Chapter Seven

Diversity in the Media Sector

Two concerns traditionally have been raised about large media enterprises. First, media oligopolies may raise prices to consumers and advertisers above competitive levels. This concern about market power cuts across all industries. The second concern is media-specific, namely society's political and cultural health is fostered by numerous, independent media, and excessive media concentration may threaten the public's access to important information or viewpoints. The next administration should address both concerns.

Traditional media are in flux. In response to declining audiences, many traditional media have laid off journalists and cut back on news. The daily newspaper has been called an "endangered species."[1] What this means for antitrust policy is contested. The financial setbacks of traditional media have led some to call for further relaxation of media ownership restrictions. This argument has been supported by the recognition that the Internet has lowered entry barriers and introduced new outlets.

Others have argued that traditional media remain the principal sources from which Americans get their news and information. The problems facing traditional media are at least in part self-inflicted. Unwise acquisitions, excessive debt, and unwillingness to change outdated business models frequently are mentioned as contributing factors. Far from seeing consolidation as a solution, these critics see it as part of the problem. In addition, the critics are skeptical about the role of the Internet, especially when traditional media companies own many of the popular Internet news sites. The critics do not blithely assume that the Internet eliminates entry barriers such that media concentration is not a concern. Instead, the critics want to protect emerging media markets from being co-opted by traditional media. Moreover, they recognize that an emerging and increasingly more competitive new media market does not warrant ignoring antitrust enforcement in major media formats.

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[1] Kevin J. Martin, *The Daily Show*, N.Y TIMES, Nov. 13, 2007, http://www.nytimes.com/2007/11/13/opinion/13martin.html.

It is difficult to formulate meaningful policy when there is a fierce debate about whether a problem really exists. Thus, our principal recommendation is to get a better grasp on the fundamental issues: Are media industries becoming more concentrated or not? Where is the audience going for its news? What weight should be given to alternatives such as blogs? Have there been adverse effects from prior media mergers? Have the predicted efficiencies occurred?

MAJOR RECOMMENDATIONS

As elaborated at the chapter's end, we recommend:

- more empirical analyses of how media markets work,

- that any antitrust policy toward media mergers be in furtherance of, and driven by, a national media policy, as set by Congress. Sole reliance on enforcement by the Federal Communications Commission (FCC) or federal antitrust agencies has proven to be too ad hoc, too haphazard, and not particularly effective.[2] Aside from political and ideological concerns about lax or zealous antitrust enforcement, conventional antitrust policy is not easy to apply in media markets,[3] and

- a combination of new legislation and more informed antitrust enforcement to: (1) promote, or at least not diminish, the media's contribution to the marketplace of ideas;[4] (2) have antitrust merger policies complement FCC policy, which together should provide some of the necessary legal framework for a vibrant marketplace of ideas; and (3) understand from a 21st Century perspective, all of the values, including noneconomic values, such as localism and diversity, that

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[2] Although two contributors of this chapter had suggested in 2001 that the antitrust laws, properly interpreted, would be sufficient to ensure a robust marketplace of ideas, this has proven to be more hopeful than realistic. Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).

[3] Howard Shelanski, *Antitrust Law as Mass-Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 373 (2006).

[4] As former Federal Trade Commission (FTC) Chairman Robert Pitofsky observed, if the federal agencies get it wrong, there is more at stake here than just taking money out of consumers' pockets. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

are important to preserving a healthy marketplace of ideas. Antitrust will play only one part in implementing the overall media policy.

I. How a Vibrant Marketplace of Ideas Promotes Democracy and the Free Market

A competitive "marketplace of ideas"[5] plays an important role in our democracy.[6] Its beneficial social value is based on the theory that truth prevails in the widest possible dissemination of information from diverse and antagonistic sources. An essential goal of the First Amendment is to promote this marketplace of ideas by restricting to varying degrees *governmental* restraints on speech and achieving "the widest possible dissemination of information from diverse and antagonistic sources."[7]

The question invariably arises whether the First Amendment restricts the government's ability to regulate media ownership or, rather, supports such an effort. Some media owners see attempts to limit ownership as placing a burden on their ability to speak to as many people as they can through the acquisition of additional media. This interpretation of the First Amendment, supported by statements by the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*,[8] views the beneficiaries as corporations and the First Amendment as a vehicle to keep government away from their expressive freedom.[9]

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[5]The marketplace of ideas is a sphere in which intangible values compete for acceptance. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1383 (Merriam-Webster 1986). *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market[.]").

[6] The marketplace of ideas is important to our democracy, in that democracy prospers when there is an unrestrained flow of information. First, to govern themselves, the electorate must have full access to "social, political, esthetic, moral and other ideas and experiences." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969). Second, the best test of truth is the success of an idea in gaining acceptance in free competition with other ideas. Just as competition produces the best widget, so too competition in the marketplace of ideas advances truth. *See* United States v. Assoc. Press (AP I), 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) (AP II). While to many this marketplace of ideas "is, and always will be, folly," we, in our democracy, "have staked upon it our all." *AP I*, 52 F. Supp. at 372.

[7] *AP II*, 326 U.S. at 20.

[8] Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1128 – 29 (D.C. Cir. 2001).

[9] The argument that the government should not limit the rights of media conglomerates depends on several assumptions. First, it assumes that laws that regulate business conduct such as mergers are equivalent to laws that prohibit specific communicative content, which is the defining feature of censorship of speech. Second,

But a better reading of the First Amendment, one that is more in tune with Supreme Court precedent, is that it is "the right of the viewers and listeners," not the right of the owners, "which is paramount."[10] Mergers and acquisitions may have either a positive or a negative effect from the standpoint of viewers and listeners. Mergers may create a strong voice where none existed before; on the other hand, mergers may reduce the number of "diverse and antagonistic sources" of information, and therefore potentially inhibit the robustness of debate important to a democracy. In tandem with First Amendment principles, the federal antitrust laws can promote the marketplace of ideas by reaching anticompetitive *private* restraints on this marketplace.[11] As Judge Greene wrote in the *AT&T* case, "as the Supreme Court has recognized, in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws."[12]

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it assumes that the corporation is the ultimate and proper beneficiary of press freedom. Third, it views structural rules as appropriately evaluated under a heightened level of scrutiny. C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 127 – 28 (2006).

[10] *Red Lion,* 395 U.S. at 389. In *AP II*, Justice Black rejected AP's argument that it should have the autonomy to control its own operations and its own associations with newspapers without government interference: "[T]he First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." *AP II*, 326 U.S. at 20. That this is the proper interpretation may be seen from the fact that telephone companies, as common carriers, must carry expression that their owners would find objectionable, and from the widespread requirements that both broadcasters and cable systems must carry content that they would reject. Under this view, the application of antitrust laws is in tune with the First Amendment because "[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." *Id.*

[11] The Supreme Court and lower courts have made this link explicit. *See*, *e.g.*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800 n.18 (1978) ("application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment"); *Red Lion,* 395 U.S. at 390 ("[T]he purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

[12] United States v. AT&T Corp., 552 F. Supp. 131, 176 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). Some have argued that consideration of First Amendment values should persuade antitrust law to seek a higher than usual level of competition in media markets. *See*, *e.g.*, Wilfred Rumble, *The FCC's Reliance on Market Incentives to Provide Diverse Viewpoints on Critical Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F. L. REV. 793 (1994). For a general review of such arguments, see Federal Trade Comm'n, Proceedings of the Symposium on Media Concentration, Dec. 14 – 15, 1978, at 22 *et seq.* (remarks of Professor Monroe Price, UCLA Law School).

In promoting a competitive marketplace of ideas, competition agencies, in turn, can promote the objectives of competition generally.[13] A competitive media, for example, increases political accountability and reduces corruption, which hampers any competition policy. As Professor Baker writes, "Concentrated communicative power creates demagogic dangers for a democracy, reduces the number of owners who can choose to engage in watchdog roles, may reduce the variety in perspectives among the smaller group of people who hold ultimate power to choose specific (varying) watchdog projects, and multiplies the probable conflicts of interest that can muzzle those watchdogs."[14]

II. Concerns About the Competitiveness of the Marketplace of Ideas

A. Health and Competitiveness of Traditional Media

Given the importance of a vibrant marketplace of ideas to our democracy and free market system, the next administration will face the ongoing debate over the health and competitiveness of the U.S. news media.[15] The media industry is in flux. In recent years,

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[13] An independent and competitive media, for example, (1) informs policy makers of the unintended social effects of their policies, (2) provides a voice to pressure the government for change, and (3) serves as a catalyst for institutional change to promote competition policy. For a discussion how an independent competitive media can advance the goals of competition policy, see Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 1020 – 25 (2008).

[14] BAKER, *supra* note 9, at 120 – 21.

[15] Senator Kohl recently summarized the concerns about the effects of media consolidation on the marketplace of ideas:

> It's such a very important issue, media consolidation, because it has the potential to reduce if not eliminate the opportunities people have to read and think about differing opinions and independent opinions. If this were to happen, it would have a devastating impact on our society and our democracy. So I believe both the FCC and the antitrust enforcement agencies, and our Antitrust Subcommittee, all have an important role to play in addressing this issue . . . . We need to be very much on guard to see to it that media consolidation doesn't happen to the extent that we have a society where the Fourth Estate has lost its spontaneity, its vigor, and its ability to encourage debate and to get people thinking. It's so important to our democracy. Multiplicity of independent ownership and vigorous competition is what is essential. If we have just a few companies that control vast portions of the media, I cannot imagine how that's in the interest of anyone, except of course media owners who would profit greatly. In sum, I believe it is very important that we in government – including here in Congress and in the antitrust enforcement agencies too – stand in the way of excessive media consolidation. And I understand that this may make some people in the private sector upset because they think maybe you're going too far. But if you gave me the choice of going too far and not going far enough, in the effort to keep the media as independent and competitive as we can, I'd rather go too far than not go far enough.
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> ANTITRUST: So it sounds like you believe that this issue of preserving diversity of viewpoint should be a part – perhaps a big part – of the antitrust review.

some media conglomerates have shed,[16] while others have increased, their holdings.[17] And traditional media companies have expanded their Internet holdings, or sought to collaborate with well-known Internet companies.

Many traditional news media are losing their audience. Daily newspapers and alternative newsweeklies have lost circulation for their print editions.[18] In recent years, ratings for

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> SENATOR KOHL: Yes, very much so. I strongly believe that antitrust enforcement agencies should be aware of, and consider, the likely effects on diversity and the marketplace of ideas when they review a media merger.

Interview with U.S. Senator Herb Kohl [D-Wi], Chairman, Senate Antitrust Subcommittee, 21-SPG ANTITRUST 7, 12 (2007).

[16] In 2005, Viacom split into two separate companies: Viacom and CBS Corporation. In 2006, Clear Channel Communications and CBS, the largest and second largest radio holders, announced plans to sell some of their radio and television stations. Clear Channel announced its intention to sell 448 "non-core" radio stations, all in markets outside the top 100, and its entire television station group, which collectively contributed less than 10 percent of the company's 2005 revenues. Press Release, Clear Channel Announces Plan to Sell Radio Stations Outside the Top 100 Markets and Entire Television Station Group (Nov. 16, 2006), http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1825. (As of its most recent Form 10-K, Clear Channel sold 217 non-core radio stations and reached definitive purchase agreements to sell 28 more "non-core" radio stations. In 2007, Clear Channel entered into a definitive agreement with an affiliate of Providence Equity Partners Inc. to sell its television business. Subsequently, Providence informed Clear Channel that it is considering its options under the definitive agreement, including not closing the acquisition on the terms and conditions in the definitive agreement. Clear Channel Communications, Inc., Annual Report (Form 10-K), at 4 (Feb. 14, 2008), http://www.clearchannel.com/Investors/Documents/291.pdf.) Since 2005, CBS sold 11 television and 39 radio stations in medium and smaller markets, leaving it with 29 television stations and 140 radio stations. John Eggerton, *CBS Sells Four Stations to Four Points Media Group Completes Deal, Divestiture of 50 Medium and Smaller-Market Stations*, BROADCASTING & CABLE, Jan. 10, 2008, http://www.broadcastingcable.com/article/CA6521802.html. In 2007, Walt Disney Co. sold 22 big-city radio stations to Citadel for approximately $2.7 billion. (Citadel's entire stock market value dropped in 2008 to under $300 million, which is a fraction of the value of its purchase of the Disney radio stations completed eight months earlier. Paul Farhi, *Strapped Owner Fires WMAL Host Chris Core*, WASH. POST, Mar. 1, 2008, at C01.) On May 7, 2007, the New York Times Company sold its Broadcast Media Group, consisting of nine network-affiliated television stations, their related Web sites and the digital operating center, to Oak Hill Capital Partners, for approximately $575 million. New York Times Company, Annual Report (Form 10-K), at P1 – P2 (Feb. 26, 2008).

[17] In 2007, News Corporation, which has major holdings in filmed entertainment, television, cable network programming, direct broadcast satellite television, magazines, newspapers, and book publishing, acquired for approximately $5.6 billion Dow Jones & Company, Inc. Rivals Sirius Satellite Radio and XM Satellite Radio Holdings Inc. announced plans to merge, which faced no opposition by the Department of Justice (and had not been ruled upon by the FCC at the time of writing).

[18] Between 1950 and 2006, the circulation and number of United States daily newspapers steadily declined from 1,772 newspapers with a collective daily circulation of nearly 59 million to 1,437 newspapers with a collective daily circulation of over 52 million. NEWSPAPER ASSOCIATION OF AMERICA, THE SOURCE – NEWSPAPERS BY THE NUMBERS (2008), *available at* http://www.naa.org/TrendsandNumbers/Total-Paid-Circulation.aspx. This decline is attributable to evening newspapers; the number of morning newspapers

cable and network national news and local televised news have declined.[19] For the three major networks' evening newscasts, the number of viewers in 2006 is half its 1980 level, with the median age of the networks' nightly news viewers at 60 years.[20] Between 1998 and 2006, the commercial radio audience declined as well.[21] (A notable exception, National Public Radio, has had an increase in listeners.[22]) Americans surveyed had a less favorable view of the press in 2006, partly due to the perception of greater bias.[23]

B. *Traditional Media's Reduction in Output*

Traditional media companies – the large broadcasters, newspaper and magazine publishers – generally have responded to these audience declines by reducing costs. Some cost savings may be a result of efficiencies such as back office savings and a move to cheaper delivery alternatives. Many major media companies, however, continue to lay off journalists,[24] close news bureaus, and offer less investigative journalism.[25] Radio stations

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(some of which are former afternoon newspapers) increased from 322 newspapers with a collective circulation of over 24 million to 833 morning newspapers with a daily circulation of over 45 million. *Id.*

19 Project for Excellence in Journalism, The State of the News Media 2007, Overview (2007), *available at* http://www.stateofthemedia.org/2007/index.asp. The average audience for the three main cable news channels declined in 2006. Project for Excellence in Journalism, The State of the News Media 2007, *Cable TV* (2007), *available at* http://www.stateofthemedia.org/2007/index.asp.

20 Project for Excellence in Journalism, The State of the News Media 2007, Network TV (2007), *available at* http://www.stateofthemedia.org/2007/index.asp.

21 The average number of radio listeners per quarter hour, based on Arbitron, has fallen 6.6 percent from approximately 19.7 million to approximately 18.4 million. George Williams, Federal Communications Commission, Review of the Radio Industry, 2007 at 14 – 15, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf. The author of the report noted that further analysis was necessary to test whether there was a causal link between industry consolidation and this decline in listenership. Alternative explanations could include the availability of alternative products, such as satellite radio, Internet radio, and downloading of digital music.

22 Project for Excellence in Journalism, The State of the News Media 2007, Radio (2007), *available at* http://www.stateofthemedia.org/2007/index.asp.

23 Project for Excellence in Journalism, Overview, *supra* note 19. A recent national poll found significantly declining percentages of Americans saying they believe all or most of media news reporting. Just 19.6% of those surveyed could say they believe all or most news media reporting, down from 27.4% in 2003. Press Release, Sacred Heart University News, Americans Slam News Media on Believability (Jan. 8, 2008), http://www.sacredheart.edu/pages/20786_americans_slam_news_media_on_believability.cfm.

24 Between 2000 and 2005, newsroom staffing at daily newspapers declined by 3000 or about 5%. Another 1000 layoffs were estimated in 2006. Layoffs at the major news magazines (such as Time and Newsweek) and network news programs were at even greater percentages. In contrast, newsroom staffing is increasing for local television news and the ethnic press. Project for Excellence in Journalism, Overview, *supra* note

carry less local news.[26] Local television stations have increased the production of news, but without significantly adding journalists, leading to less original reporting and greater reliance on non-original material.[27]

Many daily newspapers and television stations remain profitable,[28] indeed more profitable than other industries.[29] This has led skeptics to dispute the claim that newspapers and

19; *see also* DAVID H. WEAVER ET AL., THE AMERICAN JOURNALIST IN THE 21ST CENTURY: U.S. NEWS PEOPLE AT THE DAWN OF A NEW MILLENNIUM 2 (2007) (decline of approximately 6,000 full-time people or 5% working in the news between June 1992 and November 2002). The total employment at newspapers, which increased between 1970 and 1990, declined annually thereafter. NEWSPAPER ASSOCIATION OF AMERICA, THE SOURCE (data for 1970 – 2003), http://www.naa.org/info/facts04/employment.html.

[25] Eric Alterman, *The News Business: Out of Print*, NEW YORKER, Mar. 31, 2008, at 49. The major broadcast news networks, for example, have reduced staffing, halved the number of overseas news bureaus, and aired 46% fewer foreign stories since the late 1980s. PROJECT FOR EXCELLENCE IN JOURNALISM, NETWORK TV, *supra* note 20. As one newspaper industry analyst commented, rather than innovating, "most newspaper companies concentrated on shoring up the profitability of their traditional newsprint-oriented business, chiefly through laying off employees, downsizing their newspapers and cutting back on circulation in distant areas of little interest to advertisers in their core markets." John Morton, *Buffeted, Newspapers Are Paying The Price For Shortsighted Thinking*, AM. JOURNALISM REV., Oct./Nov. 2007, *available at* http://www.ajr.org/Article.asp?id=4416.

[26] In 2006, radio stations on average aired 37.1 minutes of locally produced news each day, of which 20.2 minutes was aired during the morning drive. Bob Papper, *By The Numbers: News, Staffing and Profitability Survey*, COMMUNICATOR 34 (Oct. 2006) (RTNDA/Ball State University survey), *available at* http://www.rtnda.org/media/pdfs/communicator/2006/oct/102006-22-34.pdf. As the article notes, "There's little positive news on the radio side. Both the average amount of news and average staff size fell from a year ago. While consolidation makes it difficult to track radio news over time, it's clear that the overall trend is down. The typical radio news director oversees three to four stations, and more than three-quarters of radio news directors also have non-news responsibilities." *Id.* at 22.

[27] PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2007, LOCAL TV (2007), *available at* http://www.stateofthemedia.org/2007/index.asp; Statement of FCC Commissioner Michael J. Copps, Concurs and Dissents in Part in Promoting Diversification of Ownership in the Broadcasting Services et al., at 6, MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, and 04-228 (Dec. 18, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A3.pdf ("We have witnessed the number of statehouse and city hall reporters declining decade after decade, despite an explosion in state and local lobbying.").

[28] As one newspaper industry analyst wrote, "Bad as 2007 has been, the publicly reporting companies still produced an average operating-profit margin of nearly 16 percent in the first half of the year—a level many businesses can never hope to achieve. Still, the average profit margin has been in steady decline since 2002, when it was 22.3 percent." Morton, *supra* note 25. *See also* Copps, *supra* note 27, at 1 ("We shed crocodile tears for the financial plight of newspapers – yet the truth is that newspaper profits are about double the S&P 500 average."). Likewise, the president of a television station brokerage business recently said, "Wall Street has walked away from broadcast investments because they don't see the growth that the industry has had over the past 20 – 30 years. Growth has slowed, but broadcasting is a tremendously high free-cash-flow business . . . . A television company has 35% – 40% operating margin. You can't put your money in anything else that

other traditional media are going the way of the buggy whip. Nonetheless, despite their double-digit profit margins, many publicly traded media companies have lost favor on Wall Street.[30]

C. *Growth of New Media*

Today consumers can access news and entertainment from personal digital audio and video devices (such as iPods, WiFi, mobile phones, WiMAX, and MP3 players), subscriber-based satellite digital radio services (with numerous niche formats), direct broadcast satellite systems, Internet content providers, and HD radio (multichannel, multiformat digital radio services). The number of media outlets has multiplied.[31] With such technological innovations, consumers can select the news items they want, when and where they want it, and through complementary means. Journalism is no longer passively consumed. Consumers, through citizen publishing, blogging, YouTube and other developments, can create news and participate in the news discourse. And entry barriers are lower with the Internet.

With traditional media in flux and the growth of new media, some argue that antitrust should have a limited role in the media industry, and the FCC should ease restrictions on media ownership.

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gets that kind of return." Paige Albiniak, *Private Property: Broadcasting Moves Away from Wall Street*, BROADCASTING & CABLE, Apr. 16, 2007, *available at* http://www.broadcastingcable.com/article/CA6433752.html.

[29] Felicity Barringer, *Fear of Cutbacks Rattles Papers In Philadelphia*, N.Y. TIMES, Oct. 23, 2000, at C1.

[30] Independent, publicly traded U.S. newspapers lost 42% of their market value in the past three years. Alterman, *supra* note 25, at 48. With the dismantling of the second largest newspaper chain, Knight-Ridder, and radio giant Clear Channel Communications going private, another debate is the optimal corporate model for ownership, whether it be public, privately held, or non-profit trust. PROJECT FOR EXCELLENCE IN JOURNALISM, OVERVIEW, *supra* note 19.

[31] FCC, *Report and Order and Order on Reconsideration*, In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-244, 04-228, 99-360 (released Feb. 4, 2008) [hereinafter *2008 FCC Report*]. The FCC noted in "absolute terms, dramatic changes have occurred over several decades with respect to the number and types of media 'voices' competing for the public's attention." The FCC noted that there are "hundreds of video programming channels available over cable and, later, by satellite distribution," approximately 11.6 million subscribers to satellite radio, and that approximately 86 percent of U.S. households subscribe to video service provided through multichannel video programming distribution (MVPD), which includes cable, satellite master antenna television (SMATV) systems, direct broadcast satellite (DBS), fiber optic network service, wireless cable, and other such delivery systems. *Id.* at ¶ 24.

D. The Impact of Consolidation

New technologies are bringing dynamic innovations, but the available evidence still points to the continuing important role of traditional media, especially newspapers and broadcast television, to the marketplace of ideas. The workhorse for gathering the news and investigating stories, as the FCC recently found from its available data, remains the local daily newspaper, followed by the local television station.[32] The Internet may provide readers more perspectives for international or national news; the Internet, however, is not necessarily a close substitute for the local news in the local daily newspaper and on the local television news broadcast. Cable provides mainly national news; commercial radio covers very little local news.

Commercial radio, instead of an example for permitting greater consolidation, may be an example of its dangers. The Telecommunications Act of 1996 weakened the ownership limits on radio stations nationally and locally.[33] In analyzing radio mergers, the U.S. Department of Justice (DOJ) considered their economic impact solely on advertisers and the rates they pay for advertising.[34] In its public filings, DOJ did not refer to other

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[32] *Id.* at ¶ 35. (Newspapers and, to a somewhat lesser extent, broadcast stations still continue to serve as the most organized, systematic gatherers of news and information in their communities.) The record before the FCC demonstrated that "traditional media still represent the most important source for local news for the majority of individuals." A Nielsen Survey indicated that 38.2 percent of all respondents consider broadcast television stations and 30.1 percent consider local newspapers "the most important source of local news or local current affairs." *Id.* at ¶ 57. Thus, the FCC categorized as "major" media voices "full-power commercial and noncommercial television stations and major newspapers" because "such sources are generally the most important and relevant outlets for news and information in local markets today." *Id.*

[33] Section 202 of the Telecommunications Act of 1996 abolished the FCC's limits on the number of radio stations a single entity could own nationally. On March 7, 1996, the FCC in revising Section 73.3555 of its Rules (47 C.F.R. § 73.3555) eliminated the national multiple radio ownership rule and relaxed the local ownership rule. WILLIAMS, *supra* note 21, at 1.

[34] Although a number of possible product markets exist (such as listenership and programming), DOJ focused in its radio consent decrees on the mergers' impact on advertisers and advertising rates as evaluated under the Department of Justice & Federal Trade Commission's Horizontal Merger Guidelines (1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,104, *available at*
http://usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html [hereinafter *Horizontal Merger Guidelines*]. The consent decrees acknowledge that radio stations also compete on advertising services – for example, by offering live remote broadcasts from an advertiser's place of business – but this tends to be a value-added feature and is not the primary focus of the relief obtained. *See*, *e.g.*, Competitive Impact Statement filed in U.S. v. Bain Capital LLC, 1:08-cv-00245 (D.D.C. filed Feb. 13, 2008); Complaint for Injunctive Relief, United States v. Clear Channel Communications, Inc. and AMFM Inc., No. 00-2063 (D.D.C. filed Aug. 29, 2000) (complaint filed with consent decree); United States v. CBS Corp., No. 98CV00819, 1998 U.S. Dist. LEXIS 10292, at *1 (D.D.C. Jun. 30, 1998) (proposed decree requiring divestiture of radio stations to cure anticompetitive effect in radio advertising market); United States v. Westinghouse Elec. Corp., No. 96 2563,

possible markets, such as programming markets or listenership markets, or consider consumer choice.

Significant ownership concentration ensued. Between March 1996 and March 2007, the number of commercial radio stations increased 6.8 percent, but the number of radio owners declined by 39 percent.[35] Over the same period, the size of the nation's largest radio group owners increased. In 1996, the two largest radio group owners controlled 62 and 53 stations, respectively. By March 2007, the leading radio group, Clear Channel Communications, controlled over 1100 radio stations.[36] One complaint, reported by the Project for Excellence in Journalism (PEJ), was "that Clear Channel's domination was diminishing the quality of the AM/FM radio dial by monopolizing key markets and homogenizing content."[37]

1997 U.S. Dist. LEXIS 3263, at *8 (D.D.C. Mar. 10, 1997) (same). Under the Horizontal Merger Guidelines' approach, whether radio advertising is a relevant product market is based in part on advertisers' likely response to a "small but significant and nontransitory increase" in the advertising rates of the merging radio stations. Some of the antitrust product market questions addressed in the radio merger consent decrees are (i) would large numbers of advertisers shift to other media, (ii) are there attributes of radio advertising that make other media poor substitutes to many advertisers, and (iii) can stations identify advertisers with strong radio preferences and selectively raise prices? Similarly, in assessing competitive effects, DOJ inquires whether advertisers will end up paying more or getting less after a radio merger. Some of the issues addressed in these consent decrees are (i) have advertisers lost the ability to play one of the merging company's radio stations off against the other company's stations to get better advertising rates, (ii) can advertisers buy around the merged entity to reach a particular audience demographic, and (iii) after the merger, can advertisers reach their target audience with equivalent efficiency without using the merged company's radio stations? DOJ's radio merger consent decrees do not address nonprice competition unrelated to advertising, including the quality of programming, listener choice, or the likely impact of these mergers on the marketplace of ideas.

[35] WILLIAMS, *supra* note 21, at 1. This trend was already apparent by 2001, by which time the number of radio owners had already declined 25%. FCC, REVIEW OF THE RADIO INDUSTRY 2001 at 2 (Sept. 2001). Likewise, the number of full-power television stations increased (from 875 in 1970 to 1,754 in 2006). Kiran Duwadi, Scott Roberts, & Andrew Wise, *Media Ownership Study Two: Ownership Structure and Robustness of Media*, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf. But the number of unique television owners decreased (from 491 to 480 in 2005). Letter from JayEtta Z. Hecker, Director, Physical Infrastructure Issues, Government Accountability Office, to The Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and the Internet, House Committee on Energy and Commerce 5 (Dec. 14, 2007) *available at*
http://www.gao.gov/new.items/d08330r.pdf. The number of newspapers remained about the same between 2002 and 2005, but the number of newspaper owners declined from 422 to 389.

[36] In 2008, Clear Channel still controls 833 U.S. radio stations, 508 of which are located in the largest 100 Arbitron markets. Competitive Impact Statement filed in United States v. Bain Capital LLC, 1:08-cv-00245 (D.D.C. filed Feb. 13, 2008), *available at* http://www.usdoj.gov/atr/cases/f230100/230166.htm.

[37] PROJECT FOR EXCELLENCE IN JOURNALISM, RADIO, *supra* note 22. Critics have also complained that it exerted a negative effect on American radio. Clear Channel reportedly also

The ownership concentration in radio was felt on the local level.[38] The number of local cross-ownerships between radio and television stations increased.[39] One empirical study relied upon by the FCC showed that the amount of news for these cross-ownership stations was consistently less than for their peers: "the average effect of radio cross-ownership on local news coverage is consistently negative," i.e., less news.[40] Not only were local radio markets more concentrated, but a few radio firms dominated local advertising. On the local level, the largest firm in each radio metro market has, on average, 46 percent of the market's total radio advertising revenue; the largest two firms have, on average, 74 percent of the radio advertising revenue.[41] Although radio listening declined since 1998, radio advertising rates since 1996 have nearly doubled, suggesting that even on this dimension, the antitrust review may have been inadequate. As one recent FCC study concluded, "the [consumer price index] increased approximately 3 percent per year during this time period, while the annual growth rate in radio prices was approximately 10 percent."[42]

The claim was frequently made in the 1990s that consolidation would allow owners to offer a more diverse array of formats.[43] But it is not evident that increased ownership

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> popularised voice-tracking, whereby segments of speech, music and commercials were sent digitally from one Clear Channel network to another. These were then cut and pasted into the radio programmes, giving the listener the impression that, for example, a DJ was taking a live request or was doing an interview when, in fact, they were not. Clear Channel argued that this technique allows it to deliver national DJ talent to local markets that could not otherwise afford it. It also cuts costs.

Clear Channel agrees $18.7bn sale, BBC News, Nov. 16, 2006, http://news.bbc.co.uk/2/hi/business/6155284.stm.

[38] The average number of radio station owners across all metro markets declined from 13.5 in 1996 to 9.4 in 2007. WILLIAMS, *supra* note 21, at 8.

[39] The number of television/radio station cross-ownerships in the same market increased from 273 television/656 radio stations in 2002 to 333 television/782 radio stations in 2005. Duwadi, Roberts, & Wise, *supra* note 35, at 11 (Table 5).

[40] Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* 21 (Rev. Sept. 2007), *available at* http://www.fcc.gov/ownership/studies.html. The FCC relied upon this study as evidence of how newspapers can spread their fixed costs over other media to increase news content, which is discussed *infra* text accompanying note 69.

[41] WILLIAMS, *supra* note 21, at 2.

[42] The consumer price index increased 29 percent during the same period. *Id.* at 16.

[43] *See, e.g.*, Matt Spangler, *Can't Find Nothin' on Radio?*, R&R, July 31, 1998, *available at* http://www.radiodiversity.com/nothingonradio.html.

concentration has led to greater program diversity. According to one FCC study, between 1996 and 2007, the average number of formats appears to have declined slightly for some of the large markets, while increasing slightly for most of the smaller ones. The variety of radio formats overall has held steady.[44]

The traditional deregulatory, anti-interventionist argument is that the free market will adjust to match viewer preferences, so that ownership does not matter. But there is some evidence that brings this truism into question. In a study of FCC data, several consumer groups claim that less news is broadcast in cities where companies have been granted waivers to the FCC cross-ownership rules to allow them to own both newspapers and broadcasters, although the evidence is equivocal.[45] One of the starkest effects of media consolidation has been its effect on minority and female ownership,

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[44] WILLIAMS, *supra* note 21, at 2.

[45] *See* FCC, 2006 Quadrennial Regulatory Review, Further Comments of Consumers Union, Consumer Federation of America and Free Press (Oct. 27, 2007), at 6 – 8, 86 – 109, *available at* http://stopbigmedia.com/filing/critique_complete.pdf. The FCC noted that the empirical evidence in the record supported "both sides" concerning the relationship between newspaper/broadcast combinations and localism. The FCC concluded that on balance, the evidence "suggests" that "some" newspaper/broadcast cross-ownership combinations could enhance localism. *2008 FCC Report*, *supra* note 31, at ¶ 42. The FCC relied in particular on one study of 29 cross-owned television stations in 27 markets, which concluded that "local television newscasts for cross-owned stations contain on average about 1 – 2 minutes more news coverage overall, or 4% – 8% more than the average for non-cross-owned stations . . . ." Milyo, *supra* note 40, at 29. The study's author, however, recognized several important caveats. First, the study's sample was small: time and resource constraints limited him to "only three days during the week prior to the 2006 general elections on Tuesday, November 7th." *Id.* at 8. The second important caveat to his study is that these three days may not be representative of the remainder of the year: "the behavior of local news stations may not be the same during the week just prior to the general elections compared to other times of the year" so "the findings of this study may not be representative of differences in local news coverage by cross-ownership throughout the rest of the year." *Id.* at 9. A third important caveat is that he looked only at late-evening local news, which may not represent a station's daily news coverage. A fourth caveat is that his analysis "cannot determine whether local television stations (cross-owned or not) present news in a balanced or biased manner." *Id.* at 30. Some of the author's findings were surprising nonetheless given the upcoming elections. Local stations broadcast approximately 26 minutes of total news coverage, with about 80% of this time devoted to local stories. But actual "local news, excluding sports and weather, accounts for a little less than half (46%) of the total news time. Finally, state and local political coverage averages just about three minutes per newscast for the dates under study." *Id.* at 16. The amount of incremental news coverage from cross-owned televisions stations was only "about 21 seconds." *Id.* One FCC-sponsored peer review of this study concluded that given these caveats, "the empirical data in the study are so limited that the study's conclusions do not and cannot possess the reasonable level of confidence necessary to provide policymakers with useful evidence on which to base their regulatory decisions. Put simply, the findings from a single three-day study of one type of news broadcast should not form the evidentiary basis for any sort of public policy making." Kenneth Goldstein, Matthew Hale & Martin Kaplan, Invited Peer Review of FCC Media Ownership Study 6, MB Docket No. 06-121 (Oct. 30, 2007)*, available at* http://www.fcc.gov/mb/peer_review/prstudy6a.pdf.

although an analysis of the significance of this issue for media policy is beyond this chapter's scope.[46]

The debate concerns not only the quantity of independent media owners, but the extent to which programming is affected when a radio or television station is owned by a large out-of-market station group as opposed to a local independent owner.[47] There is some evidence that large public companies tend to sacrifice journalistic quality in pursuit of the bottom line. Good journalism is expensive and yields social benefits that are not captured in the balance sheet. In a large study in 2003, the PEJ ranked television news programs from best to worst and divided stations into groups based on the size of the owner.[48] PEJ found the news programs of the smallest owners to be 30% high quality, compared with 12% for the largest owners. Likewise, the smallest owners had 17% news programs graded as low quality, compared to 23% of the largest owners. In general, as ownership size increased, news quality decreased.[49] On the other hand, the study also found that a television station's cross-ownership of a newspaper led to better grades. Stations in cross-ownership situations were more than twice as likely to receive an "A" grade as were other stations.[50]

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[46] For a discussion of media consolidation's impact on women and minority ownership, and its implications, see Maurice E. Stucke & Allen P. Grunes, *Toward a Better Media Policy* (Univ. of Tenn. Working Paper, 2008) (on file with AAI).

[47] As of 2005, a minority of the newspapers and commercial radio and television stations were locally owned: 210 of the nation's 1381 commercial television stations, 4827 of the nation's 10,893 commercial radio stations, and 444 of the nation's 1445 newspapers. In contrast, the majority of noncommercial radio and television stations were locally owned: 1671 of 2697 noncommercial radio stations and 229 of the 383 noncommercial television stations. Duwadi, Roberts, & Wise, *supra* note 35, at 6 (Table 1) & 8 (Table 2).

[48] To examine size, the authors separated the television companies studied into four categories, using the FCC rankings of audience reach. Their measurement of audience reach followed the FCC's policy of discounting for the difference in reach between UHF and VHF stations.

[49] PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS? A FIVE-YEAR STUDY OF OWNERSHIP AND QUALITY 2003, *available at* http://www.journalism.org/node/243. In analyzing content across local markets, James Hamilton similarly found that group-owned television stations carried fewer hard news stories, network affiliates did more stories in their local news programs about the network's entertainment programming, and that papers owned by chains covered a higher percentage of soft news topics. JAMES T. HAMILTON, ALL THE NEWS THAT'S FIT TO SELL 249 (2004).

[50] The study's authors, like the FCC in liberalizing the cross-ownership ban, thought that cross-ownership suggested that the joint resources of a newspaper and television station freed up people to do more original work. But as their study revealed, the cross-owned stations actually scored lower on the enterprise index in general, and particularly in the area of sending out reporters to cover stories: "the generalized sign of higher quality at cross-owned stations, for some reason, did not include those stations doing more enterprise." PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER, *supra* note 49.

The FCC allegedly ordered its staff to destroy all copies of a draft study that suggested greater media concentration would hurt local television news. Based on a review of 10,500 clips from local news programs broadcast in twenty markets, two FCC economists found that locally-owned television stations produced more local news—about five and one-half minutes more local news per half-hour program—than non-locally-owned stations.[51] The study's finding was said to have been at odds with the FCC, which was reportedly facing pressure from the broadcast industry to conclude that media ownership rules were too restrictive and should be loosened. In a meeting with their supervisor, the FCC economists were allegedly told, "the front office wasn't going to let it out, and the bureau chief wasn't going to let it out."[52]

E. The Role of the Internet

The Internet's benefits may eventually counteract these tendencies. But the Internet today cannot prevent all media market failures. First, market failure in media industries differs from that in other industries. With many commodities, market failure manifests in higher prices. But market failure in the marketplace of ideas may not manifest itself in higher prices. Newspapers and other types of information-heavy media are what consumer protection specialists refer to as "credence goods."[53] Their actual quality is difficult to determine even after being bought and consumed; it must be taken to some degree on faith. A news channel may claim to be "fair and balanced" or "the most

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[51] *See* John Dunbar, *FCC Quashed Contrary Reports: Research Supported Notion that Local Ownership of TV Stations Strengthened News*, RICHMOND TIMES-DISPATCH, Jan. 26, 2007, at A4.

[52] *Id.* Another reportedly suppressed FCC radio study indicated that over seven years there had been a 35% decline in the number of radio station owners, and that 70% of advertising revenue in markets that were examined was controlled by two firms. The Senate, during its confirmation hearings, questioned the incoming FCC chairman about this self-censorship, and the FCC thereafter posted drafts of the local news study and a copy of the radio study on the Web.

[53] *See* Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 207 (2007); Michael Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68 – 69 (1973) ("Credence qualities are those which, although worthwhile, cannot be evaluated in normal use. Instead the assessment of their value requires additional costly information . . . . The line between experience and credence qualities of a good may not always be sharp, particularly if they will be discerned in use, but only after the lapse of a considerable period of time.").

trusted name in news," but while sensing bias, consumers are ill-equipped to ascertain the veracity of these assertions regarding specific stories.

Another market failure unique to the media is self-censorship.[54] Increased competition in the news market can lead to lower bias.[55] Also, if a concentrated media industry is dependent upon government funding[56] or a few major advertisers, the risk of self-censorship increases.[57]

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[54] *See, e.g.*, BAKER, *supra* note 9; BEN H. BAGDIKIAN, THE MEDIA MONOPOLY (6th ed. 2000); ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 243 (1999); Copps, *supra* note 27 (Commissioner heard "first-hand from editorial page editors who . . . told [him] they can cover any story, save one—media consolidation, and that they [had] been instructed to stay away from that one"). Journalists and media watchdogs have also expressed concern about the rise of self-censorship and the loss of journalistic independence following the increasing media concentration. *See, e.g.,* Trudy Lieberman, *You Can't Report What You Don't Pursue*, COLUM. JOURNALISM REV., May/June 2000, at 44, 44 – 49; Mark Crispin Miller, *Can Viacom's Reporters Cover Viacom's Interests?*, COLUM. JOURNALISM REV., Nov./Dec. 1999, at 50, 50. In enacting the 1992 Cable Act, Congress noted its "special concerns" about concentration of the media in the hands of a few who may control the dissemination of information. One concern was that "the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." Congress's second concern about "horizontal concentration is that it can be the basis of anticompetitive acts. For example, a market that is dominated by one buyer of a product, a monopsonist, does not give the seller any of the benefits of competition." S. REP. NO. 10292, at 32 – 33 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1165–66. Congress sought to remedy these concerns in the 1992 Cable Act, with several provisions including the "must-carry," "subscriber limits" and "channel occupancy" provisions.

[55] Matthew Gentzkow & Jesse M. Shapiro, *Media Bias & Reputation*, 114 J. POL. ECON. 280 (2006). The authors found that in high feedback settings (such as weather or sports reporting), bias is minimal. In slow feedback settings, competition affects bias. Media firms in more competitive markets have stronger incentives to reveal important information; the authors show quantitatively that television news reports leading up to the 2000 elections were more equitable in their treatment of Bush and Gore in more competitive media markets. This finding was consistent with several other studies that show how competition among alternative sources of media reduces bias. *Id.* at 309.

[56] *See* WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 188 (2002), *available at* http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm.

[57] In a survey of journalists, editors, and news executives in the United States, "more than one-third responded that news is not reported if it might hurt advertising revenues and thus harm the financial position of media firms." *Id.* at 188. If the advertisers (such as department stores) consolidate, this lessening of competition can also adversely affect media dependent on these advertisers (such as daily newspapers, which relied on Macy's, Bloomingdale's, and Lord & Taylor, among others for advertising). The extent to which consolidation has adversely affected newspapers overall is not evident from Newspaper Association of America data on newspaper revenues for retail and national advertising. *See* http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx. Although the failure of liberal talk show Air America had many causes, it is interesting to note that, according to an ABC Radio Network memo, 90 prominent advertisers, including Hewlett-Packard, Microsoft, Wal-Mart, Visa, Exxon-Mobil, Cingular and McDonald's, did not want their advertising running during any syndicated Air America programming the ABC stations carried. PROJECT FOR EXCELLENCE IN JOURNALISM, RADIO, *supra* note 22.

The Internet remains a distribution medium, not a source of original news content. Internet sites unaffiliated with traditional media typically collect stories from various newspapers, or comment on the news, but do little original local news coverage or investigative reporting. Although Internet companies invest in this medium, the investment has tended to be in technology and not in journalists. The most popular Internet sites for news remain the domain of the largest media conglomerates.[58] According to a study by the PEJ, 17 of the 20 online news sites in 2005 were associated with traditional news companies.[59] Moreover, with consumers spending on average 6 minutes online per day reading the news,[60] this (as other studies show) suggests that online news currently complements, rather than replaces, traditional news media.[61]

Despite the increasing prominence of the Internet as a place where people access news and advertisers spend money, it is unclear whether the Internet will be sufficiently profitable to invest in local investigatory journalism. One pessimistic conclusion is that "the economic base supporting the most difficult and expensive journalistic undertakings is eroding."[62]

III. Calls for Liberalization to Protect Traditional Media

A. Moving Beyond a Dogmatic Laissez Faire Attitude

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[58] PROJECT FOR EXCELLENCE IN JOURNALISM, ONLINE, THE STATE OF THE NEWS MEDIA 2007 (2007), *available at* http://www.stateofthemedia.org/2007/index.asp. The 100 largest media companies (in terms of 2005 revenues) owned 16 of the top 20 popular online news sites, as ranked by Nielsen/Net Ratings. *Id.*

[59] PROJECT FOR EXCELLENCE IN JOURNALISM, ONLINE, THE STATE OF THE NEWS MEDIA 2006, *available at* http://www.stateofthemedia.org/2006/narrative_online_ownership.asp?cat=5&media=4.

[60] PROJECT FOR EXCELLENCE IN JOURNALISM, ONLINE, *supra* note 58. In contrast, surveyed consumers spent 30 minutes watching TV news, 15 minutes reading a newspaper, and 16 minutes listening to news on the radio. *Id.*

[61] *Id.*

[62] BAKER, *supra* note 9, at 117 (quoting PROJECT FOR EXCELLENCE IN JOURNALISM, ONLINE, THE STATE OF THE NEWS MEDIA 2005, *available at* http://www.stateofthemedia.org/2005).

The Bush administration generally had great faith that free market forces correct market failures and little faith that government institutions can promote competition.[63] But this view of markets generally, and media markets specifically, is empirically suspect.[64] In understanding these issues, the next administration cannot blindly rely on neoclassical economic theory's simplistic assumptions about human behavior or efficient markets.[65] The purpose and benefits of a competitive marketplace of ideas differentiate media markets from other markets. Ideally, the federal competition agencies in the next administration should do or sponsor more empirical work to understand better the competitive dynamics of media industries and how they differ from other industries. More empirical work is necessary—in particular, work that goes beyond advertising markets and that includes nonprice competition. Currently, the FCC, under the Telecommunications Act of 1996 (1996 Act), must justify empirically in its biennial review its existing ownership regulations. If the FCC cannot readily supply this empirical evidence, the courts have construed the 1996 Act as requiring the FCC to further deregulate.[66] Given the empirical difficulties in testing the correlation between media consolidation and viewpoint diversity, the current default standard effectively favors further media deregulation. We urge that before any further deregulation is undertaken, the next administration should study or sponsor studies of the effects of media consolidation to date.

B. Should We Allow More Newspapers and Television Stations to Merge?

[63] The administration generally surmised that: (1) free market forces are generally self-correcting and self-initiating, (2) absent governmental restraints, the free market will allocate resources efficiently, (3) the government is an exogenous force to be used sparingly for sustained market failure, (4) the government can do more harm than good, so the risk of false positives is greater than of false negatives, (5) government bureaucrats are so susceptible to regulatory capture that the goals of competition policy, once inoculated from politics, will be value-free efficiency and consumer welfare, and (6) competition policy should focus on hard-core price-fixing cartels. Stucke, *supra* note 13. The federal antitrust agencies similarly had a hands-off approach, with a few exceptions, to the media industries.

[64] *See id.* at 1009 – 12.

[65] *See* Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 521 (2007) (discussing the intersection of antitrust and behavioral economics).

[66] DANIEL E. HO & KEVIN M. QUINN, VIEWPOINT DIVERSITY AND MEDIA CONSOLIDATION: AN EMPIRICAL STUDY 62, *available at* http://ssrn.com/abstract=1121229.

The FCC recently voted to relax media cross-ownership restrictions.[67] FCC Chairman Kevin Martin's proposal to loosen the newspaper-broadcast cross-ownership ban in the top 20 cities was much more limited than his predecessor's attempt at wholesale transformation of the media ownership rules. Nonetheless, opposition was not long in coming. The U.S. Senate has already voted to nullify the rule through a "resolution of disapproval."[68]

Among other things, critics argued that Chairman Martin's proposal had a loophole that would allow cross-ownership in smaller markets, not just in the 20 largest markets.

The FCC's rationale for allowing owners of certain newspapers and television stations in the same market to merge is based on efficiencies: the merger will enable the owners to spread their high fixed costs for obtaining news over a greater audience. Thereby, the newspaper/television station owner will have a greater incentive to produce more news.[69] The FCC's key assumption is that cross-ownership in "the largest markets can preserve the viability of newspapers without threatening diversity by allowing them to spread their operational costs across multiple platforms" and newspapers "can improve or increase the news offered by the broadcaster and the newspaper."[70] The FCC Chairman defended relaxing the ownership restrictions to protect newspapers: "The newspaper industry has

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[67] The vote was three to two along party lines. The FCC adopted a presumption, in the top 20 Designated Market Areas (DMAs), that it is consistent with the public interest for one entity to own a daily newspaper and a radio station or, under the following circumstances, a daily newspaper and a television station, if (1) the television station is not ranked among the top four stations in the DMA and (2) at least eight independent "major media voices" remain in the DMA. In all other instances, the FCC will adopt a presumption that a newspaper-broadcast station combination would not be in the public interest, with two exceptions, and therefore emphasize that the FCC is unlikely to approve such transactions. Taking into account these respective presumptions, in determining whether the grant of a transaction that would result in newspaper-broadcast cross-ownership is in the public interest, the FCC will consider: (1) whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast outlet, and if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations. The FCC discussed the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity. *2008 FCC Report*, *supra* note 31, at Appendix A.

[68] *Senate Votes to Roll Back on Media Ownership*, RICHMOND TIMES-DISPATCH, May 16, 2008, at B11.

[69] *2008 FCC Report*, *supra* note 31, at ¶ 35.

[70] *Id.* at ¶ 24.

faced significant challenges recently and I feel we have to do all we can to ensure we continue to have a vibrant industry."[71]

Opponents have questioned whether the FCC should worry about newspapers' financial health since newspapers are generally outside the scope of the agency's expertise. Another question is whether the case has been made that the newspaper industry actually needs or would benefit from this particular type of regulatory relief.

It is worth recalling that in 2000, New York Times Co. Chairman Arthur Sulzberger, Jr., said, "From a business perspective, we will not achieve the financial success that can be ours without entering the world of television."[72] Seven years later, the Times sold its nine television stations and left its partnership with Discovery Communications on a joint television channel.[73] What changed? Apparently, the expected synergies never materialized. Moreover, newspapers, including the *New York Times*, discovered that it was cheaper to shoot digital video of a news event and post it on the newspaper's own Web site. This low cost video has proven to be popular with both viewers and advertisers.[74]

In addition, less restrictive alternatives exist to a full newspaper-television station merger. Content-sharing arrangements are already in place in many markets, although apparently not in the very largest markets.[75] Newspapers can and do collaborate with local television networks to promote their news content in ways that do not involve a full merger.

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[71] Stephen Labaton, *Few Friends for Proposal on Media*, N.Y. TIMES, Nov. 14, 2007 at C1. The industry trade association, Newspaper Association of America, however, complained that that the FCC's three Republican commissioners did not go far enough in relaxing the cross-ownership ban. *Id.*

[72] Frank Ahrens, *Newspaper-TV Marriage Shows Signs of Strain*, WASH. POST, Jan. 11, 2007, at D01.

[73] *Id.*

[74] *Id.*

[75] The Government Accountability Office's (GAO) recent survey of several media markets found agreements among stations to share content or agreements that allow one company to produce programming or sell advertising through two outlets. These agreements, "were prevalent in a variety of markets but not in the top three markets, suggesting that market size may influence the benefits that companies realize through such agreements." Letter from JayEtta Z. Hecker, *supra* note 35, at 2.

Finally, even if a newspaper-television station combination yields some efficiencies, one must ask: at what price? The inherent inefficiency of the marketplace of ideas sets it apart from mergers of ordinary commodities. In industries with high fixed costs and homogeneous products, a merger may enable firms to achieve economies of scale by rationalizing production lines. The machines run for longer periods, with greater output. Consumers in these industries may not desire product variety, and this loss of diversity is insignificant. But in the marketplace of ideas, a premium is placed on diversity of ideas.[76] Indeed, a concern with cost-saving efficiencies may point in the wrong direction when other values are at stake.[77] Cost-saving efficiencies may be beneficial when they yield greater output of better quality programming. But cost-savings alone are not dispositive: many competing independent news sources might confer a greater benefit to society than a highly efficient monopolist that produces a homogeneous news product.[78] Consequently, when cost-saving efficiencies are claimed in media mergers, the next administration should recognize the tension between cost-saving efficiencies arising from

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[76] While the newspaper venture may be more efficient, the marketplace of ideas would be diminished. *See, e.g.,* Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 45 (7th Cir. 1996) ("[a] market in which every newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one").

[77] As the former FTC Chairman noted, "an occasional loss of efficiency as a result of antitrust enforcement can be tolerated and is to be expected if antitrust is to serve other legitimate values." Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1074 (1979). *See also* BAKER, *supra* note 9, at 43 – 44.

[78] It might be very efficient if all the newspapers combined their news collection operations into one operation. News collection generally has high fixed costs. Reporting a story costs the same whether you have one reader or a million readers. This cost is reduced with each additional newspaper that is sold or read. Under one operation, the newspapers could eliminate their back offices, duplicate news bureaus, etc. The joint venture could better utilize its scarce resources, and achieve significant cost savings unattainable outside the venture. This joint venture may produce a lower-cost newspaper, with a lower newsstand price – so instead of paying fifty cents, one might pay a quarter for the newspaper. The American Antitrust Institute (AAI) expressed similar concerns following the computer system failure of the Voter News Service during the 2002 midterm election. The Voter News Service is a joint venture among five major television news organizations (ABC, CBS, NBC, Fox, and CNN), and the Associated Press, which is designed to produce and analyze election exit polling information. Until the 1988 election, the major news organizations did their own exit polling and made their election predictions independently. In 1990, ABC, NBC, CBS, and CNN formed Voter Research & Surveys, combining their exit polling operations as a cost saving measure. All six major news organizations relied on the same data and the same models, rather than competing to predict election results the most accurately. Following the 2000 elections, AAI blamed the networks' erroneous reporting of the presidential election results on the void of competition and urged the government to break up the joint venture. *See* Press Release, American Antitrust Institute, AAI Calls, Again, For Breakup of Voters [sic] News Service (Nov. 19, 2002), *available at* http://www.antitrustinstitute.org/Archives/215.ashx.

product homogenization, on the one hand, and a media policy seeking greater diversity in the marketplace of ideas.

C. *Number of Media Sources may be a Poor Indicator of Competitiveness*

In relaxing its cross-ownership rules, the FCC noted that the number of radio and television stations on the air since 1975 increased by approximately 76 percent and 83.5 percent, respectively.[79] It is a mistake, however, to confuse the number of media outlets with the robustness of competition in the marketplace of ideas.

Ordinarily for commodity goods, such as sugar, absent perfect price discrimination, an increase in output is a good proxy of increased competitiveness. But in the media industry, the increase in outlets delivering news "has generally not meant covering a broader range of stories."[80] Media industries may differ from other industries for several reasons.

First, "the number of independently owned media outlets in a given market," as the GAO found, "is not always a good indicator of how many independently produced local news or other programs are available in a market."[81]

Second, an increase in output (more media outlets) could simply mean fewer owners controlling more outlets. As discussed above, between March 1996 and March 2007, the number of commercial radio stations *increased* by 6.8 percent, but the number of radio owners *decreased* by 39 percent. Likewise, the number of full-power television stations significantly increased, while the number of unique television station owners decreased.

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[79] *2008 FCC Report*, *supra* note 31, at ¶ 24.

[80] PROJECT FOR EXCELLENCE IN JOURNALISM, OVERVIEW, *supra* note 19.

[81] In five markets that the GAO surveyed, the television stations were participating in operating agreements. The five markets were Nashville, Tennessee; Wilkes Barre/Scranton, Pennsylvania; Springfield, Missouri; Myrtle Beach/Florence, South Carolina; and Terre Haute, Indiana. For example, in Wilkes Barre/Scranton, the GAO identified eight television stations. But one owner of two stations participated in an agreement with a third station and the remaining four television stations participated in two separate agreements—each agreement covering two stations. Thus, while there are eight television stations and seven owners in Wilkes Barre/Scranton, there are actually only three loose commercial groupings in the market. Letter from JayEtta Z. Hecker, *supra* note 35, at 7.

The number of newspapers remained about the same between 2002 and 2005, but the number of newspaper owners also declined.[82]

Third, media sources are not interchangeable or of equal weight. Some defense counsel in a media merger justify an "all media market," as many local outlets carry some news or advertising. But the empirical evidence shows the continuing importance of the local daily newspaper, followed by the local television station in gathering and investigating news. Thus to observe that 40 media outlets exist in one city may say little about the competitiveness of the marketplace of ideas. Typically, many publications cover discrete commodities (such as autos or real estate), are targeted for specific religious or ethnic audiences, or are limited to community events. Given the "relatively unanimous support" for the fact that consumers "continue predominantly to get their local news from daily newspapers and broadcast television,"[83] allowing these two dominant news sources to merge can pose greater risk to the marketplace of ideas than allowing a newspaper to acquire other less news-intensive media.[84]

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[82] *See supra* note 35.

[83] *2008 FCC Report*, *supra* note 31, at ¶ 57.

[84] In 2003, the FCC introduced a Diversity Index that sought to give its media ownership framework an empirical footing. The Diversity Index was modeled on the Herfindahl-Hirschman Index (HHI) used by the federal antitrust agencies in merger cases. The FCC selected which media to include based on consumers' reported preferences. It then weighted the media based on their popularity (for example, television stations received a greater weight than newspapers). To apply the Diversity Index in a specific market, the FCC counted the number of media outlets in the market. Each outlet of a certain type of media was given an equal weight with every other outlet of the same type. Finally, the FCC summed the squares of the weighted ownership shares to calculate the market's Diversity Index score. The Court of Appeals for the Third Circuit rejected the FCC's Diversity Index for a number of reasons, including the equal weighting of outlets. Prometheus Radio Project v. FCC, 373 F.3d 372 (3rd Cir. 2004). As the Third Circuit wrote, "[a] Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America [the *New York Times*] also requires us to abandon both logic and reality." *Id.* at 402 – 03. The FCC subsequently recognized that its Diversity Index is an inaccurate tool for measuring diversity, that some aspects of diversity may be difficult to quantify, and thus abandoned its Diversity Index. *2008 FCC Report*, *supra* note 31, at ¶¶ 16 – 17. Professor Eli Noam and DOJ attorney Brian Hill have each suggested alternatives to the Diversity Index designed to remedy the shortcomings the Third Circuit identified. Professor Noam proposes adding a measure of the number of voices in a market to generate a combined number that corrects the concentration index by giving better scores to markets with more distinct voices. The insight behind this approach is that one is better off with the choice of more radio stations on the dial or another newspaper at the kiosk even if these outlets do not draw large crowds. Eli Noam, *How to measure media concentration*, http://www.citi.columbia.edu/elinoam/FT/8-30-04/measure.htm. Mr. Hill proposes an entirely new formula that he argues is better able to satisfy the major two assumptions that both the FCC and Third Circuit thought were critical: (1) diversity in a media market should decrease with ownership concentration; and (2) the contribution to diversity of an individual entity, its diversity importance, should increase with the

Fourth, even if two competing television stations had comparable weight, it is problematic, or as Judge Learned Hand asserted "impossible," to treat different news services as "interchangeable."[85] In *Associated Press*, newspapers, which were excluded from the dominant AP news service joint venture, could obtain news from other news services. This did not mitigate the competition concerns. Nor was the fact that readers could read the AP news stories in one local newspaper determinative. A newspaper reflects the biases and views of its writers, editors, and owners. One newspaper may downplay and truncate a news wire story, the other newspaper may carry it as a headline. These are not fungible commodities. Thus, the media marketplace is not about consumers switching from one homogeneous product to another. Rather, it should be concerned with the net increase in consumer welfare from having many competing and diverse news sources and editorial voices. As Judge Hand stated about the marketplace of ideas, "it is only by cross-lights from varying directions that full illumination can be secured."[86] Unlike restraints on ordinary commodities (where consumers may turn to less-desirable alternatives but the overall societal impact is insignificant), for restraints in the media, the alternatives may be inherently unsatisfactory and the costs imposed on society may be significant.[87]

IV. Some Proposals for the Incoming Administration

A. A Coherent Media Policy

Given the importance of the marketplace of ideas to our democracy and free-market economy, it is time for the next administration to examine the way information flows in the marketplace of ideas, the potential bottlenecks, and mechanisms to promote competition.

Congress recently held a range of hearings on media-related topics, including specific media mergers, the "digital future," net neutrality, piracy, the role of private equity, as

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weighted market shares of that entity's outlets. Brian Hill, *Measuring Media Market Diversity: Concentration, Importance, and Pluralism*, 58 FED. COMMS. L.J. 169 (2006). In this regard, a recent thoughtful article highlighted the challenges of empirically capturing substantive viewpoint diversity. *See* HO & QUINN, *supra* note 66.

[85] United States v. Assoc. Press (AP I), 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) (AP II).

[86] *AP I*, 52 F. Supp. at 372.

[87] *See AP II*, 326 U.S. at 28 (Frankfurter, J., concurring).

well as FCC oversight hearings. Ideally, a national media policy would emerge from these hearings, including media specific legislation and new ways to further the other goals of any media policy, such as localism and diversity.[88]

Other countries, including Germany, England, Norway, Sweden, and the Netherlands have taken steps to limit concentration and promote editorial independence.[89] Some possibilities discussed by C. Edwin Baker and others include requiring more extensive premerger review, applying presumptions against media mergers under certain defined circumstances, barring certain types of transactions entirely, explicitly taking editorial independence into account, giving journalists a say or even a veto in merger decisions, imposing some non-content-based access requirements on dominant firms, changing tax and subsidy policies, and strengthening antitrust enforcement through more objective criteria (e.g., presumption of illegality based on market share).[90] Today's ad hoc, piece-meal policy work by each regulatory fiefdom is inadequate. Congress needs to step in, clearly define the policy goals, and legislate media-specific competition laws. To accomplish this task, Congress should establish a commission composed of diverse stakeholders to examine further these issues of media ownership, conduct hearings, and to make recommendations to Congress, which Congress can implement.

Nor should media policy be left exclusively to one federal agency's domain. Each agency should have a defined role in preserving the marketplace of ideas. The roles should be complementary, and further the overall policy objectives. Today, a telecommunications merger may not necessarily violate the Clayton Act, but still fail the FCC's public interest standard and ownership restrictions. In essence, one does not necessarily follow from the other.[91]

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[88] It would be useful for Congress during the next administration to identify best practices relating to media ownership and ways to promote minority ownership.

[89] For a survey of various nations' approaches to media mergers, see ORGANIZATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, MEDIA MERGERS 16 (2003), *available at* http://www.oecd.org/dataoecd/15/3/17372985.pdf.

[90] BAKER, *supra* note 9, at 163 – 89.

[91] *See, e.g.,* United States v. Radio Corp. of Am., 358 U.S. 334, 350 n.18 (1959) (stating that while the FCC may deny applications under its public interest standard where antitrust violations exist, "its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has

B. *Further Empirical Work on Media Mergers' Impact Beyond Advertising Markets*

For some media industries, the federal antitrust agencies examine only the merger's likely impact on advertising rates[92] (and do not revisit the market post-merger to determine if it predicted correctly). But reduced price competition for advertising and programming is not the only (or even primary) potential anticompetitive effect from a media merger. Indeed, one will miss an important part of the competitive landscape if the focus is solely advertising.

All media compete to varying degrees with other media for advertising dollars. This is of particular importance in the newspaper, television, and radio industries, where the competition extends beyond advertising prices. National newspapers, such as the *New York Times* and *Wall Street Journal*, compete against other media for national advertisements; daily newspapers compete against craigslist for classified ads. By June 2006, Google had 45% of advertising revenue for search engines; but when it comes to news, Google is primarily an aggregator with apparently little investment in the traditional

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not been violated, and therefore cannot forestall the United States from subsequently challenging those transactions").

[92] *See supra* note 34. In the 2002 Biennial Review Order, the FCC defined advertising as the primary economic market in which broadcast stations and newspapers derive their primary sources of revenue. The FCC concluded that for purchasers of advertising time, "newspapers, television, and radio are not good substitutes and therefore make up distinct product markets." Thus, the only "economic" market in which broadcast stations and newspapers compete is advertising, and thus the only relevant product market is advertising. Report & Order and Notice of Proposed Rule Making, 2002 Biennial Regulatory Review et al., MB Docket Nos. 02-277, 01-235, 01-317, 00-244, and 03-130 ¶ 331 (released July 2, 2003). The FCC in liberalizing its media cross-ownership rules in 2008 continued to support that conclusion and found "no reason to deviate from the defined product market." The FCC continues to believe that newspaper-broadcast combinations "cannot adversely affect competition in *any* relevant product market." *2008 FCC Report*, *supra* note 31, at ¶ 39 n.131 (emphasis added). This is nonsense. In reaching this position, the FCC relied on statements by media companies Gannett and Hearst (who have an interest in the outcome of the FCC's rules) that "very little advertising substitution exists between daily newspapers and broadcast outlets." Report & Order, *supra, at* ¶ 332. The FCC ignores Gannett's and Hearst's contrary representations in their SEC filings, which emphasize the competition between newspapers and television. *See* Gannett Co., Inc., Annual Report (Form 10-K) at 8 (Feb. 28, 2008) (newspapers and affiliated Web sites "compete with other media for advertising principally on the basis of their performance in helping to sell the advertisers' products or services and their advertising rates . . . . Most of the company's newspapers compete with other newspapers published in nearby cities and towns and with free-distribution and paid-advertising weeklies, as well as other print and non-print media, including magazines, television, direct mail, cable television, radio, outdoor advertising and Internet media."); Hearst Argyle Television Inc., Annual Report (Form 10-K) at 12 (Feb. 28, 2008) (its broadcast television stations "compete for advertising revenues with other broadcast television stations, as well as with a variety of other media, such as newspapers, radio stations, magazines, outdoor advertising, transit advertising, yellow page directories, direct mail, the Internet and [multichannel video programming distribution] serving the same market").

newsgathering function.[93] Likewise, craigslist in some cities is a significant competitor for online classified ads; but craigslist has no traditional news gathering function.[94] Thus, Google and craigslist may be formidable competitors with the traditional media for certain advertisers, but are not competitive threats for newsgathering. This increase in *advertising* competition does not translate into competition for better journalism (indeed the reverse may be true as many major newspapers are downsizing staff, reducing newshole (the amount of space devoted to news), and eliminating news bureaus). If advertising were the sole focus, the traditional news media in a community could freely merge, given craigslist, Google, and other vehicles for online advertising.

It is important to any media policy to consider media mergers' impact on other policy objectives besides lower advertising rates. Media consolidation may adversely affect, for example, nonprice editorial competition,[95] and noneconomic policy considerations such as localism and diversity.

The next issue is what mechanism should be implemented to promote these values, and what should be antitrust's role? DOJ historically and recently challenged anticompetitive restraints in the print media based in part on their impact on the marketplace of ideas, specifically the loss of editorial competition.[96] The DOJ is challenging currently the loss of the editorial competition resulting from alleged abuses of a newspaper joint operating agreement. In its complaint involving two leading West Virginia newspapers, the United States alleged that local daily newspapers, such as the *Charleston Gazette* and the *Charleston*

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[93] PROJECT FOR EXCELLENCE IN JOURNALISM, ONLINE, *supra* note 59. The 100 largest media companies (in terms of 2005 revenues) owned 16 of the top 20 popular online news sites, as ranked by Nielsen/Net Ratings. *Id.*

[94] Started as a hobby by Craig Newmark in early 1995, craigslist provides local classifieds and forums for 450 cities worldwide. With more than 9 billion page views and more than 30 million people using craigslist each month, the Internet site publishes each month more than 30 million new classified ads and 2 million new job listings. Craigslist, *Factsheet*, http://www.craigslist.org/about/factsheet.html (last visited May 23, 2008).

[95] It is well accepted, and a matter of everyday experience, that price is not the sole measure of competition. Companies can, and often do, compete on other dimensions, such as quality, service, and innovation. Newspapers historically invested in editorial content to attract readers, which in turn attracted advertisers.

[96] *See, e.g.*, United States v. Citizen Publ'g Co., 280 F. Supp. 978, 985 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969); United States v. Times Mirror Co., 274 F. Supp. 606, 612 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968); Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1166 (W.D. Ark. 1995), *aff'd*, 139 F.3d 1180 (8th Cir. 1998).

Daily Mail, provide a unique package of attributes for their readers. They provide national, state, and local news in a timely manner and in a convenient, hardcopy format. The news stories featured in such newspapers are more detailed, when compared to the news reported by radio or television, and they cover a wide range of topics of interest to local readers, not just major news highlights. Newspapers are portable and allow the reader to read the news, advertisements, and other information at his or her own convenience. Readers also value other features of local daily newspapers, such as calendars of local events, movie and TV listings, classified advertisements, commercial advertisements, legal notices, comics, syndicated columns, and obituaries. Most readers of local daily newspapers in the Charleston area do not consider weekly newspapers, radio news, television news, Internet news, or any other media to be adequate substitutes for the two local daily newspapers serving the Charleston area.[97]

In challenging a market allocation scheme between the nation's two largest alternative newsweekly publishers, DOJ described the competition between the defendants' alternative newsweeklies. Readers and advertisers benefited with better editorial coverage, heavily discounted advertising rates, and higher quality service.[98] The FTC, for its part, was sensitive to the marketplace of ideas in the merger between AOL and Time Warner.[99]

But for other media industries, such as radio, the federal antitrust agencies examine the merger's impact only on advertising rates. Considering a merger's impact on editorial competition for some media and not others makes little sense. But the larger issue is whether this is suitable for antitrust inquiry. Some argue that the competition agencies

[97] Complaint, United States v. Daily Gazette Co., Civ. Act. No. 2:07-0329 (S.D. W.Va.) (filed May 22, 2007), *available at* http://www.usdoj.gov/atr/cases/f223400/223469.htm.

[98] For example, in challenging the defendants' market allocation scheme, the United States discussed the evidence of the intense editorial competition. The defendants' alternative newsweeklies responded to the other's editorial changes and improvements by introducing new or better features or increasing investigative journalism to recapture the readers' attention to its publication. The different, and at times opposing, views and positions of the defendants' competing alternative newsweeklies provided "readers with alternative viewpoints of important local events affecting social, political, esthetic, and moral issues." Competitive Impact Statement, United States v. Village Voice Media, LLC, and NT Media, LLC, Civil Act. No. 1:03CV0164 (N.D. Oh. Feb. 3, 2003), *available at* http://www.usdoj.gov/atr/cases/f200700/200715.htm.

[99] America Online and Time Warner, FTC Docket No. C-3989. *See* Press Release, Federal Trade Comm'n, FTC Approves AOL/Time Warner Merger with Conditions (Dec. 14, 2000), *available at* http://www.ftc.gov/opa/2000/12/aol.htm.

should look beyond a media merger's impact on advertising rates and services and consider its impact on nonprice competition, which includes editorial competition[100] and choice.[101] Others argue that editorial competition involves noneconomic concerns better left to other agencies, such as the FCC. Although the courts have found that editorial competition among newspapers is cognizable under the competition laws,[102] there remains the concern that a particular administration may use editorial competition as a vehicle to punish or support a media company, based on the media's views toward the administration and its policies. Despite these differences, no one advocates that the government agencies make normative judgments about whether the *Wall Street Journal* would be a better newspaper in the hands of the Murdochs, Grahams, or Sulzbergers.

Instead, one mechanism to promote a vibrant marketplace of ideas and avoid these normative judgments might be to revise the structural ownership requirements (such as FCC caps on ownership). In addition, as certain proponents argue, antitrust should have a role if direct evidence of market power exists.[103] Direct evidence of past anticompetitive restraints in that market, or natural experiments in other geographic markets (for example, evidence of anticompetitive effects where one of the merging parties recently acquired its direct competitor) should establish a prima facie Section 7 violation. Another category of potential concern is the transmission/content arena, when a company that dominates the transmission of information seeks to enter the content side.[104]

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[100] *See* Stucke & Grunes, *supra* note 2, at 270 – 73.

[101] *See* Averitt & Lande, *supra* note 53, at 207. For example, if the broadcast networks were to combine their news operations, but each independently set its own advertising rates, the merger might not be challenged if the marketplace of ideas were excluded from the analysis. Even though the evening news would remain free, and the ad rates would remain competitive, the nonprice competition among the news networks would be eliminated because the loss of editorial diversity could not be readily replaced.

[102] The most recent decisions are United States v. Daily Gazette Co., No. 2:07-03292008, WL 2895899, at *6 (S.D.W.Va. June 19, 2008); Reilly v. MediaNews Group, Inc., No. C 06-04332 SI, 2007 WL 1068292, at *3 (N.D. Cal. 2007) (Judge Illston holding that the alleged loss of editorial competition was sufficient for antitrust injury). *See also* Hawaii v. Gannett Pac. Corp., 99 F. Supp. 2d 1241, 1249 – 50 (D. Haw. 1999), *aff'd*, 203 F.3d 832 (9th Cir. 1999).

[103] *See* Stucke & Grunes, *supra* note 2, at 299 – 302.

[104] This was the situation in the *AT&T* case. United States v. AT&T Corp., 552 F. Supp. 131, 176 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). And it may arise in a merger between a major cable operator and movie studio (the anticompetitive effects of which prompted in part the 1992 Cable Act). Congress found, in enacting the 1992 Cable Act, that a cable operator has an incentive to favor its affiliated programmers. But a cable operator also has an incentive to offer an attractive package of programs

C. *Promoting Access to the Marketplace of Ideas*

Given traditional media's high fixed costs and significant entry barriers,[105] concentrated media ownership can hinder competition. The next administration should affirmatively examine how information flows in the marketplace of ideas and what remedial steps can remove any bottlenecks.

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to its subscribers. When these two incentives are in conflict, "the operator may, as a rational profit-maximizer, compromise the consumers' interests." Time Warner Entm't Co. v.United States, 211 F.3d 1313, 1322 (D.C. Cir. 2000). This scenario arose in a consent decree involving Time Warner's acquisition of Turner Broadcasting System. Time Warner Inc., Turner Broad. Sys., Inc., Tele-Communications, Inc., and Liberty Media Corp., Dkt. No. C-3709 (Feb. 3, 1997). The FTC believed that its enforcement action was wholly consistent with the goals of Congress in enacting the 1992 Cable Act in providing greater access to programming and promoting competition in local cable markets. Statement of Chairman Pitofsky, and Commissioners Steiger and Varney in Time Warner Inc., Turner Broad. Sys. Inc., Tele-Communications, Inc., and Liberty Media Corp., FTC Docket No. C-3709 (Feb. 3, 1997). One of the consent decree provisions required Time Warner to place a rival to its newly acquired CNN on certain of its cable systems. The FTC responded that this narrowly drawn provision was designed to restore the incentives Time Warner would otherwise have had to carry rivals to CNN but for the fact of this acquisition. The FTC believed that Time Warner's acquisition of CNN, as alleged in the complaint, gave it both the ability and incentive to make entry of competing news services more difficult, by denying them access to its extensive distribution system. Letter from FTC Secretary Donald S. Clark to Brian P. Lamb, C-SPAN, in response to Lamb's comment about the FTC's consent decree regarding the acquisition of Turner Broadcasting System, Inc. by Time Warner Inc., and Tele-Communications, Inc.'s and Liberty Media Corporation's Proposed Acquisitions of Interests in Time Warner, FTC Docket No. C-3709 (Feb. 3, 1997). The FTC observed that courts have upheld against First Amendment challenge regulations specifically designed to address competitive concerns arising from vertically integrated cable companies' monopoly control over distribution. What is also interesting is that the FTC abstained from determining which rival to CNN must be carried on the cable network. "In this case, there is even greater reason to avoid a more intrusive role, since programming content would be unavoidably implicated – the selection of one competitor over another inevitably determines to some degree the content of the new entry. In addition, excessive involvement in the selection process could conflict with the goal that the antitrust laws, and antitrust remedies, are intended to protect competition, not competitors." Statement of Chairman Pitofsky and Commissioners Steiger and Varney in Time Warner Inc., Turner Broad. Sys. Inc., Tele-Communications, Inc., and Liberty Media Corp., FTC Docket No. C-3709 (Feb. 3, 1997). A similar concern arose in the AOL/Time Warner merger, prompting restrictions against AOL/Time Warner from discriminating on the basis of corporate affiliation in the transmission of content. *See* Analysis of Proposed Consent Order to Aid Public Comment, America Online, Inc., and Time Warner Inc., FTC Docket No. C-3989, *available at* http://www.ftc.gov/os/2000/12/aolanalysis.pdf; *see also FTC Backs AOL-Time Warner Merger*, J. RECORD, Dec. 15, 2000, *available at* 2000 WLNR 4524846 (quoting Chairman Robert Pitofsky) ("Our concern here was with access, that these two powerful companies would create barriers that would injure competitors"); *AOL Merger Clears Last Big Hurdle*, WASH. POST, Dec. 15, 2000, at A1 (quoting Commissioner Leary) ("I had and I continue to have concerns about these content issues.").

[105] Television, cable, and radio have regulatory barriers and high fixed costs. Newspapers have high fixed "first copy" costs. Publishing the first copy of a newspaper is high, given the reporting and editorial costs, the infrastructure to print newspapers, and costs to solicit advertisers. The marginal cost of producing the second, third, and fourth copies is very low and remains low up to the newspaper's printing capacity. *See* WORLD BANK, *supra* note 56, at 183.

The Supreme Court of late has displayed great faith in regulation to diminish the likelihood of and remedy anticompetitive harm.[106] It would be a mistake, however, to believe that regulatory dictates alone could replicate a competitive marketplace of ideas. In addition to the risks of imperfect information and regulatory capture, government regulators, unlike private actors (who bear the costs of their mistakes), may undertake anticompetitive actions because of weaker incentives to avoid mistakes, political myopia, and the lack of direct accountability to the public.[107] As Alfred Kahn stated, the "essential task of public policy in a free enterprise system should be to preserve the framework of a fair field and no favors, letting the results take care of themselves."[108] Similarly, to prevent the formation of monopolies, the United States historically focused on maintaining competitive market structures, rather than regulatory dictates.[109] Indeed, the 1996 Act was deregulatory in its approach, continuing the shift of the telecommunications industry away from a heavily regulated industry (with behavioral restrictions) to the aspired open competition (with structural restrictions).[110]

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[106] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004).

[107] François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. ECON. 847, 850 (2004). For example, the Federal Energy Regulatory Commission's (FERC) merger review policies were recently criticized for relying on data supplied by the regulated entities, rather than on data generated by its own independent fact gathering and analysis of market definition. Sara Stefanini, *Think Tank Urges FERC to Reform Merger Policies*, COMPETITION LAW 360 (Mar. 15, 2007), *available at* http://competition.law360.com/Secure/ViewArticle.aspx?id=20553; *see also* Comments of Diana Moss at FERC Technical Conference on Electricity Merger Policy (Mar. 14, 2007), *available at* http://www.antitrustinstitute.org/Archives/FERC_comments.ashx.

[108] Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 39 (1953).

[109] Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 178 – 79 (2002) (FTC enforcement efforts during the 1990s were directed toward preserving open access to markets). Thus, Section 1 of the Sherman Act focuses on concerted activity to eliminate competitors and raise entry barriers. Section 7 of the Clayton Act prevents mergers that tend to create a monopoly. Attempts to monopolize violate Sherman Act Section 2. *See* Maurice E. Stucke, *Should the Government Prosecute Monopolies?,* 2009 U. ILL. L. REV. (forthcoming 2009), *available at* http://ssrn.com/abstract=1116463.

[110] Congress's intent, as expressed by the 1996 Act, is that the antitrust analysis should be primarily conducted by the federal antitrust agencies and not by the FCC. While the FCC's "public interest" standard and ownership control regulations touch upon antitrust issues, Congress wanted DOJ and the FTC independently and carefully to review media mergers and their impact on competition in the marketplace of ideas. The legislative history of the savings clause to the 1996 Act shows that the FCC regulatory scheme does not preempt antitrust review of media mergers generally, and the marketplace of ideas specifically. Stucke & Grunes, *supra* note 2, at 288 – 94.

Thus, the best remedy for media monopolies is to prevent their formation, through (1) structural mechanisms (such as cross-ownership restrictions and caps on ownership both nationally and in local markets), (2) removal of bottlenecks and any government-imposed entry barriers, and (3) active and informed antitrust enforcement to enjoin anticompetitive media mergers. The administration, for example, should be vigilant against any onerous government regulations that reduce the media's independence or distort the provision of information. This means keeping the media independent and free from governmental control or improper influence.[111]

The next administration should also examine mechanisms to foster the free flow of information. Under an evolutionary economic perspective, not only is experimentation critical, but so is the dissemination of information of that experimentation and feedback from it.[112] Division of labor has increased specialization of knowledge, whereby individuals know much about a limited area. This specialization of knowledge can increase transaction costs (namely, ascertaining the measurement and performance characteristics of goods and services outside one's area of expertise).[113] Moreover, the dispersion of information in society and the attendant search costs can inhibit our understanding of the sources of poor economic performance and thwart dynamic efficiency. This is precisely where the government can play a key role in further "integrating the dispersed knowledge essential to efficient production in a world of specialization."[114] In facilitating "the greatest possible centralization of information, and diffusion of it from the centre,"[115] the government can more cheaply inform market participants. This does not mean having the government evaluate or filter the information's content. Instead, the government can evaluate additional steps to promote

[111] The World Bank noted, "[h]igher levels of perceived media freedom or independence are associated with lower levels of perceived corruption, regardless of differences in a country's level of income." WORLD BANK, *supra* note 56, at 182.

[112] A positive feedback loop for example may emerge from the learning effects of diffused technologies. For example, as end-users experiment and alter a particular technology, the suppliers learn from this diffusion. In the next round, the suppliers, in turn, can offer this greater diffusion of offerings, which various users can further modify. RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 402 (1982); *see also* Moreau, *supra* note 107, at 869.

[113] DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 73 (2005).

[114] *Id.* at 164.

[115] JOHN STUART MILL, ON LIBERTY 123 (David Bromwich & George Kateb eds., 2003).

the free flow of information and reduce search costs.[116] These steps may include creating antitrust safe harbors for private individuals to (1) publicly disseminate price, wage, and other information,[117] or (2) promote novel forms of information dissemination, such as prediction markets, whereby individuals bet on future outcomes.[118] To foster accountability—and lower the media's search costs—the government can promote its own transparency and remove restraints in accessing such information.[119]

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[116] For example, the government can promote benchmarks so that consumers can readily compare prices of goods, such as retail fuel prices, mattresses, and cell phone services. In markets with many sellers, buyers may have high search costs to identify the lowest-priced seller. Increased price transparency may make it easier for buyers to compare prices and bargain shop, reducing their search costs. Retail fuel prices can be moderately affected if Web sites publish the comparative prices at local pumps on a timely basis, and government should be vigilant against any private restraints to inhibit this transparency; in locations where private resources do not make this information available, local governments might well step in.

[117]Making available historical price, supply, or cost data may also enable each competitor to benchmark its performance to an industry standard. For such exchanges, the federal antitrust agencies have outlined some steps to mitigate litigation risks by (1) having a third party, e.g., a purchaser, government agency, consultant, academic institution, or trade association, collect the data, (2) basing the information provided by the participants on data more than three months old, (3) having at least five providers report data upon which each disseminated statistic is based, with no individual provider's data representing more than 25 percent on a weighted basis of that statistic, and (4) aggregating any information disseminated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider. *See* DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 63 (1996), http://www.usdoj.gov/atr/public/guidelines/0000.pdf; *see also* Letter from R. Hewitt Pate, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Diana West, Internationally Board-Certified Lactation Consultants (May 25, 2004), *available at* http://www.usdoj.gov/atr/public/busreview/203831.pdf (explaining that the Division would not challenge the collection of fee information for a survey among competitors, which would be collected following the principles outlined in the Health Care Guidelines). For a further discussion of the antitrust risks of the dissemination of price information, see generally Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency*, 19 ANTITRUST 81 (2005).

[118] *See* KENNETH J. ARROW ET AL., AEI-BROOKINGS JOINT CTR., STATEMENT ON PREDICTION MARKETS 2 (2007), *available at* http://wwm.com/abstract=984584.

[119] The Freedom of Information Act, 5 U.S.C. § 552 (2000), for example, was enacted to foster this transparency. For a critique of its success and shortcomings in recent years, see generally ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE (2006).