; establishment of advertising rates; and establishment of circulation rates and revenue distribution; provided there is no merger, combination, or amalgamation of editorial or reportorial staffs, and editorial policies are independently determined. 15 U.S.C. § 1802(2) (1976).

The Act maintains substantial artificial barriers to entry in markets where joint operating agreements are in effect, and has been widely criticized on this and other grounds. *See* Flynn, *Antitrust and the Newspapers: A Comment on S. 1312,* 22 VAND. L. REV. 103 (1968); Knox, *Antitrust Exemptions for Newspapers: An Economic Analysis,* 1971 LAW & SOC. ORD. 3; Comment, *The Newspaper Preservation Act: An Ineffective Step in the Right Direction,* 12 B.C. INDUS. & COM. L. REV. 937 (1971); Comment, *The Newspaper Preservation Act,* 32 U. PITT. L. REV. 347 (1971); Comment, *Failing Newspaper or Failing Journalism: The Public Versus the Publishers,* 4 U.S.F.L. REV. 465 (1970); Note, *Newspaper Preservation Act: A Critique,* 46 IND. L.J. 392 (1971).

The Act was found to be constitutional in Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972). Most recently, the Attorney General's consent, required by the Act for the establishment of joint operating agreements, was held to apply only to those newspapers which sought the Act's antitrust exemption. *See* Newspaper Guild v. Levi, 539 F.2d 755 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977).

149. *See* note 109 *supra.*

effect on the press may result from antitrust actions instigated by a President who is hostile toward the press,[150] the Court has consistently ignored this possibility.

To some extent, the Court's cautious avoidance of this first amendment issue is explained by comparing the fact situations that have been presented to the Court for adjudication. In almost all of the Court's newspaper antitrust cases, the market structure or the conduct of competing firms is so clearly anticompetitive and contrary to the first amendment interest in diversification, that the gains from antitrust actions clearly outweigh any inhibitory effects. The clarity of the evidence in *Lorain Journal, Times Mirror,* and *Citizen Publishing,* for example, permitted the Court to ignore any remotely possible chilling effect on first amendment freedoms. Only in *Associated Press,* in which the Justices disagreed sharply over the issue of whether the evidence was sufficient to sustain a motion for summary judgment, did some members of the Court perceive first amendment problems.[151]

The Court's seeming unconcern with first amendment problems in newspaper antitrust cases may also be explained by the Court's position that business conduct of the press is beyond the protection of the first amendment. It is striking that Justices Black and Douglas, who argued that the first amendment was absolute in other contexts, held in *Associated Press* and *Citizen Publishing* that restraints of trade were not protected by the first amendment. The Court in these cases seems to formulate an analogy to the speech versus conduct cases in first amendment analysis;[152] business behavior of the press is not protected by the first amendment in the same way that certain behavior by a speaker is not protected by the first amendment.[153] If an advertiser had obtained an injunction against the *Lorain Journal* because the newspaper refused to carry advertisements on the basis of content, the Court certainly would have reversed on first amendment grounds.[154] The injunction in *Lorain*

150. In 1972 the Justice Department brought suit against the three national commercial television networks, charging them with violations of the Sherman Act. The networks responded that the suit was motivated by President Nixon's disdain for the news media. *See* United States v. National Broadcasting Co., 65 F.R.D. 415 (C.D. Cal. 1974), *appeal dismissed,* 421 U.S. 940 (1975). *See generally* Note, *The Antitrust Implications of Network Television Programming,* 27 HASTINGS L.J. 1207 (1976).

151. *See* note 109 *supra.*

152. *See, e.g.,* United States v. O'Brien, 391 U.S. 367 (1968).

153. *See* Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937). The Court has held, however, that while the press is not immune from general laws, it is protected from laws designed to punish only the press. *See* Grosjean v. American Press Co., 297 U.S 233 (1936).

154. *Cf.* Columbia Broadcasting Sys., Inc., v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (no individual or group has the right to command the use of broadcasting facilities).

Journal was permissible only because it did not inhibit directly a protected function—the editorial selection of news and advertising.

Because a central fuction of the press is to scrutinize the actions of government,[155] the press should be free, to the largest possible extent, from government regulation of business affairs. Thus, any government regulation of the press must meet four conditions: first, the regulation must not infringe upon protected activity; second, the regulation must be no broader than necessary; third, there must be a compelling reason for the regulation; and finally, the regulation must be substantially the same as that imposed on enterprises that are not involved in expression. This test would avoid the problems of extensive government regulation of the press that might accompany the less demanding standards implicit in Justice Frankfurter's concurring opinion in *Associated Press.*[156] The newspaper antitrust cases in which the Court struck down allegedly anticompetitive practices or market structures satisfied this test completely, because none of the cases involved protected activity, the Court's remedy was narrowly circumscribed, the first amendment interest in open market conditions justified regulation, and none of the remedies were applied solely to the newspaper industry.

The Court did, however, change its approach to the question of economic efficiency. In *Associated Press,* the Court "displayed hostility to the very concept of efficiency."[157] In contrast, the *Times-Picayune* Court supported economies of operation, claiming that achievement of such economies was a legitimate aim of unit plans.[158] Similarly, in *Citizen Publishing* the Court did not attack summarily all aspects of joint operating agreements.[159] The Court's recognition that competitive advantages do not necessarily violate the Sherman Act undercuts the sweeping attack on competitive advantages im-

155. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) (without information about government actions provided by the press, most citizens would be unable to vote intelligently); New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (only a free and unrestrained press can effectively expose deception in government); Mills v. Alabama, 384 U.S. 214, 219 (1966) (the press serves as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means of keeping public officials responsible to all of the people whom they were selected to serve); Near v. Minnesota, 283 U.S. 697, 717 (1931) (liberty of the press is cherished because publications charging official misconduct are immunized from prior restraints); Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUNDATION RESEARCH J. 521; Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975).

156. *See* text accompanying notes 101-04 *supra.*

157. R. BORK, *supra* note 6, at 341.

158. 345 U.S. 594, 623 (1953).

159. 394 U.S. 131, 135 (1969).

plicit in *Associated Press,*[160] and insulates publishers from special antitrust standards.

Some commentators observe that the economics of newspaper publishing will inevitably lead to the decline of competing dailies that are produced by separate publishers in separate plants.[161] Faced with market forces that make concentration economically attractive, one could question whether the Court should attack admittedly unreasonable conduct that only hastens the inevitable. As new technologies that alter the economics of newspaper publishing become available, however, widespread resort to artificial restraints may drive competing firms from the market or inhibit entry of new firms. Vigorous antitrust prosecution of unreasonable, artificial restraints would be an important means of fostering first amendment values, and would conform to the Court's fundamental premise that newspaper markets should not be unreasonably restrained.

In summary, the antitrust laws have not become the despot's instrument that Justice Murphy feared in his *Associated Press* dissent.[162] Antitrust prosecutions, however, have been sporadic in the newspaper industry and have not resulted in a substantial reduction in anticompetitive conduct or concentrated market structures. By contrast, antitrust prosecutions have markedly changed the motion picture industry.

III. Regulating the Structure and Conduct of the Motion Picture Industry

In *United States v. Paramount Pictures, Inc.,*[163] Justice Douglas stated that "moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[164] More than any other form of mass communication,

160. *See* 326 U.S. at 17.

161. *See* B. Owen, *supra* note 11, at 52-53; Comment, *Local Monopoly in the Daily Newspaper Industry,* 61 Yale L.J. 948, 1005-06 (1952).

162. *See* note 109 *supra.*

163. 334 U.S. 131 (1948).

164. *Id.* at 166. Until this statement in *Paramount Pictures,* the Court adhered to its dictum in Mutual Film Corp. v. Indus. Comm'n, 236 U.S. 230, 244 (1915), that motion picture exhibition is a "business pure and simple, originated and conducted for profit, like other spectacles," that is not deserving of constitutional protection as an "organ of public opinion" or of the press. *Mutual Film* was invalidated in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952), in which the Court expressly refused to hold that motion pictures lacked first amendment protection because they are produced, distributed, and exhibited for private profit. The Court cautioned, however, that motion pictures are not always subject to the rules that govern other particular methods of expression, because each method presents its own peculiar problems. *Id.* at 503. Thus, the Court has held that films may be subject to licensing. *See* Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

however, the motion picture industry has been hampered by restrictive practices.[165] Consequently, antitrust actions have produced greater change in the structure and practices of the motion picture industry than in any other communications industry. Although the first amendment has rarely appeared as an issue in motion picture antitrust litigation, the Supreme Court's decisions in this area have furthered the first amendment interest in an open market.

A. *Distributor Power: Blacklists and the Integrated Producer-Distributor*

(1) Blacklists: The Simple Problem in *Binderup*

The Supreme Court first applied the Sherman Act to motion pictures in *Binderup v. Pathe Exchange, Inc.*[166] Binderup, who owned a motion picture theatre in Nebraska and leased a circuit of theatres, was threatened by a group of distributors: unless he procured films from them, they would pressure other distributors to cease doing business with him.[167] When Binderup refused to accede to their threats, he was "blacklisted" by the distributors' organization, the effect of which was to deprive him of films for his theatres. Binderup sought treble damages under the Sherman Act. After plaintiff's opening statement, the defendants moved for a directed verdict, claiming that the complaint and opening statement had failed to show that interstate commerce was restricted by the alleged blacklist. The trial court sustained the motion and instructed the jury to return a verdict for the defendants. The Court of Appeals for the Eighth Circuit affirmed.[168]

The United States Supreme Court unanimously reversed the lower courts and held that interstate commerce was involved in the

165. For general studies of restrictive practices in the industry and lower court decisions, see D. BERTRAND, W. EVANS, & E. BLANCHARD, THE MOTION PICTURE INDUSTRY—A PATTERN OF CONTROL, (TNEC Monograph No. 43, 1941) [hereinafter cited as D. BERTRAND]; M. CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY (1960); 2 S. WHITNEY, ANTITRUST POLICIES 145-95 (1958).

166. 263 U.S. 291 (1923). Prior to deciding *Binderup,* the Court rejected a patent infringement suit brought by the Motion Picture Patents Company, a patent pooling company formed in 1908 by camera and projector manufacturers. Although the company attempted to restrict commerce, the patent issues raised in Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917), are beyond the scope of this article. *See also* United States v. Motion Picture Patents Co., 225 F. 800 (E.D. Pa. 1915), *dismissed per stipulation,* 247 U.S. 524 (1918).

167. For a discussion of predatory practices in the early stages of the motion picture industry, see Cassaday, *Monopoly in Motion Picture Production and Distribution: 1908-1915,* 32 S. CAL. L. REV. 325 (1959).

168. Binderup v. Pathe Exchange, Inc., 280 F. 301 (8th Cir. 1922).

distribution of the films,[169] explaining that since the distributors controlled the distribution of all films in the United States, the result of the conspiracy was to put Binderup out of business.[170] The Court noted in dictum, however, that each distributor acting separately could have refused to deal with Binderup without violating the Sherman Act.[171]

Although the Court did not address first amendment issues in *Binderup*, the conspiracy violated the first amendment as well as the Sherman Act. Binderup was faced with the choice of exhibiting particular films, which amounted to compulsory publication,[172] or discontinuing his exhibition activities. Both alternatives would have violated the spirit of the first amendment. By finding for Binderup, the Court protected his first amendment right to exhibit free from coercion.[173]

(2) The Integrated Producer-Distributor: *Paramount Famous Lasky* and *First National*

The practices in *Binderup* were clear violations of the antitrust laws, and the Court reached its decision easily. The Court faced far more difficult issues in *Paramount Famous Lasky Corp. v. United States*[174] and *United States v. First National Pictures, Inc.*,[175] when it addressed the question whether a joint attempt to stabilize commerce violates the antitrust laws.

Paramount Famous Lasky and *First National Pictures* stemmed from unstable conditions in the motion picture exhibition market during the 1920's.[176] In an attempt to stabilize the field, a

169. 263 U.S. at 309. The defendants had unsuccessfully argued that the Sherman Act was not applicable, because interstate commerce was not involved. Brief for Defendants at 18-31, Binderup v. Pathe Exchange, Inc., 263 U.S. 291 (1923).

170. 263 U.S. at 312.

171. *Id.*

172. *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compelling a flag salute invades the sphere of intellect and spirit which the first amendment is designed to protect).

173. In another motion picture case, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), Justice Douglas refused to discuss first amendment issues because no monopoly of production was apparent. *See* text accompanying notes 299-304 *infra*. If one argues that there were no important first amendment issues in *Binderup* because Binderup was merely an exhibitor, then by extension, interference with a television station that "exhibits" material primarily produced by others would similarly present no important first amendment problems. The first amendment would be virtually meaningless if it did not protect all forms of mass communication from production to exhibition.

174. 282 U.S. 30 (1930).

175. 282 U.S. 44 (1930).

176. *See generally* United States v. Paramount Famous Lasky Corp., 34 F.2d 984, 985-86 (S.D.N.Y. 1929); United States v. First Nat'l Pictures, Inc., 34 F.2d 815, 816 (S.D.N.Y. 1929); D. BERTRAND, *supra* note 165, at 6-7.

group of producers, distributors, and film boards of trade (local organizations of distributor representatives) agreed among themselves to adopt a standard contract.[177] One clause provided that each party to the contract would submit any matter of disagreement to a local board of arbitration composed of members of the local film board and theatre managers.[178] If an exhibitor refused to submit to arbitration, a security deposit was to be paid to all distributors with whom the exhibitor had existing contracts. If the exhibitor refused to supply the security deposit, all of his contracts with the distributors would be cancelled, thus terminating his supply of films.

The United States charged that the standard exhibition contract violated section 1 of the Sherman Act, and the district court agreed.[179] The district court found that the contract improved trade conditions in the industry,[180] but that it was an unreasonable restraint because of the distributors' coercive "power to say 'Take what is offered or get nothing'. . . ."[181] The United States Supreme Court unanimously affirmed.[182]

Justice McReynolds' majority opinion in *Paramount Famous Lasky* emphasized the public interest in competition. Because the Sherman Act seeks to protect the public against the unreasonable destruction of competition,[183] and because the effect of the standard contract was to produce an unreasonable restraint upon trade,[184] Justice McReynolds concluded that it was unnecessary to show that the agreement suppressed all competition between the parties. The public interest in preserving competition, he claimed, was paramount.[185]

177. For a description of the lengthy conferences within the industry that preceded adoption of the standard exhibition contract, see United States v. Paramount Famous Lasky Corp., 34 F.2d 984, 985-86 (S.D.N.Y. 1929).

178. The text of section 18 is reprinted in 282 U.S. at 37-39.

179. United States v. Paramount Famous Lasky Corp., 34 F.2d 984, 988-89 (S.D.N.Y. 1929).

180. The district court found, however, that the distributors had brought about this beneficial result by exercising their combined "irresistible economic force" and imposing their will upon the industry. *Id.* at 989.

181. *Id.*

182. 282 U.S. 30 (1930).

183. *Id.* at 43.

184. *Id.* at 41.

185. *Id.* at 44. After *Paramount Famous Lasky* was decided, a motion picture exhibitor refused to accept, exhibit, or pay for films that were sent to him pursuant to contracts identical to those in *Paramount Famous Lasky.* Fox Film Corporation brought an action against the exhibitor for breach of contract, and the exhibitor answered that the contracts were invalid under the Sherman Act. A Minnesota court agreed with the exhibitor, and the Minnesota Supreme Court affirmed, holding that the district court opinion in *Paramount*

In *United States v. First National Pictures, Inc.*,[186] a companion case to *Paramount Famous Lasky*, the Supreme Court held that a somewhat different type of agreement between competing distributors violated the Sherman Act. In doing so, the Court reversed a lower court holding that the practice in question regulated but did not suppress competition.[187]

During the 1920's, motion picture studios each spring would announce the films that they would make available for exhibition during the coming season. Motion picture exhibitors would bid on the films and arrange engagements accordingly. After exhibition contracts were completed, however, some theatre owners would transfer ownership of their theatres to avoid honoring the contracts. Because new motion picture products decline sharply in market value within a short time after release, distributors sustained heavy losses when exhibitors transferred ownership in this manner. As a result, a group of competing distributors in 1926 caused thirty-two film boards of trade to establish local credit committees. Upon transfer of a theatre, the credit committee would send the new owner a credit questionnaire asking, *inter alia*, if existing exhibition contracts would be honored.[188] If the new owner failed to respond to the questionnaire, or failed to post a security bond, his theatre was placed on a list kept by the credit board and distributors were prohibited from dealing with that theatre.

The same district court that had decided *Paramount Famous Lasky* found no unreasonable restraint, explaining that the purpose and effect of the distributors' combination was to regulate, not suppress competition.[189] The district court found that the situation was one that could "only be dealt with by joint action of the distributing group, in protection of their interests as a group."[190] The Supreme Court unanimously reversed, explaining that the arrangement was

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Famous Lasky, 34 F.2d 984 (S.D.N.Y. 1929), rendered illegal all standard exhibition contracts. Fox Film Corp. v. Muller, 192 Minn. 212, 255 N.W. 845 (1934), *cert. dismissed as improvidently granted*, 294 U.S. 696 (1935). After the United States Supreme Court dismissed the writ of certiorari because it appeared that no final judgment had been entered, the Minnesota Supreme Court reaffirmed its decision. 194 Minn. 654, 260 N.W. 320 (1935). The United States Supreme Court again granted certiorari, 295 U.S. 730 (1935), but subsequently dismissed the writ for want of pendent jurisdiction. 296 U.S. 207, 210-11 (1935).

186. 282 U.S. 44 (1930).

187. United States v. First Nat'l Pictures, Inc., 34 F.2d 815 (S.D.N.Y. 1929), *rev'd*, 282 U.S. 44 (1930).

188. The questionnaire and related documents appear in United States v. First Nat'l Pictures, Inc., 282 U.S. 44, 51-54 (1930).

189. 34 F.2d at 818. The district court also found that there was no evidence of intent to exclude anyone from exhibiting motion pictures. *Id.*

190. *Id.* at 816.

coercive and restricted a "free and untrammeled market."[191] The Court held that enterprises in the same market which combine to protect themselves against inimical trade conditions violate the Sherman Act.[192]

The Court was correct in rejecting the district court's attempt to distinguish *First National.* It could have applied easily the district court's *Paramount Famous Lasky* analysis, because the credit boards' positive effects on competition, assuming there were any, were achieved by the distributors' "irresistible economic force," which enabled them to fix the terms under which they would distribute films.[193] The district court's distinction between the two cases was therefore tenuous,[194] and if the Court had affirmed, it would have established a dangerous precedent. Instead, the Court found that the public interest in preserving competition, which was a primary consideration in *Paramount Famous Lasky,* pertained to *First National* as well, and that the interests of a combination are insignificant when compared to the public interest in a market free of coercion and collective refusals to deal.[195]

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191. 282 U.S. at 54. On remand, the district court entered a decree prohibiting the defendants from conspiring with one another. United States v. First Nat'l Pictures, Inc., 51 F.2d 552 (S.D.N.Y. 1931).

192. 282 U.S. at 55. *See also* FTC v. Raymond Bros.-Clark Co., 263 U.S. 565, 574 (1924) (an act which is legal when done by one firm may become illegal when done by many acting in concert, and may be prohibited if the result harms the public or the individual to whom the concerted action is directed).

193. 34 F.2d at 988-89.

194. In *Paramount Famous Lasky,* the district court found that the standard exhibition contract was oppressive because it was being forced on exhibitors by distributors. *Id.* at 989. The practices in *First National* were similarly forced on exhibitors by distributors.

195. Professor Chafee's comment on *Paramount Famous Lasky* also applies to *First National:*

> The vital question in the case is whether the Contract and the Rules went too far in safeguarding the distributors. Unfortunately, the Supreme Court made no effort to consider this question. So it is hard to say just how this particular attempt to bring order out of chaos should have been revised to make it lawful.

Z. CHAFEE, *supra* note 6, at 568 (footnote omitted). The thrust of both *Paramount Famous Lasky* and *First National,* however, is that joint attempts to regulate commerce violated the Sherman Act. Certainly any distributor could have refused to deal with an exhibitor that lacked an approved credit rating or failed to post a security bond, and Professor Chafee appears to have overlooked this fact. *See* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); text accompanying notes 335-39 *infra.*

As in *Binderup,* the Court did not address first amendment issues in either *Paramount Famous Lasky* or *First National.* These cases are similar, however, in terms of the severe penalty imposed by the restrictive agreement—termination of films for exhibition—and that penalty has an important first amendment aspect. By holding that the practices in *First National* restricted an exhibitor's freedom to select from among the available films, the Court promoted the exhibitor's first amendment right to exhibit.

For another motion picture case involving a combined refusal to deal, see United States

B. *Circuit Buying Power: The Exhibitor Strikes Back*

Binderup, Paramount Famous Lasky, and *First National* each involved the power of producer-distributors. By the late 1920's the theatre circuit—a chain of theatres controlled by a single firm—had become another powerful component of the motion picture industry. Beginning with *Interstate Circuit, Inc., v. United States,*[196] the Court addressed the monopolistic effects of circuit buying power.[197]

(1) First-Run versus Subsequent-Run Theatres: Defusing *Interstate Circuit*

The Interstate Circuit, which operated forty-three first-run and second-run theatres in Texas, had a monopoly of first-run theatres in all cities in which it operated except Houston. An affiliated circuit, Texas Consolidated, also operated theatres in Texas, mostly in the Rio Grande Valley. The two circuits dominated the exhibition markets in which their theatres were located, paying more than 74% of the total license fees paid to distributors by all theatres in those markets. On July 11, 1934, the joint manager of the two circuits wrote to distributors, announcing that Interstate would cease exhibiting the distributors' class "A" features at its first-run theatres unless the distributors agreed to establish a twenty-five cent minimum admission price in selling "A" films for subsequent runs,[198] and agreed to prohibit double feature exhibition of certain "A" films.[199] These demands were directed at independent subsequent-run theatres which were commonly showing double features at an admission price of less than twenty-five cents. The distributors agreed to Interstate's demands. The district court held that by acting uniformly on Interstate's demands, the distributors were conspiring with one another, and that they had conspired with Inter-

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v. Warner Bros. Pictures, Inc., 13 F. Supp. 614 (E.D. Mo. 1936), *aff'd per curiam,* 298 U.S. 643 (1936).

196. 306 U.S. 208 (1939).

197. For other cases in which the Court examined circuit buying power, see United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); and United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

198. Films were exhibited in a pattern of successive release weeks or runs. First-run theatres exhibited certain types of feature films for the first time in a market. Subsequent-run theatres exhibited those films after the first run. *See* text accompanying note 259 *infra* (discussion of a similar release system used in Chicago).

199. The letter appears in Interstate Circuit, Inc. v. United States, 306 U.S. 208, 216 n.3 (1939). The letter listed branch managers of competing distributors as addressees. Thus each distributor was aware that his competitors were faced with identical demands from Interstate.

state to impose the restrictions on exhibitors' four Texas cities.[200] The district court thus enjoined the distributors from continuing the restrictions.

The United States Supreme Court affirmed, holding that the lower court correctly inferred a conspiracy from the distributors' similar or "parallel" actions.[201] This laid the foundation for the doctrine that conscious parallelism can be illegal.[202] In determining whether the agreements between Interstate and the distributors were reasonable, the Court found that both the purpose and effect of the agreements were to damage Interstate's competitors by forcing them to raise their prices and to discontinue double features.[203] The result was a deflection of attendance from subsequent-run theatres to Interstate's first-run theatres.[204]

The practices condemned in *Interstate* have grave first amendment implications. If the restrictions had remained in effect, the variety of information available to the public could have been restricted. It is probable that the independent theatres would have been either forced out of business or forced to sell out to Interstate. In that event, Interstate would have had a complete exhibition monopoly in key Texas cities, and the consequent power to exclude certain films from those cities if it disapproved of the content of the films. Moreover, the restrictions on price and manner of exhibition imposed an artificial barrier to the entry of new, independent subsequent-run theatres. By eliminating these restrictions, *Interstate* fosters the public interest in diversity of information.

(2) Divestiture of Theatre Monopolies: *Crescent, Griffith,* and *Schine*

The *Interstate* Court did not discuss the Circuit's attempted monopolization of first-run theatres in certain cities, but in subsequent cases in which this issue was squarely addressed, the Court applied broad principles for divestiture.[205] The first of these cases,

200. United States v. Interstate Circuit, Inc., 20 F. Supp. 868, 873 (N.D. Tex. 1937).

201. 306 U.S. at 223. In his dissenting opinion, Justice Roberts argued that the restraints were not unreasonable because they did not restrain competition between the distributors. *Id.* at 237. Justice Roberts also disagreed with the conspiracy finding. *Id.* at 240. Justices McReynolds and Butler joined Justice Roberts' dissent.

202. *See* Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951), *cert. denied,* 342 U.S. 909 (1952); Milgram v. Loew's, Inc., 94 F. Supp. 416 (E.D. Pa. 1950), *aff'd,* 192 F.2d 579 (3rd Cir. 1951), *cert. denied,* 343 U.S. 929 (1952). The Court later tempered this doctrine in Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954). *See* text accompanying notes 335-39 *infra.*

203. 306 U.S. at 229.

204. *Id.* at 231.

205. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Schine Chain

United States v. Crescent Amusement Co.,[206] was a landmark because the Court, for the first time in the motion picture context, approved divestiture as a means of preventing illegal activities.

From 1934 to 1939 the Crescent Amusement Company, which owned a chain of motion picture theatres in the South, and several closely affiliated exhibition chains[207] experienced rapid growth in the number of towns in which they operated theatres, in the number of towns in which they faced no competition, and in earnings. Crescent and its affiliates insisted that distributors give them monopoly rights in towns in which they faced competition. If a distributor refused this request, the exhibitors refused to exhibit the distributor's films in their monopoly towns.[208] This policy was designed to restrict the availability of films for the Crescent group's competitors, and its threat was sufficient to cause many theatres to sell out to the Crescent group.

The United States charged that the phenomenal growth of Crescent and its affiliates was the result of restraints of trade that violated section 1, and of monopolistic practices that violated section 2, of the Sherman Act. The district court found that the exhibitors had violated the Sherman Act by combining their licensing policies for monopoly towns and competitive towns, thus forcing distributors to license films on a noncompetitive basis and to discriminate against independent competitors.[209] Moreover, the district court found that the exhibitors had coerced independent theatres to sell out to them. The district court entered a decree requiring the exhibitors to divest themselves of stock in other exhibition corporations, prohibiting the practice by which licensing of films in competitive towns was conditioned upon licensing in monopoly towns and permitting further theatre acquisitions only if the owner offered to sell without coercion.

Before the Supreme Court, the United States argued that the exhibitors should affirmatively show that future acquisitions would not unreasonably restrain competition.[210] The Supreme Court affirmed those parts of the district court's decree pertaining to divestiture and licensing of films, but required such an affirmative showing before acquisitions would be permitted.[211] The Court, noting the

Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

206. 323 U.S. 173 (1944).

207. The chains were interrelated through stock ownership and principal officers.

208. 323 U.S. at 181.

209. *Id.* at 179.

210. Brief for the United States at 33.

211. 323 U.S. at 187, 189, 190. The Court found that the combination was designed to

combination's success in eliminating competition,[212] explained that the public interest would not be protected by the lower court's acquisition requirement.[213] Where the proclivity for unlawful conduct was evident, the Court concluded, the decree should operate as an effective deterrent to repetition of the conduct.[214]

The exhibitors had become closely aligned through ownership of stock in other exhibitors, and the district court ordered divestiture so that none of the exhibitors would own stock in other exhibition corporations.[215] This provision of the decree, they argued, was inequitable, but the Court sharply disagreed, explaining that since the combination violated the Sherman Act, the exhibitors could not claim hardship as a means of avoiding "an undoing of their unlawful project."[216] Because acquisition of stock in many of the other corporations resulted from the predatory practices, and because there would be a tempting opportunity to continue to act in combination against independent theatres if the exhibitors remained affiliated with one another, the Court concluded that divestiture was the only effective remedy.[217]

By holding that dissolution of a combination will be ordered if the creation of the combination violates the Sherman Act,[218] *Crescent* establishes a key precedent for divestiture of mass media enterprises. Because the *Crescent* rule applies not only to horizontal combinations of motion picture exhibitors, but also to horizontal and vertical combinations of producers and distributors, it is an important tool for the restructuring of groups that unreasonably restrain competition.[219] Moreover, *Crescent* is important because of the Court's willingness to modify and strengthen a decree.[220]

The Court took an equally significant step in *United States v.*

"crush competition," *id.* at 183, and there was ample evidence that the combination had used its buying power to either restrict its competitors' ability to license films or to eliminate competition by acquiring its competitors' property. *Id.* at 181. Prohibition of the licensing plan, which was the chief anticompetitive weapon of the combination, was plainly warranted.

212. *Id.* at 183.

213. The Court has modified decrees where it has approved the conclusions of lower courts on the character of Sherman Act violations. *See* United States v. American Tobacco Co., 221 U.S. 106, 184-88 (1911); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 78-82 (1911).

214. 323 U.S. at 186.

215. Some officers were also forced to resign from the affiliates.

216. 323 U.S. at 189.

217. *Id.* at 189-90.

218. *Id.* at 189.

219. *See* Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); text accompanying notes 236-55 *infra*.

220. *See* United States v. Loew's, Inc., 371 U.S. 38 (1962); text accompanying notes 341-58 *infra*.

Griffith,[221] holding that a finding of specific intent to restrain trade or to build a monopoly was not prerequisite to a finding that the antitrust laws had been violated.[222] Moreover, *Griffith* condemns monopoly power even if unexercised.[223] On April 28, 1939, as part of an extensive attack on the conduct and structure of the motion picture industry, the United States brought a suit against the Griffith theatre circuit and its affiliates operating in Texas, Oklahoma, and New Mexico. Griffith and its affiliates, which operated theatres in eighty-five towns, fifty-three of which were monopoly situations, bargained as a unit with distributors. The United States charged that the circuit's use of its total buying power to obtain special privileges from distributors violated the Sherman Act.[224] The district court dismissed the complaint, finding that the agreements between Griffith and the distributors had not restrained trade, that no conspiracy existed, and that Griffith had not conditioned the licensing of films in competitive towns on the licensing of films in closed towns.[225] The district court distinguished *Crescent*, in which circuit buying power was used with the intent to eliminate competition. Finding no intent to monopolize,[226] the district court concluded that the existence of circuit buying power per se did not violate the Sherman Act,[227] absent a specific intent to use that power to eliminate competition.

The United States Supreme Court reversed, holding that proof of specific intent was not necessary to establish a violation of the Sherman Act,[228] and that the district court had failed to make adequate findings on the effects of the circuit's buying power.[229] The Court readily perceived the anticompetitive tendencies of circuit buying by recognizing that whenever a circuit uses the strategic position of a closed town to obtain exclusive privileges in a competi-

221. 334 U.S. 100 (1948).
222. *Id.* at 105.
223. *Id.* at 107.
224. These privileges included preventing independent theatres from obtaining films on a first-run basis and forcing independents to maintain prices higher than those warranted by a film's quality.
225. United States v. Griffith Amusement Co., 68 F. Supp. 180 (W.D. Okla. 1946).
226. *Id.* at 196.
227. The district court was drawing upon United States v. Int'l Harvester Co., 274 U.S. 693, 708 (1927), in which the Supreme Court held that the mere size of a corporation or its unexerted power does not in itself constitute an offense when unaccompanied by unlawful conduct in the exercise of its power. The district court concluded by emphasizing "what . . . *was done*, and any fair inferences we can gather from those acts regarding the *intent* of those who acted." United States v. Griffith Amusement Co., 68 F. Supp. 180, 189 (W.D. Okla. 1946) (emphasis in original).
228. 334 U.S. at 105. Justice Frankfurter dissented, agreeing with the district court.
229. *Id.* at 109.

tive town, it is employing its monopoly power as a trade weapon.[230] The Court saw great potential for abuse of circuit buying power, especially when there are a large number of monopoly towns, because such monopoly power could be used to drive independent competitors out of business.[231] Since the Court believed that Griffith's monopoly power had some effect on competition and the growth of Griffith's circuit, it remanded the case to the district court to determine the extent of the effect.[232]

By striking at a prevalent device by which circuits used their collective buying power to force concessions from motion picture distributors and thereby force independent theatres out of business, the *Griffith* Court was promoting the public interest in diverse sources of information. A component of many circuit buying plans was a restriction on the number and quality of films which competitors could obtain, an obvious impediment to the flow of information from diverse sources.[233] If allowed to continue unabated, circuit buying plans would lead to expanded chains and presumably an increase in the number of closed towns. The threat that this posed was readily apparent, because "a monopoly of theatres in any one town commands the entrance for all films into that area."[234] Moreover, when used to obtain restrictive agreements from film distributors, circuit buying power enables the circuit to impede entry of new exhibitors into the market.[235] All of these results would constrict the market and diminish the flow of information to the public.

In *Schine Chain Theatres, Inc. v. United States,*[236] a companion case to *Griffith,* the Supreme Court similarly addressed circuit buying power. While *Griffith* did not address the issue of divestiture, *Schine* held that divestiture could be used to render impotent monopoly power which violates the Sherman Act.[237] The Schine theatre

230. *Id.* at 107.

231. Specific intent to drive competitors out of business was not necessary, the Court explained, because "the end result is the necessary and direct consequence of what he did." *Id.* at 108. Professor Bork has strongly criticized the *Griffith* Court's linking of two markets without predatory conduct. R. BORK, *supra* note 6, at 142.

232. 334 U.S. at 109. Large scale buying was not held to be unlawful per se. *Id.* at 108. On remand the district court enjoined the defendants from licensing films for closed towns and competitive towns in single contracts, but did not order divestiture. *See* United States v. Griffith Amusement Co., 94 F. Supp. 747, 755 (W.D. Okla. 1950).

233. For example, Griffith was charged with restricting the availability of first-run and other classes of films. *See* United States v. Griffith Amusement Co., 68 F. Supp. 180, 181 (W.D. Okla. 1946).

234. 334 U.S. at 107.

235. *Id.*

236. 334 U.S. 110 (1948).

237. *Id.* at 129.

chain was the largest nonstudio affiliated theatre circuit in the United States during the 1940's. Of the seventy-six towns in which it operated theatres in 1942, sixty were closed towns. In 1928 Schine had operated theatres in only four closed towns. As in *Crescent* and *Griffith,* the United States charged the circuit with restraining competition by using the combined buying power of its closed and open towns to obtain concessions, including lengthy "clearances," from distributors that were not available to competing theatres.[238] Moreover, Schine was charged with forcing or attempting to force competitors out of business by threatening to use its buying power to restrict a competitor's supply of films.[239] The district court found that Schine and several major film distributors[240] had conspired with each other to violate sections 1 and 2 of the Sherman Act. It entered a decree enjoining various practices[241] and ordering divestiture of Schine and its affiliates.[242]

The Supreme Court affirmed the district court in part and reversed in part, with Justice Douglas writing for a unanimous Court.[243] The Court explained that since clearances were not per se unlawful restraints under the Sherman Act,[244] the unreasonableness of the clearance agreements in question must be clearly established.[245] Because the district court did not give any specific content to the concept of unreasonableness, the Court was unable to determine what standards had been applied.[246] The Court thus set aside the district court's findings on clearances so the lower court could delineate more precisely what it meant by unreasonableness. By doing so, the Court balanced the public interest in competition against the interest of the press in being free from harassment in the form of unjustified litigation. If left undefined, the concept of unrea-

238. A clearance is a period of time between the conclusion of one exhibition run of a film in a market and subsequent runs. In addition to receiving lengthy clearances, Schine was able to restrict the supply of first- and second-run films available to its competitors. *See* United States v. Schine Chain Theatres, Inc., 63 F. Supp. 229 (W.D.N.Y. 1945).

239. Schine would also threaten to build theatres in an attempt to discourage competition. *Id.* at 232.

240. The distributors were Columbia, Fox, Loew, Paramount, RKO, United Artists, Universal, and Warner. *Id.*

241. *Id.* at 241. The decree enjoined the licensing of films based on the licensing of films in other competitive situations, unreasonable clearances, and monopolization of first and second-run films. *Id.*

242. *Id.* at 241-42.

243. 334 U.S. at 110.

244. *Id.* at 121.

245. "If reasonableness is the test," Justice Douglas stated, "the factors which bear on it would appear to be numerous." *Id.* (footnote omitted). For a discussion of clearances, see D. BERTRAND, *supra* note 165, at 40-41.

246. 334 U.S. at 122.

sonableness could be used as a tool to hamper the press and ultimately the flow of information,[247] but the requirement that unreasonableness be defined is not an insurmountable barrier to a finding that trade has been unduly restrained.

The Court also set aside the lower court's divestiture decree because it was improperly fashioned.[248] The Court thus deprived the defendants of the benefits of their conspiracy and broke up the monopoly power that violated the Sherman Act.[249] In requiring Schine to sell more than fifty theatres,[250] the district court did not determine which theatres had been acquired through Schine's anticompetitive practices.[251] Thus, the plan was set aside and the case remanded so the district court could make appropriate findings on this question. This was a necessary step before the district court could determine whether Schine still retained monopoly power after being "deprived of the fruits of . . . [its] conspiracy."[252] The Court, noting that divestiture might be necessary to diminish Schine's monopoly power, concluded that the Sherman Act prohibits not only the overt exercise of monopoly power but also "[t]he mere existence of the power to monopolize, together with the purpose or intent to do so."[253]

The *Schine* Court did not define monopoly power, but in *Griffith* and *United States v. Paramount Pictures, Inc.*,[254] monopoly

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247. *Cf.* Associated Press v. United States, 326 U.S. 1, 52, 59 (1945) (Murphy, J., dissenting) (clear and unmistakable evidence is needed to justify applying the Sherman Act to the press).

248. In this type of case, Justice Douglas stated, it was necessary to start from the premise that an injunction against future violations would be inadequate to protect the public interest, because those who build their empires unlawfully would preserve them intact. 334 U.S. at 128.

249. *Id.* at 128-29.

250. Schine originally presented a plan to the district court that would have divided the circuit into three separate corporations, each owned by members of the Schine family. The district court rejected the plan, ordering the sale of theatres and prohibiting future acquisitions, except after a showing that competition would not be unreasonably restrained. 63 F. Supp. 229 (W.D.N.Y. 1945); *see* note 252 *infra.*

251. Justice Douglas noted that the divested theatres may in fact have been lawfully acquired, while the retained theatres may have been unlawfully acquired. 334 U.S. at 127-28.

252. *Id.* at 129. On remand, Schine entered into a consent decree that involved divestiture of 39 theatres. *See* United States v. Schine Chain Theatres, Inc., [1948-1949] Trade Cas. (CCH) ¶ 62,447 (W.D.N.Y. 1949). Eventually, Schine and several affiliated corporations were found guilty of criminal contempt for failing to dispose of all of the theatres that had been ordered sold. *See* United States v. Schine, [1956] Trade Cas. (CCH) ¶ 68,580 (W.D.N.Y. 1956), *aff'd,* 260 F.2d 552 (2d Cir. 1958), *cert. denied,* 358 U.S. 934 (1959).

253. 334 U.S. at 130.

254. 334 U.S. 131 (1948).

power was defined as the power to exclude competition as desired.[255] Certainly the existence of such power is antithetical to the public interest in receiving information from diverse sources. By emphasizing divestiture as a means not only of depriving firms of the fruits of illegality, but also of breaking up monopoly power, *Schine* establishes the propriety of deconcentrating highly concentrated mass communications markets. This principle would have its most significant application to mass communications in *Paramount Pictures,* in which the Supreme Court also addressed first amendment issues.

C. *The Integrated Producer-Distributor-Exhibitor:* Bigelow *and* Paramount Pictures

During the 1920's, it became clear to the major motion picture producer-distributors that their ability to bargain for first-run exhibition of their films depended upon their control of a theatre chain which could be used as a reciprocal bargaining weapon when dealing with other major vertically integrated firms.[256] By the early 1930's, the major firms in the motion picture industry were integrated accordingly to combine the production, distribution, and exhibition functions. The problems which accompanied this vertical integration were examined in *Bigelow v. RKO Radio Pictures, Inc.*[257] and *United States v. Paramount Pictures, Inc.*[258]

(1) The Chicago System of Release: An Independent Theatre Challenges the Majors

Under a distribution plan known as the Chicago system of release, films were exhibited in Chicago in a pattern of successive release weeks or runs. During the Loop first run, a film would be shown in one of the large theatres located in the Loop, the heart of Chicago's business district. After this run, a waiting period or "clearance" of three weeks occurred, during which the film would not be exhibited in the city. Three weeks after the Loop run had finished, the film would be released for successive periods: the fourth, fifth and sixth weeks were the A pre-release weeks, the seventh and eighth weeks were B pre-release weeks, the ninth week was the C pre-release week, and successive weeks were the general release period.[259]

255. *Id.* at 173; *see* American Tobacco Co. v. United States, 328 U.S. 781, 809, 811 (1946).

256. *See* M. CONANT, *supra* note 165, at 26.

257. 327 U.S. 251 (1946).

258. 334 U.S. 131 (1948).

259. For a discussion of the Chicago exhibition market and the effects of antitrust

In 1942, Bigelow, owner of an independent theatre on Chicago's South Side, charged that a number of theatres and distributors in Chicago that were owned by large producers, such as RKO, Paramount, and Warner Brothers, had conspired to restrain trade by not permitting independent theatres to show films prior to their exhibition in studio-owned theatres. Bigelow charged that it had sustained an earnings loss of more than $120,000 from 1937 to 1942 because it had been unable to play films before they were shown at studio-owned theatres. The case went to trial solely on the question of damages, and the jury returned a verdict for $120,000, which the trial court trebled. The Seventh Circuit, while noting that there was substantial evidence of a conspiracy,[260] held that Bigelow failed to prove actual damage as a direct result of the conspiracy.[261]

The United States Supreme Court reversed the court of appeals and affirmed the district court.[262] The Court agreed with the court of appeals that there was sufficient evidence of a conspiracy resulting in the discriminatory release of films in Chicago.[263] The Court, however, concluded that the evidence on damages was sufficient to support "a just and reasonable inference" that Bigelow had been damaged by the conspiracy.[264]

Bigelow at trial sought to prove damages by introducing two classes of evidence. The first was a comparison of earnings from 1937 to 1942 between Bigelow's theatre and a competing theatre that had been permitted to exhibit films before Bigelow. This showed that the competing theatre's net receipts exceeded Bigelow's by approximately $116,000. The second class of evidence compared Bigelow's receipts for the 1937-1942 period with those for the 1932-1936 period, and showed a falling off in net receipts of approximately $126,000 from 1937 to 1942.[265] Prior to 1937, Bigelow had been able to obtain some films which had not been shown elsewhere, but after that year, double features became prominent, and theatres with playing positions ahead of Bigelow began to use nearly all of the available films. The Court found that because the discriminatory release system placed Bigelow in an inferior competitive position, it was damaging, and that both classes of evidence tended to show damage.[266]

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actions on that market, see M. CONANT, *supra* note 165, at 154-77.

260. Bigelow v. RKO Radio Pictures, Inc., 150 F.2d 877, 882 (7th Cir. 1945).

261. *Id.* at 883.

262. 327 U.S. 251 (1946).

263. *Id.* at 255. The Court explained that there was evidence that the integrated distributors and exhibitors conspired to give to the studio-owned theatres preferential playing positions in the release system over those accorded independent competing theatres. *Id.* at 256.

264. *Id.* at 266.

265. Neither figure included the cost of renting films.

266. 327 U.S. at 260.

The respondents argued before the Supreme Court that the evidence was too speculative to support a damage award. In particular, they claimed that the comparison of receipts before and after 1937 was specious on the question of damages. The comparison assumed, they claimed, that conditions affecting profits would have remained favorable to Bigelow after 1937 if Bigelow had been able to obtain films not previously shown.[267] The Court, citing *Eastman Kodak Co. v. Southern Photo Materials Co.*[268] and *Story Parchment Co. v. Paterson Parchment Paper Co.*,[269] replied that the jury could infer from proof of the defendants' illegal acts the tendency of those acts to harm the plaintiffs' business, and that the jury could infer actual harm from a decline in profits that was not attributable to other causes.[270] The comparison of receipts before and after 1937, the Court concluded, was sufficient to support the jury's computation of damages.[271]

In his dissent in *Bigelow,* Justice Frankfurter concluded that plaintiff, while establishing the existence of an illegal conspiracy, failed to show that the conspiracy had caused injury, explaining that it would have had to prove its business would have been more profitable had the conspiracy not existed.[272] Because the distributors, acting independently of one another, could have given preference to their affiliated exhibitors without violating the Sherman Act, Justice Frankfurter reasoned, Bigelow could have suffered the same injury even if no illegal conspiracy existed. Moreover, Justice Frankfurter accused the Court of ignoring a crucial distinction "between proving that some damages were 'the certain result of the wrong' and uncertainty as to the dollars and cents value of such injuring wrong."[273]

The Court in *Bigelow* misapplied *Story Parchment*'s rule precluding recovery of damages that "are not the certain result of the wrong"[274] while permitting recovery of damages which are definitely caused by the wrong but are uncertain in amount only. By allowing

267. *Id.* at 261.

268. 273 U.S. 359 (1927).

269. 282 U.S. 555 (1931).

270. 327 U.S. at 264.

271. *Id.* at 266. The Court stated in *Story Parchment* that while damages may not be determined by speculation, it is sufficient if the evidence shows the extent of damages as a matter of "just and reasonable inference." 282 U.S. at 563. In *Eastman Kodak,* the Court explained that the amount of damages must be ascertainable "as a matter of reasonable inference." 273 U.S. at 379. In both these cases, unlike *Bigelow,* liability was clearly established.

272. 327 U.S. at 267.

273. *Id.*

274. 282 U.S. at 562.

an inference of harm in *Bigelow,* the Court transferred the uncertainty which *Story Parchment* permitted in determining the amount of damages to the question whether the alleged conspiracy had actually harmed plaintiff. By thus making an award of damages easier to obtain, the Court neglected the interest of communications firms in being free from damage awards that may not be directly attributable to their illegal conduct. Certainly unlawful actions can be enjoined, but to permit treble damages where there is uncertainty as to whether damage is directly attributable to such actions may unduly endanger communications firms. Nevertheless, the effect of the less rigorous *Bigelow* test is to promote an open market, because it signals the danger of engaging in illegal practices.[275]

(2) Divestiture and the Majors: *Paramount Pictures*

The Court's most important motion picture antitrust decision, *United States v. Paramount Pictures, Inc.*,[276] resulted in divestiture of the exhibition branches of the major film studios. *Paramount Pictures* stemmed from the Antitrust Division's intensive attack in the 1930's on anticompetitive practices and concentration in the motion picture industry.[277] The United States filed a complaint on July 20, 1938 and an amended complaint on November 14, 1940, charging that five major and three minor motion picture studios had conspired to restrain trade in motion pictures.[278] The five majors were charged with monopolizing the production, distribution, and exhibition of motion pictures, and with violating sections 1 and 2 of the Sherman Act by integrating vertically. The five majors accepted a consent decree on November 20, 1940, which prohibited certain practices, such as agreements to tie licenses for newsreels to

275. Following the Supreme Court's decision in *Bigelow,* plaintiff obtained a decree which prohibited, *inter alia,* distributors from preventing Bigelow from obtaining films for first neighborhood run. Bigelow v. RKO Radio Pictures, Inc., 162 F.2d 520 (7th Cir.), *cert. denied,* 332 U.S. 817 (1947). Bigelow also received an award for the period 1937-1946 of $970,322, including costs and attorneys' fees. M. CONANT, *supra* note 165, at 167. This award signaled to other exhibitors and distributors the danger of inhibiting the market illegally. For an analysis of the decree in *Bigelow,* see *id.* at 167-72.

276. 334 U.S. 131 (1948).

277. *See generally* E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966).

278. The major studios were Loew's, Paramount, RKO, Twentieth Century-Fox, and Warner Brothers. The minor defendants were Columbia, United Artists, and Universal. Only the majors were involved in production, distribution, and exhibition of films. Columbia and Universal produced and distributed films, and United Artists was involved only in distribution. In the amended complaint, unlike the original complaint, the conspiracy charges assumed a predominant position. One commentator speculates that this shift was a result of the intervening decision in *Interstate.* Taubman, *The Performing Arts and the Anti-Trust Laws,* 3 ANTITRUST BULL. 405, 412 (1958).

those for features, and established an arbitration system to resolve disputes.[279] The decree did not alter the structure of the industry.[280]

In August 1944 the United States petitioned the district court to modify the decree, most significantly to order divestiture of the majors' exhibition circuits from their production and distribution activities. The district court found that uniform specification of admission prices by distributors was a horizontal price fixing conspiracy,[281] that licensing of one film on the condition that another film also be accepted (block-booking) was illegal,[282] and that pooling agreements which combined the operation of competing studios' circuits were illegal.[283] The district court issued a decree prohibiting these and other practices,[284] and ordered that films be licensed on the basis of competitive bidding. The district court explained that divestiture of the studio's exhibition circuits from their production and distribution activities was unnecessary, because competition could be safeguarded adequately by less drastic means, such as requiring competitive bidding and prohibiting practices such as block-booking.[285] Moreover, in determining the defendants' market power, the district court analyzed data which merely showed the percentage of all theatres in the United States which were owned by the defendants, rather than analyzing data for different classes of theatres. The district court therefore concluded that the owners of little more than one-sixth of all the theatres in the United States were not likely to exercise a monopoly of the motion picture business such that divestiture would be an appropriate remedy.[286] The district court also reasoned that divestiture would not improve service

279. United States v. Paramount Pictures, Inc., [1940-1943] Trade Cas. (CCH) ¶ 56,072 (S.D.N.Y. 1940). *See generally Symposium on Arbitration in the Motion Picture Industry,* 5 ARB. J. 10 (1941); Whitman, *The Consent Decree in the Moving Picture Industry,* 10 FORDHAM L. REV. 65 (1941); Note, *The Sherman Act and the Motion Picture Industry,* 13 U. CHI. L. REV. 346 (1946).

280. One commentator concluded that the decree would have the effect of freezing the existing pattern of competition. Comment, *Operation of the Consent Decree in the Motion Picture Industry,* 51 YALE L.J. 1175, 1194 (1942).

281. United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 337 (1946), *modified* 70 F. Supp. 53 (S.D.N.Y. 1947).

282. *Id.* at 350.

283. *Id.* at 351. The district court also found that pooling agreements between a studio-owned circuit and an independent circuit were illegal. *Id.*

284. United States v. Paramount Pictures, Inc., 70 F. Supp. 53, 72 (S.D.N.Y. 1947). *See generally* Note, *Judicial Regulation of the Motion-Picture Industry: The Paramount Case,* 95 U. PA. L. REV. 662 (1947).

285. United States v. Paramount Pictures, Inc., 66 F. Supp. 323, 355 (1946). The district court also believed that establishment of competitive bidding would create conditions such that new theatres could enter the exhibition market. *Id.* at 353-54.

286. *Id.* at 353. The court also found insufficient proof that ownership of first-run theatres by the major studios was the result of an attempt to monopolize. *Id.* at 354.

to the public because new owners would be less experienced than the existing owners.[287]

Before the Supreme Court, the United States attacked the adequacy of the district court's relief. The Government conceded that the defendants had not monopolized film production, but maintained that their control over the distribution and exhibition fields unreasonably restricted opportunities for independent producers.[288] The Government also argued that the concentration of first-run theatre ownership by the defendants[289] was so great that no distributor could succeed without access to these theatres.[290] There was no compelling economic justification for integration of distribution and exhibition, the Government claimed, explaining that the defendants desired "market control" with the resulting opportunity to control prices, exclude competition, and extract monopoly profits.[291] Thus, the only way the domestic film market could be opened to competition, the Government argued, was to divorce the majors from their exhibition circuits.[292]

First amendment issues were also raised in *Paramount Pictures.* The government accepted the theory that markets which are free of unreasonable restrictions will lead to a diverse flow of information, and argued that only by assuring that the distribution field "is equally open to all may the fullest diversity of film content be had."[293] The American Civil Liberties Union (ACLU) in an amicus curiae brief similarly asserted that the majors' market power in the distribution and exhibition fields denied the public diversity in films,[294] and inhibited the public's first amendment right to receive information.[295] The ACLU argued that the first amendment as well as the Sherman Act presented important reasons for diminishing the majors' market control, explaining that if "our fundamental guarantees of free speech, free assemblage, and free press, under the First Amendment, could not be invoked to arrest such control over

287. *Id.* at 353.

288. Brief for the United States at 10; *see* text accompanying notes 300-03 *infra.*

289. The majors owned 70% of all first-run theatres in cities with a population of at least 100,000. Brief for the United States at 20.

290. *Id.* at 61.

291. *Id.* at 105.

292. *Id.* at 50. The Government argued that acquisition and use of market control for a similar purpose by vertical combinations had resulted in dissolution in other Supreme Court cases construing the Sherman Act. *See* United States v. Lehigh Valley R.R., 254 U.S. 255 (1920).

293. Brief for the United States at 124.

294. Brief for the American Civil Liberties Union as Amicus Curiae at 16.

295. *See* Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (the first amendment embraces the right to distribute literature and necessarily protects the right to receive it).

so basic a medium of communications as motion pictures, then, indeed, it will not be long before they may seem illusory."[296]

The Supreme Court affirmed in part and reversed in part, eliminating the system of competitive bidding[297] and directing the district court to restudy divestiture.[298] The Court, however, read the first amendment issues narrowly. While noting that motion pictures are included in the press whose freedom is guaranteed by the first amendment, the Court claimed that first amendment concerns would have been focused only if the case had involved monopoly in the production of moving pictures.[299] The district court had indeed found that the defendants had not attempted or conspired to monopolize the production of motion pictures,[300] and the government did not contest this finding before the Supreme Court. The Court's assumption that such a finding eliminates any and all first amendment issues, however, demonstrates a lack of understanding of the first amendment implications of the majors' domination of first-run exhibition. The Court explained as follows:

> The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspects under the Sherman Act. But it bears only remotely, if at all, on any question of freedom of the press, save only as timeliness of release may be a factor of importance in specific situations.[301]

The Court's assumption that the public was not denied access to films is fundamentally incorrect. First, by controlling first-run exhibition in major cities, the five majors could prevent an independent producer from exhibiting in their theatres, and thus virtually prevent that producer from establishing the desirability of a film for subsequent runs. Second, in his study of the motion picture industry, Professor Michael Conant concluded that by controlling first-run theatres, the five majors obtained indirect control of production and successfully curtailed entry by independent producers.[302] Fi-

296. Brief for the American Civil Liberties Union as Amicus Curiae at 6.

297. 334 U.S. at 161-66.

298. *Id.* at 166-75.

299. *Id.* at 166.

300. United States v. Paramount Pictures, Inc., 70 F. Supp. 53, 60. (1947).

301. 334 U.S. at 166-67.

302. M. CONANT, *supra* note 165, at 37. Professor Conant adds that

> the independent producer of better quality, more costly pictures had to turn to a member

nally, the five majors' domination of first-run theatres permitted them to enforce a production code which minimized the diversity of motion pictures. The majors agreed that a film which did not conform to the guidelines established by the Production Code Administration, an agency which they controlled, would not be exhibited in their theatres. Consequently, a film treating a controversial subject that would violate the code often could not establish its desirability for subsequent runs.[303] Certainly there were important first amendment problems in the majors' control of first-run theatres, but neglect of these issues did not prevent the Court from reaching a result that promoted first amendment values.[304]

The Court disagreed with the district court's approach to divestiture, because the Sherman Act problem is not solved merely by measuring concentration in terms of size or extent of holdings. Rather, the Court emphasized the relationship between the unreasonable restraints of trade and the position of the defendants in the first-run exhibition field.[305] The Court agreed with the district court that the defendants conspired with one another, but because the lower court had failed to consider what the defendants had gained in terms of theatre holdings as a result of the conspiracy, the Court directed an examination of this question on remand.[306] The Court also concluded that the district court's findings of a lack of purpose on the part of the five majors to obtain a national exhibition monopoly was deficient for three reasons. First, the district court had erred by considering the percentage of all theatres which the five majors owned, rather than the percentage of first-run theatres.[307] Second,

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> of the combination for distribution in order to secure entry into enough key theatres for revenue to cover his costs. He had to pay their monopolistic distribution fees and also to conform to their production code. It is reasonable to conclude that the monopolization of first-run theatres facilitated monopolization of distribution, in both its input and output markets.

Id. at 47.

303. *Id.* at 40-43. Professor Conant found that after separation of the majors' exhibition circuits, the Production Code Administration's power of enforcement was markedly reduced. *Id.* at 113. For an example of an independent producer's difficulties with the Production Code Administration prior to divorcement, see Hughes Tool Co. v. Motion Picture Ass'n, 66 F. Supp. 1006 (S.D.N.Y. 1946). For a general study of code enforcement, see M. SCHUMACH, THE FACE ON THE CUTTING ROOM FLOOR (1964).

304. From a first amendment standpoint, *Paramount Pictures* is also notable for the statement that motion pictures are included as part of the press. This position departed from *Mutual* and was later affirmed in *Burstyn*. *See* note 164 *supra*. *Paramount Pictures* led some commentators to criticize *Mutual*. *See* Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L.Q. 273 (1951); Note, *Motion Pictures and the First Amendment*, 60 YALE L.J. 696 (1951).

305. 334 U.S. at 172.

306. *Id.* at 171.

307. *Id.* at 172-73.

in its reference to an absence of purpose, the district court had meant an absence of specific intent, and specific intent is not necessary to establish a purpose or intent to create a monopoly.[308] Finally, the district court had failed to address the problem of monopoly power—the power to exclude competition when it is desired to do so—which may violate section 2 of the Sherman Act even though it remains unexercised.[309] The Court also directed the district court to study vertical integration, explaining that vertical integration in the motion picture industry was not a per se violation of the Sherman Act,[310] and that the question whether such integration was illegal turned on "the purpose or intent with which it was conceived," or the power it creates.[311]

By remanding these issues, the Supreme Court opened the door to the most significant change in the structure of a mass medium to be achieved to date under the antitrust laws. On remand, the district court found that the theatre holdings of the five majors played a vital role in causing violations of the Sherman Act,[312] that there was a close relationship between the vertical integration of the five majors and the illegal practices such as price fixing,[313] and that monopoly power was present.[314] The district court ordered separation of exhibition from production and distribution, and subsequently each of the majors complied.[315]

The Court eliminated the competitive bidding provisions of the district court's decree for two reasons. First, the system placed those with the "longest purse" in a preferred position, and thus might increase the concentration of economic power in the industry.[316] Second, judicial supervision of the bidding would involve courts in business management, a task for which they are unsuited.[317] The Court sustained the district court's rulings on the illegality of trade

308. *Id.* at 173; *see* text accompanying note 228 *supra*.

309. *Id. See* American Tobacco Co. v. United States, 328 U.S. 781, 809, 811 (1946).

310. 334 U.S. at 174.

311. *Id.*

312. United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 887 (S.D.N.Y. 1949), *aff'd per curiam*, 339 U.S. 974 (1950).

313. 85 F. Supp. at 893.

314. *Id.* at 894.

315. For a discussion of the divestiture, see M. CONANT, *supra* note 165 at 107-12. Howard Hughes, owner of 24% of RKO's stock, agreed to a consent decree that permitted him to place the stock in trust. This decree was modified to require compulsory sale of the stock, but the Court held this was error because of the absence of a hearing on the modification. *See* Hughes v. United States, 342 U.S. 353 (1952).

316. 334 U.S. at 164.

317. *Id.* at 163.

practices such as block-booking,[318] formula deals and master agreements,[319] and price fixing,[320] and sustained the district court's finding that the defendants had developed a system of unreasonable clearances and runs.[321] Unlike the district court in *Schine*, the district court in *Paramount Pictures* established clear standards for determining whether clearances were unreasonable.[322] The Court supported this approach and agreed that there was ample evidence to sustain a finding of an unlawful conspiracy to restrain trade by imposing unreasonable clearances.[323] The Court also agreed that pooling agreements, whereby the majors pooled the operation of their theatres, and joint ownership of theatres by the majors were blatant attempts to substitute monopoly for competition and sustained their dissolution.[324] The Court concluded, however, that dissolution of joint first-run theatre ownership by majors and independents was improper because the lower court had not inquired into the particular circumstances under which a particular interest had been acquired.[325]

The Court in *Paramount Pictures* sought to establish a freer motion picture exhibition market, and its prohibition of block-booking, unreasonable clearances, and similar practices has had that effect.[326] The subsequent separation of the majors from their theatres has increased the opportunities for independent producers,[327] although the Court apparently did not have this result in mind.[328] The *Paramount Pictures* Court recognized structural

318. *Id.* at 158. The Court did not suggest that films may not be sold in groups when a buyer is not compelled to purchase more than one film, but held merely that a refusal to license one or more copyrights unless another copyright is accepted is illegal. *Id.* at 159.

319. *Id.* at 154. A formula deal is a licensing agreement between a distributor and a circuit of theatres in which the license fee of a given feature is measured by a percentage of the feature's national gross. *Id.* at 153. A master agreement that covers exhibition in two or more theatres in a particular circuit permits an exhibitor "to allocate the film rental paid among the theatres as it sees fit and to exhibit the features upon such playing time as it deems best, and leaves other terms to the discretion of the circuit." *Id.* at 154.

320. *Id.* at 143-44. Drawing on *Interstate*, the Court explained that it was "not necessary to find an express agreement in order to find a conspiracy." *Id.* at 142.

321. *Id.* at 147.

322. 66 F. Supp. 323, 343 (S.D.N.Y. 1946).

323. 334 U.S. at 146-47.

324. *Id.* at 149.

325. *Id.* at 152.

326. *See* 2 S. WHITNEY, *supra* note 165, at 161. For a discussion of motion picture distribution following *Paramount Pictures*, see Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 S. CAL. L. REV. 150 (1958).

327. *See* M. CONANT, *supra* note 165, at 112. Significant tax incentives have also opened up the market for independent producers. *See* 2 S. WHITNEY, *supra* note 165, at 180-81. Divestiture has also dissipated the power of the five majors to enforce the production code, and thus has increased diversity in film offerings.

328. The Court's discussion of monopoly power was addressed primarily to the exhibi-

change as a means of eliminating monopoly power in mass media. Moreover, the Court's lack of concern for the issue of government interference with the press by divestiture implies support for the position that the first amendment does not immunize the press from the antitrust laws. In fact, as stated in *Associated Press*, the first amendment provides "powerful reasons" for attacking groups such as the *Paramount Pictures* defendants.[329]

D. Problems After Divestiture: Theatre Enterprises *and* Loew's

After *Paramount Pictures* there was a tremendous increase in private treble damage suits against the *Paramount Pictures* defendants.[330] Under section 5 of the Clayton Act, the decrees in the case became prima facie evidence in suits which sought awards for damages inflicted prior to the decrees by the illegal combination of the *Paramount Pictures* defendants.[331] Moreover, the method of proving damages in *Bigelow* and the conscious parallelism doctrine of *Interstate* posed serious threats to the *Paramount Pictures* defendants in cases which challenged their post-*Paramount Pictures* actions.[332] In *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*,[333] however, the Supreme Court tempered the doctrine of conscious parallelism.

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tion market and did not focus on the majors' power to exclude competitors in either the distribution or production markets. *See* 334 U.S. 131, 173 (1948).

329. 326 U.S. 1, 20 (1945).

330. There were also private actions against the Griffith and Schine circuits. *See* Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 157 F. Supp. 251 (N.D.N.Y. 1957), *aff'd*, 263 F.2d 533 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959); Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc., 208 F.2d 316 (10th Cir. 1953), *cert. denied*, 347 U.S. 935 (1954). *See generally* Cassady and Cassady, *Damage Measurement in Motion Picture Industry Private Antitrust Actions*, 37 S. CAL. L. REV. 389 (1964).

331. Section 5(a) of the Clayton Act provides in pertinent part that

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . .

15 U.S.C. § 16(a) (1976).

332. For application of the doctrine of conscious parallelism, see Milgram v. Loew's, Inc., 94 F. Supp. 416 (E.D. Pa. 1950), *aff'd*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

333. 346 U.S. 537 (1954). Prior to deciding *Theatre Enterprises*, the Court decided FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953), which dealt with the production and distribution of filmed advertisements that were shown between features. The Court sustained the FTC order prohibiting the defendants from entering into exclusive contracts with theatres for more than one year. Because this Article focuses on the production, distribu-

(1) *Theatre Enterprises:* No Evidence of Conspiracy

Theatre Enterprises opened a theatre six miles from downtown Baltimore in February 1949. Before and after the theatre's opening, its management attempted to obtain feature films on a first-run basis. The important national film distributors, each of which had been a defendant in *Paramount Pictures,* refused to license feature films on a first-run basis to the suburban theatre. Theatre Enterprises sought treble damages and injunctive relief, alleging that the distributors had conspired to restrict first-run films to downtown Baltimore theatres. There was no direct evidence of a conspiracy to deny first-run films to the plaintiff, and during the trial, the plaintiff offered the decrees entered against the defendants in the *Paramount Pictures* case as evidence of conspiracy. The trial judge refused to direct a verdict for the plaintiffs and instructed the jury that additional evidence was needed to relate the conspiracy to the claimed damage period and to Baltimore. The jury returned a verdict for the defendants, and the Fourth Circuit affirmed.[334]

The Supreme Court affirmed, citing *Interstate* for the proposition that business behavior is admissible circumstantial evidence from which a court may infer conspiracy.[335] The Court cautioned, however, that proof of parallel business behavior does not conclusively establish agreement, nor does such behavior constitute a Sherman Act offense.[336] The crucial question, the Court concluded, is whether the defendants' actions toward the plaintiff stemmed from an independent decision or from a tacit or express agreement.[337] There was substantial evidence that the distributors had each refused Theatre Enterprises' request because they had independently decided that the suburban theatre, because of location, absence of transportation facilities, and similar factors, would not be a successful first-run theatre.[338] This was sufficient, the Court held, to support the trial judge's decision to submit the question of conspiracy to the jury.[339]

tion, and exhibition of other types of films, and *Motion Picture Advertising* did not have a significant impact on those other types of films, it is not discussed. For commentary on this case, see R. Bork, *supra* note 6, at 308-09; Blake & Jones, *Toward a Three-Dimensional Antitrust Policy,* 65 Colum. L. Rev. 422, 444-45 (1965).

334. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 201 F.2d 306 (4th Cir. 1953).

335. 346 U.S. at 540.

336. *Id.* at 541.

337. *Id.* at 540.

338. *Id.* at 541-42. The defendants apparently were trying to maximize their profits.

339. *Id.* at 542. The Court also held that the *Paramount Pictures* decrees alone could not support the charge of conspiracy, because they did not rest on findings relating to runs

The denial of first-run films to Theatre Enterprises was not part of an unreasonable system of clearances and runs, nor was it part of a conspiracy to eliminate the firm. The public was not denied access to any first-run films; they were available at the firm's suburban theatre twenty-one days after the first-run had concluded. Many firms adopt similar marketing practices without tacit agreement or unreasonable restraints of trade. Although it was not attempting to do so, the Court in *Theatre Enterprises* protected the first amendment interest of the press in being free from undue government interference. If the Court had found that parallelism of action constituted conspiracy regardless of business justification and absence of evidence of tacit agreement, it would have fashioned an instrument for repressing the press.[340]

(2) The Problem of Block-Booking: *Loew's*

The Supreme Court affirmed *Paramount Pictures'* prohibition of block-booking in *United States v. Loew's, Inc.*[341] *Loew's* resulted from civil antitrust actions brought by the United States in 1957 against six major distributors of motion pictures for television exhibition. The distributors were charged with violating section 1 of the

in Baltimore, and they involved a conspiracy that was enjoined before June 25, 1948. Theatre Enterprises' claim for damages covered the period from February 1949 to March 1950. Thus, the Court found *Paramount Pictures* to be irrelevant. *Id.* at 544. In dissent, Justice Black argued that the jury instruction on burden of proof deprived the jury of benefits accorded by the prima facie evidence provision of section 5 of the Clayton Act. *Id.*

In Eagle Lion Studios, Inc. v. Loew's, Inc., 141 F. Supp. 658 (S.D.N.Y. 1956), *aff'd*, 248 F.2d 438 (2d Cir. 1957), *aff'd per curiam by an equally divided court*, 358 U.S. 100 (1958), another motion picture case involving section 5 of the Clayton Act, the Court held that a judgment on one cause of action is not conclusive in a subsequent suit on a different cause of action as to questions of fact not determined in the first suit. Eagle Lion produced and distributed motion pictures and attempted to introduce a finding in *Paramount Pictures* as evidence of a conspiracy to exclude Eagle Lion from licensing its films to the defendants' New York theatres. The Second Circuit distinguished *Paramount Pictures*, explaining that while the *Paramount Pictures* plaintiffs were independent exhibitors, the instant plaintiffs were independent distributors who had not been the target of the *Paramount Pictures* conspiracy. 248 F.2d at 444-45 (2d Cir. 1957).

340. Commenting on *Theatre Enterprises*, Professor Conant stated that there can be no inference of conspiracy when there is no evidence of conspiracy. M. CONANT, *supra* note 165, at 191. Professor Turner argued that conscious parallelism is not meaningful in the absence of additional facts which indicate that the decisions of the alleged conspirators were "interdependent." Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962).

In another motion picture conspiracy case, the Court interpreted *Theatre Enterprises* as requiring that conspiracy must be proved in conscious parallelism cases. *See* Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285 (3d Cir. 1963), *aff'd per curiam by an equally divided court*, 378 U.S. 123 (1964). *Theatre Enterprises* and *Viking Theatre* clearly protect the press from unsupported conspiracy actions.

341. 371 U.S. 38 (1962).

Sherman Act by refusing to deal except on the basis of block-booking. For example, to get films such as Casablanca and Treasure of the Sierra Madre, a station would also have to purchase films such as Gorilla Man and Tugboat Annie Sails Again. The district court, drawing upon *Paramount Pictures'* prohibition of block-booking,[342] found that each of the distributors had engaged in this practice.[343] The district court enjoined the distributors from block-booking, but permitted distributors to refuse to break films out of packages on a "temporary" basis pending an attempt to sell the entire package to other customers.[344]

The United States argued before the Supreme Court that the "temporary" refusal to negotiate for individual films was illegal.[345] The distributors argued that because there was no market dominance by any of them, there could be no illegal tie-in.[346] The Supreme Court vacated the district court's decree, including the "temporary" refusal to deal provision,[347] and held that the block-booking agreements were illegal tie-ins.[348] The Court rejected the distributors' market dominance test. Drawing upon the "sufficient economic power" test of *Northern Pacific Railroad Co. v. United States,*[349] the Court explained that even in the absence of market dominance, economic power could be inferred from the tying product's desirability to consumers or from "uniqueness in its attributes."[350] Because each film was copyrighted, the Court agreed with the district court's presumption of uniqueness.[351]

342. The district court concluded that the defendants could offer their films in blocks or groups, but could not condition the license of one or more films upon the license of other feature films. United States v. Loew's, Inc., 189 F. Supp. 373, 380 (S.D.N.Y. 1960); *see* United States v. Paramount Pictures, Inc., 334 U.S. 131, 159 (1948).

343. 189 F. Supp. at 383. For a discussion of the evidence presented against each distributor, see *id.* at 383-97.

344. *Id.* at 395.

345. Brief for the United States at 30.

346. Brief for Appellant Screen Gems at 9.

347. 371 U.S. at 55 (1962).

348. *Id.* at 50.

349. 356 U.S. 1, 6 (1958).

350. 371 U.S. at 45. If the uniqueness test had been applied in *Times-Picayune,* the Court might have concluded that the newspapers' products were distinct. *See* text accompanying notes 40-55 *supra.*

351. 371 U.S. at 48. In his critique of *Loew's,* Professor George Stigler concluded that two copyrights are substitutes for each other and that in setting the price of one, a distributor must take into account its effects on the sales of others. Stigler, *United States v. Loew's Inc.: A Note on Block-Booking,* 1963 SUP. CT. REV. 152, 154. To regard all copyrights as substitutes for one another, however, miscasts the issues in *Loew's.* The *Loew's* Court recognized that there are different grades of feature films, *see* 371 U.S. at 48 (1962), and that films of the highest grade are considered to be unique, since "to television as well as motion picture viewers there is but one 'Gone With The Wind.' " 371 U.S. at 48 n.6. The implication is that

The Court ordered the district court to modify its decrees in several important ways. First, the district court permitted each distributor to offer films in a package without listing individual prices for each film. The Court believed that this practice might permit distributors to violate surreptitiously the decree against block-booking by allowing salesmen to be reluctant to produce the individual price list on request, so that some stations would buy an entire block rather than negotiate for individual films.[352] The Court directed the district court to modify the decree so that individual film prices could be made available on the first approach of salesmen.[353] Second, the district court permitted distributors to refuse to deal on an individual film basis pending negotiations with others who might purchase the entire package. This practice could have permitted refusals to deal during negotiations which had already commenced, or refusals to deal while awaiting other negotiations. In the latter situation, refusals could stretch *ad infinitum* while the distributor exhausted the pôssibility of selling an entire package. The Court developed a more precise standard and ordered the district court to proscribe "temporary" refusals to deal on less than a block basis, except briefly during negotiations already under way with a competing station pursuant to which the distributor has offered to license or sell films individually or in a package.[354] Finally, the district court prohibited price differentials between a film offered as part of a package and the same film offered individually, because such differentials had the effect of conditioning the sale of one film upon the

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lower grade films were considered by purchasers to be easily substitutable for each other. Thus, the problem in *Loew's* was the foreclosing of markets for lower grade films through the forced tying of distinct products.

The Court treated the tying agreement in *Loew's* as a per se violation and did not examine the impact of the tying agreements. Drawing upon International Salt Co. v. United States, 332 U.S. 392 (1947), and United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the Court concluded that a valid patent or copyright on the tying product gives rise to a presumption that a tying arrangement involving the patented or copyrighted product has anticompetitive consequences. 371 U.S. at 46. Moreover, there was no question that the commerce involved was substantial. *Id.* at 49. *See generally* Turner, *supra* note 31. For commentary on a per se rule for tying agreements, compare R. BORK, *supra* note 6, at 374-75 with C. KAYSEN & D. TURNER, ANTITRUST POLICY 157 (1959).

Block-booking had the effect of foreclosing entry into the motion picture market for independent producers and distributors. *See* M. CONANT, *supra* note 165, at 79, 112. Although *Loew's* did not involve section 2 of the Sherman Act, it is possible that if block-booking of motion pictures for television exhibition had continued, competitive opportunities for independent producers and distributors would have diminished substantially, as television exhibition plays a key role in determining the profitability of films.

352. A tactic used by distributors to encourage the purchase of packages was to avoid giving a firm answer to stations that asked for individual prices. *See* 371 U.S. at 53-54.

353. *Id.* at 54.

354. *Id.* at 55.

sale of another. The United States contended that this prohibition was too vague and that distribution costs should be the only basis for a discount. While agreeing that the decree was vague and prohibiting differentials that were not the result of cost savings, the Court permitted quantity discounts if legitimately cost-justified.[355]

The Court's alteration of the *Loew's* decrees indicates the extreme care it took to promote free competition.[356] The *Loew's* Court can be criticized, however, for its blind reliance on *Paramount Pictures'* prohibition against block-booking because the block-booking in *Loew's* may have lacked the pernicious effects present in *Paramount Pictures.*[357] Read together, *Paramount Pictures* and *Loew's* erect a per se rule prohibiting forced block-booking.[358]

E. The First Amendment, the Antitrust Laws, and the Motion Picture Industry

Freedom of expression is inherently laissez faire; it implies an absence of government control.[359] Yet the conditions in the motion picture industry which resulted in cases such as *Binderup, Schine,* and *Paramount Pictures* illustrate vividly the need for government economic intervention to foster diversity of expression. In its motion picture antitrust decisions, the Supreme Court has attempted to promote a freer market, but in a few instances the Court has fostered that goal by unnecessarily denigrating the interest of communications firms in being free, to the greatest possible extent, from government control.

355. *Id.* at 54-55.

356. *Id.* at 48. In a separate opinion, Justice Harlan disagreed with the Court's modification of the decrees. *Id.* at 56 (Harlan, J. concurring in part and dissenting in part). Justice Stewart joined in Justice Harlan's opinion.

357. *See* note 351 *supra.* In fact, *Paramount Pictures* did not analyze the actual anticompetitive impact of the defendants' block-booking agreements. *See* 334 U.S. at 156-59. Block-booking in *Paramount Pictures,* however, foreclosed the market for independent producers and distributors. *See* M. CONANT, *supra* note 165, at 79, 112. One distributor in *Loew's* testified that block-booking was adopted partly because the firm had not yet converted its films from 35 mm. theatre prints to the 16 mm. prints required for television exhibition. Testimony pointed out that in a full library sale, taking perhaps seven years to play off in a television market, the station would not need all of the prints immediately, yet a buyer of selected films who needed the product immediately could not obtain it immediately because of the delay caused by the conversion of the prints. *See* United States v. Loew's Inc., 189 F. Supp. 373, 384 (S.D.N.Y. 1960). Professor Bork has criticized the per se treatment of tying agreements, arguing that they can have beneficial effects. *See* R. BORK, *supra* note 6, at 375-81. *See also* R. WARREN, ANTITRUST IN THEORY AND PRACTICE 220 (1975).

358. Professor Turner, commenting on *International Salt,* indicated that while that case did not erect a per se rule on tying agreements, it came about as close as any case can. Turner, *supra* note 31, at 53. Professor Turner's comment is equally applicable to the block-booking in *Paramount* and *Loew's.*

359. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 38 (1966).

The standards of proof on the issues of conspiracy in *Interstate*[360] and damages in *Bigelow*[361] may pose problems for the press. Conscious parallelism should not lead to an inference of conspiracy unless there also is evidence that the allegedly conspiring firms were engaged in interdependent decisionmaking. Fortunately, the Court tempered *Interstate* in *Theatre Enterprises* by requiring evidence of tacit or express agreement among firms.[362] Without this qualification, a host of practices adopted merely on the basis of sound business principles might be attacked as constituting conspiracy. The damages problem in *Bigelow,* however, remains. There is a clear distinction between uncertainty as to the amount of damages and uncertainty as to whether a plaintiff was actually damaged by a defendant's conduct. While a defendant should certainly be restrained from continuing any illegal action, a damages award should be founded on proof that the plaintiff's losses were attributable exclusively to the restraints of trade.[363]

None of the Court's motion picture decisions have entailed intrusions into functions of the press that are protected by the first amendment, and even drastic measures such as divestiture orders have been drawn as narrowly as possible. Moreover, in each case there has been a compelling need—the public interest in the widest possible dissemination of information from diverse sources—which justified government intervention in the marketplace. While motion pictures have not been singled out for antitrust standards which are distinct from those applicable to firms not engaged in expression, some disturbing implications arise from the Court's treatment of first amendment issues in *Paramount Pictures.*[364]

The Court's belief that first amendment issues were not present in *Paramount Pictures* because of an absence of questions concerning monopoly of production is shortsighted. Is the power to exclude competitors in either distribution or exhibition less offensive from a first amendment standpoint than similar power in production? Certainly heavy concentration or attempts to monopolize at any level may inhibit another level and have harmful effects on the flow of information. The public interest in receiving information from diverse sources requires that all levels—production, distribution, and exhibition—be free from unreasonable restraints, conspiracies,

360. *See* text accompanying note 201 *supra.*
361. *See* text accompanying notes 262-75 *supra.*
362. *See* text accompanying notes 335-39 *supra.*
363. *See* note 547 *infra.*
364. *See* text accompanying notes 298-303 *supra.*

and attempts to exclude competitors.[365] The first amendment consequently supports attacks on unreasonable practices or monopolistic structures which may occur at any level.

From a first amendment standpoint, the greatest benefit of the *Paramount Pictures* decrees has been increased opportunities for independent producers.[366] Moreover, the divestiture principles of *Crescent, Schine,* and *Paramount Pictures* can be adapted easily to restructure other mass communications markets. These principles include using divestiture to eliminate an illegal conspiracy,[367] force firms to give up properties acquired through illegal schemes,[368] eliminate unlawful monopoly power,[369] and eliminate vertical integration that is designed to have unlawful effects or that creates the power to bring about unlawful effects.[370] Unfortunately, these principles have not been applied adequately to the distribution phase of motion pictures, which the *Paramount Pictures* defendants have controlled since 1948.[371] The principle pertaining to vertical integration, however, has an important application in the broadcasting industry, where each of the major networks engages in production, distribution, and station ownership.

IV. Regulating the Structure and Conduct of the Broadcasting Industry

The broadcasting industry, unlike the newspaper and motion picture industries, is subject to direct government control of market structure and conditions of entry, and the Supreme Court has approved such control on the premise that broadcasting utilizes a "scarce" resource.[372] It is fallacious to distinguish between broadcasting and other communications industries on this premise, for almost all resources used in the economic system are limited.[373] The

365. Two authors believed that the only permanent solution to oligopoly in the motion picture industry is "atomization" of the production, distribution, and exhibition phases. McDonough & Winslow, *The Motion Picture Industry: United States v. Oligopoly,* 1 Stan. L. Rev. 385, 416-17 (1949).

366. For a discussion of how one feature of the *Paramount Pictures* decrees has been used to limit competition in exhibition markets, see Comment, *An Experiment in Preventive Anti-Trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees,* 74 Yale L.J. 1041 (1965).

367. United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944).

368. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128 (1948).

369. United States v. Paramount Pictures, Inc., 334 U.S. 131, 173 (1948).

370. *Id.* at 174.

371. *See* Crandall, *The Postwar Performance of the Motion-Picture Industry,* 20 Antitrust Bull. 49 (1975).

372. National Broadcasting Co. v. United States, 319 U.S. 190, 213, 216 (1943).

373. Judge David Bazelon has asked, "When we say there is a scarcity of frequencies, to what are we comparing this scarcity?" Bazelon, *FCC Regulation of the Telecommuni-*

Court has nevertheless held consistently that because there are more individuals who want to broadcast than there are frequencies to allocate,[374] denial of a license does not infringe upon first amendment freedoms.[375] The Court has interpreted very carefully the Communications Act of 1934,[376] but its analysis of first amendment issues raised by government control of broadcasting markets has often been superficial.

A. *The Licensing Power:* Nelson, Pottsville, *and* Sanders

The Court first addressed first amendment issues raised by the FCC's licensing authority in *National Broadcasting Co. v. United*

cations Press, 1975 DUKE L.J. 213, 224. The newspaper industry, in particular, has recently been troubled by scarcity of critical resources. Due to the massive grain harvest during the summer of 1979, there has been a shortage of railroad cars available for the transportation of newsprint. Moreover, Canadian newsprint production in 1979 is running below 1978 levels. *See* Publisher's Auxiliary, August 6, 1979, at 1, col. 1. Professor Ronald Coase has been a leading exponent of the view that although broadcasting facilities are scarce, that fact by itself does not justify the present system of government allocation of frequencies. He has suggested using a pricing mechanism for frequency allocation. *See* Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues,* 41 J. LAND & PUB. UTIL. ECON. 161 (1965); Coase, *The Interdepartment Radio Advisory Committee,* 5 J.L. & ECON. 17 (1962); Coase, *The Federal Communications Commission,* 2 J.L. & ECON. 1 (1959). Professor Harry Kalven called Professor Coase's position an "insight more fundamental than we can use." Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J.L. & ECON. 15, 30 (1967). Rep. Lionel Van Deerlin, chairman of the House Communications Subcommittee, however, recently sponsored a bill which would have charged spectrum users a fee. *See* H.R. 3333, 96th Cong., 1st Sess. (1979). The bill, known as the Communications Act of 1979, proposed many sweeping changes in the broadcasting regulatory system and was the subject of extensive hearings. Congressman Van Deerlin later announced that he will offer amendments to the Communications Act of 1934, rather than attempt to revamp the entire Act. *See* BROADCASTING, July 23, 1979, at 24; BROADCASTING, July 16, 1979, at 24. For a discussion of frequency allocation and alternatives to the present system, see generally H. LEVIN, THE INVISIBLE RESOURCE (1971); Levin, *Federal Control of Entry in the Broadcast Industry,* 5 J.L. & ECON. 49 (1962); Robinson, *Radio Spectrum Regulation: The Administrative Process and the Problems of Institutional Reform,* 53 MINN. L. REV. 1179 (1969); Note, *The Crisis in Electromagnetic Frequency Spectrum Allocation: Abatement Through Market Distribution,* 53 IOWA L. REV. 437 (1967).

374. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 389 (1969). In *Red Lion* the Court cited data that in 1968 there were 153 unutilized UHF television channels in the top 100 markets. *Id.* at 398 n.25. It appears that the Court's blanket statement about the number of people who want to broadcast and the scarcity of facilities really only applies to some markets and types of broadcasting facilities.

375. National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943). There is a need for technical regulation and licensing in broadcasting, but this does not necessarily require other forms of regulation. *Cf.* Kalven, *supra* note 373, at 37 (the issue is not what the need for licensing permits the FCC to do, but rather what the first amendment inhibits the FCC from doing, even though it is given power to license). The Court, however, has held that the need for technical regulation and licensing mandates unique first amendment standards for broadcasting.

376. 47 U.S.C. §§ 151-609 (1976).

States (NBC).[377] Prior to *NBC,* the Court decided three cases involving government control of market structure through broadcast licensing—*Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.,*[378] *FCC v. Pottsville Broadcasting Co.,*[379] and *FCC v. Sanders Brothers Radio Station.*[380] Read together, *Nelson, Pottsville,* and *Sanders* show that the "public interest" standard is a supple but powerful instrument that can be used to alter the structure of broadcasting markets.

In 1928, Congress amended the Radio Act of 1927 to require the Federal Radio Commission (FRC) to allocate broadcasting licenses according to population.[381] WJKS, the only radio station in Gary, Indiana, was subject to interference from stations in other communities and applied to the FRC for use of a frequency which was being used by two Chicago stations, WIBO and WPCC.[382] The FRC approved WJKS's application and terminated the licenses of the two Chicago stations, an action that the FRC believed would result in a more equitable distribution of stations according to population.[383]

The District of Columbia Circuit reversed the FRC, holding that it was not consistent with legislative policy to equalize the comparative broadcasting facilities of different states by unnecessarily injuring established stations.[384] Before the Supreme Court, the owners of WIBO argued that the FRC lacked the power to revoke a license in an attempt to implement a quota system of distribution.[385]

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377. 319 U.S. 190 (1943); *see* text accompanying notes 412-47 *infra.*

378. 289 U.S. 266 (1933); *see* text accompanying notes 381-92 *infra.*

379. 309 U.S. 134 (1940); *see* text accompanying notes 393-401 *infra.*

380. 309 U.S. 470 (1940); *see* text accompanying notes 402-11 *infra.*

381. *See* 47 U.S.C. § 89 (1928) (repealed 1934).

382. During the 1920's, radio receivers were unselective and transmitters tended to drift from frequency to frequency. These technical difficulties meant that only a few frequencies could be allocated for each market. In the larger markets, stations were required to share the same frequency; each station would be able to broadcast only during a limited time period each day.

383. 289 U.S. at 273. The FRC explained that WJKS's programs were designed for the ethnic groups of Gary, and that deletion of the two Chicago stations would not deprive listeners because the type of programming the stations broadcast could be received from other Chicago stations. *Id.*

384. Nelson Bros. Bond & Mortgage Co. v. FRC, 62 F.2d 854, 856-57 (D.C. Cir. 1932). The court of appeals also stated that the programming of the two Chicago stations served the public interest to as great an extent as that of WJKS. *Id.* at 856. The dissent concluded that the Commission had acted within its authority, and that the court was substituting its own conclusions for those of the FRC. *Id.* at 859 (Groner, J., dissenting). *Cf.* Trinity Methodist Church v. FRC, 62 F.2d 850, 854 (D.C. Cir. 1932), *cert. denied,* 288 U.S. 599 (1933) (one who applies for or obtains a permit to make use of a medium of interstate commerce subject to the power of the government, takes such a grant subject to the power of the government to withdraw it).

385. Brief for Respondents at 11, FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

The FRC argued that the owner of a station possesses no vested right to continue to operate which is superior to federal regulatory power.[386] The Supreme Court unanimously agreed with the FRC and reversed the court of appeals, holding that the Commission had the authority to redistribute frequencies in the public interest, as long as the Commission did not act arbitrarily or capriciously.[387] Chief Justice Hughes, writing for the Court, explained that in light of the scarcity of radio facilities and the confusion that would result from interference, the broad authority of Congress to establish a licensing and allocation system was not open to question,[388] and included the power to delete stations if necessary to achieve a result mandated by Congress.[389] Chief Justice Hughes' view of licensing authority has been consistently followed in subsequent Court decisions. *Nelson* establishes a landmark principle of broadcasting regulation: broadcasting markets can be restructured to achieve a legitimate end regardless of the investments of private broadcasters.

The power of the licensing authority was paramount in *Nelson*, but the Court did not hold that the public interest standard by which licenses are granted was "so indefinite as to confer unlimited power."[390] Chief Justice Hughes explained that since the Radio Act defined the powers of the FRC, "definition is limitation."[391] Because redistribution of frequencies was within the powers granted by the Act, the Court concluded that whether a particular redistribution would meet the public interest standard was a question for the FRC to determine.[392]

The licensing authority's broad discretion to determine the public interest was reaffirmed in *FCC v. Pottsville Broadcasting Co.*,[393] the first case in which the Supreme Court construed the Communications Act of 1934.[394] *Pottsville* arose after the Pottsville

386. Brief for the FRC at 19.

387. 289 U.S. at 282 (1933). The Court defined an arbitrary or capricious finding as one without substantial evidence to support it. *Id.* at 277.

388. *Id.* at 282.

389. Chief Justice Hughes stated:

> this Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce *is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy*, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises.

Id. (emphasis added).

390. *Id.* at 285.

391. *Id.* at 276.

392. *Id.* at 285.

393. 309 U.S. 134 (1940).

394. *Id.* at 137.

Broadcasting Company sought a construction permit from the FCC for a broadcasting station in Pottsville, Pennsylvania. The Commission denied the application on the grounds that the applicant was not qualified financially, and did not represent adequately local interests in the community the station was to serve.[395] The District of Columbia Circuit reversed and remanded the case to the FCC.[396] Pottsville Broadcasting then petitioned the FCC to grant its original application: the Commission, however, set the application for a comparative hearing because two other applications for the same facilities had been filed subsequent to Pottsville's original application. Pottsville Broadcasting then obtained a writ of mandamus from the District of Columbia Circuit requiring the Commission to set aside the comparative hearing.[397]

The Supreme Court unanimously reversed the court of appeals and ordered the dissolution of the writ of mandamus.[398] Justice Frankfurter, writing for the Court, explained that because the Act recognized the rapidly changing nature of broadcasting, broad discretion was given the FCC in determining procedures for ascertaining the public interest.[399] The public interest standard, he explained, serves as a supple instrument for the exercise of discretion by the expert body that Congress created to implement legislative policy.[400]

In *Pottsville,* Justice Frankfurter observed that Congress adopted the Communications Act out of a concern for competition, and that the licensing system was designed to prevent monopolies.[401] In *FCC v. Sanders Brothers Radio Station,*[402] the Court repeated Justice Frankfurter's dictum, and held that economic injury to an existing station is not a criterion the Commission should take into account in determining whether it shall grant or withhold a license.[403]

395. Pottsville Broadcasting Co., 4 F.C.C. 318 (1937).

396. Pottsville Broadcasting Co. v. FCC, 98 F.2d 288 (D.C. Cir. 1938). The court of appeals did not decide whether the company adequately represented local interests.

397. Pottsville Broadcasting Co. v. FCC, 105 F.2d 36 (D.C. Cir. 1939).

398. 309 U.S. at 146. Before the Supreme Court, the FCC argued that it was immaterial that Pottsville's application had been the first filed, because the public interest standard required that the best use of the spectrum be obtained. Brief for the FCC at 11. Pottsville argued that an applicant who is entitled to be heard first and meets the statutory requirements is entitled to a license without waiting for later applicants to be heard. Brief for Respondent at 2-3.

399. 309 U.S. at 138, 145-46.

400. *Id.* at 138.

401. *Id.* at 137.

402. 309 U.S. 470 (1940).

403. *Id.* at 476.

In January 1936, the publisher of the *Dubuque Telegraph Herald* applied to the FCC for a construction permit for a station in Dubuque, Iowa. Shortly afterwards, WKKB, located in East Dubuque requested that its transmitter and studios be moved to Dubuque, and asked that it be permitted to intervene in the *Telegraph Herald* proceeding. At a consolidated hearing, WKKB argued that there was insufficient advertising revenue to support an additional station, but the FCC approved both applications.[404] WKKB appealed to the District of Columbia Circuit, which held that the Commission's approval of the *Telegraph Herald* application was an arbitrary and capricious action because the Commission had failed to make findings on the economic injury issue.[405]

The FCC argued before the Supreme Court that it had no obligation to protect an existing licensee from competition and that the Communications Act expressly provided for the maintenance of competitive conditions in broadcasting.[406] The Court agreed, and, reversing the court of appeals, held that resulting economic injury to a rival station is not, in and of itself, an element the FCC must weigh or make findings on when considering a license application.[407] Writing for a unanimous Court, Justice Roberts explained that the Act envisioned free competition and that its purpose was to protect the public, not licensees.[408] Justice Roberts warned, however, that competition may result in both stations going out of business due to insufficient advertising revenue, and thus would leave the public without adequate radio service. The effect of competition on the public, Justice Roberts concluded, was distinct from the consideration of economic loss to a station due to increased competition.[409]

404. Telegraph Herald, 4 F.C.C. 392 (1937).

405. Sanders Bros. Radio Station v. FCC, 106 F.2d 321 (D.C. Cir. 1939). The court of appeals explained that there was no substitute for adequate findings, thus the Commission's interpretation of the public interest standard cannot stand unless supported by adequate findings. *Id.* at 324.

406. Brief for the FCC at 16, 27, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

407. 309 U.S. at 473. *See generally* Kahn, *Economic Injury and the Public Interest,* 23 FED. COM. B.J. 182 (1969); Meeks, *Economic Entry Controls in FCC Licensing: The Carroll Case Reappraised,* 52 IOWA L. REV. 236 (1966); Mayer, *Sanders Brothers Revisited: Protection of Broadcasters from the Consequences of Economic Competition,* 49 KY. L.J. 370 (1961); Note, *Economic Injury in FCC Licensing: The Public Interest Ignored,* 67 YALE L.J. 135 (1957); *see also* Givens, *Refusal of Radio and Television Licenses on Economic Grounds,* 46 VA. L. REV. 1391 (1960).

408. 309 U.S. at 475.

409. *Id.* at 476. *Cf.* Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958) (when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for the presentation of such proof).

In discussing broadcasting regulation, Justice Roberts, like Chief Justice Hughes in *Nelson,* stressed that if Congress had not exercised its power over interstate commerce in allocating and regulating "limited" frequencies, nobody would be able to use them.[410] In *Sanders,* as in *Nelson* and *Pottsville,* the Court did not question government control of entry conditions and market structure from a first amendment standpoint. These decisions, however, promote some first amendment values, because they reflect the Court's conviction that without regulation chaos would result. The need for government allocation does not mean that the government can regulate a licensee without restraint. Each decision gives the Commission broad discretion to ascertain the public interest when licensing stations, but only *Sanders* attempts to define the types of regulation that are not permissible. In that case, Justice Roberts in dictum noted that the Act does not regulate the program content, business management, or policy of the licensee.[411] This statement, however, did not settle the issue. In *NBC* the Court would be presented with the question whether regulation of business relations violates the Communications Act and the first amendment.

B. *Regulation of Network-Affiliate Relations and the First Amendment:* NBC

At the insistence of Congress, the FCC began an investigation of network broadcasting in 1938.[412] After a lengthy process of hearings and oral argument, the Commission issued eight regulations pertaining to network broadcasting in May 1941 that modified or

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The premise that competition may actually harm the public interest would later be an important aspect of the Commission's restrictions on cable television systems. The Court generally approves of the licensing and regulation of broadcasting because of the scarcity of frequencies. *See* notes 372-76 *supra* and accompanying text. The fact that this rationale does not apply to cable has not prevented the FCC from regulating cable systems. In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), the Court held that the FCC had the authority to regulate cable systems, if reasonably necessary for the regulation of television broadcasting. *Id.* at 178. *Southwestern* arose out of the Commission's rules regarding the importation of distant television signals by cable systems. Local stations were concerned that importation of distant stations would fragment their audiences and reduce their advertising revenues, thereby curtailing local public service. Professors Noll, Peck, and McGowan believe that the local broadcasters' services would change only slightly with signal importation. *See* R. NOLL, *supra* note 10, at 152. For a discussion of importation, see *id.* at 151-82 and the authorities cited in *id.* at 152 n.3. Because the *Southwestern* Court focused on the narrow issue of FCC authority over cable systems, and did not discuss the issue of restraining one type of communications firm to protect another, *Southwestern* is not discussed in this Article.

410. 309 U.S. at 474.

411. *Id.* at 475.

412. *See generally* Friedrich & Sternberg, *Congress and the Control of Radio-Broadcasting* (pt. 1), 37 AM. POL. SCI. REV. 797 (1943).

prohibited certain network practices such as exclusive affiliation,[413] territorial exclusivity,[414] option time,[415] control of station rates by networks,[416] the right to reject programs,[417] and the length of affiliation contracts.[418] The regulations also sought structural changes by

413. The exclusivity provisions of affiliation contracts prohibited stations from broadcasting the programs of another network. This was a significant barrier to the entry of new networks, the FCC believed, because there were 45 cities with a population of more than 50,000 in which networks other than NBC and CBS could not broadcast their programs. The Commission thus ruled that no station should enter into exclusive agreements if such agreements prevent it from offering the public programs of any other network or hinder the entrance of new networks. FCC, REPORT ON CHAIN BROADCASTING 54 (1941) [hereinafter cited as FCC REPORT]. Exclusivity provisions were consequently banned. *See* 47 C.F.R. § 3.101 (1941).

414. Often networks would agree with affiliates not to offer to other stations in the same area programs rejected by the affiliate. FCC REPORT, *supra* note 413, at 58, 59. The Commission initially prohibited such territorial exclusivity entirely, but in October 1941 modified the regulation to permit affiliated stations to have a right of first call on network programs. The Commission nevertheless continued to prohibit contracts which prevented competitors from obtaining network programs rejected by the affiliate. *See* 47 C.F.R. § 3.102 (1941).

415. Affiliates would agree to preserve certain blocks of time during the day, called network option time, for the broadcasting of network programs. Such option time, however, would inhibit stations from broadcasting non-network programs, such as those produced by syndicators, and those developed by other networks. Option time is striking in its similarity to block-booking. Initially, the FCC banned option time. In October 1941, however, the FCC modified the regulation, limiting option time to a certain number of hours during the day and requiring networks to notify stations 56 days in advance that an option time period would be utilized. *See* 47 C.F.R. § 3.104 (1941).

416. Stations were compensated for carrying network programs according to a rate which depended upon such factors as the station's location and transmitter power. If a station sold time for non-network national advertising at a rate which was less than its network rate, the network could reduce the rate at which it compensated the station. This had the effect of decreasing a station's incentive and ability to compete for national spot advertising. FCC REPORT, *supra* note 413, at 73. The FCC prohibited networks from setting rates at which affiliates sold non-network time, and from penalizing affiliates for selling such time at a rate which was different from their network rate. *See* 47 C.F.R. § 3.108 (1941).

417. NBC and CBS required affiliates to accept network programs unless they were not in the public interest, and NBC further required affiliates to show that they had broadcast a program that was more in the public interest than the network program they had rejected. The Commission found these requirements particularly offensive because they removed much of the stations' control over programming. Moreover, they made it difficult for affiliates to broadcast non-network programs or programs from other networks. The Commission consequently held that a licensee should not be bound to accept programs merely because it cannot sustain the burden of proof that it has a better program, and that the licensee must be free to select the programs which in its view best serve the public interest. FCC REPORT, *supra* note 413, at 65, 66. The FCC prohibited contracts which prevented stations from rejecting programs which, in the station's opinion, were contrary to the public interest. *See* 47 C.F.R. § 3.105 (1941).

418. CBS and NBC required their affiliates to sign contracts for a term of five years. The FCC found this requirement to be offensive because it compelled licensees to accept network programs even if during the contract term the quality of those programs deteriorated. FCC REPORT, *supra* note 413, at 61. The Commission initially limited affiliation contracts to one year, but in October 1941 modified this regulation to permit two year contracts. *See* 47 C.F.R. § 3.103 (1941).

prohibiting each network from owning more than one station in the same service area,[419] and by prohibiting a company from operating more than one network.[420] The regulations were designed to give affiliates greater freedom from network control, to enhance opportunities for the entry of new networks and non-network programming sources, and to deconcentrate the industry. Certainly these were antitrust policies whose enforcement was not the FCC's responsibility. Although the Commission recognized this limitation on its rulemaking power, however, it claimed nonetheless that it should administer its regulatory powers in light of Sherman Act purposes, because preservation of the fullest possible measure of competitive opportunity is a key element of the public interest standard.[421] After hearing oral argument, the Commission on October 11, 1941 amended three of the regulations and set their effective date as November 15, 1941.[422] The regulation prohibiting operation by the same company of more than one network was suspended indefinitely.[423]

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419. NBC owned two stations in each of the following cities: Chicago, New York, San Francisco, and Washington. CBS owned eight stations, seven of which were in major markets. The FCC saw network control of these stations as a major barrier to the entry of new networks, because it "bottled up," or rendered inaccessible to competing networks, the best station facilities. FCC REPORT, *supra* note 413, at 67. The Commission prohibited network ownership of more than one station in the same service area, and banned network ownership in any market where there were so few stations, or where the existing stations were so unequal (in terms of power, for example) that competition would be substantially restrained. *See* 47 C.F.R. § 3.106 (1941).

420. The Commission also viewed NBC's operation of two networks—the Red and the Blue—as a substantial barrier to the entry of new networks. NBC offered volume discounts to advertisers, and the Commission found that this gave the Blue network a marked advantage over competitors. Moreover, the Blue network was used as a buffer to protect the highly profitable Red network against competition. Beyond competitive considerations, the Commission found that the concentration of power resulting from operation of two networks by one company was inimical to the public interest. FCC REPORT, *supra* note 413, at 70-72. The Commission prohibited a network from operating more than one network at the same time. *See* 47 C.F.R. § 3.107 (1941).

421. FCC REPORT, *supra* note 413, at 46-47.

422. *See* notes 414-18 *supra*. For a range of opinion on the regulations, see *Hearings on S. Res. 113 Before the Senate Comm. on Interstate Commerce,* 77th Cong., 1st Sess. (1941).

423. Prior to the October 1941 modifications in the rules, RCA had indicated the desirability of disposing of one of its networks, known as the Blue network. Radio Corp. of America, 10 F.C.C. 212, 213 (1943). To facilitate this sale without a time deadline that would unduly depress the price, the FCC indefinitely suspended the regulation pertaining to one company operating more than one network. *Id.* It has been stated that RCA opposed the sale of one of NBC's networks and fought this issue all the way to the Supreme Court. *See, e.g.,* 2 E. BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES: THE GOLDEN WEB 187 (1968). But this is incorrect. As early as 1936, NBC executives had discussed the desirability of selling the Blue network. *See* Minutes of NBC Executive Meeting (June 19, 1936) (found in NBC General Correspondence Collection, Mass Communications History Center, State Historical Society of Wisconsin, Madison, Wis.) [hereinafter cited as NBC Collection]. In 1940, NBC's

On October 31, 1941, NBC and CBS filed suits to enjoin enforcement of the regulations. The district court dismissed the suits for want of jurisdiction, but stayed enforcement of the regulations pending direct appeal to the Supreme Court.[424] The Court held that the suits could be maintained under section 402(a) of the Communications Act, and reversed the district court's dismissal.[425] On remand, the district court granted a motion for summary judgment and dismissed the suits on the merits.[426] Writing for the district court, Judge Learned Hand rejected NBC's arguments that the Commission could not promulgate the regulations because they dealt with the business affairs of a licensee,[427] and that the Commission could not decide antitrust questions.[428]

NBC also challenged the regulations on first amendment grounds, charging that they indirectly controlled what stations may broadcast. Judge Hand agreed that the regulations fettered station choices because "absolutely free choice" would include the opportunity to continue abusive practices which thwarted the growth of competing networks. Because the public interest under which the

treasurer estimated that the Blue network lost almost $2 million in 1938, and slightly more than $2 million in 1939. *See* Letter from Mark Woods to Niles Trammell and Lenox Lohr (January 9, 1940) (in NBC Collection). When the FCC announced the regulations in May 1941, NBC executives at first publicly criticized the forced sale of a network, but this criticism subsided quickly. NBC did not challenge the prohibition of dual network operation in court, and the Supreme Court did not consider the validity of this regulation. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 208 (1943). During the litigation, *see* text accompanying notes 424-37 *infra*, RCA completely severed the Blue network from NBC and began operating it as a separate RCA subsidiary on Jan. 1, 1942. Following this separation, Mark Woods, president of the Blue Network Company, made an intensive effort to sell the company. *See* Reminiscences of Mark Woods (found in Oral History Collection, Columbia University, New York, N. Y.). On October 12, 1943, the FCC approved the sale of the Blue Network Company to the American Broadcasting System, Inc., the predecessor of ABC. *See* Radio Corp. of America, 10 F.C.C. 212 (1943).

424. National Broadcasting Co. v. United States, 44 F. Supp. 688 (S.D.N.Y. 1942).

425. Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407 (1942). *See* 47 U.S.C. § 402(a) (1934). *See generally* Note, *Columbia Broadcasting System, Inc. v. United States: FCC Regulation Affecting Relationship Between Broadcasting Stations and Network as Reviewable Order*, 56 HARV. L. REV. 121 (1942).

426. National Broadcasting Co. v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942).

427. *Id.* at 943-44. *Sanders* was irrelevant, Judge Hand explained because the only question decided in that case was whether injury suffered by an existing station was a material factor in the licensing of another station. *Id.* at 945.

428. *Id.* at 944-45. Judge Hand explained that the FCC is peculiarly competent to assess the impact upon broadcasting of restrictive or monopolistic practices. *Id.* at 945. NBC also claimed the public interest standard was too vague for the regulation of the business affairs of licensees. Judge Hand, explaining that the drafters of legislative standards cannot predict accurately all the occasions to which they will apply, concluded that a delegation of power is not vague if "a clue can be found in it for dealing with the several occasions which may arise." *Id.* at 945-46.

regulations were issued was none other than the interest in free speech, however, Judge Hand concluded that they could pose no first amendment problem. Thus, the regulations protected "the very interests which the First Amendment itself protects, i.e. the interests, first, of the 'listeners,' next, of any licensees who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks.' "[429] This view of the first amendment would be restated by Judge Hand shortly after *NBC* in *Associated Press.*[430]

NBC appealed to the Supreme Court, arguing that the Communications Act permitted the FCC to regulate only the technical or engineering aspects of network broadcasting, and that the Commission could only deal with antitrust violations after a court had supplied fact and conclusion.[431] NBC also contended that the first amendment prohibited government action to foster free speech as well as to repress free speech.[432] Finally, NBC argued that the broad scope of the licensing power raised the question whether freedom of the broadcast press could continue to exist.[433] The United States argued that the licensee should be responsible solely for determining the programs it broadcast, and that the primary purpose of the regulations was to diminish the control of networks over what their affiliates broadcast.[434] Through their control over affiliates, the networks arguably excluded diverse sources from broadcasting, and the United States contended that such exclusion hindered the effective use of radio.[435] Interpreting the Communications Act as an instrument for preserving "full opportunity for expression of viewpoints," the United States claimed that avoidance of concentration and control was a cardinal objective of the Act.[436]

The Supreme Court upheld the Commission's authority to adopt the regulations,[437] but Justice Frankfurter's lengthy opinion

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429. *Id.* at 946.

430. *See* text accompanying note 85 *supra.*

431. Brief for Appellant National Broadcasting Co. at 23, National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

432. *Id.* at 40.

433. Reply Brief for Appellant National Broadcasting Co. at 14.

434. Brief for the United States and the FCC at 118.

435. *Id.* at 34. The American Civil Liberties Union at pages 3-4 of an amicus curiae brief developed a position which the Court would later adopt in *Associated Press. See* text accompanying note 100 *supra.* The ACLU stated that unless particular ideas are allowed to compete in the marketplace of thought, or unless there is the potential for such competition, there can be no freedom of thought or expression.

436. Brief for the United States and the FCC at 45.

437. 319 U.S. 190 (1943). Justice Murphy in dissent argued that the Commission could be concerned only with technical aspects of the relations between networks and affiliates. *Id.* at 233. Justice Roberts agreed with Justice Murphy. For the FCC's current network affiliation rules, see 47 C.F.R. §§ 73.132 (AM), 73.232 (FM), 73.658 (TV) (1978).

for the Court miscast NBC's first amendment arguments. He noted initially that if the regulations violated the first amendment, then every person who was denied a license would also be denied constitutional rights. Freedom of expression is necessarily abridged on radio, he asserted, because radio facilities are inherently limited by the laws of physics.[438] NBC was not arguing that the first amendment prohibited licensing of broadcasting stations; it was questioning whether the scope of the licensing authority as applied by the FCC violated the first amendment. Certainly denial of a license because of a technical scarcity of frequencies is a very different matter than denial for the business reasons presented in *NBC*. Yet Justice Frankfurter approached the case as though there were no difference. As long as an applicant was denied a license under the public interest standard of the Communications Act, Justice Frankfurter asserted, there was no denial of free speech.[439] As Professor Harry Kalven has noted, however, different types of regulation present different first amendment problems.[440] By failing to address directly the scope of the licensing authority, Justice Frankfurter in *NBC* sidestepped a key first amendment issue.[441]

Justice Frankfurter's failure to see any first amendment limitations on the scope of FCC regulation of business practices permits the FCC to regulate far beyond the scope of the antitrust laws, and allows the FCC to determine which practices are unreasonable in light of the public interest standard. This places broadcasters in a very different position than other mass media firms because a practice which may be a reasonable restraint of trade under the antitrust

438. 319 U.S. at 226. For a critique of the scarcity rationale and other principles used to justify broadcasting regulation, see Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 757-66 (1964).

439. 319 U.S. at 227.

440. "[T]he traditions of the First Amendment do not evaporate because there is licensing . . . . The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is *what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license.*" Kalven, *supra* note 373, at 37 (emphasis added).

441. Professor Glen Robinson observes that accepting *NBC* at face value, it is difficult to find any significant first amendment limitations on the Commission's authority to regulate radio and television broadcasting, at least in the area of economic regulation, so long as the standard of public interest is satisfied. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 87-88 (1967). *NBC* has also been interpreted as permitting program regulation. *See id.* at 97-163; note 444 *infra*.

Justice Frankfurter did, however, indicate that certain types of licensing criteria might present first amendment problems, as where the Commission chooses among applicants upon the basis of their political, economic or social views, or upon any other capricious ground. 319 U.S. at 226. This indicates that although business regulation does not violate the first amendment, there are other types of regulation that could.

laws could be found unreasonable by the FCC. Moreover, the diluted public interest standard presents the possibility of intimidation of broadcasters through regulation of business practices which would be legitimate, for example, in the motion picture industry.[442]

While Justice Frankfurter's treatment of first amendment issues in *NBC* was cursory, he carefully discussed whether the Communications Act permitted more than engineering regulation. Justice Frankfurter set out at length the history of broadcasting regulation and noted that because of the scarcity of spectrum frequencies, regulation of broadcasting was as "vital to its development as traffic control was to the development of the automobile."[443] In an oft-quoted dictum, Justice Frankfurter explained:

> The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard 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. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed that task to the Commission.[444]

Justice Frankfurter suggested that in selecting applicants the Commission was to be guided by the public interest standard, that the Commission would have great discretion in determining what con-

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442. The FCC is composed of presidential appointees and is also subject to great influence from Congress. Although the Justice Department is not immune from political pressures, the courts, which supply both fact and conclusion in antitrust cases, are less subject to political pressures than the FCC. Moreover, denial of a station license poses a far greater threat to broadcasters than do antitrust decrees or an award of treble damages. While courts review FCC actions to determine if they are within the authority granted by the Communications Act, and/or arbitrary and capricious, the FCC is given broad discretion in determining the public interest. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); text accompanying notes 527-28 *infra*.

443. 319 U.S. at 213.

444. *Id.* at 215-16. Justice Frankfurter suggested that the Commission's duty to identify the public interest cannot be satisfied merely by determining that there are no technological objections to the granting of the license. *Id.* at 216-17. The Commission has interpreted this passage as permitting inquiries into programming service. *See, e.g.*, FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946); *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 RAD. REG. (P & F) 1901 (1960). Close analysis of *NBC*, however, indicates that Justice Frankfurter was addressing only the narrow question whether the Act permitted the FCC to issue the regulations in question. Congress had empowered the Commission to make the fullest and most effective use of radio, and Justice Frankfurter believed the regulations represented a "particularization" of the Commission's conception of the public interest. 319 U.S. at 218. Furthermore, Justice Frankfurter was careful to note that the Commission had been empowered to make special regulations pertaining to network broadcasting and could be concerned with monopoly power and unreasonable restraints of trade. *Id.* at 223.

stituted the public interest, and that the Court would take a limited approach in reviewing the actions of regulatory commissions.[445]

The sweeping powers the Court approved in *NBC* enable the FCC to foster open markets.[446] Moreover, three similarities between *NBC* and *Associated Press* may be noted briefly. First, the *NBC* Court's suggestion that the first amendment does not prohibit business regulation of the broadcast press became crystallized in the *Associated Press* rule that the first amendment does not immunize any segment of the press that adopts business practices which restrain freedom of expression. Second, the *NBC* Court's statement that the public interest to be served under the Communications Act was the interest of the listening public in the "larger" and "more effective" use of radio[447] is in complete harmony with Justice Frankfurter's concurring opinion in *Associated Press* and its emphasis on the public interest in diversity of information. Finally, neither Justice Frankfurter's majority opinion in *NBC* nor his concurring opinion in *Associated Press* expresses any inclination to impose restraints upon government regulation of mass media conduct and market structure.

C. *Concentration of Ownership:* Storer Broadcasting

The Court again analyzed the FCC's authority to control market structure in *United States v. Storer Broadcasting Co.*,[448] but did

445. The Court's duty is complete, Justice Frankfurter claimed, when it finds that Commission action is based on findings supported by evidence and is within its authority. 319 U.S. at 224. *See also* Board of Trade v. United States, 314 U.S. 534, 548 (1942) (the Court does not have the technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission).

446. The FCC's enforcement of the chain regulations, however, has been quite weak. In one case, after finding massive violations of the regulations, the FCC refused to require revocation of licenses. *See* Don Lee Broadcasting System, 5 RAD. REG. (P & F) 1179 (1949). The major achievements of the chain broadcasting regulations were the structural changes reached through the sale of NBC's Blue network and prohibition of network ownership of more than one station in the same service area. The regulations that were aimed at network practices did not eliminate all abusive practices. *See generally* Comment, *The Impact of the FCC's Chain Broadcasting Rules*, 60 YALE L.J. 78 (1951). For a thorough discussion of anticompetitive network practices in the 1950's, see HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, REPORT ON NETWORK BROADCASTING, H.R. REP. No. 1297, 85th Cong., 2d Sess. (1958).

447. 319 U.S. at 216.

448. 351 U.S. 192 (1956). Shortly before deciding *Storer*, the Court decided FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955), a minor case in which the Court again held that the FCC had broad discretion under the public interest standard. After comparative hearings for the use of the same AM frequency by stations in two neighboring cities, the FCC selected the applicant from Allentown, Pennsylvania because the needs of that community were greater than those of Easton, Pennsylvania. Easton Publishing Co., 11 F.C.C. 1339 (1947). The District of Columbia Circuit reversed the Commission and remanded the case

not address the first amendment issues therein. On November 25, 1953, after a five-year inquiry, the FCC announced new rules limiting ownership of broadcasting stations by a single firm to seven AM stations, seven FM stations, and five television stations.[449] On the same date, the FCC dismissed without a hearing Storer Broadcasting's application for construction of a television station in Miami.[450] At the time of its application, Storer and its wholly-owned subsidiaries together owned five television stations. The District of Columbia Circuit held that a multiple owner must be given a hearing to show that another station would not give him such control of communications media as to prejudice the public interest.[451] The court of appeals disagreed sharply with the FCC's preference of mechanical rules over ad hoc adjudication, and ordered the Commission to determine how each license application would comport with the public interest, because in some cases holdings different than those permitted by numerical rules would be in the public interest.[452]

for findings upon the comparative needs of the two communities for new radio service and the relative abilities of the applicants to serve the greater need. Easton Publishing Co. v. FCC, 175 F.2d 344, 351 (D.C. Cir. 1949). After noting that Allentown had three AM stations, while Easton had only one and had a greater need for an additional station, the Commission found that both applicants were about equal in their abilities, but held that the needs of Easton for another radio station were decisive. Easton Publishing Co., 17 F.C.C. 942 (1953). The District of Columbia Circuit again reversed the FCC, holding that there was no substantial evidence in the record to support the Commission's determination that the applicants were about equal in abilities, and ordered it to reconsider the issue of the abilities of the applicants. Moreover, since the Easton applicant owned the only newspaper and television station in Easton, along with one of the town's two FM stations, the court of appeals directed the FCC to determine whether a monopoly existed in Easton. Allentown Broadcasting Co. v. FCC, 222 F.2d 781 (D.C. Cir. 1954).

Before the Supreme Court, the Commission asserted that when mutually exclusive applicants seek to serve different communities, the question of which community has a greater need for additional service must be determined before the question of which applicant can best serve that community's needs can be determined. The Court agreed and held that the allocation of a second license to a community to promote local competition among broadcasters was within the FCC's authority. 349 U.S. at 362.

The Court analyzed the FCC's procedure for hearing mutually exclusive applications in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), holding that with mutually exclusive applications, the Commission violates the Communications Act by granting one without hearings on both. While diversification goals are important in FCC comparative license proceedings, the FCC has often found that other goals, such as local ownership, have priority. For a discussion of those goals, see W. JONES, CASES AND MATERIALS ON ELECTRONIC MASS MEDIA 43-47 (2d ed. 1979).

449. The Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regulations relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288 (1953). *See generally* Howard, *Multiple Broadcast Ownership: Regulatory History,* 27 FED. COM. B.J. 1 (1974).

450. Storer Broadcasting Co., 18 F.C.C. 300 (1953).

451. Storer Broadcasting Co. v. United States, 220 F.2d 204, 209 (D.C. Cir. 1955).

452. *Id.*

Certainly the numerical rules are shortsighted in their treatment of all broadcasting stations as equals within a class.[453] The court of appeals, however, did not consider the Commission's willingness to waive rules upon application.[454] This would be a key aspect of the Supreme Court's decision.[455]

Before the Supreme Court, the FCC argued that its multiple ownership rules were attempts to implement the competitive philosophy of *Pottsville, Sanders,* and *Associated Press.*[456] Storer, on the other hand, claimed that the rules were in conflict with the economic analysis required by the antitrust laws because the rules assumed, rather than proved, that an acquisition which exceeded the numerical limits violated antitrust policy.[457] The FCC responded by claiming that, although the multiple ownership rules were in conformity with the underlying philosophy of the antitrust laws,[458] the FCC is not responsible for enforcing those laws.

The Supreme Court reversed and remanded, holding that the Commission had the authority to adopt rules necessary to the orderly conduct of its business,[459] even if the rules contained limitations on licensing not authorized specifically by the Communications Act.[460] The Court concluded that the rules were consistent with

453. The rules provided, however, for case-by-case analysis, such that in determining whether there is a concentration of control, consideration would be given to such variable factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. 47 C.F.R. § 3.636(a)(2) (1953). One group of investigators found that as the rule was enforced, the Commission did not look to particular facts but relied instead on the five VHF station ceiling, such that no applicant owning fewer stations than the maximum was ever denied a license in the public interest. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, REPORT ON NETWORK BROADCASTING, H.R. REP. No. 1297, 85th Cong., 2d Sess. 555 (1958). The Commission assumes falsely that unless the numerical limits are exceeded, violation of the public interest is unlikely. One commentator also suggests that the rules err in not considering the holdings a firm may have in other media. *See* Comment, *Diversification and the Public Interest: Administrative Responsibility of the FCC,* 66 YALE L.J. 365, 372 (1957). Quantitative limits are not always inappropriate. By recasting the limits in terms of audience size reached by a group owner or of the number of competitors in each market, the FCC would have a far better approach to concentration than that provided by the current numerical rules. *See generally* Levin, *Competition, Diversity, and the Television Group Ownership Rule,* 70 COLUM. L. REV. 791 (1970).

454. *See* 47 C.F.R. § 1.361(c) (1953).

455. *See* text accompanying note 462 *infra.*

456. Brief for Petitioners at 12, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

457. Brief for Respondent at 11. Storer also claimed the rules were invalid because they denied an applicant a hearing. *Id.* at 9.

458. Brief for the United States and the FCC at 13. *See* text accompanying note 421 *supra.*

459. 351 U.S. 192, 202 (1956). On remand, the court of appeals held that the numerical rules were valid. *See* Storer Broadcasting Co. v. United States, 240 F.2d 55 (D.C. Cir. 1956).

460. 351 U.S. at 202-03.

the Communications Act's legislative history because Congress had given the Commission great discretion in determining the public interest, and because an essential purpose of the Act was the preservation of competition in broadcasting.[461] Moreover, the Court interpreted the Act and rules promulgated thereunder as mandating a hearing for those who, wanting to exceed the numerical limits, submit waiver applications.[462]

The *Storer* Court did not address the constitutionality of the Communications Act or the multiple ownership rules. What is important in *Storer* is that, like *NBC,* it permits the Commission to decide questions involving concentration of ownership, grants the Commission broad rulemaking powers, and avoids deciding whether the public interest would be furthered by the rules in question. In *Storer,* the Commission claimed to be using its authority in conformity with the underlying philosophy of the antitrust laws to maximize diversification of program content.[463] Yet the rules in *Storer* are short-sighted in their treatment of broadcasting stations as equals.[464] Professor Bernard Schwartz has accused the Commission of failing to comprehend basic principles of antitrust laws,[465] and this failure is illustrated by *United States v. Radio Corp. of America.*[466]

D. *FCC Action versus Subsequent Antitrust Enforcement: The Blessings of* RCA

In 1955, NBC applied to the FCC for approval of an exchange

461. *Id.* at 203-04.

462. *Id.* at 205. *See also* NBC v. United States, 319 U.S. 190, 225 (1943). Justice Harlan, in a concurring and dissenting opinion, questioned the Court's jurisdiction in *Storer* because he did not believe the Commission's adoption of the rules constituted a reviewable order. 351 U.S. at 206-07. Justice Frankfurter dissented on the ground that Storer was not an aggrieved party. *Id.* at 213.

463. The Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 291 (1953).

464. *See* note 453 *supra.* While the Commission can consider factors such as the number of competitors when considering another license for a multiple owner who does not exceed the numerical limits, it has often found that other factors have priority over antitrust considerations. *See, e.g.,* Comment, *supra* note 453, at 376-79; note 448 *supra.* The Commission's record in preventing concentrated ownership is quite poor.

For the current FCC rules on multiple ownership of broadcasting stations, see 47 C.F.R. §§ 73.35 (AM), 73.240 (FM), 73.636 (TV) (1978).

465. Schwartz, *Antitrust and the FCC: The Problem of Network Dominance,* 107 U. PA. L. REV. 753, 783 (1959). Professor Robert Bennett similarly believes the FCC has a very poor record in considering principles of section 7 of the Clayton Act when approving mergers. *See* Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens,* 66 NW. U. L. REV. 159 (1971).

466. 358 U.S. 334 (1959).

of NBC's Cleveland television station for Westinghouse's Philadelphia television station. After an investigation of the exchange, during which the Justice Department was informed that substantial antitrust questions were raised, the FCC granted approval on December 28, 1955. The Commission did not hold hearings on the exchange; the Justice Department could have requested a hearing on the matter or filed a protest, but did nothing.[467] The sale occurred on January 22, 1956, and on December 4, 1956 the Justice Department brought an antitrust action, based on information which the FCC had before it when it approved the exchange, alleging that NBC and RCA conspired to upgrade the television station holdings of NBC. To force Westinghouse to exchange its Philadelphia station, which was in the nation's fourth largest market, for NBC's Cleveland station, which was in the less desirable tenth largest market, NBC was alleged to have threatened to discontinue its affiliation with Westinghouse's Boston and Philadelphia television stations, and to refuse affiliation with any other television stations Westinghouse might acquire.[468]

The government moved for a preliminary determination of the sufficiency of RCA's defenses,[467] and the district court dismissed the complaint, holding that the FCC's approval of the exchange, subject to review by the District of Columbia Circuit, prohibited the government's actions.[470] Before the Supreme Court, the government argued that while the FCC could take antitrust policies into account in administering its licensing powers, Commission action did not determine the legality of conduct under the antitrust laws, and thus did not preclude independent proceedings to enforce the antitrust laws.[471] RCA, on the other hand, claimed that the FCC had exclusive jurisdiction, and that its conclusions and determinations of the public interest, including the substantive provisions of the antitrust

467. To prevent problems such as those created by the Justice Department's failure to intervene in the license proceeding, Dean Roscoe Barrow proposed a statute that would provide for mandatory intervention of the Justice Department in FCC proceedings which involve antitrust questions. *See* Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 1964 DUKE L.J. 282, 301-02.

468. Complaint at 6-7, United States v. Radio Corp. of America, 158 F. Supp. 333 (E.D. Pa. 1958).

469. The defenses were—(1) that the district court lacked jurisdiction; (2) that the FCC's determination of the issues raised in the complaint was final; (3) that the plaintiff had forfeited its right to claim equitable relief under the doctrines of laches and estoppel. United States v. Radio Corp. of America, 158 F. Supp. 333, 334 (E.D. Pa. 1958).

470. *Id.* at 333.

471. Brief for the United States at 17-18, United States v. Radio Corp. of America, 358 U.S. 334 (1959). *See also Report on Uniform Policy as to Violation by Applicants of Laws of the United States*, 1 RAD. REG. (P & F) 91:495 (1951).

laws, were final.[472]

The Supreme Court unanimously reversed.[473] Writing for the Court, Chief Justice Warren reviewed the legislative history of the Communications Act, and held that the FCC did not have power to decide antitrust issues "as such," noting that "Commission action was not intended to prevent enforcement of the antitrust laws in federal court."[474] Chief Justice Warren agreed, however, with the *NBC* Court that the FCC could consider antitrust policy in determining whether a broadcaster's actions would meet the public interest standard.[475] Moreover, Chief Justice Warren speculated that antitrust considerations alone might be sufficient to support a Commission finding that the public interest standard had not been met, for example, when the publisher of the only newspaper in a community applies for the only available radio and television frequencies.[476] Concurrent antitrust and FCC actions would not be damaging, Chief Justice Warren suggested, because broadcasters are not common carriers,[477] and therefore lack a common carrier rate structure or delicate regulatory scheme that would be disrupted by antitrust actions.[478]

RCA does not deal with the Commission's discretion in determining the public interest. The significance of *RCA* in promoting competitive broadcasting markets, however, should not be underestimated. The FCC's antitrust expertise is not very well developed,[479] and antitrust issues are often overridden by other concerns in FCC proceedings.[480] *RCA* counteracts these negative tendencies by per-

472. Brief for Appellees at 18.

473. 358 U.S. 334 (1959). Justice Harlan concurred in the result. *Id.* at 353.

474. *Id.* at 346. In reaching this result, the Court rejected RCA's claim that a 1952 amendment to the Communications Act, which deleted language permitting government action against broadcast licensees who violated the antitrust laws, repealed that authority. After examining the legislative history of the 1952 amendment, the Court concluded that the deletion did not indicate Congressional disapproval of the right to bring such antitrust actions. *Id.* at 344-45. *See generally* Wall & Jacob, *Communications Act Amendments, 1952—Clarity or Ambiguity*, 41 GEO. L.J. 135 (1953); 57 MICH. L. REV. 885 (1959) (commenting on United States v. Radio Corp. of America, 358 U.S. 334 (1959)).

475. 358 U.S. at 351.

476. *Id.* at 351-52.

477. *Id.* at 348-49. *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940).

478. 358 U.S. at 349-50.

479. For a critique of the FCC's shortcomings in a major merger case, see ABC-ITT Merger, 7 F.C.C.2d 245, 278-330 (1966) (Johnson, Comm'r, dissenting). More recently, the FCC approved a merger of the Gannett Company and Combined Communications Corporation. *See* BROADCASTING, June 11, 1979, at 19. The merger creates a firm with 80 newspapers, seven television stations, 12 radio stations, outdoor advertising, Canadian newsprint interests, marketing, research, and news service subsidiaries. Substantial antitrust questions are created by this merger, and it may be subject to action by the Department of Justice.

480. *See, e.g.*, note 448 *supra*.

mitting the Justice Department and federal courts to separate antitrust questions from other factors that the FCC would weigh in identifying the public interest.[481]

E. *Divestiture of Co-located Newspaper-Broadcasting Combinations:* NCCB

The FCC's broad discretion in determining the public interest, its rulemaking authority, and the limitations beyond which courts may not substitute their judgment for that of the Commission coalesced in *FCC v. National Citizens Committee for Broadcasting.*[482] Following a lengthy rulemaking proceeding, the FCC in 1975 adopted rules which required divestiture of sixteen co-located newspaper-broadcasting combinations in communities with only one daily newspaper and one broadcasting station, and which prospectively barred the formation of other co-located newspaper-broadcasting combinations.[483] The rules were designed to achieve

481. *RCA* culminated in the FCC ordering NBC to return the Philadelphia station to Westinghouse. *See* National Broadcasting Co., 37 F.C.C. 427 (1964).

After *RCA*, the Court decided Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962), another case stemming from network acquisition of a television station. In 1954, the FCC modified its television group ownership rules to permit group ownership of two UHF stations in addition to five VHF stations. CBS then cancelled its affiliation agreement with WCAN, a UHF station in Milwaukee, and purchased WOKY, also a UHF station in Milwaukee. WCAN, which had been a successful station as a CBS affiliate, was unable to compete in Milwaukee without network affiliation and subsequently sold its equipment to CBS-owned WOKY. The owner of WCAN alleged that CBS conspired to eliminate WCAN from the market, but the district court granted CBS's motion for summary judgment and held that the injury suffered was *damnum absque injuria.* Poller v. Columbia Broadcasting System, Inc., 174 F. Supp. 802 (D.D.C. 1959), *aff'd,* 284 F.2d 599 (D.C. Cir. 1960), *rev'd,* 368 U.S. 464 (1962). The Supreme Court reversed, holding that there was a genuine issue as to material facts and that summary judgment was inappropriate. 368 U.S. at 473. *See also* Associated Press v. United States, 326 U.S. 1, 58 (1945) (Murphy, J., dissenting).

482. 436 U.S. 775 (1978).

483. 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, Second Report and Order, 50 F.C.C.2d 1046 (1975) [hereinafter cited as Second Report and Order], *amended upon reconsideration,* 53 F.C.C.2d 589 (1975). For discussion of the rules, see Mills, Moynahan, Perlini & McClure, *The Constitutional Considerations of Multiple Media Ownership Regulation by the Federal Communications Commission,* 24 AM. U.L. REV. 1217 (1975); Comment, *Media Cross-Ownership—The FCC's Inadequate Response,* 54 TEX. L. REV. 336 (1976); Comment, *A Primer on Docket Number 18110: The New FCC Cross-Ownership Rules,* 59 MARQ. L. REV. 584 (1976); Note, *The Power of the FCC to Regulate Newspaper-Broadcast Cross-Ownership: The Need for Congressional Clarification,* 75 MICH. L. REV. 1708 (1977). *See generally* H. LEVIN, BROADCAST REGULATION AND JOINT OWNERSHIP OF MEDIA (1960); Howard, *Cross-Media Ownership of Newspapers and TV Stations,* 51 JOURNALISM Q. 715 (1974); Levin, *Economies in Cross Channel Affiliation of Media,* 31 JOURNALISM Q. 167 (1954); Sterling, *Newspaper Ownership of Broadcasting Stations, 1920-1968,* 46 JOURNALISM Q. 227 (1969); Toohey, *Newspaper Ownership of Broadcast Facilities,* 20 FED. COM. B.J. 44 (1966); Comment, *Antitrust—"Cross-Media" Ownership and the Antitrust Laws—A Critical*

two goals—diversity of viewpoints and economic competition.[484] The Commission emphasized the former goal and, quoting *Associated Press,* ruled that the public interest could encompass many factors such as the widest possible dissemination of information from diverse and antagonistic sources.[485] The prospective rule drew its support principally from this first amendment concern,[486] the Commission claimed, while the divestiture order was founded upon both first amendment and antitrust concerns.[487]

In selecting standards for divestiture, however, the Commission treated economic competition as a secondary concern. The Commission's primary concern was diversity in ownership as a means of enhancing diversity in programming service to the public,[488] and it developed a limited divestiture standard which applies only to "egregious" cases.[489] The Commission eschewed market share analysis because it would result in such large scale divestiture that the public interest might be harmed, for example by disruption of service.[490]

The District of Columbia Circuit, in a decision written by Judge David Bazelon, affirmed the FCC's authority to issue the rules.[491] The court of appeals held, however, that the Commission should have ordered divestiture of all co-located newspaper-broadcasting combinations.[492] In determining whether the prospective ban had a rational basis, the court drew upon *Associated Press*

Analysis and a Suggested Solution, 47 N.C.L. REV. 794 (1969); Note, *Newspaper—Radio Joint Ownership: Unblest Be The Tie That Binds,* 59 YALE L.J. 1342 (1950).

484. Second Report and Order, *supra* note 483, at 1074.

485. *Id.* at 1048 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)). The Commission explained that ownership was significant from the standpoint of a diversified flow of information because ownership entailed "the power to select, to edit, and to choose the methods, manner and emphasis of presentation." *Id.* at 1050.

486. *Id.* at 1049.

487. *Id.* The Commission stated that antitrust policy suppported its diversification policy because "requiring competition in the marketplace of ideas is, in theory, the best way to assure a multiplicity of voices." *Id.*

488. *Id.* at 1079.

489. *Id.* at 1049.

490. *Id.* at 1079-80. Commissioner Robinson, in a concurring and dissenting opinion, disagreed with the Commission's decision not to adopt an approach based upon "conservatively interpreted" antitrust guidelines. *Id.* at 1113.

491. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977). Judge Bazelon construed *Storer* as permitting the Commission "to codify in rule its understanding, if reasonable, of the public interest licensing standard." *Id.* at 951. Judge Bazelon also drew upon United States v. Southwestern Cable Co., 392 U.S. 157 (1968), *see* note 409 *supra,* to support the premise that express authority is not essential to the validity of FCC regulations. *See generally* Second Report and Order, *supra* note 483, at 1131 (Robinson, Comm'r, concurring in part and dissenting in part).

492. 555 F.2d at 965-66.

as evidence of the Supreme Court's approval of diversification based on first amendment considerations,[493] and concluded that the structural approach was appropriate from a first amendment standpoint because it did not entail government supervision of speech.[494] Moreover, the court read *RCA* as permitting the FCC to follow antitrust policy in promoting diversification.[495]

According to Judge Bazelon, the fairness doctrine represented the maximum government intervention permissible to insure diversification through direct content control. He did not, however, suggest any first amendment limits to a structural policy designed to diversify sources of information.[496] The American Newspaper Publishers Association argued that the prospective ban conditioned unconstitutionally the first amendment right to publish a newspaper. Drawing upon *Associated Press,* Judge Bazelon replied that the first amendment does not necessarily shield publishers from regulation that may make publication more difficult,[497] and that in any event the rule conformed to the spirit of the first amendment because it was designed to enhance the diversity of information available to the public.[498]

Judge Bazelon emphasized the importance of a diversified ownership structure in deciding whether the FCC was correct in refusing to order large-scale divestiture without a tangible showing that the public interest had been harmed.[499] The Commission's position was that evidence of harm was necessary before divestiture of cross-ownership could be ordered,[500] because the public interest would be

493. *Id.* at 949.

494. *Id.* at 950-51. *See generally* Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications,* 31 FED. COM. L.J. 201 (1979).

495. 555 F.2d at 949.

496. *Id.* at 949-50. Judge Bazelon did state, however, that any regulation must be able to withstand rational basis scrutiny. *Id.* at 949 n.29. This type of examination would not call for a weighing of the benefits of a diversification policy against its costs in terms of government intervention with the structure of the press.

497. *Id.* at 953. Citing Grosjean v. American Press Co., 297 U.S. 233 (1936), which involved taxation to limit the distribution of information, Judge Bazelon declared unconstitutional burdens upon publication if they restrict the flow of information. 555 F.2d at 953.

498. 555 F.2d at 953-54. The FCC used similar reasoning in its Second Report and Order, *supra* note 483. Responding to the American Newspaper Publishers Association argument that the FCC was inhibiting a newspaper publisher's freedom to publish, the FCC explained that it was acting in conformity with *Associated Press.* Thus, the Commission could promote diversified sources of information and ban business relations that were either unlawful or not in the public interest. Second Report and Order, *supra* note 483, at 1050. Commissioner Robinson emphasized that the FCC's target was not newspaper owners but rather monopolies and oligopolies which are beyond first amendment protection. *Id.* at 1118-19 (Robinson, Comm'r, concurring in part and dissenting in part).

499. 555 F.2d at 962.

500. Second Report and Order, *supra* note 483, at 1083. Although it called for over-

adversely affected in several ways—local ownership and management would be reduced because many sales would have to be made to outside interests; continuity of operation would be broken; interest rates and selling price would be affected; and local economic dislocations would result due to an increased demand for equity capital.[501] The opinion attacked each of these concerns asserting first that because approximately one-fourth of the newspaper-television groups were not locally owned, divestiture might spark improvement.[502] Since groups commonly claimed that their jointly owned broadcasting stations and newspapers were managed separately, Judge Bazelon suggested that owner management may be unusual, and that there was no reason to assume that local interests would not purchase divested broadcast properties.[503] Second, the opinion argued that the Commission's concern for continuity of operation was specious in light of its practice of routinely approving license assignments.[504] Finally, Judge Bazelon found that factors such as selling price were relevant only when shown to have an adverse impact on the provision of broadcasting services to the public.[505] Because the record did not disclose the extent to which large-scale divestiture would impair these public interest considerations, Judge Bazelon concluded that their potential impairment would not outweigh the presumption against cross-ownership.[506]

Before the Supreme Court, several combination owners argued

whelming and unambiguous evidence to support divestiture, the Commission failed to offer any evidence other than market structure to support its divestiture order for the 16 "egregious" cases. Judge Bazelon noted that the record developed by the Commission was inconclusive about whether cross-ownership harms or benefits the public interest. 555 F.2d at 962. Specifically, the record did not support the conclusion that "divestiture would be more harmful in the grandfathered markets than in the 16 affected markets, nor did it show that the need for divestiture in the affected markets was 'overwhelming' and the evidence 'unambiguous.'" *Id.* at 966.

501. Second Report and Order, *supra* note 483, at 1078. *But see id.* at 1128-30 (Robinson, Comm'r, concurring in part and dissenting in part).

502. 555 F.2d at 963-64.

503. *Id.* at 964. In its concern for preserving local management, the FCC was concerned that newspaper-broadcasting groups would swap stations. Second Report and Order, *supra* note 483, at 1068-69. While the divestiture order alters local market structures, it does not diminish the total number of broadcast holdings in the hands of groups.

504. 555 F.2d at 964. *See* Second Report and Order, *supra* note 483, at 1128 (Robinson, Comm'r, concurring in part and dissenting in part).

505. 555 F.2d at 964. Only two studies submitted during the rulemaking proceeding addressed the economic impact of divestiture, and the Commission dismissed as "exaggerated" an estimate that television stations sold under a divestiture order would sell at 10% to 20% below true value. Second Report and Order, *supra* note 483, at 1072. Commissioner Robinson commented that even if there were a diminished return, this should be of little concern. *Id.* at 1130 (Robinson, Comm'r, concurring in part and dissenting in part).

506. 555 F.2d at 965.

that the first amendment is absolute in its protection and that when the government decides who may speak in the name of furthering the first amendment, there is no first amendment.[507] The American Newspaper Publishers Association (ANPA) argued that rules precluding newspaper publishers from holding licenses for co-located broadcasting stations burden unconstitutionally the right to publish a newspaper.[508] In its brief, the United States challenged these positions, arguing that newspaper owners do not have a constitutionally protected right to a broadcast license, and that denial of a license in the public interest does not violate the first amendment.[509] Both the ANPA and the National Association of Broadcasters mistakenly drew upon *Miami Herald Publishing Co. v. Tornillo,*[510] for the proposition that the first amendment commands government to stay out of the marketplace of ideas.[511] Since *Miami Herald* involved direct government regulation of newspaper content, the Court in its decision did not analyze government action to modify the structure of economic markets, although such actions may affect the marketplace of ideas. That the FCC's rules did not involve direct government supervision of expression was viewed as significant by the National Citizens Committee for Broadcasting (NCCB),[512] which argued that structural diversification serves rather than abridges first amendment principles.[513] Both the NCCB and the United States agreed that the FCC's reasons for grandfathering most combinations were arbitrary and unsupported by evidence.[514] The United States nevertheless asserted that once the court of appeals exposed the Commission's errors, it should have remanded the case to permit the FCC to formulate new rules, rather than ordering the FCC to adopt a large-scale divestiture rule.[515] The FCC similarly argued that its function was to weigh the relevant public interest factors, and the court could not substitute its judgment for that of the Commission nor could the court dictate the result the Commission must reach on remand.[516]

507. Brief for Petitioners The Post Company, KNUJ, Inc. and Mickelson Media, Inc. at 11, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978). *But see* National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943).

508. Brief for Petitioner American Newspaper Publishers Ass'n at 26.

509. Brief for the United States at 15.

510. 418 U.S. 241 (1974).

511. Brief for Petitioner National Ass'n of Broadcasters at 30; Brief for Petitioner American Newspaper Publishers Ass'n at 25.

512. Brief of Respondent National Citizens Committee for Broadcasting at 22.

513. *Id.* at 13.

514. *Id.* at 32; Brief for the United States at 18-19.

515. Brief for the United States at 21.

516. Brief for Petitioner FCC at 19.

The Supreme Court unanimously affirmed the Commission's prospective ban, but reversed the judgment of the court of appeals pertaining to large-scale divestiture.[517] The Court re-emphasized the Commission's broad discretion in determining the public interest and its rulemaking authority to restructure broadcasting markets and thereby promote diversity. The Court in *NCCB*, however, found that the first amendment does not require the FCC to give its diversification policy controlling weight in all circumstances.[518] *NCCB* thus slights the first amendment requirement of greatest possible diversity, by permitting legislatively created goals to supersede first amendment diversification goals.[519]

NCCB breaks no new ground with respect to the FCC's rulemaking authority.[520] The National Association of Broadcasters attempted to distinguish *NBC* and *Storer* because they dealt solely with the broadcasting industry, but Justice Marshall replied that any distinction undersells the Commission's power to regulate broadcasting in the public interest.[521] Moreover, the FCC's diversification policy was consistent with the Communications Act, and was supported by antitrust and first amendment values. It was not inconsistent, Justice Marshall explained, "for the Commission to conclude that the maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole."[522]

The Court easily disposed of the argument that the regulations violated the first amendment rights of newspaper publishers by quoting *Red Lion Broadcasting Co. v. FCC*[523] which held that there is no fundamental first amendment right to broadcast comparable to the right to speak, write, or publish.[524] The Court accepted the

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517. 436 U.S. at 792.

518. *Id.* at 810.

519. The public interest standard encompasses many goals, including those of the first amendment. *NCCB* does not place the first amendment goals in a preferred position. *See* text accompanying notes 527-31 *infra*.

520. *See* 436 U.S. at 793-94.

521. *Id.* at 794.

522. *Id.* at 795. ANPA challenged the reasonableness of the prospective rule on two grounds—first, that the record did not conclusively establish that prohibiting colocated cross-ownership would lead to greater diversity, and second, that the rule was based on the fact of diversification to the exclusion of other facts that the Commission normally considers in licensing decisions. The Court agreed that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints, and that the Commission's change in policy was a reasonable response to changed circumstances in the broadcasting industry. *Id.* at 796-97.

523. 395 U.S. 367 (1969).

524. 436 U.S. at 799 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)). Responding to the argument that the FCC had unfairly singled out newspaper

need for licensing because of physical scarcity, explaining that there was nothing in the first amendment to prevent the FCC from allocating licenses to promote diversification of mass media.[525] To what extent, however, does the first amendment require the widest possible dissemination of information from diverse and antagonistic sources?[526] The Court did not address this issue, but it clearly subordinated the first amendment goals posited by *Associated Press* to the FCC's discretion to determine the public interest.

The Court believed that the limited divestiture order reflected a rational weighing of competing policies.[527] The court of appeals referred to factors such as disruption of service as "lesser policies" and presumed that cross-owned stations do not serve the public interest. The Supreme Court, however, concluded that the weighing of policies under the public interest standard is a task that Congress delegated to the Commission in the first instance.[528] Consequently, such a presumption would contradict the Commission's practice of giving controlling weight to the goal of the best practicable service to the public—a goal the Court ostensibly approved in *Sanders*.[529] *Sanders* did not, however, subordinate first amendment goals to that goal, and it did not resolve the question whether other public interest goals have priority over the first amendment goal of diversity.

The Court's concern for preserving FCC discretion in determining the public interest blurred a larger constitutional issue: to what extent should public interest goals, such as disruption of service, take priority over first amendment goals such as diversity?[530] Cer-

owners for more stringent treatment than other owners, the Court found that newspaper owners were treated in essentially the same fashion as other multiple owners. 436 U.S. at 801.

525. 436 U.S. at 799. The Court also drew upon *NBC*'s recognition that denial of a license in the public interest is not a denial of free speech. *Id.* at 800.

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

527. 436 U.S. at 803. The Court found that the lack of evidence to support the FCC's decision was not a shortcoming. The Court, relying on FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961), explained that because the Commission's decision was one involving judgment and prediction, complete factual support was not necessary or required. 436 U.S. at 814. The Court, however, supported the Commission's reasoning on the issue of harm that might result from divestiture, even where that reasoning was faulty. For example, the Court explained that there was no guarantee that future licensees would provide the same level of service as previous licensees. On the other hand, there was no guarantee that new licensees would not exceed the level of service offered by the preceding licensee. *Id.* at 807.

528. 436 U.S. at 810.

529. *Id.* at 804. *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

530. This is not to suggest that the public interest standard does not take into account first amendment goals. As the *Sanders* Court observed, there may be instances when licensing another station causes broadcasters to go out of business, leaving a portion of the listening public without adequate service. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475-76 (1940). In *NCCB* the FCC believed that the "mere hoped for" gains from diversity were

tainly, under the Communications Act the Commission has the authority to determine the public interest, but this does not necessarily mean that statutory goals should have priority over constitutional goals. In *NCCB*, constitutional goals should have been accorded preferred status. This action would have carried the FCC's presumption that cross-ownership is contrary to the public interest into the area of divestiture, except that where proof is offered that divestiture would result in specific harm to the public interest, the Commission could waive a divestiture order. Precisely the opposite approach is now employed—unless specific abuse can be shown, grandfathered combinations will not be dissolved.[531] This approach thwarts the attainment of the diversified market envisioned in *Associated Press.*

The Commission's assumptions with respect to damages resulting from divestiture are similarly misplaced. The first amendment requires the opposite presumption, and sufficient means are available in the Commission's waiver procedures to permit a careful weighing of the gains from diversity against the damage to other goals on a case-by-case basis. By approving the Commission's approach, the Court permitted other factors in the public interest standard to take priority over the first amendment's goal of diversification, and failed to consider the constitutionality of this preference.

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insufficient to overcome the possible harm to the public interest caused by divestiture. Second Report and Order, *supra* note 483, at 1078.

531. The Commission in its Order explained that it would scrutinize allegations of section 2 violations on an ad hoc basis. Second Report and Order, *supra* note 483, at 1080 n.29. The court of appeals criticized the FCC's level of antitrust expertise and concluded that its emphasis on antitrust issues was inconsistent with the Order's first amendment thrust. 555 F.2d 938, 966 n.108. The Court of Appeals also seemingly believed that the FCC would not consider petitions to deny if they specified noneconomic abuses such as programming violations. The Court interpreted the Order as foreclosing petitions to deny only if they argued that cross-ownership was per se undesirable. 436 U.S. at 788 n.12, 791 n.13.

Judge Bazelon was quite correct in criticizing the level of the FCC's antitrust expertise. The Commission's general tendency not to deny licenses when there has been anticompetitive conduct, *see, e.g.*, Don Lee Broadcasting System, 5 RAD. REG. (P & F) 1179 (1949), offers scant hope that the Commission will break up grandfathered newspaper-broadcasting combinations in ad hoc proceedings. On the issue of programming abuses, Judge Bazelon noted that the "intrusiveness involved in the very process of attempting to uncover abuses—such as news distortion—might severely strain First Amendment values." 555 F.2d at 961. *Cf.* Second Report and Order, *supra* note 483, at 1121 (Robinson, Comm'r, concurring in part and dissenting in part) (determining which stations are "better" involves qualitative judgments which the first amendment and sound public policy would seem to forbid); Robinson, *supra* note 441, at 162-63 (the first amendment comes into play when the Commission concerns itself with programming and program operations to the point of establishing unacceptable programming). The gains from diversity might not offset the inhibiting and conforming effects such programming inquiries might have.

F. The First Amendment, the Antitrust Laws, and the Broadcasting Industry

Government control of market structure and entry conditions in broadcasting raises issues that are distinct from those in other mass communications industries. There is a technical need to assign a limited number of frequencies to each market, and to award licenses for those frequencies. This requirement, however, does not eliminate all first amendment concerns in broadcasting cases. While there does not exist an unabridgeable first amendment right to obtain a frequency, those who do use broadcast frequencies should not be subjected to regulations that would interfere with protected functions in other forms of communication. Thus, the structural measures in *NBC, Storer,* and *NCCB* are particularly laudable on first amendment grounds because they seek to diversify expression without interfering directly with the editorial process. To assume that a diversified ownership structure will result in a diverse marketplace of ideas is a far sounder public policy than imposition of access requirements or comparisons between applicants on the basis of their programming proposals or performance.

The technical nature of broadcasting requires government allocation, but this process does not necessitate regulation of ownership structure or business conduct under standards which are distinct from those applied to other forms of communication.[532] *NBC* and *NCCB* are striking in their lack of concern for restraint on government economic regulation of broadcasters. Even if it is assumed that the business policies of the press fall outside the first amendment, this does not mean the government can impose virtually any regulation upon those policies.[533] Thus, regulation of business conduct in broadcasting under the public interest standard has the potential of being overbroad.

Congress recently considered legislation that would have substantially restricted the use of public interest regulation in broadcasting.[534] In the area of economic regulation, this bill proposed that

532. There is a distinction between allocating frequencies to a market and awarding licenses to operate on those frequencies. In considering the acceptable level of concentration in an award of a license, or the reasonableness of conduct, antitrust standards should be followed. Employment of antitrust standards could be implemented through the mandatory intervention of the Department of Justice when antitrust questions are before the licensing authority. *See generally* Barrow, *supra* note 467.

533. *Cf.* Grosjean v. American Press Co., 297 U.S. 233 (1936) (the press may be subject to ordinary taxation, but special taxation is unconstitutional).

534. *See* H.R. 3333, 96th Cong., 1st Sess. (1979). The proposed Communications Act of 1979 provided that market forces should determine the development, introduction, and availability of technologies and services which use the electromagnetic spectrum. Only where

the allocation process would remain under government control. Conduct and ownership structure, however, would have been regulated primarily through the antitrust laws.[535] This approach is a step toward treating broadcasting like other forms of communication, but it does not go far enough. The compelling need for allocation of frequencies does not justify regulating broadcasters' conduct differently from newspaper publishers' or motion picture distributors' conduct.

As *NBC* and *RCA* illustrate, there is a compelling need for the government to intervene in economic markets when monopolistic structure or conduct threatens. The antitrust laws, if enforced, are fully adequate to insure that markets are deconcentrated and free of coercion. Although none of the Court's broadcasting decisions have involved intrusions into protected activity, the breadth of business regulation currently permissible under the public interest standard may pose a threat to press freedom.

Despite the fact that the FCC's authority in the area of economic regulation is largely unrestrained, it is unlikely that the Commission will attempt to modify significantly the structure or conduct of the broadcasting industry. The problem with broadcasting regulation is not that the Commission regulates the broadcasting business more extensively than the antitrust laws regulate other forms of mass communication, but rather that the Commission does not adequately promote the public interest in diversity.[536]

marketplace forces were deficient would government regulation in the public interest have been permitted. *Id.* § 411 (1).

535. The proposed Act, however, provided several structural controls. No licensee may operate more than one television station, one AM radio station, and one FM radio station per market. There was no limit on the total number of radio stations a group may own, but group-ownership of television stations was limited to seven stations. *Id.* § 451. This bill, which generally forbids balancing concentration factors against other public interest factors, is a step toward regulating ownership structure solely by the antitrust laws. *See* notes 448, 532 & 534 *supra*.

536. The Commission's failure to promote the public interest in diversity is illustrated by the following general observations. First, the Commission's television allocation policy is a key factor limiting entry of new television networks. *See generally* Park, *New Television Networks*, 6 BELL J. ECON. 607 (1975). Second, in 1959, the Assistant Attorney General stated that option time substantially restrained the ability of affiliates to deal with programming sources other than networks during prime time and thus constituted an illegal tying agreement. *See* Opinion of Assistant Attorney General, Antitrust Division, 18 RAD. REG. (P & F) 1801 (1959). Despite this opinion, the FCC found that option time was in the public interest. *See Study of Radio and Television Network Broadcasting*, 18 RAD. REG. (P & F) 1809 (1959). The FCC, however, later banned option time for television. *See* Option Time and the Station's Right to Reject Network Programs, 34 F.C.C. 1103 (1963). Third, the Commission has failed to deal adequately with vertical integration in the national television networks. Professor Robert Crandall concluded that one recent FCC attempt to promote greater program quality and diversity will have little beneficial effect upon either. *See* Crandall, *The Eco-*

V. The First Amendment, the Antitrust Laws, and Mass Communications Industries

The most challenging problems in first amendment theory today, according to Professor Thomas Emerson, "lie in the prospect of using law affirmatively to promote more effective functioning of the system of freedom of expression."[537] Insofar as the general objective of the antitrust laws is to promote competition in open markets,[538] antitrust enforcement supports the first amendment interest in such markets.[539] Any attempt to use government power to achieve a limited objective and simultaneously keep that power under control, however, "is a risky enterprise."[540] Thus, government intervention in the market must be restrained or it may actually inhibit the public interest in a vigorous press. This is the central problem in applying the antitrust laws to the press, and it is a problem that the Court has not sufficiently addressed.

The Supreme Court views the business conduct of the press as falling outside the protections of the first amendment. While there can be no first amendment defense to unreasonable anticompetitive conduct by the press, the unique constitutional position of the press—an institution designed to scrutinize the actions of government[541]—requires that the press be free, to the largest possible ex-

nomic Effect of Television-Network Program "Ownership", 14 J. L. & Econ. 385 (1971). *See generally* Schuessler, *FCC Regulation of the Network Television Program Procurement Process: An Attempt to Regulate the Laws of Economics?*, 73 Nw. U.L. Rev. 227 (1978). *See also* R. Noll, *supra* note 10, at 83-89. Finally, group ownership in the top fifty markets has become increasingly concentrated, despite a poorly enforced FCC policy designed to limit such ownership. *See generally* Comment, *The "Top 50 Market Policy": Fifteen Years of Non-Policy*, 31 Fed. Com. L.J. 303 (1979).

The Commission recently announced an inquiry to determine whether network practices enable networks to exert anticompetitive influences on the industry. *See* Variety, Oct. 25, 1978, at 1, col. 5. If typical, this inquiry will not result in substantial alterations in market conduct. It is more likely that the government's current antitrust suits against ABC and CBS will result in modifications of market conduct and structure than will any FCC action. *See* United States v. Columbia Broadcasting Sys. Inc., No. 74-3599 (C.D. Cal., filed Dec. 10, 1974); United States v. American Broadcasting Co., No. 74-3600 (C.D. Cal., filed Dec. 10, 1974). The cases will probably be tried during 1979. *See* Harwood, *Judge Narrows Network Program Case: Both Sides Told To Hurry It Up*, Variety, Nov. 1, 1978, at 45, col. 3. For analysis of the government's suits, see Fastow, *Competition, Competitors and the Government's Suit Against the Television Networks*, 22 Antitrust Bull. 517 (1977); Note, *supra* note 150.

537. T. Emerson, The System of Freedom of Expression 627 (1970).

538. Att'y Gens. Nat'l Comm. To Study the Antitrust Laws, Final Report 1 (1955).

539. *See* Hale v. FCC, 425 F.2d 556, 561 (D.C. Cir. 1970) (application of antitrust doctrines to the mass media is not solely a question of sound economic policy; it is also an important means of achieving the goals posited by the first amendment).

540. T. Emerson, *supra* note 537, at 630.

541. *See* note 155 *supra*.

tent, from government regulation. In the same sense that freedom of expression rests upon the broadest possible commitment to freedom and the narrowest basis for restrictions,[542] economic freedom of the press must rest upon the broadest possible freedom, and only where there is a compelling interest in regulation should the government intervene.

In areas such as libel, the Court has created tests that are designed to minimize the chilling effects on expression that may be caused by litigation.[543] Similarly, any government intervention in the economic marketplace of mass media must meet the following conditions: first, the regulation must not infringe upon protected activity; second, the regulation must be no broader than necessary; third, there must be a compelling reason for the regulation; and finally, the regulation must be substantially the same as that which is imposed on enterprises which are not involved in expression. This four part test would prevent government attacks upon press conduct that merely create economies without threatening open market conditions. Moreover, this approach would minimize the extent of permissible regulation and would exclude the use of relaxed definitions of unreasonable behavior. In effect, this test would require courts to employ strict scrutiny in economic cases involving the press that would approach the similar standards that they employ in cases involving the core of the first amendment.[544]

Despite the Court's view that business behavior of the press falls outside the protection of the first amendment, the Court has generally required strict antitrust standards in its mass communications cases. The Court has not subjected the press to special antitrust standards, and the Court's belief in open mass communications markets has not been translated into a large-scale attack on competitive advantages.[545] The Court has tempered any hostility it displayed toward competitive advantages in *Associated Press* with a recognition in later cases, such as *Times-Picayune,* that some

542. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 19 (1966).

543. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

544. In United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), Justice Stone suggested that the Court should scrutinize legislation which restricts personal liberties more strictly than legislation which restricts economic liberties. In economic cases involving the press, the operation and effect of particular statutes should be closely analyzed. *See* Near v. Minnesota, 283 U.S. 697, 708 (1931).

545. Professor Bork claims that while free competition reflects the ideal of equality of opportunity, an undue concern for the survival of small and relatively inefficient competitors reflects a preference for equality of outcome. R. BORK, *supra* note 6, at 422. For the most part, the Supreme Court's mass communications antitrust decisions reflect a concern for equality of opportunity and not equality of outcome.

restrictive practices of communications firms can have legitimate business justifications. Moreover, the Court in *Theatre Enterprises* tempered substantially the doctrine of conscious parallelism, which followed from *Interstate.* While the *Bigelow* method of awarding damages is still in effect,[546] it has not yet resulted in any serious problems for the press.[547]

The Court's most serious error in economic regulation of the press has been in granting the FCC wide-ranging authority to engage in business regulation that might exceed the scope of the antitrust laws. The Court has yet to reconsider carefully Justice Frankfurter's statement in *NBC* that denial of a station license under the public interest standard is not a denial of free speech. Certainly the first amendment poses some limits to economic regulation. If the Court blindly follows Justice Frankfurter's belief, it may permit the press to be inhibited unjustifiably.

There is a need for government control of the allocation of broadcasting facilities to prevent technical interference among stations. That requirement, however, should not be the basis for regulating the ownership structure or business conduct of broadcasters differently than other forms of communication. It is fallacious to suggest that broadcasters are the only mass communicators using a scarce resource. Newspaper publishers, for example, distribute their products via fossil fuel powered vehicles. In the event of a critical fuel shortage resulting in government allocation of fuel supplies, would the government be able to constitutionally impose public interest regulations on newspapers in return for their use of a scarce resource? The first amendment requires that all forms of mass communication be uniformly subject to government regulation. Laws regulating the business of communicating should not be applied loosely to one form of communication and rigorously to another because the technical methods of communication differ.

VI. CONCLUSION

A viable marketplace of ideas depends in large measure upon a competitive economic marketplace. Thus, to a certain extent, the first amendment and the antitrust laws do not stand in philosophic opposition to one another. As the Court asserted in *Associated*

546. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

547. In a recent antitrust case involving the press, Knutson v. Daily Review, Inc., 468 F. Supp. 226, 228-29 (N.D. Cal. 1979), a federal district court declined to follow *Bigelow,* and held that a plaintiff cannot recover damages that are not the certain result of the defendant's violation.

Press, the first amendment provides powerful reasons for attacking monopolistic structures and practices. Anticompetitive control of any stage of the mass communications process, exemplified by the theatre holdings of the major defendants in *Paramount Pictures,* can have an important impact on what the public sees and hears. Promoting competition in the economic marketplace is perhaps the best means of fostering competition in another marketplace, the marketplace of ideas, without direct government regulation of speech. The failure of the government to promote open mass communications economic markets would have grave consequences for our society, but equally grave would be the consequences of unrestrained government intervention in those markets.