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## Media Concentration: Giving Up on Democracy

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## MEDIA CONCENTRATION: GIVING UP ON DEMOCRACY

*C. Edwin Baker*\*

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During the twentieth century, virtually all western democracies saw growing media concentration as a threat to freedom of the press and to democracy. Most have adopted laws to support press diversity, whether through competition (antitrust and media specific) laws or subsidy arrangements, often subsidies targeted specifically to support weaker competing media.<sup>1</sup> Historically, it has been the same in the United States. A famous journalist and press critic, A.J. Liebling, long ago quipped: “freedom of the press belongs to those who own one.”<sup>2</sup> Liebling’s quip makes ownership central. And that has been the general view. Although very cautious about government intervention,<sup>3</sup> the single most important, semi-official study of the mass media in U.S. history, the Hutchins Commission Report of 1947,<sup>4</sup> saw the problem of concentration—the “decreased proportion of the people who can express their opinions and ideas through the press”—as one of three factors threatening freedom of the press.<sup>5</sup> They accepted the reality that modern economic forces drive inexorably toward media concentration.<sup>6</sup> Even then, most American cities

1. See PETER J. HUMPHREYS, MASS MEDIA AND MEDIA POLICY IN WESTERN EUROPE 66-110 (1996).

2. A.J. LIEBLING, THE WAYWARD PRESSMAN 265 (1947). In slightly different words—“freedom of the press is guaranteed only to those who own one”—the same remark is quoted from later sources. *E.g.*, A.J. LIEBLING, THE PRESS 32 (2d rev. ed., 1975).

3. See THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS 5, 83-86 (1947).

4. See *id.*

5. *Id.* at 1; see also *id.* at 17, 37-44. Although clearly focused on dangers of media concentration, Chafee was very skeptical of use of law to restrict it. See ZECHARIAH CHAFEE, JR., 2 GOVERNMENT AND MASS COMMUNICATIONS, A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS 537-677 (1947). For example, though favoring “a very sparing use of the Antitrust Laws against communications industries,” *id.* at 674, Chafee emphasized the little the antitrust laws could do, *id.* at 653, 676-77, and the dangers in their use, *id.* at 666-74.

6. *Cf.* CHAFEE, *supra* note 5, at 617 (“It is obvious, then, that bigness in the press is here to stay, whether we like it or not.”).

were coming to face daily newspaper monopolies, a trend that has since increased, leaving only a handful of American cities with separately owned and operated daily papers.<sup>7</sup> One way to understand the Commission's central recommendations concerning the need for a "socially responsible press" is that it tried to make the best of a bad situation.

The media is a huge non-democratically organized force that has major power over politics, public discourse, and culture. As such, it is not a surprise that media concentration receives great attention. Just as in Europe, where pressure for governmental responses came mostly from Left and Centrist political parties, trade unions, journalists' associations, and consumer groups,<sup>8</sup> many Americans, especially on the left and center, but many conservatives as well, see media concentration as a problem and dispersed ownership as crucial for democracy.<sup>9</sup> Legal policy long reflected that view. Nevertheless, the last twenty years have seen a remarkable change in the legal treatment of media concentration. This Article aims to describe and evaluate that change.

This recent change has had three fronts. Most overtly, there has been a dramatic reduction in legal restrictions on ownership concentration, especially related to broadcast and cable media and to media cross-ownership. Second, there has been a change, often unarticulated, in the view of appropriate criteria or standards with which to identify objectionable concentration. Something resembling antitrust standards

7. In 1910, with much smaller populations, 689 American cities or towns had competing (i.e., separately owned and operated) daily newspapers. C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 16, 146 n.34 (1994). In 1940, shortly before the Hutchins Commission's Report, the number had fallen to 181. *Id.* By 2002, the number was 14. Walt Brasch, *The Media Monolith: Synergizing America*, COUNTERPUNCH, at <http://www.counterpunch.org/brachmedia.html> (Feb. 9, 2002). In addition, another twelve cities had Joint Operating Agreements (JOA), that is cities with two or more papers that are required to be editorially independent but are operated jointly as one business. Facts About Newspapers 2001, available at [http://www.naa.org/info/facts01130\\_jointop/index.html](http://www.naa.org/info/facts01130_jointop/index.html).

8. See HUMPHREYS, *supra* note 1, at 94.

9. The literature is filled with both popular and scholarly discussions. Robert McChesney is possibly the best known leftist currently emphasizing the concern. See, e.g., EDWARD S. HERMAN & ROBERT W. MCCHESENEY, *THE GLOBAL MEDIA: THE NEW MISSIONARIES OF CORPORATE CAPITALISM* (1997). More centrist is BEN H. BAGDIKIAN, *THE MEDIA MONOPOLIES* (6th ed. 2000). A partial dissenter might describe the central problem as involving market forces generally as the main determinant of the media content, not the specifics of ownership. See, e.g., ROBERT BRITT HORWITZ, *COMMUNICATION AND DEMOCRATIC REFORM IN SOUTH AFRICA* (2001). Objection to the distorting effects of market-based commercialism was, for example, the basis of European commitment to public broadcasting. Most European courts find a public monopoly over broadcasting to be consistent with broadcasting freedom and some countries view the existence and adequate support of public broadcasting, at least in some contexts, to be constitutionally required. ERIC BARENDT, *BROADCASTING LAW: A COMPARATIVE STUDY* 57-59, 69-70, 74 (1993). Obviously, the same critic can object to both concentrated ownership or market forces.

that look solely at market power to raise prices above competitive levels has replaced previously invoked democratic concerns. Finally, within constitutional doctrine, especially in the lower courts, there has been an unarticulated change from viewing the press as consisting of instrumentally-valued entities that are protected for how they serve people's need for a robust communication order to viewing media entities as being rights-bearing units in their own right. This changed conception changes in turn the view of media structural regulation from being an often appropriate means to serve First Amendment interests in a free and diverse communications order to being a presumptive interference with corporate entities' First Amendment rights.

Parts I (related to constitutional doctrine) and II (related to legal regulation) of this Article will critically describe these shifts, including the underlying assumptions that support them. These Parts provide the empirical basis for the Article title. My evaluative claim is that the legal order is giving up on democracy in two profoundly troubling ways. First, policy makers, especially in the FCC, have been abandoning their earlier concerns with how media ownership can be structured to further a democratic society and are now apparently concerned only with making the media more responsive to demands for commodities. Second, judicial doctrine evidences a declining willingness to accept legislative structural policies in the media area, in a sense going back to a *Lochner*-era, unreflective notion of existing property distributions as a natural baseline. This change essentially replaces democracy, which has authority to make structural policy to further people's values, with the market as a measure of value. Both in administrative realms and implicitly in lower court constitutional decisions, there has been a fundamental shift away from the notion that the government aim should be to promote a democratic communications order. The new attitude is that the only goal of regulation should be to assure efficient production of commodified media products within competitive markets.

My criticism of the shift would be inapt if ownership concentration is not a problem. Thus, Part III describes but then rejects arguments that the concern with ownership and undue concentration is either misguided or, at least, vastly overstated. Unless those arguments are rightly rejected, antitrust law as currently practiced may embody the only needed limits on ownership. Finally, Part IV catalogues some more specific objections to mass media concentration and suggests elements of more desirable policies. Both Parts III and IV assert that the special democratic and cultural role of the media, as well as specific features of the market for media goods, explain why even a *desirable* recasting of antitrust law to

include consideration of “non-economic” factors<sup>10</sup> would be insufficient for optimal media ownership regulation. Thus, these Parts argue for special media-related ownership policies.

## I. CONSTITUTIONAL FRAMEWORK

Legal regulation of concentration consists in two parallel but intersecting stories: the legal regime adopted by Congress or state legislative bodies and expanded by administrative agencies, and the constitutional standards that this regime must meet. Change could occur in either the regime favored by policy makers or the constitutional standards formulated by the courts. In fact, change has occurred in both dimensions. Although, as will become clear, holding the two separate is somewhat artificial,<sup>11</sup> here I will consider the situation as it appears constitutionally and then in Part II look at development within the actual legal regime.

The First Amendment might have at least four possible relations to media concentration. Arranged in order of increasing opposition to concentrated media, the First Amendment might: (i) require government to limit concentration, (ii) prohibit government from affirmatively promoting concentration, (iii) leave government relatively free to choose structural media policies in general or at least in respect to concentration, or, finally, (iv) seriously limit government’s authority to engage in structural regulation including its power to restrict concentration.<sup>12</sup>

My claim here will be that the Supreme Court holdings have been most consistent with the third possibility—leaving the government relatively free to engage in structural regulation. However, with encouragement by the Supreme Court’s recent articulation of a new doctrinal approach and with a new, usually unarticulated conception of media claimants’ status, lower courts have increasingly adopted the fourth—constitutional limits on legislative power over structure.

American constitutional jurisprudence generally shies away from finding affirmative obligations, the first possibility. Mostly it only

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10. Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).

11. An illustration might be the invalidation by lower courts as unconstitutional a statutory ban on cross ownership of telephone company and cable system in their local operating area, and the dismissal of an appeal of this holding as moot due to congressional action that on policy grounds eliminated the challenged restrictions. *United States v. Chesapeake & Potomac Tel. Co.*, 516 U.S. 415 (1996) (vacating lower rulings after passage of the Telecommunications Act of 1996).

12. Analytically, there is also the possibility that the First Amendment requires the government to promote concentration. I leave that out—no one whom I know has advanced such a position even as a possibility.

identifies constitutional prohibitions.<sup>13</sup> Thus, unsurprisingly, the Constitution has never been authoritatively interpreted to require limits on concentration.

Closely related is the issue of whether the Constitution affirmatively requires the government to regulate on behalf of expressive interests of nonowners or the needs of the public. So far the answer has been no.<sup>14</sup> In the most prominent case, a political party and a public interest group each asked the court to require (or to order the FCC to require) a television network to air their paid editorial advertisements.<sup>15</sup> The plaintiffs claimed, first, that government involvement in broadcast licensing and in prohibiting non-licensed broadcasting were among the factors that created state action.<sup>16</sup> Second, they argued that this state action created a constitutional duty to require that broadcasters present communications by outsiders, especially for those outsiders willing to pay to have their message presented.<sup>17</sup> With only Justices Brennan and Marshall dissenting on these points, the majority rejected one or the other of these claims.<sup>18</sup>

However, should the answer always be the same? In broadcasting, the government self-consciously promoted competitive media outlets. Maybe it should be required to provide access or other opportunities for the public if, for example, it creates, or there otherwise is in fact, a communications monopoly? Should some degree of common carriage be constitutionally required, if the government creates a local telephone or cable monopoly? In one case where the government granted monopoly control to a single cable company, a claim was made that the Constitution required the government to condition the grant on some duty to allow some public access in the use of the medium. Without a court ruling on this or the plaintiffs' other claims, the case settled in favor of the plaintiffs.<sup>19</sup>

13. Obviously, this claim is too simple. The one claim can be turned into the other—the government can be prohibited from not taking some action, which happens in an equal protection case whenever the court invalidates an exclusion of a group from the category of beneficiaries.

14. This situation can be contrasted with common requirements, of both constitutional and statutory basis, for access in many situations in Europe—although only a speaker's right to reply to false, or negative statements about the speaker is a common requirement at the constitutional level. See BARENDT, *supra* note 9, at 144-67.

15. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

16. *Id.* at 172-81.

17. *Id.* at 182-92.

18. See *generally id.* In addition to Justices Brennan and Marshall, several other Justices thought it was clear that the claim would be valid if there was state action but these Justices found no state action. More recently, however, the Court seems to be unanimous that the existence of state action, namely, state ownership, of a broadcast station normally creates no type of forum and, thus, creates no obligation to present expression of outsiders. *Arkansas Educ. Tel. Comm. v. Forbes*, 523 U.S. 666 (1998).

19. *Missouri Knights of the Ku Klux Klan v. Kansas City*, 723 F. Supp. 1347, 1350, 1353 (W.D. Mo. 1989) (refusing to dismiss this or other more traditional claims made by the plaintiffs).

The second possibility is that the First Amendment restricts the government's power to purposefully promote media concentration.<sup>20</sup> The claim could be that such a pro-concentration policy restricts the First Amendment rights of those who do not then own a media outlet or who are not granted the monopoly. In contrast, the government can assert authority to conclude that sometimes a monopoly or a more concentrated ownership regime would lead to more efficient use of resources—and a better overall communications order. For some portions of the communications order, such government authority historically has been assumed—for example, in relation to telephone operating companies—even though current government policy wholeheartedly takes the opposite policy position of trying to promote competition.

The government's theoretical premise is that it should be able to engage in structural regulation to improve the quality of the communications realm, and under some circumstances concentration could have this effect. Thus, a lower court once upheld FCC authority to deny a license to an available slot in the broadcast spectrum space if the agency concluded that the additional broadcast licensee would undermine the economic viability or quality of broadcast service provided in a given geographical area.<sup>21</sup> The reasoning was that the geographic area covered by the license might not provide adequate (advertising) revenue to support quality broadcasting by the larger number of stations.<sup>22</sup> A license grant would result in "ruinous competition."<sup>23</sup> Although the FCC eventually dropped the policy behind this case, the "Carroll doctrine," courts never rejected the policy as impermissible on constitutional grounds.<sup>24</sup>

More recently, potential competitors challenged government grants of cable franchise monopolies. The government never clearly articulated its policy rationale for granting an exclusive license. A possible explanation is that a monopoly provider, using a single cable wire, would require less

I should disclose that I suggested including this claim in the complaint.

20. European cases presenting the claim that a public broadcasting monopoly was unconstitutional might be seen to raise a similar claim. The context is different, though, since national public broadcasting systems in Europe were typically required, often constitutionally, to provide for diversity—a policy designed to accomplish at least arguably the key goal of a rule requiring the prevention of monopolies. In any event, with the exception of Italy, where the Constitutional Court found that a public broadcasting monopoly was impermissible at least at the local level, the European courts routinely rejected these claims. BARENDT, *supra* note 9, at 56-58.

21. *Carroll Broad. Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

22. *Id.* at 443.

23. *Policies Regarding Detrimental Effects of Proposed New Broad. Station on Existing Stations*, 3 F.C.C.R. 638, 640 (1988).

24. *Id.* at 638 (eliminating the Carroll doctrine). Since the doctrine authorized restraint of speech—on broadcast licenses—on grounds obviously unrelated to physical scarcity, it is interesting that the doctrine was noted, specifically without either approval or disapproval, by the Supreme Court in *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 401 n.28 (1969).

economic (and physical) resources to provide a given geographical area with cable service. Additional cable franchisees may not offer substantially different communication content but would require large expenditures on “duplicative” facilities for which someone, ultimately the residential users, would have to pay—again, a form of the “ruinous” or wasteful competition argument. The monopoly grant might increase people’s communicative opportunities if the government combined the monopoly grant with regulations that direct (some) potential monopoly profits be spent on various communication-oriented public benefits—for example, public access, educational, or governmental (PEG) channels and maybe facilities and personnel to support these channels, or an obligation to provide cable service to the entire community (even unprofitable areas).<sup>25</sup> In addition, the government could try to control monopoly profits through rate regulation—a structural policy significantly limiting the cable operator’s freedom.<sup>26</sup> Essentially the policy goal would be to avoid waste of resources and to direct that savings go to providing broader or better communications content or less costly service. If achievable, these benefits, which the market (whether or not competitive) would not provide, suggest a media specific justification for a monopoly franchise, at least in some circumstances.

A Supreme Court decision, *Los Angeles v. Preferred Communications Inc.*,<sup>27</sup> is widely interpreted as finding such monopoly franchises to be unconstitutional. This interpretation, however, probably over-reads the decision. The Court issued an emphatically narrow decision.<sup>28</sup> In rejecting the suit’s dismissal, the Court postponed deciding whether there would be a First Amendment violation if the City “refus[ed] to issue a franchise to more than one cable television company when there was sufficient excess physical and economic capacity to accommodate more than one.”<sup>29</sup> Although subsequent discussion focused mostly on physical capacity, the Court’s formulation obviously leaves open to interpretation the issue of “sufficient excess . . . economic capacity.”<sup>30</sup> Is there sufficient capacity whenever more than one cable system could survive in a competitive market? Or, alternatively, is there sufficient economic capacity only when

25. Under the economic conditions hypothesized here, there would be insufficient revenue to get good results from imposing these costly requirements on multiple competing systems.

26. This power has been upheld against constitutional attack. *See, e.g., Time Warner Entm’t Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

27. 476 U.S. 488 (1986).

28. *See id.* at 493.

29. *Id.* at 492 (emphasis added). The Court remanded in order to provide an opportunity to develop a factual record. *Id.* at 496. Lower courts then held the monopoly franchise to be unconstitutional, at least in Los Angeles. *Preferred Communications v. Los Angeles*, 13 F.3d 1327 (9th Cir. 1994).

30. *Preferred Communications*, 476 U.S. at 492.

an additional system would not undermine provision of the level or quality of service that the City desired and would deliver it at the lowest possible cost to the members of the public? These matters have not been resolved.

The choice between third and fourth possibilities—leaving the government generally free to engage in structural regulation or limiting such authority—has dominated recent debates. It is here that recent lower court cases have evidenced a shift, made without justification or self-conscious explanation.

Restricting this government power to limit concentration should seem implausible. Such a reading could, for example, protect corporate attempts to amass monopolistic or otherwise vast communications empires, a result that could undermine a diverse, pluralist marketplace of ideas. Thus, corporate media's attempts to establish constitutional limits on this government power have consistently lost in the Supreme Court.

The issue first clearly came before the Court in 1945.<sup>31</sup> The Associated Press, an association of newspapers, argued that the First Amendment exempted them from government antitrust regulation.<sup>32</sup> The Supreme Court forcibly rejected the assertion.<sup>33</sup> Justice Black wrote for the Court: "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom . . . Freedom of the press from governmental interference . . . does not sanction repression of that freedom by private interests."<sup>34</sup> The government was allowed to intervene structurally to promote freedom!

Although the issue was slightly different, earlier in 1943, a broadcast network challenged rules designed to prevent the broadcast network's contractual control of affiliate local stations—in effect an anti-concentration measure in that the rules were designed to limit concentrated network power and to protect independent decisionmaking authority of local broadcasters.<sup>35</sup> The Court unanimously rejected the industry's First Amendment claim,<sup>36</sup> and it has never since backed away from this position. For example, in rejecting corporate First Amendment claims, the Court in 1978 unanimously upheld limitations on a newspaper owning broadcast stations in the locale in which the newspaper company operated.<sup>37</sup> In an earlier 1956 case, although not raising the constitutional issue, the Court upheld very restrictive national limits on the number of

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

32. *Id.* at 19.

33. *Id.* at 20.

34. *Id.*

35. *NBC v. United States*, 319 U.S. 190 (1943).

36. *Id.* at 226-27.

37. *See FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

broadcast stations a single entity could directly or indirectly control.<sup>38</sup> As will be discussed further below, these cases represent a history in which the Supreme Court always upholds congressional structural regulation of the media, that is, regulation not tied to or aimed at suppressing particular media content against assertions that the regulations violate the First Amendment rights of corporate owners.<sup>39</sup> In the context of constitutional attacks on structural regulation, the only regulation *questioned* by the Court was, as noted above, when the legislative authority—a city government—was creating, not restricting, concentration in the cable industry.<sup>40</sup> There the Court required the city to show a good reason for its action.<sup>41</sup>

The Supreme Court has been clear. Recent decisions by the lower courts, however, show that *they* have *not* gotten *that* message. Lower courts have increasingly found structural regulation of communications industries to unconstitutionally interfere with media entities' asserted First Amendment rights. Without a complete review, two lower court cases illustrate this point in relation to ownership. (As will be noted, these cases may be prescient.) The increasingly activist, conservative, pro-market Court may abandon its earlier approach as described here. Despite continuing to uphold structural media regulations, its recent decisions have been cast in scrutiny language suggesting the possibility of invalidating regulations on First Amendment grounds if corporate lawyers can convince the Court that the structural choices are inadequately justified—an approach that may encourage abuse by lower courts.<sup>42</sup>

Early in the development of cable, Congress and the FCC had concluded that telephone companies should not own cable systems in the geographic area of their joint operation.<sup>43</sup> Phone companies were later allowed to offer “carriage” of cable programming over their phone lines—but the programming provider/seller had to be independent of the phone company.<sup>44</sup> This ownership regulation could serve various purposes.

38. See *United States v. Storer Broad. Co.*, 351 U.S. 192, 203-04 (1956) (upholding a limit of seven stations per service category).

39. See C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57.

40. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

41. *Id.* at 494-96. Although not related to control of concentration, the case, sometimes cited for limiting government's power to engage in structural regulation, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), has been interpreted by the Court to have struck down the right to reply law because it (improperly) penalized specific content, that is, was a content rather than a structural regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653-55 (1994); see Baker, *supra* note 39, at 57-58.

42. See *infra* notes 66-85 and accompanying text.

43. *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 185 (4th Cir. 1994).

44. *Id.*

Use of the phone company “wires” by video suppliers other than the phone company could potentially produce competition for a local cable company. As a common carrier, the phone company would not be permitted to discriminate among potential video services wishing to deliver programming. Phone company carriage creates the possibility of multiple competitors who could avoid the huge cost of laying their own lines. In contrast, if the phone company itself were the cable operator, that is, if it sold the video programming to the public, the phone company might inappropriately cross subsidize its cable service with revenue from its regulated phone service, thereby competing unfairly.<sup>45</sup> Worse, it was feared that the phone company could and would discriminate in favor of its own programming over that of other entities who might otherwise deliver programming over the phone lines.<sup>46</sup> Although formal regulation could prohibit both of these objectionable practices,<sup>47</sup> the complex accounting and behavioral practices involved makes effective enforcement awfully difficult, resulting in the “hands-on” regulatory solution becoming more theoretical than real. This regulatory difficulty, however, is largely eliminated by the separation created by the cross ownership rule. The rule simply tells the phone company that, as long as it is a phone company (a common carrier), it cannot also be a different type of company—a cable company that sells video content to the public. The corporate entity has to choose which business to be in. Nevertheless, two circuits found that this argument bordered on the irrational; they held that the ownership bar violated the telephone companies’ First Amendment rights.<sup>48</sup>

This conclusion represents a radical repudiation of the past. The premise, seemingly implicit in all past Supreme Court decisions on the subject, had been that regulation of corporate entities in an effort to promote a better communications order raised no serious First Amendment issues. The government could not censor speakers but could regulate to open up the structure. Phone companies existed to serve people’s communications needs and were subject to any form of regulation that served those needs. Individuals, not corporate enterprises, were the fundamental constitutional rights holders and any rights that media enterprises hold were derivative. These recent cross-ownership cases

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45. *Id.* at 190.

46. *Id.* at 190 n.13.

47. Even the constitutionality of such regulations is unclear. Some lower court decisions suggest that phone companies may have a First Amendment right to discriminate against (i.e. exclude) some users on the basis of the content of their speech. *See, e.g.*, *Carlin Communications v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987); *Carlin Communications v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1360-62 (11th Cir. 1986).

48. *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 202 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996); *U.S. West, Inc. v. United States*, 48 F.3d 1092, 1094 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996).

implicitly reject that view. Instead, they recognize a type of rights of corporate entities entirely absent, at least until recently,<sup>49</sup> in any Supreme Court decision. Whether these holdings are authoritative is unclear. Congress adopted legislation that, in the name of deregulation, eliminated this restriction on the telephone companies. The Supreme Court then vacated the Court of Appeals' decisions without indicating any view on the merits, remanding to determine mootness.<sup>50</sup>

Second is a case involving ownership of cable systems.<sup>51</sup> At the direction of Congress, the FCC adopted a rule permitting a single multiple-cable operator (MSO) to own cable systems that serve no more than thirty percent of the country's subscribers to multichannel video program distributor services (primarily subscribers to cable and direct broadcast satellite).<sup>52</sup> A comparison might help put this rule in context. The country has about 12,600 radio stations and about 10,400 cable systems. The Supreme Court upheld an FCC rule (since abandoned) restricting a single entity from owning more than seven FM and seven AM radio stations.<sup>53</sup> Even if every owner owned the maximum, the country would have at least 900 radio station owners and each owner would be able to reach only a small portion of the American public. The FCC's new cable rule allowed a single entity to own cable systems that serve thirty percent of the country's subscribers. Assuming roughly equal sized systems and little overlap, a single entity could own about 3,467 cable systems. Under this rule, the country could be left with only four separate cable owners.

Four owners is a lot more concentrated than the mandate of at least nine hundred approved by the Supreme Court but it turned out that mandating at least four is too restrictive of corporate ownership "rights." The Court of Appeals in *Times Warner Entertainment Co. v. FCC*<sup>54</sup> took the constitutional challenge to this rule very seriously. It observed that the rule "interferes with [the cable owners'] speech rights by restricting the number of viewers to whom they can speak."<sup>55</sup> The court then avoided the constitutional issue by finding that, on the record before it, the "[thirty

49. See *infra* notes 66-85 and accompanying text.

50. *United States v. Chesapeake & Potomac Tel. Co.*, 516 U.S. 415 (1996); *United States v. U.S. West, Inc.*, 516 U.S. 1155 (1996).

51. *United States v. Storer Broad.*, 351 U.S. 192 (1956).

52. *Id.* at 193.

53. *Id.* at 195 n.1 (citing 47 U.S.C. § 3.636 (1953)).

54. 240 F.3d 1126 (D.C. Cir. 2001).

55. *Id.* at 1129. The court is not quite right. The rule leaves the cable company as free as anyone else in the country to try to place programming on others' systems. What the cable operator wanted was to have speech rights that, on the court's reasoning, Congress could only guarantee to one other speaker (one other corporation) in the country—the opportunity to use its own monopolized facilities to speak to people.

percent] horizontal limit is in excess of [the FCC's] statutory authority."<sup>56</sup> The court commented that it could understand reasoning that "would justify a horizontal limit of [sixty percent]."<sup>57</sup> It recognized Congressional authority to prevent concentration to a degree that would allow a single company to control the survival of any particular programmer.<sup>58</sup> Thus, Congress could guarantee at least two owners but the court indicated serious constitutional doubts about a rule that assured at least four.<sup>59</sup>

A second holding in *Time Warner*, although not directly concerned with concentration, illustrates this developing approach to structural regulation. At the direction of Congress, the FCC prohibited a cable operator from using over forty percent of its first seventy-five channels for programming owned by the cable operator or its affiliates.<sup>60</sup> By guaranteeing opportunities for unaffiliated programming, this requirement partially responds to potential anti-competitive effects of vertical integration—the combination of delivery and programming. The rule assures that audiences will receive programming created by more independent voices. In *Time Warner*, the court held the FCC had not met First Amendment requirements in justifying this rule.<sup>61</sup> The First Amendment problem is that the rule restricts cable companies' "editorial control over a portion of the content they transmit"<sup>62</sup> and, the court concludes, this "burden[s] substantially more speech than necessary."<sup>63</sup> On similar grounds, another court found that a local regulation that required local cable operators to provide carriage facilities to competing broadband Internet Service Providers violated the cable operators' First Amendment rights.<sup>64</sup>

These decisions seem directly contrary to prior suggestions by the Supreme Court. The Court in the *Turner Broadcasting System, Inc. v. FCC* cases upheld "must-carry" requirements, essentially the same type of intrusion into cable company's authority as involved in these cases.<sup>65</sup> Of course, the Court was closely divided in the *Turner* cases—but the divisive issue was whether the must-carry rules should be considered content-based. In the subsequent *Comcast Cablevision v. Broward County* and *Time Warner* lower court cases, there is less reason to view the rules as

56. *Id.* at 1136.

57. *Id.* at 1132.

58. *Id.* at 1131.

59. *Id.* at 1134-35.

60. 47 U.S.C. § 533(f)(1)(B) (1993).

61. *Time Warner*, 240 F.3d at 1139.

62. *Id.* at 1129.

63. *Id.* at 1139.

64. See *Comcast Cablevision v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).

65. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 217 (1997) (*Turner II*); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 622 (1994) (*Turner I*).

content-based.<sup>66</sup> Rather, by merely requiring that the cable operator carry unidentified independent programming, the rules operated much like a common carrier requirement. But even in the major dissent in *Turner I*, Justice O'Connor suggested that the government could impose on cable operators, in an analogy with telephone companies, a common carriage duty in respect to at least some of their channels<sup>67</sup>—precisely the requirement that the lower court in *Time Warner* struck down. Curiously, despite heavy reliance on *Turner I*, the court in *Time Warner* made no reference either to O'Connor's approval of precisely this type of restriction or to the majority's actual holding in *Turner I* that the government could require the cable company to carry (specific) channels unaffiliated with the cable operator.<sup>68</sup>

After a consistent sixty year history of Supreme Court acceptance of structural media regulation, these lower court decisions striking down ownership limits (i.e., the cross-ownership rule limiting telephone companies ownership of local cable systems and the rule limiting concentration in the cable industry) and striking down requirements that cable companies carry others' programming over their facilities, should come as a surprise. I suggest that conceptually, these decisions represent two significant changes.

First, these cases explicitly apply a scrutiny analysis that, in the structural media arena goes back only to *Turner I*.<sup>69</sup> Thus, the court in *Time Warner* repeatedly cited *Turner I & II* for the scrutiny test and how to apply it, not for the *Turner* cases' holdings, which involved virtually the same issue—requiring the cable system to carry outside channels—as in *Time Warner*.<sup>70</sup> Imposition of this justificatory burden on the government

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66. See Comcast, 124 F. Supp. 2d 685 (S.D. Fla. 2000); *Time Warner*, 240 F.3d at 1126..

67. *Turner I*, 512 U.S. at 684 (O'Connor, J., dissenting).

68. See *Time Warner*, 240 F.3d at 1126.

69. The great foundational media cases—such as *Miami Herald* and *Red Lion*—made no mention of scrutiny. After toying with the issue in *Preferred Communications*, the Court in *Turner I* emphasized using scrutiny tests, purportedly to evaluate the constitutionality of media regulations. See *Turner I*, 512 U.S. at 641-42. The majority continually invoked the idea of scrutiny, mentioning it on fifteen separate pages of its opinion. See *id.* The issue of scrutiny has plagued the Court since. In *Denver Area Education Telecommunication Consortium v. FCC*, 518 U.S. 727 (1996), in an opinion discussing different scrutiny analyses but refusing to settle on one, the Court properly struck down portions of a law requiring the suppression of, or giving cable systems authority to suppress, indecency. *Id.* at 743. Despite the government's plausible claim that the law was merely a structural regulation of cable, to the extent the decision invalidated the statute, it should be applauded for identifying as a constitutional evil the statute's aim of suppressing particular content. Clearer scrutiny analysis, however, would not have aided but only further confused the Court's reasoning.

70. See *Time Warner*, 240 F.3d at 1126 (citing the *Turner* cases over a dozen times, almost all dealing with how to apply scrutiny, but interestingly all in the first part of the decision dealing with ownership). It did not bother with the *Turner* cases explicitly (presumably because it had

was new in *Turner I*<sup>71</sup>—and careful thought should be given as to whether it is justified.<sup>72</sup> Historically, the Court, in approving structural regulations, merely looked to see if it could identify a justification for the law in terms of improving the communications order and, finding one, approved the law. For example, there was no attempt to see whether cross-ownership rules or a limit of seven on the number of television stations that an entity could own was closely tailored or did not regulate more speech than necessary to serve some government interest.<sup>73</sup> Essentially, unlike the prior approach, the scrutiny analysis creates room for any activist court to manipulate its characterization of the government interests to find them inadequately served and, thus, strike down any structuring provision of which it does not approve.

In contrast to the earlier approach, not only will this scrutiny test allow invalidating legitimate structural regulations, it is not evident that the test would identify laws that, historically, the Court has struck down. In *Miami Herald Publishing Co. v. Tornillo*,<sup>74</sup> the one significant case where the Court did strike down a media law that is sometimes seen as structural, the Court did not consider how closely the right of reply law served the state interest or how important or compelling the state interest was—although the fit seemed close and the interest important.<sup>75</sup> Rather, whether because it invaded editorial control (a common interpretation now implicitly repudiated by the Court in *Turner I* case) or because it penalized the paper's initial speech (the interpretation emphasized in *Turner I*) *Miami Herald* involved the Court directly finding an abridgement of protected speech and, without more, holding it unconstitutional.<sup>76</sup> This approach followed the practice of many great First Amendment cases protecting speech—such as in *Brandenburg v. Ohio*,<sup>77</sup> *New York Times v. Sullivan*,<sup>78</sup> and *Hustler Magazine v. Falwell*.<sup>79</sup> In each of these cases, and in *Miami*

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already established how to apply the test) in the portion of the opinion dealing with the issue that was virtually identical to *Turner's*—the use of channel capacity by outsiders. As to this issue, the result in *Time Warner* was the opposite of that reached in the *Turner* cases and the opposite of that approved in dicta by Justice O'Connor's dissent. See generally *id.*

71. In most respects, Justices Steven's opinion in *Turner I* represents the more traditional deference to congressional structural regulation.

72. Although agreeing with the result, I have previously criticized both the scrutiny analysis and the content-discrimination analysis of the Court in the *Turner* cases. See Baker, *supra* note 39.

73. See *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956). Cf. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

74. 418 U.S. 241 (1974).

75. See generally *id.* In many European countries, for example, the interest has constitutional status. See *supra* note 14.

76. *Miami Herald*, 418 U.S. at 258.

77. 395 U.S. 444 (1969).

78. 376 U.S. 254 (1964).

79. 485 U.S. 46 (1988).

*Herald*, the results would likely change under the scrutiny analysis. In each, the government interest involved could be considered very important and it is unclear that any other means would serve the interest as well. The Court, however, neither balanced nor applied a scrutiny analysis. Rather it determined that the law restricted speech that the Court could explain must be protected by the First Amendment—and that point concluded the reasoning.<sup>80</sup> In other words, application of scrutiny analysis is probably less protective of speech than the Court has been in its great speech-protecting cases and, at the same time, allows an activist court to invalidate laws involving the distribution and promotion of speech opportunities that the Court has traditionally approved.

Second, and possibly more important, these cases represent a subtle and undefended reconceptualization of the First Amendment. The courts are basically offering a new (and unwarranted) vision of the status of media entities. Earlier cases treated media entities instrumentally in terms of serving a democratic society's need for non-governmentally created or approved information and vision. Regulations striking at the heart of the media's function were invalid. Hence, censorship—penalties on particular speech choices, which now provides the favored interpretation of *Miami Herald*<sup>81</sup>—and rules that undermine the institutional integrity of the press<sup>82</sup> interfere with this instrumental role. These should be unconstitutional on that basis. When protected, media entities were protected in order to serve the interests of the audience in the receipt of uncensored and diverse content.<sup>83</sup> However, unlike individuals for whom the notion of structural regulation is somewhat incoherent and whose autonomy the Court often protected, the Court never treated structural regulation of the press, absent reason to see the law as undermining the press' contributions to the audience, as creating any particular constitutional problem.

Now, however, possibly egged on by the *Turner* cases, these lower court decisions are treating media enterprises as rights bearers in their own behalf. On the older view, a court would not ask whether limiting the number of media outlets one firm could own or requiring cable systems to offer channel capacity to outsider programmers would “burden

80. See C. Edwin Baker, *Harm, Liberty and Free Speech*, 70 S. CAL. L. REV. 979 (1997).

81. Although the Court initially offered two, apparently different, justifications for its decision in *Miami Herald*, the Court has since limited the rationale of *Miami Herald* to the concern with content-based censorship. See, e.g., *Turner I*, 512 U.S. 622, 644, 653-55 (1994).

82. This problem was the basis of the asserted right not to disclose confidential sources that four, and depending on how Justice Powell is counted, maybe five Justices accepted in *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972).

83. This is the respect in which the Court's statement in *Red Lion*—“[i]t is the right of the viewers and listeners . . . which is paramount”—has general applicability. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). That also is why the court immediately supported this claim with a proposition drawn from print media cases.

substantially more speech than necessary.” The court would not treat these rules as burdening speech. Rather, the rules distribute speech opportunities. The question is whether they do so in a manner that plausibly promotes, or at least could not be thought to undermine, the functioning of the communications order. A “yes” answer was generally easy. That is, the Court never conceived the corporate media as subjects whose moral autonomy must be respected.<sup>84</sup> The Court accepted as a matter of course any structural regulation that could be reasonably seen to serve a better, more robust democracy. It saw absolutely no serious First Amendment interest that was in opposition to structural regulation designed to assure a better—a more diverse, more participatory, less concentrated—media order. But in the (brave) new world now being offered, the corporate media are the central rights-bearing subjects. Interference with these huge, often monopolistic, institutions is now seen as a First Amendment offense. Justice Black’s admonition in *Associated Press v. United States* has been forgotten.<sup>85</sup>

## II. CONCENTRATION POLICY

The primary concerns here are to survey existing media specific concentration policies, see how concentration policy has evolved over time, and examine the intellectual underpinnings of the changes. However, media specific ownership policy operates within an overlay of general laws, specifically antitrust laws.<sup>86</sup> For example, FCC rules have long rigidly restricted concentrated ownership of broadcast properties, making antitrust concerns largely irrelevant. Recent deregulatory moves, however, resulted in proposed mergers of local radio stations being accepted by the FCC but opposed by the antitrust division of the Justice Department as anti-competitive.<sup>87</sup> A central policy issue is whether essentially exclusive

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84. This lack of moral autonomy explains why must-carry rules as well as other structural regulations do not run afoul of basic First Amendment protections of the individual as were involved in the flag salute case. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); see also *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding one cannot be forced to display on license plate a motto to which the driver objects).

85. See *supra* text accompanying note 34.

86. For an overview, see H. Peter Nesvold, Note, *Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions*, 6 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 781 (1996).

87. Elizabeth A. Rathbun, *Justice Tells ARS to Sell Stations*, 126 *BROADCAST & CABLE* 45, 10 (1996). In agreeing to the Westinghouse purchase of Infinity Broadcasting, the justice department required the sale of stations that would have allowed Westinghouse’s share of the radio advertising market in Philadelphia to rise from 28% to 45% and in Boston from 15% to 40%, indicating that sometimes a 40% share is too much. Ira Teinowitz & Michael Wilke, *Justice Department Sets 40% as Guide on Radio Mergers: Solutions Tied to Target Audience Paves Way for Westinghouse Deal for Infinity*, *ADVERTISING AGE*, Nov. 18, 1996, at 65.

reliance should be placed on antitrust law. Therefore, this Part will begin with a brief review of antitrust issues related to media ownership and then conclude with an assessment of whether antitrust law even potentially offers an adequate approach to the ownership issue.

### A. *Antitrust Law and the Media*

The presently dominant approach to mergers—the concern most overtly of section 7 of the Clayton Act<sup>88</sup>—seems to be a Chicago School interpretation that focuses almost exclusively on economic, primarily efficiency, concerns. As explained by the Justice Department’s merger guidelines, antitrust law’s merger restrictions have as a dominant, arguably exclusive, aim “that mergers should not be permitted to create or enhance market power or to facilitate its exercise” in order to prevent “a transfer of wealth from buyers to sellers or a misallocation of resources.”<sup>89</sup> The merger guidelines are logically defined and calibrated to identify a merger in any market in which the merger would cause an increase in the merged firm’s power over prices. Their application, however, is hardly mechanical. Despite a theoretical economic logic, the tasks of defining the product and the geographical markets are not exact sciences. In the media context, for example, the FCC has maintained for the last twenty years that all information and entertainment media are part of the same product market, implicitly treating them as substitutable.<sup>90</sup> The main rival view is that each media form is a separate product category, as the courts have usually held in respect to newspapers,<sup>91</sup> and the Department of Justice has concluded in respect to radio broadcasting.<sup>92</sup>

Undoubtedly, antitrust enforcement that successfully furthers economic efficiency will, in some haphazard way, serve non-economic aims as well. The key issue here, however, is whether non-efficiency concerns do or should affect the underlying antitrust analysis. Antitrust history, for example, suggests “democratic” or political concerns with concentrated

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88. 15 U.S.C. § 18 (1988). Section 7 prohibits mergers “where in any line of commerce . . . in any section of the country, the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly.” *Id.* Also relevant are the Sherman Act, which refers to an “unfair method of competition,” 15 U.S.C. § 1 (1988), and Section 5 of the FTC Act, which applies to an “unfair method of competition,” 15 U.S.C. § 45 (1988).

89. U.S. DEPT. OF JUSTICE & THE FEDERAL TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 0.1 (1992, rev. 1997), available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html).

90. See Nesvold, *supra* note 86, at 823 n.262, 856 n.452.

91. *Id.* at 823-29; see also *United States v. Times Mirror Co.*, 274 F. Supp. 606, 617 (C.D. Cal. 1967).

92. See, e.g., *United States v. CBS*, 63 Fed. Reg. 18,036 (Dep’t of Justice Apr. 13, 1998); Sarah Elizabeth Leeper, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 FED. COMM. L.J. 473, 482-83 (2000).

power.<sup>93</sup> A strong case can be made that non-economic media-specific considerations, such as democratically-based concerns relating to diversity in the marketplace of ideas or to the capacity of small numbers of firms to dominate the formation of public opinion, are appropriately considered.<sup>94</sup> Some recent antitrust scholarship argues that the primary or, at least, a prominent policy concern in the media arena should be power within the so called marketplace of ideas.<sup>95</sup>

The identification of goals makes a huge difference. A marketplace of ideas focus could lead antitrust analyses to different formulations of both the relevant product markets and the level at which concentration becomes problematic. For this focus, the relevant market is people with a subjectively defined set of interests. An interest in diversion from a person's workday world would encompass all potentially diverting media. An interest in in-depth local news might include only daily newspapers local to the audience. An interest in in-depth leftist perspectives on local events would not find conservative papers to be within the market and would find monopoly power in the absence of competing leftist papers (or, maybe, competing leftist media). Christian activists need both media favoring right-to-life issues and media favoring liberation theology—and maybe competition within each framework. Blacks certainly need media promoting both assimilationist and Black power views—and maybe competing versions of each. From this audience perspective, the market is *monopolized* if these “activist ideas” are not offered in competing media using a format on which a person relies.

The theoretical point is that the dominant antitrust focus on *power over pricing* can be distinguished from *power over the content available for consumer choice*. In the currently dominant paradigm, a merger that dramatically reduced the number of independent suppliers of a particular category of content—say, news or local news or Black activist news—creates no antitrust problem if, as likely, it does not lead to power to raise prices.<sup>96</sup> However, if the concern is power to negatively affect

93. See, e.g., RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* (2000).

94. See Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Stucke & Grunes, *supra* note 10.

95. See Stucke & Grunes, *supra* note 10.

96. It is possible, but unlikely, that an audience category would be both sufficiently defined and sufficiently valued by advertisers that one media firm serving them would have power over advertising rates (or in the case of print media, also power over prices to consumers) such that the content category would be a proper product category for traditional antitrust purposes. More likely, an antitrust regulator could conclude, for example, that although only one radio station in a community offers content desired by this group, *potential* competition exists from other stations in the area. Low entry barriers for these stations means that the single station should be unable to exercise improper market power over price. This *potential* competition does little, however, to

consumers' choices, power over content should have a policy status at least equal to power over price.<sup>97</sup>

Existing antitrust law may not be entirely immune from these non-economic, media-specific concerns. At least one recent antitrust case probably requires such a perspective. The Newspaper Preservation Act (NPA),<sup>98</sup> a congressionally created exception to the antitrust laws, allows two (or more) newspapers to form a joint operating agreement (JOA) under circumstances of economic distress at all but one of the papers. A JOA combines the papers' business sides (giving the joint entity greater, possibly monopoly, pricing power) as long as the editorial sides are maintained as entirely independent. A common complaint about this arrangement is that the combination can often exercise even greater market power than could a single paper after the other failed. Weeklies or suburban papers, for example, make this complaint. They argue that they would be better able to compete economically against a single surviving paper than against the stronger force of the JOA juggernaut. Dissolving a JOA, which predictably results in only one paper surviving, should increase economic competition but not competition within a marketplace of ideas. Thus, when a court recently held that an agreement to dissolve the JOA violated the antitrust laws, its decision made perfect sense from the latter perspective but not from the traditional economic focus.<sup>99</sup>

Horizontal mergers, the implicit subject of the above discussion, are complemented by non-horizontal mergers, a category sometimes subdivided between vertical and conglomerate.<sup>100</sup> Vertical mergers were once widely condemned by both academics and courts as generally unnecessary and anti-competitive. Since the 1960s, however, Chicago School commentators have argued that this type of merger seldom (if ever)

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provide actual competition in any marketplace of ideas or to provide this narrow audience choices relevant to their interests.

97. This point is effectively elaborated and applied to media industries in Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 715, 752-53 (1997).

98. Pub. L. No. 91-353, § 2, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-1804 (2000)).

99. *Hawaii v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241, 1249-50 (D. Haw.), *aff'd* 203 F.3d 832 (9th Cir. 1999). *But see* *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1210-12 (N.D. Cal. 2000) (rejecting similar argument). *See also* Stucke & Grunes, *supra* note 10, at 270-74.

100. In some respects "conglomerate" mergers may be more like horizontal than vertical mergers. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 388 (2d ed. 1999).

harms consumers and almost always produces important efficiencies.<sup>101</sup> Antitrust enforcement has become rare.<sup>102</sup>

*United States v. Paramount Pictures, Inc.*<sup>103</sup> illustrates both prior attitudes and current trends. Though involving a vertical price fixing conspiracy, not a vertical merger, the same reasoning should apply since in both contexts the concern is impermissible market power of the integrated entity. In *Paramount Pictures*, the price fixing involved vertical arrangements between the entities that produce and distribute and those that exhibit first run movie theatre releases.<sup>104</sup> The Supreme Court affirmed an order requiring the producer/distributor defendants to divest some of their *ownership* interests in theatres.<sup>105</sup> It also directed the district court to evaluate the legitimacy of other instances of such ownership.<sup>106</sup> The subsequent consent judgment required additional divestiture of the defendant producer/distributors' ownership interests and severely restricted their future ownership of theatres.<sup>107</sup> This framework prevailed in the industry for forty years. Then in 1989, the court of appeals found "changing circumstances" and lifted the portion of the consent decree that would limit Warner Brothers' ownership of theatres.<sup>108</sup> Although this finding was possibly well taken, the decision probably also represents the generally less skeptical, modern acceptance of vertical integration.

Still, some life remains in never completely repudiated objections to vertical integration. In the media area, opposition to vertical mergers seems overtly responsive to marketplace of ideas concerns. During the 1990s, for example, the FTC opposed aspects of QVC Network's (owned in part by a major cable programmer and a major cable system operator) proposed acquisition of Paramount Pictures (a major programmer).<sup>109</sup> The vertically integrated firm would both produce programming and distribute it to consumers. The FTC's objection was that its predictable bias in favor of its "own" programming could cause a decline in the quality and output

101. ELEANOR M. FOX & LAWRENCE A. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* 839-41 (1989); HOVENKAMP, *supra* note 100, at 377 n.1 (citing articles by Richard Posner and Frank Easterbrook for the proposition that vertical mergers should *generally* be permitted, and by Robert Bork that they should *always* be legal); *id.* at 381 (noting a dramatic shift toward allowing vertical integration since the 1960s).

102. HOVENKAMP, *supra* note 100, at 386 (prevailing judicial approach to condemn only in extreme circumstances); *id.* at 389-90 (suggesting that Justice Department's Merger Guidelines reflect little attempt to police vertical mergers); FOX & SULLIVAN, *supra* note 101, at 840 (noting there has been little enforcement since mid-1960).

103. 334 U.S. 131 (1948).

104. *Id.* at 140-41.

105. *Id.* at 149.

106. *Id.* at 151-53.

107. *United States v. Paramount Pictures*, 85 F. Supp. 881 (S.D.N.Y. 1949).

108. *United States v. Loew's, Inc.*, 882 F.2d 29, 33 (2d Cir. 1989).

109. ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 354 (4th ed. 1997).

of premium movie channels.<sup>110</sup> It obtained a consent decree, which did not go into effect only because the proposed merger did not materialize, designed to protect the interests of independent content producers.<sup>111</sup> Similarly, the Justice Department expressed concern with a merger of a major cable system operator, TCI, and a major program producer, Liberty Media Corporation.<sup>112</sup> It obtained a consent decree to limit feared anti-competitive effects on TCI's competitors who might otherwise be denied access to Liberty Media's programming.<sup>113</sup> The consent decree also aimed to protect competing programmers who might be disadvantaged in providing programming to TCI's cable operating systems.

This examination of antitrust indicates that if limited in the media area to economic efficiency concerns, antitrust law would be inadequate to serve the value of audience choice. A limitation of even this broader focus on audiences' choice should, however, be noted. Even the broader conception in the end adopts a commodity perspective. The concern is with the availability to audiences of a choice among commodities. This is hardly the only possible normative concern of media concentration policy. The value of audience choice must be distinguished from concerns with power *per se*, with maximizing the number of media speakers, or with broadly distributing communicative power. For example, neither an efficiency nor a marketplace of ideas approach is bothered by newspaper chain ownership if the papers do not compete for the same audience—that is, if each is located in and “local” to a separate city. Owning more than seven TV or radio stations, if each is in a different city (with non-overlapping signals), normally creates neither power over prices nor power to restrict alternatives available to any given consumer. If these types of ownership concentration are a concern, even antitrust law informed by non-economic, media-specific concerns will be insufficient. Media specific regulation would be required—and, since the early days of the FCC, such regulation has existed.

### B. *Media-Specific Rules*

Media specific concentration rules might be divided among those concerned with local concentration, national concentration, and what is usually a sub-category of the former, cross-ownership. The original framework developed over much of the twentieth century will be considered before turning to more recent changes.

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110. *Id.*

111. *Id.*

112. *Id.* at 355.

113. *Id.*

## 1. Local Concentration

Print and cable, as well as broadcasting, have been subject to media specific concentration policies. This point is important because it is often blithely asserted that broadcasting, where federal licensing was introduced as a means to respond to the “chaos” of unregulated use of the airwave “commons,”<sup>114</sup> is the only area where special regulation of First Amendment protected mass media makes sense<sup>115</sup>—and academic writing increasingly challenges the constitutionality of regulation even in the broadcast arena.<sup>116</sup>

The newspaper industry long argued that the First Amendment forbids the application of even general regulatory laws, such as antitrust legislation, to newspapers—a view long since rejected by the Court.<sup>117</sup> As a more plausible fall back position, special structural regulation of newspapers is often asserted to be contrary to bedrock First Amendment principles. The NPA, discussed in the last part,<sup>118</sup> is a prominent example that puts the lie to that assertion.

Congress adopted the NPA in response to industry lobbying after the Supreme Court decision found a JOA—whereby two newspapers in a single city combined their business operations, split the profits in a prearranged manner, but keep separate and independent editorial staffs—to violate the antitrust laws.<sup>119</sup> The NPA has considerable jurisprudential significance. As noted earlier, the NPA is not merely a special privilege for newspapers; it is a benefit for those papers forming a JOA but a likely competitive obstacle for other local papers—a fact seen from the beginning by newspapers and some members of Congress. Judicial decisions upholding the NPA against constitutional attack, premised on the differential and unfavorable treatment of some papers, imply the propriety of legislation that has an undoubted purpose of

114. This chaos/commons quality arguably provides the best understanding both of federal intervention in broadcasting and of the Court’s opinions in crucial cases such as *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). See Baker, *supra* note 39, at 102. The standard view—which may be more easily described, but which is also more vulnerable to savage and effective critique—is that an inherent scarcity of broadcast frequencies justified government regulation.

115. I have argued elsewhere that this view is wrong both normatively and descriptively. Baker, *supra* note 39. In support of the view that structural regulation is generally permitted, note that possibly the primary case relied upon by the Court in *Red Lion* for upholding structural regulatory power aimed at increasing diversity in the marketplace of ideas was *Associated Press v. United States*, 326 U.S. 1 (1945), a case involving newspapers. *Red Lion*, 395 U.S. at 387, 390, 392.

116. See, e.g., Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989).

117. *Associated Press*, 326 U.S. at 1.

118. See *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Associated Press*, 326 U.S. 1.

119. *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 140 (1969).

improving the communications order as a whole even if the legislation overtly works to the disadvantage of some media entities.<sup>120</sup>

The NPA is not the only newspaper-related ownership regulation. In 1975, the FCC barred joint ownership of a newspaper and local broadcast station and, in “egregious” cases, required divestiture of existing combinations.<sup>121</sup> The Court’s unanimous decision<sup>122</sup> upholding the rule against statutory and constitutional challenges has three important jurisprudential implications. First, this limitation on newspapers makes perfect sense if, as argued in Part I and as Justice Black declared, constitutional protection of the press allows government structural regulation to further the press’ constitutional purposes.<sup>123</sup> If, however, a newspaper is the essential rights bearing unit, it would seem questionable to deny a newspaper, simply because it is a (constitutionally protected) newspaper, an opportunity available to others—the opportunity to apply for or purchase a broadcast license. Second, by approving the limitation of divestitures to egregious cases, the Court made clear that newspaper-specific rules can discriminate among newspapers.<sup>124</sup> Third, although a local newspaper-broadcasting combination might sometimes create power to raise prices in the advertising market, the rule is not limited to these cases. Thus, antitrust “efficiency” considerations cannot explain the rule. Rather, just like the NPA, the rule only makes sense as an attempt to maintain independent voices in the communications sphere.

Curiously, unlike with newspapers, regulation of cable ownership has not tried to maintain as many independent, competing cable operators as possible. As noted earlier,<sup>125</sup> there is a (contestable) economic logic to maintaining a single local system regulated on behalf of diversity. Thus, the norm was long for local governments to grant exclusive (monopoly) franchises, with both the franchise agreement and federal law providing

120. Comm. for an Indep. P-I v. Hearst Corp., 704 F.2d 467, 482-83 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983).

121. Amendment of Sections 73.34, 73.240, and 73.636 of the Comm.’s Rules Relating to Multiple Ownership of Standard, FM, and Television Stations, 50 F.C.C.2d 1046 (1975). Long sensitive to the issue, the FCC had originally decided to consider the issue on a case by case basis. *See* Newspaper Ownership of Radio Stations, Notice of Dismissal of Proceeding, 9 Fed. Reg. 702 (1944).

122. FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775 (1978). Interestingly, unlike current doctrine that often employ a form of supposed heightened scrutiny, the Court simply explained that “[t]he regulations are a *reasonable means* of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment . . . .” *Id.* at 802 (emphasis added).

123. *Associated Press*, 326 U.S. at 20.

124. *See* Leathers v. Medlock, 499 U.S. 439 (1991) (allowing tax distinction between cable and satellite even if they were considered both video delivery media). The Court has also allowed for tax distinctions among media in the same category. *Id.*

125. *See supra* text accompanying notes 25-27.

for varying types of access channels and for carriage of independent channels. This situation prevailed until the Supreme Court in 1986 cast doubt upon the constitutionality of a monopoly franchise,<sup>126</sup> a practice that was then barred by the 1992 Cable Act.<sup>127</sup>

Despite the logic of having a single regulated cable system, congressional and FCC policy once attempted to maintain independent media voices by restricting ownership of cable systems by local telephone companies, other local video delivery providers, local broadcast stations, as well as by national broadcasting networks. More recently, however, the 1996 Telecommunications Act or FCC decisions made in light of the NPA have either eliminated or relaxed all these cross-ownership restrictions.<sup>128</sup>

The most extensive restrictions on concentration apply to broadcasting. In 1938, the FCC refused to grant a radio broadcasting license to an applicant that already controlled another broadcast station in the area. The decision began what became known as the “duopoly” rule, a refusal to grant multiple licenses for similar types of facilities in the same broadcast area to a single entity or to financially related entities.<sup>129</sup> The FCC would grant a single owner at most one each of several different types of facilities—AM radio, FM radio, and television. It tightened this restriction in 1971 when it adopted a rule generally forbidding a single owner from holding a license for both a VHF television and a radio station within a single community.<sup>130</sup> Earlier, in 1970, it prohibited cross-ownership in a single community of a television station and a cable system, then a newly developing category of video enterprise<sup>131</sup> and, as noted, in 1975 it prohibited cross-ownership of a local newspaper and broadcast station.<sup>132</sup>

126. *Los Angeles v. Preferred Comm. Inc.*, 476 U.S. 488, 494 (1986).

127. 47 U.S.C. § 541 (1992).

128. *Id.* §§ 571-572 (eliminating cross-ownership bar for telephone companies); Implementation of Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996, 11 F.C.C.R. 15, 115 (1996); 47 C.F.R. §§ 21.912 (1996), 76.501(f) (1997) (removing limits in communities where there was “effective competition”); FCC Broadcast Services; Radio Stations, Television Stations, 65 Fed. Reg. 43,333, 43,345-47 (July 13, 2000) (leaving intact rule prohibiting cross-ownership of cable system and local broadcaster, although statutory bar has been eliminated). More detail on the cable cross ownership rules can be found in HARVEY L. ZUCKMAN ET AL., *MODERN COMMUNICATION LAW* 1148-52 (1999).

129. MARC A. FRANKLIN, *CASES AND MATERIALS ON MASS MEDIA LAW* 847 (3d ed. 1987); Rules Governing Standard and High Frequency Broadcast Stations, § 3.228(a), 5 Fed. Reg. 2382, 2384 (1940). “Attribution” rules determine when formally independent corporate entities are sufficiently connected financially to bring the ownership restrictions into play.

130. Multiple Ownership of Standard, FM and TV Broadcast Stations, 28 F.C.C.2d 662, 679 (1971). In contrast to the preferred VHF television licenses, combinations were allowed involving the economically and technologically less attractive UHF television licenses. *Id.* at 673-74.

131. *Comm. Antenna Television Sys.*, Second Report and Order, 23 F.C.C.2d 816 (1970).

132. *See supra* text accompanying note 121.

These strict limits on local concentration are inexplicable from an antitrust perspective limited to a concern with power over pricing and economic efficiency.<sup>133</sup> Rather, the rules seem consistently aimed at maximizing the number of independent media voices.<sup>134</sup> Only this explains the NPA. This goal also provides the most obvious explanation of the general prohibitions on cross-ownership. Clearly, the one-to-a-market rule in respect to broadcast services is not needed, in many contexts, by the concern with economic market power but rather directly embodies a judgment that more separate voices are better.

## 2. National Concentration

In contrast to its relevance for local concentration, antitrust theory provides little reason to object, except maybe in extreme circumstances,<sup>135</sup> to what might be called “national concentration”—ownership by a single firm of many local media entities each engaged in communication in a separate geographic market. Since these firms do not compete against each other, there is little “economic” reason to prevent their combination. Nevertheless, ownership of multiple non-competing media entities has long been a concern both in the United States and elsewhere. In respect to print, the post-war coalition government in France in 1944 may have

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133. Even a broader antitrust approach that maintained a concern with the continued vitality of competition in a marketplace of ideas or with audience choice, see, e.g., Stucke & Grunes, *supra* note 10, would not explain the goal of maintaining such a wide distribution of ownership. In fact, sometimes the antitrust analysis could find the ownership restrictions to be positively perverse as impediments to both efficiency and the diversity of products provided to consumers. For example, the owner of multiple local broadcast channels has little reason to offer programming that competes against its other programming. Rather than engage in “ruinous” competition for the same dominant market, the owner of multiple competing media entities is more likely than separate owners to use them to respond to different sorts of preferences, thereby garnering a larger overall audience, and by the same token producing diversity of a sort. See BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS (1992); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 CAL. L. REV. 293, 304-16 (1991).

134. Most rules had exceptions that allowed cross-ownership or multiple ownership when that seemed the only practical way to have the service offered at all. These exceptions hardly contradict the general point.

135. The extreme circumstance is where the national concentration is so great that the owner could exercise distorting power as a buyer of media content. This was the only policy concern that the appellate court recognized as a possible basis for the FCC to limit ownership of cable systems nationally. *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001). Interestingly, the FCC rule would have guaranteed that there be at least four owners nationally. Using the Justice Department’s HHI index, a market divided among four enterprises would receive a score of at least 2500, while as a rule of thumb the Justice Department considered any market with a score of over 1800 as highly concentrated, suggesting an antitrust problem. The court, however, could only justify a rule limiting ownership to 60% of the country’s cable systems, a rule that would guarantee only two owners and a HHI of at least 5200. *Id.* at 1136.

adopted the most restrictive rule.<sup>136</sup> Although never effectively enforced, it prohibited any individual or company from owning more than one daily newspaper.<sup>137</sup>

In the United States, despite the general policy concerns being applicable to all media of communications, the most important *legal* restraints on national concentration have applied to broadcasting and, to a much lesser extent, to cable.<sup>138</sup> Regulation began in the 1940s, when the FCC explicitly limited ownership to six FM radio stations and three television stations.<sup>139</sup> It loosened this limit in 1953, allowing ownership of up to seven stations in each service category—AM radio, FM radio, and television.<sup>140</sup> It also prohibited any entity's ownership of more than one broadcast network.<sup>141</sup>

These ownership rules were not the only ways that the FCC tried to maintain independent media voices. Because of huge economies of scale, networks have long been of major importance, especially in packaging and distributing program content for broadcasters. The economics of broadcasting made it likely that, if left to market decisions, many local stations would generally broadcast material produced, distributed, and scheduled by one of the several national networks. Moreover, in its

136. HUMPHREYS, *supra* note 1, at 96.

137. *Id.* In the United States, the merits of “chain” ownership of newspapers has been a constant theme of both general commentary and social science research efforts. For example, one survey showed that 70% of journalism educators and 70% of “national leaders” thought “concentration of media ownership is a threat to the free flow of information to the public.” Barbara W. Hartung, *Attitudes Toward the Application of the Hutchins Report on Press Responsibility*, 58 JOURNALISM Q. 428, 432 (1981). Although the quality of the research design and analysis has been often quite low, and social science research and the appropriate conclusions to be drawn are disputed, in my review of nearly two dozen studies, I concluded that the research indicated some net negative consequences of chain ownership. More importantly, however, the research failed to adequately theorize or investigate the factors that should be of greatest concern, and the ways in which chain ownership was most likely to be objectionable. *See* C. Edwin Baker, *Ownership of Newspapers: The View from Positivist Social Science* (1994) (Res. Pap. R-12, Joan Shorenstein Center, Harvard U.).

138. Cable was discussed earlier, *see supra* text accompanying notes 53-59, and will not be re-examined here. As noted, at the direction of Congress, the FCC limited any company from owning more than, roughly, 30% of the country's cable systems—a very minimal restriction when compared to a maximum of seven AM, FM, and TV stations that a company could own. Although the Supreme Court unanimously upheld the restrictive broadcasting limit, the Court of Appeals subsequently rejected the limit on cable ownership as unjustified. *Compare* *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956), *with* *Time Warner*, 240 F.3d at 1126.

139. This history is summarized in Amendment of Section 73.3555 of the Comm.'s Rules Relating to Multiple Ownership of AM, FM and Tel. Broad. Stations, 100 F.C.C.2d 17 (1984).

140. *See* Rules and Regulations Related to Multiple Ownership of AM, FM and Television Broad. Stations, 18 F.C.C. 288, 295 (1953); *Storer Broad.*, 351 U.S. 192 (upholding rules).

141. Rules and Regulations Governing Commercial Television, § 4.226, 6 Fed. Reg. 2284, 2285 (1941).

network affiliation agreement, a profit-oriented local station would be willing to bargain away its option to do anything else, ceding most programming control to the network. The FCC sensibly believed that any evil created by concentration could equally result from formally separately owned broadcast stations contractually handing over editorial control to a single entity. Ownership dispersion was designed not just to generate separate station ownership but also to assure a plurality of people and firms making independent programming decisions. Thus, early on, the FCC adopted a panoply of rules designed to keep ultimate control and responsibility in the hands of individual licensees by preventing control being transferred through contractual agreements to a national network—the so called “chain broadcasting” rules.<sup>142</sup> The Court upheld these essentially anti-concentration rules against statutory and First Amendment attack.<sup>143</sup>

The differences between the older FCC and the more recent Chicago School antitrust responses to concentration are clear. FCC ownership policy was never concerned solely or even primarily with monopoly market power, on either a local or a national level. Instead, the FCC focused on ownership dispersal and on multiplying the number and pluralism of independent media voices. Numerous FCC policies and practices serve as illustrations. In addition to technical qualifications necessary to obtain a broadcast license, the FCC in its comparative licensing process asserted two primary objectives: quality of broadcast service and, “*a maximum diffusion of control of the media of mass communication.*”<sup>144</sup> It announced that it would favor license applicants that would contribute to the “[d]iversification of control of the media of mass communications;”<sup>145</sup> in addition, it would favor applicants that promise “[f]ull time participation in station operation by owners.”<sup>146</sup> This last factor effectively favored both local ownership and, in a sense, worker ownership or, at least, owners’ hands-on-management, as well as general diffusion of control. The FCC also adopted rules designed to promote ownership by women and minorities, hoping to expand the pluralism of media voices.<sup>147</sup>

142. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 193 (1943).

143. *Id.* at 226-27. These rules have been repealed in respect to radio but, to some extent, have continued to apply to television. 47 C.F.R. § 73.658 (2000). Even as to television, in its deregulatory frenzy the FCC eliminated several restrictions that it concluded are obsolete. Review of the Commission’s Regulations Governing Television Broadcasting, 10 F.C.C.2d 4538 (1995).

144. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965) (emphasis added).

145. *Id.*

146. *Id.* at 395. After almost thirty years, this “‘integration’ of ownership and management” criterion was found to be unjustified by the court. *See Bechtel v. FCC*, 10 F.3d 875, 877, 887 (D.C. Cir. 1993).

147. Statement of Policy on Minority Ownership of Broad. Facilities, 68 F.C.C.2d 979, 983

Another illustration is the FCC policy goal of providing television stations for most local communities. In order to control signal interference, the FCC's local-oriented allocation meant that (for a long period of time) many communities were reached by no more than three stations. The result was that the market did not support more than three networks, which apparently need local affiliates covering most of the country in order to succeed financially. Those favoring more market *competition* attacked this localism policy, pointing out that allowing larger stations with broader reach would have allowed most communities to be reached by at least four stations, encouraging earlier creation of more than the three competing television networks that dominated broadcasting from the 1950s to the 1980s. Even assuming as I do, that these critics were right in saying that this FCC policy prevented greater network competition and reduced viewing choice for the average audience, that should not end the argument. The FCC policy supported the goals of providing local communities with their own mediums of communication and of increasing the total number of owner/participants in the broadcasting realm. Given that aim, consistent with all its other policies, the FCC practice made perfect sense. The problem was not FCC stupidity, as critics sometimes imply, but was whether the Chicago School's crabbed vision of proper policy objectives should be accepted.

In sum, licensing rules directly favored dispersal of ownership and limited concentrated ownership, favored integration of ownership and control, required the owner to bear ultimate responsibility for broadcasts thereby limiting network power over local stations, and promoted broadcasting in as many communities as possible. These policies have in common a goal of increasing the number of decision makers who make choices about what content to broadcast. This dispersal itself, not competition or similar concerns of an efficiency oriented antitrust policy or even audience choice, was clearly central to FCC policy.

### 3. Changed Directions

Neither the regulatory policy, pervasive in broadcasting but also influential in relation to newspapers and cable, nor the understanding of its theoretical foundations were to last. By 1982, a move toward so-called deregulation in broadcasting had begun. That year, Mark Fowler, later Chair of the FCC, and Daniel Brenner published their famous article

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(1978). The policies in respect to minorities were upheld against a constitutional challenge of race discrimination in a 5-4 decision by Justice William Brennan in his last opinion for the Court. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990). The case's approach to affirmative action, although not the specific constitutional holding related to the FCC policy, has since been overruled. *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 228 (1995).

advocating a marketplace approach to broadcast regulation.<sup>148</sup> In 1984, the FCC expanded the national limits on station ownership from the 7-7-7 rule to a 12-12-12 rule and added a sunset provision aimed at entirely eliminating FCC restrictions on concentration in six years.<sup>149</sup> Largely due to pressure from Congress, the FCC pulled back slightly. For example, it eliminated the sunset provision and limited ownership within a given broadcast category to stations that together reached no more than twenty-five percent of the national audience.<sup>150</sup>

Still, the trend had been set. In 1992, the FCC expanded permissible ownership for radio to eighteen AM and eighteen FM stations.<sup>151</sup> Congress, which had previously slowed the FCC, responded to intense industry lobbying and energized the shift toward reliance on the market with the Telecommunications Act of 1996.<sup>152</sup> The Act eliminated the statutory restriction (but not the FCC rules) on cross-ownership of cable systems and either a local broadcast station or a broadcast network.<sup>153</sup> Congress removed all limits on the total number of radio or television stations that could be jointly owned, leaving radio ownership unregulated—which resulted in an immediate “orgy of consolidation.”<sup>154</sup> For television, the Act increased the proportion of the national audience that the single ownership group could reach from twenty-five percent to thirty-five percent.<sup>155</sup> Finally, the Act directed the FCC to reconsider most remaining ownership limitations.<sup>156</sup> Thus, in 1998, the FCC began proceedings to consider eliminating the rule prohibiting

148. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

149. Report and Order, Amendment of Section 73.3555 of the Commission’s Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 F.C.C.2d 17 (1984).

150. See generally Ronald J. Krotoszynski, Jr. & Richard M. Blaiklock, *Enhancing The Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813. Greater reach was allowed if the owner partnered with owners coming from a racial minority group. This represented a common FCC strategy employed in several contexts to allow a partial exemption from a burdensome rule if the licensee acted in a way to increase minority ownership or control of broadcast licenses. *Id.* These policies are mostly outside the scope of this Article.

151. Revision of Radio Rules and Policies, 57 Fed. Reg. 42,701-01, § 73.555(e)(1)(i) (1992).

152. For a good, critical review, see PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996 (1999).

153. Revision of Radio Rules and Policies, 57 Fed. Reg. 42,701-01, §§ 202(I), 202(f) (1992).

154. Krotoszynski & Blaiklock, *supra* note 150, at 815 n.7. For example, at the time of the 1996 Act, the largest radio ownership group consisted of less than forty stations. Federal Communications Commission Issues Biennial Regulatory Review Report for the Year 2000, Doc. No. 00-75, 2001 FCC LEXIS 378 (Jan. 17, 2001) [hereafter Biennial Report 2000], at \*96-97, ¶111. By September 2000, a single owner held over 1,000 of the country’s 12,600 stations and several other owners had more than 100 stations each. *Id.*

155. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(c)(1)(B) (1996).

156. *Id.* § 202(c)(2).

newspaper/broadcaster cross-ownership in a single community. It initiated proceedings to eliminate the remaining “chain broadcasting” or network rules—the rules unanimously upheld by the Supreme Court in 1943.<sup>157</sup> In 1999, the FCC adopted new rules allowing more joint ownership of broadcast facilities within a community.<sup>158</sup> First, these rules narrowed the situations where two stations would be considered overlapping for purposes of the ownership restraints.<sup>159</sup> Second, they expanded the circumstances in which a firm could own two television stations and up to six radio stations in a single local market.<sup>160</sup>

A complete, up-to-date list of current rules might not be important here, in part because it is likely to soon be out-of-date. The general point is clear. Up until the early 1980s, FCC policy basically aimed to restrict ownership concentration both locally and nationally. Local ownership combinations were usually allowed only when combined ownership was expected to be the only way to provide that broadcast service to the area. Even then, multiple ownership was permitted only if the combined service seemed particularly valuable. The presumption was relentlessly against concentration and toward maximizing the number of independent media voices. Since the early 1980s, the orientation has flipped. The policy direction has been toward eliminating legal restraints on concentration. The presumption favors mergers unless clear and specific problems with a combination could be shown. Interestingly, one consequence is that

157. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226-27 (1943); *see also supra* text accompanying note 143.

158. FCC Revises Local Television Ownership Rules, Rep. No. MM 99-8, 1999 FCC LEXIS 3736 (Aug. 5, 1999).

159. *Id.*

160. *Id.* One consequence of this rule was that it allowed the merger, announced shortly after the rule's adoption, of CBS and Viacom. Since ownership of two stations in a market was now permitted, the merged company's overlapping stations were, for the most part no longer a problem. Still, the merged company faced the FCC's thirty-five percent television audience cap and the bar on owning two networks, with the FCC requiring that they conform over time. At the time of this writing, the FCC has just announced that a merger of a major (e.g., CBS) with a minor network (e.g., UPN) would henceforth be allowed. Press Statement, Dual Network Report and Order, Michael K. Powell, 2001 FCC LEXIS 2164 Apr. 19, 2001. Permitting ownership of two television stations also leads to a prediction concerning the response to the thirty-five percent cap. Under this rule, Viacom could trade stations with another media conglomerate, News Corp. (Fox), whose expected purchase of stations from Chris-Craft would also put its audience reach over the top. The trade would give each conglomerate a second television station in a market in which it already owns one and where the two conglomerates would otherwise compete. The trade would leave each with duopolies in single cities, whose audience would only be counted once toward the cap on audience reach. A likely reason that such a deal has not (yet) occurred is the high likelihood that the FCC will soon increase or eliminate the percentage cap on audience reach or that the courts will hold it unconstitutional, making the swap unnecessary. *See Michele Greppi, Viacom Stay Puts Swap on Hold*, ELECTRONIC MEDIA, Apr. 9, 2001, at 1; Press Release, FCC Approves Fox Chris-Craft Merger with Conditions, FCC Lexis 4000 (July 25, 2001).

antitrust law, interpreted as merely concerned with market power, has become relevant. Thus, the Antitrust Division of the Department of Justice has been the remaining, although weaker, source of restrictions on the recent consolidating trends in radio.<sup>161</sup>

Although not always clearly articulated, this endeavor to eliminate ownership restrictions embodies four interrelated changes in basic assumptions. First, most overtly, is a new unbounded and unprobed faith in the market. The market will purportedly lead the concentrated but competitive firms to provide audiences with the variety and type of content they want.<sup>162</sup>

Second, maintenance (or creation) of competition is treated as virtually the only important policy concern. Mostly, those favoring deregulation do not answer the arguments of those favoring deconcentration, but rather are tone deaf as to why anything other than inefficient monopoly power could be a matter of concern. Wide dispersal of ownership had previously been seen, in a sense, as a good in itself or, more programmatically, as the good of simply providing for more independent voices, more opportunities to be a broadcast "speaker," less concentrated power over public opinion, as well as *potentially* more viewpoint diversity. Now, as long as competition exists, wide dispersal of ownership is seen as unimportant in itself and possibly inefficient.<sup>163</sup> From this new perspective, the FCC appropriately allows multiple ownership within a local community as long as an adequate number of competing firms continue to prevent the concentrated firm from having monopoly power over advertising rates. This focus on economic competition makes national limits hard to justify. Ownership of multiple geographically separated stations does not reduce competition in any observable geographic market.<sup>164</sup> (This same consideration explains why chain ownership of daily newspapers in different areas usually raises no antitrust issue.)

Third, policy commentators often observe competition coming from an increasing number of directions. Relevant competition could come from many sources other than those providing the particular media service at

161. See generally ZUCKMAN ET AL., *supra* note 128, at 1206; Leeper, *supra* note 92; Rathbun, *supra* note 87; Teinowitz & Wilke, *supra* note 87.

162. I systematically critique this assumption in C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY, Part I (2002).

163. This characterization is impressionistic, and I would like to be wrong. The FCC still sometimes asserts that pluralism of ownership diversity promotes competition within the marketplace of ideas. My impression is, however, that today this diversity concern is almost an afterthought, much less likely than previously to be the determinative consideration in any decision and is instead window dressing. Generally, the (unjustified) assumption is that the competitive market will provide the degree of diversity people want. See *id.*

164. This was, of course, the underlying policy assumption of the lower court in *Time Warner*. See *supra* text accompanying notes 53-59.

issue. In its most extreme form, this perspective sees all media as competing with each other, or even more grandly, views media as merely being a form of entertainment that is not too concentrated as long as other forms of entertainment are available. If media competition is not found elsewhere, it is now said that the Internet provides (or will soon provide) all the competition we want—maybe more.

Finally, although not articulated as a specific policy premise, the regulatory change likely reflects an increasing willingness to bow to industry wishes for profits or corporate aggrandizement. In fact, given their (questionable) assumption that American firms need to be huge in order to dominate globally, government policymakers, sometimes explicitly for that reason, recommend that ownership concentration be less restrained by government<sup>165</sup>—a consideration related to power and profits but hardly focused on providing the media needed by the American people either in their role as consumers or as citizens.

#### 4. Summary

The comparisons of general antitrust law and media-specific ownership regulation and of the dominant history of media-specific law with the deregulatory approach of the last twenty years paint a fairly clear picture. Antitrust regulation of the media *could* serve many values in addition to narrowly defined economic efficiency—values such as promotion of consumer choice. Media concentration would be restricted in promoting such values. Nevertheless, in practice, the market power to inefficiently raise prices and to transfer wealth from buyers to sellers has been almost the sole concern evident in recent application of antitrust laws in the media context.<sup>166</sup>

In contrast, neither Congress nor the FCC focused on economic efficiency in developing the media specific ownership rules (which were routinely upheld by the courts). Historically, media-specific policy concerns clearly related primarily to the democratic or pluralist structure of participation in the communications order—the interest that Justice Black so famously endorsed in *Associated Press*<sup>167</sup>—and to the prevention of any firm accumulating excessive communicative power. Only such values can justify or explain the FCC broadcast regulations discussed above. The repudiation of a simply economics-based antitrust approach

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165. U.S. Department of Commerce, *Globalization of the Mass Media* (U.S.G.P.O., 1993). Similarly, the need to compete internationally, especially with America, has been a major force driving deregulation in the media sphere in Europe. See generally HUMPHREYS, *supra* note 1.

166. *But see* *Hawaii v. Gannett*, 99 F. Supp. 2d 1241, 1249-50 (D. Haw.), *aff'd*, 203 F.3d 832 (9th Cir. 1999); *supra* text accompanying note 99.

167. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945), *quoted supra* note 34.

was even more overt when Congress revived JOAs after courts found them often inconsistent with antitrust rules. The NPA represents a Congressional judgment that a likelihood of greater economic exploitation by a JOA's more concentrated, potentially monopolistic market power (especially over advertisers and maybe over revenue derived directly from sales to newspaper readers) was acceptable if it increased the likelihood that independent editorial voices remained alive—a goal similar to that embodied in the broadcast rules.

Early on, cable franchising policy was arguably aimed at allowing concentration. That practice, too, would seem to contradict the antitrust premise that competition best serves society. A number of grounds, not all of them benign, might explain local cable franchise monopolies. Although now prohibited by statute, two structural policy arguments provide exclusive local franchises with their most legitimate justification. First, the practice represents a plausible judgment that competing cable systems, laying their own wires and duplicating each others infrastructure costs, even if supported by the market, wastes resources (the economic notion of “ruinous competition”) and, hence, is an undesirable form of competition. Dispersal of power and plurality of voices, however, remained of prime importance. The aim was to promote these goals without wasting these resources. Thus, legal requirements included not only rate regulation, but also mandates that channel space be made available to independent programmers—a regulation that would increase the number of entities with a guaranteed legal right to communicate over cable. More importantly, government regulation could direct that some savings generated by avoiding this wasteful competition, combined with some revenue from “monopoly” pricing, be used to support forms of communication content and expressive forums—illustrated by the public access, governmental, and educational channels—that add to diversity and potentially to consumer welfare.

Nevertheless, more recently, many if not most media-specific regulations described above have been rejected—either by Congressional, agency, or court action. Although more discussion of the policy rhetoric would be necessary to prove the point, I believe this process of change has been aided and rationalized by commentators, courts, and policy makers adopting one or both of two rhetorical stances. Often they argue (or more likely assume) that *only* an economic efficiency goal, of the sort attributed to antitrust law, really (i.e., non-paternalistically) serves the public interest. Given this assumption, they can then show that the regulations are quite irrational in their service of the goal that they posited. Alternatively, they argue that any supportable non-economic value in fact will turn out to be well-served by competitive market behavior and ill-served by regulatory control of ownership. Parts III and IV will consider arguments for and against these views.

### III. OWNERSHIP IS NOT A PROBLEM

Legal regulation of ownership presumably reflects a fear of concentration. There are, however, other related possibilities. A policy focus on ownership could also, or instead, reflect concerns about *who* owns the media, that is, about traits of the owners. The policy goal might be to disperse ownership among different groups or to have both liberal and conservative owners. Maybe local rather than absentee owners or maybe ownership integrated with management would predictably provide higher quality media content (under some obviously contestable concept of “quality”) and better serve either consumer or democratic needs. FCC licensing policy has embodied all of these views. Such concerns provide a basis for the widespread critique of newspaper chain ownership. Arguably, firms rooted in the media business would produce better content than they would if marginalized as “profit centers” of conglomerate firms that operate primarily in other lines of business.<sup>168</sup> Or maybe it would be desirable if ownership took varying forms, with different forms of economic bases.<sup>169</sup> Finally, the real issue often may be *control*, for which ownership is a loose but imperfect proxy.<sup>170</sup> The degree to which it is a

168. C.K. McClatchy, a respected editor and chair of a newspaper chain, indicated that his greatest fear was that newspapers would be run by conglomerates, such as Mobil. He argued that “good newspapers are almost always run by good newspaper people; they are almost never run by good bankers or good accountants.” C.K. McClatchy, *How Newspapers Are Owned—And Does It Matter?*, 23 PRESS ENTERPRISE LECTURE SERIES 7-8 (1988). In conversation, Warren Phillips, former editor of the *Wall Street Journal* and CEO of Dow Jones, made a similar point, emphasizing the importance placed on having the publisher come from the journalistic rather than the business side of the company (conversation with author, Fall 1992, Cambridge, MA). See also Bill Kovach, *Big Deals, With Journalism Thrown In*, N.Y. TIMES, Aug 3, 1995, at A25.

169. I will later endorse James Curran’s recommendations to this effect. See *infra* text accompanying note 310.

170. Justice O’Connor once argued that “it is important to acknowledge one basic fact: The question is not whether there will be control over who gets to speak over cable—the question is who will have this control. Under the FCC’s view, the answer is Congress . . . Under my view, the answer is the cable operator.” *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 683-84 (1994). Justice O’Connor is right in her first step—the basic question is who will have control. She erred, however, as she proceeded. As to the must carry issue in the *Turner* cases, for control to rest either with the cable operator or with the local broadcast station, to which the FCC wanted to give a carriage option, the claimant must look to law to determine whether she/he/it has that control—that is, the law ultimately controls. Under one law, one private actor controls (as to any particular decision); under another law, a different private actor controls. In *either* case, the ultimate source of control—the law—is generally thought to be in the hands of Congress (or the states if not preempted by Congress). O’Connor’s claim ultimately amounts not to an argument in favor of “owners”—Congress recognized the local broadcaster as “owner” of the decision whether a local cable system would carry its channel—but in favor of replacing Congress with the Court as the authority determining who “owned” that decision. Despite wanting “her view” to control here, at other points, she was ready to recognize that Congress could ultimately control by adopting laws

good proxy may vary given other legal rules and the sociological context. Control over different issues—budget versus content, for instance—is not always in the same hands. The ideal arrangements are hard to determine. Still, policy should be concerned with whether the law aides or impedes achieving better arrangements.<sup>171</sup> These matters are important—some will be briefly addressed later. Concentration itself is routinely the central matter raised by media critics, however, and will be the primary focus here.

At least three arguments could be made to show that concentration should not be a serious policy concern, at least not today. First, maybe the market effectively requires (or encourages) owners, *whoever they are*, to supply roughly the same diverse media products. If so, who owns the media may not be very important. The market may or may not be a desirable mechanism to determine media content—elsewhere I have argued that market competitive processes respond well neither to people’s media preferences nor to citizens’ media needs.<sup>172</sup> Such critiques show a problem with (over) reliance on a market structure. They do not show, however, that the identity of the owner matters.

Second, maybe ownership is now sufficiently dispersed that existing or realistically threatened concentration poses no real problem. In fact, even greater concentration might be beneficial.

Third, maybe the professional work habits of the journalists and writers largely determine what media content actually gets produced and then sees the light of day. Owners might not even try to control media content. But even if they do try, *whoever they are*, they will not succeed except in isolated instances. Occasional cases of actual successful ownership intervention often create considerable stir, being subject to critical media reports or exposés. These occasional occurrences, however, are the exception that proves the rule. Owners may not seriously affect either the nature of public life or the bulk of the communications received by the public. Moreover, these essentially sociological claims about owners’ lack of control may apply even more fully to large scale (concentrated) corporate organizations than to smaller entities, where an individual or family owner often exercises more hands-on control. In any event, this

that give immediate control to a private party other than the cable operator—that is, she saw no First Amendment problem with imposing common carriage requirements on at least some of the cable channels. *Id.* at 684.

171. Possibly because Europeans more clearly recognize that the press is an institution for which freedom must be seen as something referring to distributions of different decisionmaking rights to different people as well as limits on the government, BARENDT, *supra* note 9, at 40-45, legal policy often tries to respond to the needs of what is called “internal freedom” of the press, sometimes involving the rights of editors against capital suppliers and journalists against both. Compare HUMPHREYS, *supra* note 1, at 108-10, with *infra* note 258.

172. See BAKER, *supra* note 162.

third claim argues that the focus on ownership is overstated in contemporary discussion. I will present and respond to each claim separately.

### A. *Market Determined Performance*

A widespread populist perspective offers a “power” critique<sup>173</sup> of media concentration. It goes like this: Communications media exercise great political and cultural power. Concentrated power is dangerous (i.e., “power corrupts . . .”). Ownership gives control over this power.<sup>174</sup> Therefore, concentrated ownership is dangerous and should be restricted.

A second, “bottom line” critique may be more prominent among media professionals.<sup>175</sup> The problem? MBAs running—and ruining—newsrooms! Media managers fixated on the bottom line! Critics usually make their point in two parts. First, a purportedly newly dominant “bottom line mentality” is shown to undermine adequate performance of the journalistic or creative function. Then, unwelcome “recent” developments—such as the move toward ownership by media conglomerates and publicly traded companies—are identified as the key culprits. That is, the critique goes: the bottom line orientation in journalism: (i) is new (or increasing), (ii) is a problem, and (iii) is caused by ownership.

Defenders of the existing order might respond to the “bottom line” critique by challenging the first two elements. It is not clear that this bottom line orientation is new. Reviews of media commentary throughout the twentieth century would find the same complaint<sup>176</sup>—although later in this part I will discuss structural reasons to expect that recent ownership changes have exacerbated the “problem.” Still, even if not new, that hardly means that the issue is not serious. If caused or exacerbated by concentrated ownership, the historical observations should not satisfy critics of concentration.

Defenders of the existing order also sometimes reply that critics have offered little basis for criticizing this bottom line mentality. Traditional economics explains that market competition provides people with what they want. Deviating from this result would be objectionably paternalistic.

173. This critique provides the background assumption of most leftist complaints about the media. See, e.g., HERMAN & MCCHESENEY, *supra* note 9.

174. These premises provide the logic of the title of one of the more influential academic books about the media, JAMES CURRAN & JEAN SEATON, *POWER WITHOUT RESPONSIBILITY: THE PRESS AND BROADCASTING IN BRITAIN* (5th ed. 1997).

175. Often found within articles in the *Columbia Journalism Review*, the critique is suggested by Doug Underwood. See generally DOUG UNDERWOOD, *WHEN MBAs RULE THE NEWSROOM: HOW THE MARKETERS AND MANAGERS ARE RESHAPING TODAY’S MEDIA* (1993).

176. Cf. UPTON SINCLAIR, *THE BRASS CHECK: A STUDY OF AMERICAN JOURNALISM* (1919); GEORGE SELDES, *FREEDOM OF THE PRESS* (1935).

I will not pause here to repeat my (or others') extensive criticism of this Pollyannaish view of the consequences of effective market competition.<sup>177</sup> The key failing of this popular defense of the market is that economic analysis of even the most traditional and conservative sort shows that, at least in regard to *media products*, predictable consequences of truly effective market competition are not so benign. The competitive market can be expected to grossly fail to provide for the preferences of the public or for the needs of the citizen.<sup>178</sup>

Defenders of existing order, however, might more plausibly take a more radical tack that undercuts both "power" and "bottom line" critiques of concentration. Their argument denies a correspondence between ownership concentration and either power or the bottom line mentality. The claim is that the market, not owners, determine media content. Critiques of the existing performance of the media may be in order—but if so, the critic should focus on market structures, not on ownership concentration. This claim merits elaboration.

Market advocates praise and market critics disparage markets for the same reason. A competitive market structure purportedly generates pressures that dictate an enterprise's market behavior.<sup>179</sup> This shared descriptive theory—the advocates and critics diverge only in their evaluation—is based on two theoretical assumptions. First, to survive, a market participant needs to capture at least enough revenue to replace its capital—that is, to cover its costs. Second, given this first constraint and given competition, the firm must provide a product at a price that satisfies consumers as well as does everything that its competitors can supply at that price. This structurally-created dynamic dictates a profit maximization orientation (which market advocates often confuse with an efficiency orientation<sup>180</sup>). Thus, the market-based firm must try to fulfill the money-backed preferences of its customers as cheaply as possible—if it does not, it will be undersold by a competitor and eventually go bankrupt.

This market dynamic produces profit-maximizing behavior and denies the enterprise any freedom except to try to be as profitable as possible. Consistent failure to achieve this *market-dictated* goal means eventual exclusion from the market. (This account leaves real freedom of choice to

177. BAKER, *supra* note 162, Parts I and II.

178. *See id.*

179. Interestingly, this view tends to be shared by conservative market advocates and Marxist-influenced economists but rejected by liberals whose individualistic orientation often leads them to ignore structure and recommend that problems can be remedied primarily by teaching or persuading elite decision makers to act more benignly.

180. Profit maximization is served, for example, by externalizing costs or undermining labor's capacity to demand higher wages. Neither practice, however, increases "efficiency;" rather they only affect wealth distribution.

the realm of consumption—the realm Max Weber described as the *household*, which is roughly comparable for these purposes with Jürgen Habermas' concept of the *lifeworld*—where people individually or discursively decide how to spend their money and their “free” time.<sup>181</sup>) Market advocates praise the enforced responsiveness to consumer demands while radical critics often criticize particular (alienated) behavior dictated by this structure. Putting aside that debate, the important point on which the market advocates and critics seem to agree is that wherever this market dynamic operates, the identity of the owners makes little difference. To be more precise, it must be admitted that some owners are stupid or venial. The claim is only that *over time* market dynamics weed out the stupid and defang the venial. The market leads eventually to the same (optimal) production irrespective of any initially assumed set of owners. What we get depends on people's market-expressed preferences—regardless of whether this result is to be praised or condemned. Even if too exclusive a focus on the bottom line is for some reason bad, interventions to prevent concentration or to distribute ownership differently is not the solution. Rather, the only “solution” would be to develop alternatives to the market (or to restructure the market so that its incentives operate more benignly). Indeed, I partially agree with this point—as did Europe at the time it opted for public broadcasting rather than the “American plan,”<sup>182</sup> that is, an advertising-funded commercial broadcasting system.<sup>183</sup>

Unless this analysis of market dynamics, at least in the media context, is relevantly wrong, a policy concern with “who owns the media” is misguided. Therefore, a defense of this policy concern requires some critique of this account of the market. The claim could take the form of a general denial—this account of market dynamics is wrong everywhere. I have no wish to advance that general claim.<sup>184</sup> Here, instead, I suggest that, even if this dynamic is generally very powerful, at least two factors cause it not to operate effectively in the media context and that this level of slippage has huge policy relevance.

First, even if the market enforced a profit orientation, prospectively identifying the profit maximizing content is an exceedingly difficult and

181. See generally 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., Beacon Press ed. 1987) (1981).

182. ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935*, at 100, 114, 126, 133 (1993).

183. Recent studies of public broadcasting in Europe suggest a deterioration of quality the more the system relies on advertising for revenue. See HUMPHREYS, *supra* note 1, at 240-44.

184. I have actually relied on the claim that in other contexts this market dynamic is generally effective. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 194-224 (1989).

continuing task. Different owners or managers will make quite different guesses. Even if all Hollywood studio heads wanted only to maximize profits, they hardly know how (even if they willingly sacrifice other values in the attempt). They constantly attempt different content strategies—and a decision maker's one right guess does not mean that his/her next will be so. For this reason, human decisions will always lead to significant, non-market determined variations in the content of media products. The important point here is that this systematic error by all enterprises leaves considerable room for different owners to make choices influenced in part by other goals, such as personal ideology, without seriously sacrificing the profits needed to avoid bankruptcy. Moreover, to the extent some owners (or managers) are comparatively better than their competitors at finding profitable strategies, their success simply provides more options for "subsidizing" their other, non-profit maximizing aims, aims that often involve choices about content. If either Murdoch or Berlusconi is good at being profitable, this merely increases his opportunity to be ideological.

The second point, however, is more basic and maybe more important. Like utilities, media products characteristically manifest an important attribute of "public goods." Due to a significant portion of their cost being their "first copy cost," with additional copies having a low to zero cost, media products have declining average costs over the relevant range of their supply curves. This fact makes the economic theory of monopolistic competition applicable to media goods.<sup>185</sup> Attributes of monopolistic competition distinguish it from so-called pure competition, the standard model that underwrites the belief that a properly working market leads inexorably to the best result (given acceptance of the market's "givens" of market-expressed preferences and the existing distribution of wealth). These differences have major relevance for policy analysis. In monopolistic competition, products often prevail that do not have close, certainly not identical, substitutes. This non-substitutability often allows reaping of significant monopoly profits—although the nature of this competition also means that some media products only succeed minimally. The "potential" profit can be realized and taken out as profit. This is the accusation lodged at corporate newspaper chains and cost-cutting network news divisions. The market itself does not, however, require this profit maximizing response as it does in the standard model of pure competition. Rather, owners (or managers) can instead spend the potential profit on indulging (or "subsidizing") their choices about either content or price.

Actual accounts from the media industries amply illustrate this abstract economic prediction. André Schiffrin described this process in the book

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185. The classic text is EDWARD HASTINGS CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE* (8th ed., 1962).

publishing world.<sup>186</sup> He claims that, in the past, “serious” publishers would find and maintain the loyalty of very profitable authors.<sup>187</sup> The publishers would then self-consciously use these profits to sustain “good” but unprofitable books.<sup>188</sup> This example is interesting. The model of pure competition expects firms in industries with a relatively large number of players, as book publishing has,<sup>189</sup> to be forced by competitive pressures to adopt a profit maximizing strategy to survive. However, with monopoly products—which include any copyrighted item—the potential exists at each level to obtain monopoly profits. These potential profits can then be “spent” on non-profit maximizing aims or values. In Schiffrin’s account, authors who “make it” commercially often remain loyal to, that is, subsidize, publishing houses. Although the market might force publishers to “bind” authors in order to obtain sufficient revenue for the risky activity of looking for the next best seller, author loyalty and publisher behavior do not necessarily conform to this model. Schiffrin describes a process where, instead, publishers consciously use this revenue to support serious, but non-profitable entries in their list.<sup>190</sup> Publishers, like many of their “serious” authors, see themselves as “paying” themselves, not in high salaries or fancy executive suites, but in the “currency” of freedom to publish the books that they want to publish.<sup>191</sup> Of course, some might object that these non-profit maximizing “expenditures” on editor-chosen books are socially wasteful. That might be true if profit maximization led to appropriate media production. But it does not.<sup>192</sup> For several reasons, including considerable positive externalities associated with “good” books, the behavior Schiffrin describes is likely to move book publishing closer to a social optimum.

Of course, various responses to and uses of these monopoly profits are possible. The market does not dictate how monopoly profits are spent.

186. ANDRÉ SCHIFFRIN, *THE BUSINESS OF BOOKS: HOW INTERNATIONAL CONGLOMERATES TOOK OVER PUBLISHING AND CHANGED THE WAY WE READ* (2000).

187. *See id.* at 91, 95, 108.

188. Schiffrin proceeds to describe the elimination of this practice by the newly merged, huge corporate owners of the major publishing houses, many of which are like Random House in demanding that “each book should make money on its own and that one title should no longer be allowed to subsidize another.” *Id.* at 91.

189. Douglas Gomery concludes that “[i]n terms of the exploitation of concentrated ownership, book publishing and sales have generated less problems than other mass media” and in his terms, “book publishing must be judged as a loose and open oligopoly.” BENJAMIN M. COMPAINE & DOUGLAS GOMERY, *WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY* 135, 136 (3d ed. 2000). Gomery reports U.S. government data as listing 2,503 book publishing companies in the United States in 1992 but suggests even this number is quite low because of the government’s restrictive definition of publisher. *Id.* at 63-64.

190. *See* SCHIFFRIN, *supra* note 186, at 91, 95, 108.

191. *Id.* at 108.

192. *See* BAKER, *supra* note 162, Part I.

Schiffrin claims that the new corporate conglomerate owners of the major publishing houses, which now dominate the industry,<sup>193</sup> differ from the former publishers in their priorities.<sup>194</sup> These conglomerate owners squeeze much higher rates of return out of their monopoly properties—targeting rates of twelve to fifteen percent, where four percent had formerly been the industry average—while ending the prior publishers’ commitment to making books more readily available to audiences by keeping prices down.<sup>195</sup> But, according to Schiffrin, while this bottom line corporate objective now largely dominates, some potential profits apparently are also spent to satisfy the new owners’ political values, reflecting a new “intolera[nce of] dissenting opinions” and generally more conservative political views.<sup>196</sup>

This opportunity to serve alternative or multiple objectives is even greater in other media sectors, such as with the daily newspaper sector. High first copy costs, especially when there is not sufficient product differentiation among papers, creates the condition for local daily paper monopolies. Advertising encourages this lack of product differentiation in newspapers (just as a somewhat different set of advertisers sometimes encourages particular differentiations among niche magazines). The more the local paper’s revenue comes from advertisers who want the largest possible reach among local consumers, the more the paper’s profit maximizing goal becomes securing the broadest, not the highest paying, audience. Typically, an objective, non-partisan (de-differentiating) voice that speaks equally to all segments of the community best serves this aim.<sup>197</sup> The result is a pattern of one paper cities where, despite high

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193. Data and reports here vary. Mark Crispen Miller asserts that seven companies dominated book publishing as of 1998, and Gomery concludes that a dozen companies publish about half the books sold in the country. *COMPAINÉ & GOMERY*, *supra* note 189, at 62, 135. Concentration may also be greater within particular book categories.

194. *See SCHIFFRIN*, *supra* note 186, at 91.

195. *See id.* at 118-19.

196. *See id.* at 130-33, 136.

197. *See Baker*, *supra* note 7, at 7-44. Local daily competition is much more likely to be profitable if: (i) there is partisan sponsorship of papers; (ii) the public is politically engaged and consequently, desires a more partisan paper; (iii) other factors make the market much more fundamentally divided (such as into different language groups); or (iv) advertising plays a less significant role in the newspaper’s financial success.

“monopoly” profits,<sup>198</sup> potential competing papers find it virtually impossible to challenge the local monopolist.

Given a stable local monopoly, there still remains the question of how to “spend” potential monopoly profits. Should these potential profits be “cashed out,” used to provide for greater access to the paper by pricing it below the profit maximizing level,<sup>199</sup> used to pay for quality journalism, used to support other (often political or ideological) agendas, or wasted through inefficient (sometimes family) management?

Market dynamics push toward the first choice. Those who aim solely at profit maximization will typically be able to offer more to buy an existing monopoly paper than its current income stream is “financially” worth to current owners (or other bidders), at least if those current owners (or other bidders) have made one of the other choices. Thus, whenever financial value becomes crucial to owners, for example, because of the need to pay estate taxes or because some family heirs lose interest in the paper and want the money, a transfer of control to buyers prepared to cash out profits—rather than to subsidize quality journalism, personal or group ideology, or public availability—becomes likely. The result explains the continual complaint that the new owners, especially the publicly traded chain corporations, constantly try (and are able) to impose higher and higher profit rate expectations on their local management, leading to the steady deterioration of journalistic quality.<sup>200</sup> Still, the nature of monopolistic competition is that the market itself does not force this choice on media owners.<sup>201</sup> For this reason, who controls the newspaper (or other media outlet) and decides on priorities makes a huge difference.

198. Average operating margins in daily newspapers in 1997 were 19.5%, an extraordinarily high rate that should encourage new competitors except under conditions supporting “natural” monopolies or when particular “legal monopolies,” such as patents in the drug industry, protect such profits. GILBERT CRANBERG ET AL., *TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY* 18 (2001); see also BAGDIKIAN, *supra* note 9, at 13; Comments of Consumers Union et al., App. A (statement of Ben Bagdikian), *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers? Newspaper/Radio Cross-Ownership Waiver Policy*, MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001).

199. See generally William B. Blankenburg, *Newspaper Ownership and Control of Circulation to Increase Profits*, 59 *JOURNALISM Q.* 390 (1982).

200. Historically, operating margins in the daily newspaper industry have been a relatively high 10% to 15%, but now papers owned by the publicly traded companies range from 20% to 30% or higher. CRANBERG ET AL., *supra* note 198, at 10; see *id.* at 111 (describing rates moving from historic norms of 8 to 10% to increasingly higher rates, now 30% or higher, and attributing the change to replacement of owners with pride and involvement in the community to stock owners only interested in profits).

201. Of course, profit maximization might be required after the potential income stream was capitalized in the winning bid to purchase an existing monopoly paper. Cf. Todd Bonder, *A “Better” Marketplace Approach to Broadcast Regulation*, 36 *FED. COMM. L.J.* 27, 29, 68 (1984) (noting and approving the possibility of this effect in an ideally structured broadcast arena).

Contrary to the claims made from the perspective of the standard economic model, monopolistic competition allows the owner to make choices between goals of profit maximization, ideology, and product quality (here journalistic quality), and greater, even though unprofitable, circulation.

An additional feature of newspapers (and an analogous point may apply to other media) leaves greater choice in the hands of owners than is true for many consumer products. It may be the case—this is an empirical issue that can vary from community to community—that the number of readers that a paper would *gain* if the paper slants content choices toward the owners' personal ideological or other agendas is not significantly less than the number the paper *loses* through not adopting a more directly profit maximizing content slant. The paper's monopoly position within the community can make this possibility empirically more likely. Under these conditions, the amount of profits that must be "spent" to indulge an owner's particular non-market determined preferences may be quite modest, maybe even less than public stockholders would note.

Empirical research on the difference newspaper ownership makes has generally been of extraordinarily poor quality.<sup>202</sup> Still, this research arguably suggests that the public benefits slightly from ownership by private (e.g., family) independent firms rather than chain ownership by publicly traded firms, although variations in quality are greater within than between these ownership categories.<sup>203</sup> Both results are predictable on the account given above. Choice, not merely market forces, influences quality and leads to variation within ownership categories. Variation between ownership categories is largely explicable on two grounds. First, different pressures or incentives typically operate on different categories of owners. Second, sociological characteristics of people filling the ownership role in different ownership categories may vary systematically, not randomly. Both factors lead to (statistically) different types of choices. Generally, quality journalism (as well as ideological journalism) follows from choices favoring values other than the bottom line. Corporate chains may provide some efficiencies and management qualities that sometimes increase the enterprise's potential for either profits or quality. The carrots and sticks generally operating on executives (editors and publishers) in chain firms, as well as the added pressures of public ownership, are, however, typically directed toward increasing profits.<sup>204</sup> In contrast, membership and

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202. See generally C. EDWIN BAKER, OWNERSHIP OF NEWSPAPERS: THE VIEW FROM POSITIVIST SOCIAL SCIENCE (1994) (literature review).

203. See *id.*

204. In their stinging critique of the consequences of public stock ownership of large newspaper chains, this single-minded pursuit of profits is the major culprit that Cranberg et al. identify as leading to the decline in the commitment to quality and to journalism. See CRANBERG

involvement in a community may lead to dedication to the community's welfare or to a desire for status in it. For these reasons, local ownership might predictably lead to greater commitment to serve values other than the bottom line.<sup>205</sup>

In sum, the degree of choice available to media owners and the "expense" of exercising choice may vary with context, especially with the industrial structure of the particular media sector considered. As I have argued elsewhere, the nature of market competition may generally force successful producers of many consumer products to pursue profit maximization to the detriment of virtually all conflicting goals. Nevertheless, this section explains why this market determination predictably operates much less forcefully in the context of monopolistic competition, in general, and with respect to media products, in particular. Thus, the identity of media owners matters—or, more specifically, the identity of the people who *control* the media entity matters, whether these people be owners, management, workers, or others.

### B. *Ownership is Diverse*

The received wisdom is that the level of media concentration is high and growing.<sup>206</sup> Nevertheless, Benjamin Compaine, the lead author of probably the most definitive book on media ownership in the United States,<sup>207</sup> clearly does not view concentration as a problem. His answer to the question: who owns the media, is: "thousands of large and small firms and organizations . . . controlled, directly and indirectly, by hundreds of thousands of stockholders, as well as by public opinion."<sup>208</sup> He goes on to

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ET AL., *supra* note 198, *passim*. In addition to investor ownership, they identify various structural practices, such as giving editors bonuses solely on the basis of financial criteria rather than product quality or circulation criteria, by which this profit focus came to prevail. *Id.*

205. *Id.* at 63 (views expressed by stock analysts about why family ownership leads to better papers and public ownership leads to less investigative reporting and investment in editorial content); *id.* at 108-09 (suggesting that profit is a less dominant concern of family or locally owned papers where the owner's "profit was taken partly in the form of power and prestige . . . [and] in the form of a stable of famous and celebrated writers").

206. See, e.g., BAGDIKIAN, *supra* note 9; HERMAN & MCCHESENEY, *supra* note 9.

207. COMPAINE & GOMERY, *supra* note 189.

208. *Id.* at 578. Compaine and his co-author strongly disagree, with Gomery's conclusions being much closer to the received view. Still, some other informed observers are equally skeptical about claims of concentration. See, e.g., Eli M. Noam, *Media Concentration in the United States: Industry Trends and Regulatory Responses*, available at <http://www.vii.org/papers/medconc.htm> (last visited Sept. 13, 2002). Although recognizing some arenas where media concentration is a problem, Noam's main conclusions are that "[i]n the cyber-media future, scarcity and gatekeepers will be largely eliminated" and that "it is unlikely that media conglomerates combining all aspects of media will be successful in the long term." *Id.* On the same day (Aug. 24, 2001) that I first read Noam's paper, I also read an online column by Norman Solomon, *Denial and the Ravaging of Cyberspace*, where Solomon observed that "Websites operated by just four corporations account

suggest that the news media market “may be noted more for information overload and fragmentation than for concentration and scarcity.”<sup>209</sup> Basically, his claim is that the facts show, first, that concentration does not exist; and second, because of the Internet, whatever concentrated media power that did exist “is breaking up.”<sup>210</sup> A review of his argument provides an opportunity to consider how a policy analyst should think about media concentration.

### 1. Not Concentrated: The Claim

Compaine suggests that the characterization of concentration or monopolization should depend on answers to at least two questions: what constitutes the relevant market and what level of concentration is too much.<sup>211</sup> It turns out that the answer to neither question is purely factual. Rather, the answers depend on the reason for asking—that is, the reason for a concern with concentration.

Alternative concerns are implicit in two different frameworks that Compaine distinguishes for identifying when concentration is too great: an antitrust standard and a sociopolitical standard concerned with the needs of a flourishing democracy and free society.<sup>212</sup> A society might wisely consider the second to be more fundamental but, as Compaine correctly observes, the second provides no clear or accepted criteria for

for 50.4 percent of the time that U.S. users of the Web are now spending online.” Norman Solomon, *Denial and the Ravaging of Cyberspace*, MEDIA BEAT, Aug. 23, 2001, at <http://www.fair.org/media-beat/010823.html>.

209. COMPAINÉ & GOMERY, *supra* note 189, at 578. Compaine’s point is a non-sequitur. A claim that concentration exists and is a problem can be completely agnostic about issues of scarcity, fragmentation, and information overload. Such non-sequiturs, as well as overtly false factual claims, become even more prominent in Compaine’s more popular writing. For example, he asks, “what are the empirical facts,” says he has reported the facts in his book, and then claims McChesney’s statement—“that there are fewer and larger companies controlling more and more”—“is wrong.” See Benjamin M. Compaine, *The Myths of Encroaching Global Media Ownership*, OPEN DEMOCRACY, Nov. 6, 2001, at [http://www.opendemocracy.net/document\\_store/Doc807-5.pdf](http://www.opendemocracy.net/document_store/Doc807-5.pdf). So, look at his book. There, his calculation relating to his list of the fifty largest media companies show that they are bigger and control more (though not a lot more) of the industry in 1997 than in 1986. COMPAINÉ & GOMERY, *supra* note 189, at 560-61. For example, Compaine shows that between 1986 and 1997, despite becoming larger, CBS had not kept up, dropping from being the largest media company to eleventh place. *Id.* In 1986, the largest firm according to Compaine’s method of calculating, had 5.61% of the business, while in 1997 the largest had 9.22%. *Id.* at 560. The four largest had a 18.79% share in 1989 and a 24.13% share in 1997. *Id.* at 562. That is, his data shows McChesney is right—fewer and larger companies *are* controlling more and more.

210. *Id.* at 579 (quoting Philip Meyer, *Clinton-Crazy? No, Net Floods Us with News*, USA TODAY, Oct 4, 1998, at Opinion Column, News Section).

211. See *id.* at 537-79.

212. See *id.* at 547.

measuring concentration.<sup>213</sup> Compaine then suggests that “the antitrust standard is [presumably] intended to promote [the sociopolitical standard].”<sup>214</sup> Purportedly, the antitrust standard directly includes (all?) the sociopolitical concerns if the view of those who favor the “multivalued” approach to antitrust is accepted. Nevertheless, at least for discursive purposes, Compaine favors the dominant (Chicago) approach to antitrust, which emphasizes economic efficiency and market power.<sup>215</sup> He defends using the Chicago School approach on four grounds: it has the advantage that its “criteria tend to be relatively identifiable, quantified and validated[,] . . . are less likely to run into First Amendment barriers, . . . are [in many ways] reasonable surrogates for socio-political criteria[,] . . . [and] may be less susceptible to ‘the law of unintended consequences.’”<sup>216</sup> If these claims are right, his antitrust focus should be acceptable. His argument falters, of course, if there is reason to expect that this Chicago approach would significantly diverge from concerns focused on the needs of democracy and a free society—an objection, further discussed below, that I emphasized in Part II.

In the Chicago School approach, the overt reason for concern with concentration is to prevent firms from being able to raise prices in a manner that leads to inefficient restrictions on production as well as to transfers of wealth from consumers to the firm. Although in practice the application of this approach is hardly mechanical, it provides theoretically clear standards for identifying objectionable concentration—both in terms of identifying markets and identifying when concentration is too great. A relevant market is: any describable category of products and geography in which a single monopoly firm, if it existed, would be able to exercise power over pricing. The issue concerns cross-elasticity of demand between items in this market category and any potentially competing items. That is, a firm might be the only one to produce *xs*, but if consumers are just as happy to substitute *ys*, which are made by many other firms, then the first firm would have no power to raise the price of *x*. Thus, the relevant market would not be for *xs*, but for *xs* and *ys* (assuming that some other product, *z*, should not also be included because it is substitutable for *xs* or *ys*).

Although many factors, including the existence or absence of barriers to entry, can affect the characterization of a particular degree of concentration within a market as being objectionably concentrated,

213. *Id.*

214. *Id.* Why this would be true is not explained. The objective of preventing an entity from amassing economic power that allows it to inefficiently raise prices hardly seems to have any necessary correspondence to a distribution of power over public opinion that ideally serves democratic values. *But see* Stucke & Grunes, *supra* note 10.

215. COMPAINÉ & GOMERY, *supra* note 189, at 555.

216. *Id.* (emphasis added).

antitrust regulators have developed a rule of thumb starting point for identifying when concentration is too great. Compaine observes that they apply the Herfindahl-Hirschman Index (HHI),<sup>217</sup> with an industry score of under 1,000 being considered unconcentrated, while a score of more than 1,800 suggests high concentration that often raises antitrust concerns.<sup>218</sup> This HHI becomes a standard against which Compaine often makes his comparisons.

Although Compaine is not entirely consistent in this, he implicitly views the relevant market for his analysis to be the media as a whole, a characterization that supports his conclusion that there is no problem of concentration in the media. Thus, Compaine agrees that, if “[l]ooked at in small, industry-specific pieces, there is indisputably consolidation in some media segments . . . .”<sup>219</sup> But, he argues that if the media is considered “a single industry, there can be little disagreement that there is more competition than ever . . . .”<sup>220</sup> In his policy discussions, Compaine clearly inclines toward the second perspective—that of a single industry—as the better approach.<sup>221</sup> Only this inclination, for example, can explain his attention to the HHI index for the media industry as a whole, which he concludes is 268, showing that the media industry is “one of the most competitive major industries in U.S. commerce.”<sup>222</sup> For antitrust analysis, an HHI of 268 shows a very unconcentrated communications order. Attention to this HHI number, however, would be merely obscurantist except for a belief that the media industry as a whole is an appropriate unit of analysis.

## 2. Not Concentrated: The Critique

There are two problems with Compaine’s argument. First, even from a narrow, efficiency-oriented antitrust perspective, he is wrong to identify the media as a whole as the relevant market. Second, he is wrong to think that the antitrust criteria are “reasonable surrogates for socio-political

217. *Id.* at 558. The index score results from squaring the percentage of the market held by each firm and then adding the squares. *See id.* Thus, one firm that controlled the entire market would have HHI of ten thousand. One thousand firms, each controlling 0.1%, would have a net HHI of ten.

218. *Id.* For antitrust purposes, often even a high HHI will not imply undue concentration, for example, if barriers to entry are sufficiently low. Thus, antitrust regulators view the HHI as only one tool of (initial) analysis.

219. *Id.* at 574.

220. *Id.* Actually, his own data may suggest otherwise, although the increase in concentration may not be significant from an antitrust perspective. *See generally supra* note 209.

221. *See* COMPAINÉ & GOMERY, *supra* note 189, at 573. This is also seen in his more popular debates about concentration where he argues that the facts show that no concentration exists. *See* Compaine, *supra* note 209.

222. COMPAINÉ & GOMERY, *supra* note 189, at 561, 562.

criteria.”<sup>223</sup> Once that is observed, it can be seen—or at least argued—that alternative criteria justify conclusions that undesirable degrees of concentration exist.

#### a. The Antitrust Perspective

In an antitrust perspective, market definition is crucial. For example, if General Motors and Ford merged and DaimlerChrysler closed a money-losing Chrysler, the market for so-called “American cars” would be extremely concentrated (depending, of course, on the definition of “American cars”), the market for “cars” would be much less so, the market for transportation vehicles even less, while the market for “consumer goods,” of which cars are only one item, might remain extremely unconcentrated. Which is the *relevant market*? For the antitrust analyst, the issue involves price elasticity between American cars and cars, between cars and transportation devices, or between transportation devices and other consumer goods. If, when the price of cars went up slightly, many people switched from buying cars and bought movie tickets, cosmetics, or ice cream instead, the last characterization would be right—but that is implausible. Although some elasticity may exist between each category, almost surely the relevant category is cars. The antitrust question is what is the relevant category in the media realm. Any reflection shows that the media business as a whole is an incoherent basis of definition.

First, whether or not supplied by the same firm, content and content delivery are very different, *non-substitutable* products. Including both as media enterprises to show lack of concentration is clearly misleading. At times, Compaine recognizes, and even emphasizes, this point. Although Compaine’s rhetoric suggests a unified media framework and often, for example, when he applies the HHI to the media as a whole, thereby combining the media engaged in these alternative activities, he actually emphasized that “media” involve “discrete types of activities,” which he describes as substance or content, process or delivery, and format or display.<sup>224</sup> Presumably, lack of concentration in one would not show that another is not improperly concentrated. Imagine that delivery is much more expensive than content creation, that there are ten roughly equal sized “media” firms, with nine providing delivery and only one (due to some barriers to entry, monopoly power reflecting first copy costs, or other reasons) engaged in content creation. With each having about ten percent of the revenue, the HHI score would be one thousand—basically unconcentrated. Competition would appear robust. Clearly, however, one

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223. *See id.* at 555.

224. *Id.* at 542.

company controlling all content bespeaks monopoly. Problematic concentration likewise exists if there are too few distributors and entry into the distribution business is difficult. The two services—content creation and content delivery—simply should not be included as part of the same market for antitrust purposes. Given both the expense of delivery systems and their potentially efficient operation as common carriers, Bruce Owen argues that First Amendment rooted interests in diversity can generally be best furthered by keeping the two separate and subjecting the second to common carriage regulation.<sup>225</sup> Owen hoped that this separation and regulation would not only reduce economic barriers to entry into the business of content creation and sale, but also would help prevent power in one dimension, that is, power over delivery, from being leveraged to exercise control over the communicative opportunities of content creators.<sup>226</sup> Government regulation of content creation (which generally should be barred by the First Amendment) is very problematic. Common carriage regulation of the delivery business can, however, often advance both desirable public policy and expressive freedom.

Congress and the FCC once took Owen's view seriously. For example, they generally barred cross ownership of telephone companies and cable systems.<sup>227</sup> The hope was that, if kept separate, telephone systems operating as common carriers would eventually provide necessary means for new competitors to provide cable-type video content to households.<sup>228</sup> Video suppliers other than cable companies, and maybe cable companies themselves, could use telephone lines to distribute their content to household consumers. Likewise, these same considerations provide an explanation for imposing common carriage and rate regulation on other distributors, the U.S. mail, telephone companies, cable system operators,<sup>229</sup>

225. See generally BRUCE OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975).

226. See generally *id.*

227. 47 U.S.C. § 533(b) (1984).

228. This position did not fare well in the courts, *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996); *U.S. West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996) (subjecting it to an arguably misguided First Amendment attack). Nor did it prevail in a deregulatory Congress, where the rule was repealed by the 1996 Telecommunications Act. See C. Edwin Baker, *Merging Phone and Cable*, 17 HASTINGS COMM. & ENT. L.J. 97 (1994).

229. Often, this separation is almost a reflex in First Amendment analysis. Thus, even O'Connor's dissent in *Turner I* indicated the acceptability of common carriage regulation of cable. *Turner I*, 512 U.S. 622, 684 (1994). Although the Court reports no disagreement on the "initial premise [that] . . . cable operators . . . are entitled to the protection of the . . . First Amendment," *id.* at 636, rate regulation also seems to pose no serious constitutional problems, see *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 186 n.13 (D.C. Cir. 1995), although it might be suspected that similar regulation would be quite questionable as applied to newspapers.

or even broadcasters for some types of messages.<sup>230</sup> In any event, the category of media as a whole is clearly too big. Concentration for antitrust-type policy exists at least if there is concentration of those engaged in either content creation or delivery.

The complaint, however, is much broader—and will become more pointed when non-economic values are considered. Even for antitrust purposes, consumers (and often more relevantly, advertisers) will often not view different media as ready substitutes. Not only will many consumers distinguish between the *New York Times (NYT)*' Metro Section and a Disney movie, they will even distinguish it from the *Los Angeles Times*' Metro Section. A price change in the Disney movie or the *LA Times* will have little effect on their willingness to buy the *NYT*. Many advertisers will also distinguish these media products—a department store in Los Angeles is not likely to find the movie or the *NYT* to be plausible vehicles for advertising its weekend sale. Whenever products are not substitutable, and the provider of one cannot cheaply switch and supply the other, concentration should be evaluated for antitrust purposes in relation to the separate markets.

In sum, any suggestion that for *antitrust purposes* the relevant product market is the media as a whole must be rejected. First, delivery and content creation involve sufficiently separate activities that lack of market share in one, and consequent lack of market power, says virtually nothing about possible inappropriate market power in the other. Second, different media products are often not economic substitutes for each other. The more curious question would be why anyone might think so. I do not have a clear answer, but Compaine is not alone. Earlier, I noted that the modern FCC, but not the Justice Department, tended towards this view.<sup>231</sup> Progressive critics of media monopolies also tend not to make much of these distinctions.<sup>232</sup> The most overt explanation would be that from a completely commodified perspective, differences might seem unimportant—but even at the level of commodities, that ignores the nature of people's preferences. Much of Compaine's analysis suggests that he

230. Cf. 47 U.S.C. § 312(a)(7) (2000) (requiring reasonable access for candidates' campaign messages); *id.* § 315(a) & (b) (covering equal opportunities and lowest unit rate to be charged candidates for broadcast time during election periods). The combination essentially amounts to common carriage of candidate campaign advertisements. More dramatically, two Justices, Brennan and Marshall, were prepared to see carriage requirements as constitutionally imposed on broadcasters in relation to their advertising time, while other members of the Court indicated that, though not required, Congress or the FCC might find it desirable to impose some such requirements. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 131, 170-204 (1973).

231. See *supra* text accompanying notes 89-92.

232. This may not be entirely true. Bagdikain, for example, identifies the firms that have at least fifty percent of the market in various categories—such as book publishing, newspapers, movies, broadcasting, etc. See BAGDIKAIN, *supra* note 9, at 22-24.

basically adopts this narrow consumption viewpoint.<sup>233</sup> Alternatively, if media content is merely the flypaper to capture readers who are then sold to advertisers, all media content might appear to be competing in the same market—but again, this ignores advertisers' more targeted interests in different audiences. A third possibility is that the observer is not too commodity oriented but, from an antitrust perspective, not commodity (or consumer) oriented enough. The observer is much less concerned with market power over price and much more concerned with concentrated power over the public consciousness—or with the distribution of the power to speak. This possibility leads, in a moment, to the next problem with Compaine's analysis.

Note, however, that the rejection of the media as a whole as the relevant antitrust category has not demonstrated where, or even if, problematic concentration exists. These issues require much more empirical examination, for which, in places, the data in Compaine's book is relevant. Those inquiries are important, but here I want to turn to a critique of Compaine's more important claim—that the antitrust approach serves as a reasonable surrogate for advancing other important values.

#### b. Other Values

There is virtually no reason to think concentration that is acceptable from the perspective of one set of values will be acceptable from the perspective of others. Market power over price is only one possible concern in identifying and objecting to concentration in the media realm. Consider four other possibilities. First, the value of competition might relate to the wish of a consumer or citizen to have diverse options in relation to her particular interests, whether they be in local information or in cultural options. The objective would be to prevent one or a few firms from having power over content choice in the realm of her interest. Second, the concern might be with effective opportunities for speakers to reach significantly-sized targeted audiences with the expression the speaker wishes to provide. The goal here may be to prevent a speaker from being dependent on only one or two entities in her effort to reach a significant portion of the elite—or the voters—in her town with a detailed, complex, effectively presented account of corruption by the mayor or the town's most powerful corporate business. Third, the concern might be more with the citizens' wish that their community not be subject to potential political or cultural manipulation by one or a few firms—a democratic-related concern. Or, more broadly, not to have any enterprise have too much influence over public opinion and public culture. Finally,

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233. See *COMPAINE & GOMERY*, *supra* note 189, *passim*.

the concern with concentration might reflect a desire for a broad distribution of opportunities for democratic discursive participation.

Each value produces a different conception of objectionable concentration, none of which necessarily or predictably tracks the antitrust standard of power over pricing. Only the first, a concern for audience choice, even resembles antitrust concerns. Both focus on consumers' commodity consumption, although the Chicago School antitrust approach seems to limit the concern to the price variable and inefficient restrictions on total output, while the first additional value extends it to a concern with content choice. As discussed in Part II (and further below), power over choice can exist without any firm having power over price. On the other hand, concentration that gives power over price does not necessarily undermine this value. Even if a few firms had sufficient market share that they could exercise power over price, smaller alternatives could provide for choice, especially for those consumers willing to search for these alternatives. Alternative suppliers (for example, on the Internet), if adequately financed to produce quality local news or cultural products, could serve a consumer interest in availability of alternative content. Thus, even concentration that leads to antitrust objections would not necessarily be objectionable from this perspective.

In contrast, the other non-commodified values escape the antitrust paradigm entirely. For the speaker interested in reaching local elites or voters with her complicated expose, the relevant market might consist only of the one widely read local newspaper or, alternatively, that, plus prominent broadcasters who present serious local news. For the democratic concern with potential manipulation of public opinion, the relevant market might be similar—all significant participants in providing serious local news. From these two viewpoints, even a market competitive from the antitrust perspective could still look extraordinarily concentrated. Even more so, lack of power over price does little to alleviate the concern with an egalitarian sharing of opportunities to participate in public discourse.

Still, the claim that concentration insufficient to create power over price could be sufficient to create relevant power over content choices may be counter intuitive to some antitrust analysts.<sup>234</sup> The (naïve) economic view might be that, although non-price, as well as price, competition is often possible, absence of power over one roughly indicates its absence over the other. Of course, one firm might have a comparative advantage (often based on some limited, legal monopoly) relating to some non-price

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234. As used here, "power" refers to a capacity to move away from a prior (or imagined) competitive equilibrium in a manner that does not undermine the entity's economic viability but, instead, allows either increased profits or content conforming more to desires of the owner/producer and, in each case, allowing the seller to act to the detriment of consumers.

element, but as long as there is no undue concentrated pricing power, the market should lead to a proper level of exploitation of this non-price advantage. In contrast, by becoming a monopolist, an enterprise gains power to increase profits either by increasing price or by reducing expenditures on non-price aspects of the product—with some combination of strategies generally optimal for purposes of profit maximization.

Obviously, power over either price or content depends on how a change affects people's willingness to purchase. Other factors being equal, an increase in price normally leads to some people not buying without causing anyone new to buy.<sup>235</sup> The situation is somewhat different for content. While price changes are only quantitative, changed expenditures on content can be either quantitative or qualitative. Thus, the change could be in the total amount spent on content creation or the same expenditures could be used to create somewhat different content—e.g., spend the same amount, but on sports news or fiction or pro-republican commentary rather than on local news. The second qualitative change is likely to lead some people to whom the change appeals to become new purchasers at the same time it causes some of the former audience to abandon the product. These two groups could even be exactly equivalent. Since for competing declining cost-goods, like most media products, there may be insufficient demand to pay for both alternative products, the producer's choice could determine availability. That is, an equilibrium position could develop with either content prevailing. If so, a profit maximizing firm with *no power over price* could have *great power over content*, being completely or relatively unconstrained in respect to certain content changes—i.e., editorial slant, creative aesthetic, particular columns, etc.

Three hypotheticals can help illustrate how the different values a policy maker could be concerned with lead to different characterizations of the power generated by a merger. First, consider a newspaper chain, Firm X, buying an additional newspaper in an area where it had no prior media holdings. Part III-A argued that the nature of monopoly competition often leaves the owner free to make choices about the product, possibly “paid for” with monopoly profits. Those choices can involve either per copy price<sup>236</sup> or content, but the purchase by Firm X does not increase these powers, it only transfers them to the new owner. Thus, the purchase should not create an antitrust problem. (Of course, if different sorts of owners predictably exercise this power differently, this transfer may justify policy

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235. I put aside occasional false signaling or status features of price—where, for example, the higher price in itself increases the number willing to purchase the product.

236. See Blankenburg, *supra* note 199, at 390 and accompanying text. Blankenburg describes this as the power, like other powers of censorship, to decide whether to deprive a portion of the community (especially poor) of the communications that are vital to their democratic participation. See *id.* at 398.

concerns with ownership structure—but because of sociological characteristics of owners, not because of concentrated power *per se*.) Even without monopoly profits sufficient to allow either the new or old owner to make choices about price, if different content choices attracted and drove away roughly equal numbers of readers (and even more so if monopoly profits allow even more choice), a merger adds to the new owners' power to determine generally what content is made available within the country. Thus, although the merger does not create a concern from either the antitrust focus on new anti-competitive power over price or the broader antitrust concern with power over consumer choice, Firm X's purchase creates concerns from the perspective of two of the democratic values—concentrated power over public opinion and a wider distribution of power to participate in the nation's public discourse.

Next consider a purchase of a second radio station by Firm Y in a ten station market. Whether this creates the moderate concentration (using the HHI index) that justifies antitrust scrutiny probably depends on both the distribution of audience share among the various stations or, given that radio's most overt product is listeners sold to advertisers, how elastic the Antitrust Division believes the relation between radio advertising and other advertising vehicles is. If, as seems likely, the merger does not create power over pricing, no antitrust issue exists under conventional analyses. On the other hand, in ways quite duplicative of the newspaper example, power to change broadcast content should exist and, therefore, the purchase should increase Firm Y's power over content choices available to *local radio audiences*. The merger would also increase the firm's power over opportunities available to *local speakers*, or its power over *public opinion*. Thus, the merger could have negative consequences—create undesirable power—from the perspective of all four of the non-efficiency values. Certainly, fewer media firms making content choices could justify political or social concern—it certainly relates to major First Amendment themes.

Finally, consider a local daily newspaper, Firm Z, purchasing the only all-news radio station in a market with a dozen other radio stations. Advertisers might find the value of listeners of the news radio sufficiently similar to those of newspaper readers, but sufficiently distinct from other radio listeners, that Firm Z will have increased its market power over rates in an advertising market. This, however, seems unlikely. It certainly might not be the case; and if it is not, finding monopoly power will be difficult. On the other hand, the purchase quite obviously creates concentrated power over local news. Of course, Firm Z presumably could not afford to lose too many readers or listeners by making its content at its two outlets too similar, too degraded, or too offensive to prior customers (without picking up a sufficient number of new customers). Some content decisions might even encourage the entrance of new competitors. Thus, the merged

firm's power over content is not unlimited. Still, it surely has gained considerable power over news choices available within the community. In fact, an obvious reason for Firm Z to have bought a news radio station (or a station that it will use to provide news) rather than a music station is because of possible synergies (efficiencies) resulting from its capacity at least sometimes to employ the same news inputs. In such a scenario, not only will the firm's power over content have expanded to cover more outlets and its dominance increased the barriers to the entry of new providers, but also the choices made available to the public are likely to have narrowed. That is, the merged firm will have no increase in power over prices but considerably greater power over content. All the values related to media power *except* the antitrust concern with anti-competitive power over pricing will be negatively affected.

Thus, the initial complaint about the standard antitrust analysis has two parts. First, a society can be legitimately concerned with concentrated power over content choices made available to audiences. Second, this power is frequently not well correlated with the focus on antitrust attention—power over pricing. As was suggested above in Part III-A, this lack of correlation depends in part on the nature of monopolistic competition that commonly exists in respect to media products.<sup>237</sup> This power over content but not price is exacerbated by advertisers being the primary source of the media enterprise's income.

Two further normative points about this power over content have policy relevance. First, in economic terms, this power describes a situation where the market does not lead either the prior competing firms or the merged firm to have an incentive to make choices that necessarily best satisfy consumer desires (at least to the extent that the firms are unable to price discriminate and are thus unable to obtain the consumer surplus that their choices generate). And even if the incentive was present, the competition does not dictate that the firm respond. Second, these market failures merely exacerbate any democratic concern with the distribution of uncontrolled power over information or public opinion created by the merger.

### 3. The Internet Eliminates All Problems: The Claim

Compaine makes a dramatic claim to support his book's final words—"[c]oncentrated media power is breaking up."<sup>238</sup> As he sees it, the

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237. Perfect competition requires two features contrary to that which exist for media products—the goods should be homogenous and be sold at a point on their supply curve where marginal costs are increasing. For a discussion of conditions of perfect competition, see Averitt & Lande, *supra* note 97, at 724-27.

238. COMPAINÉ & GOMERY, *supra* note 189, at 579 (quoting Meyer, *supra* note 210).

Internet changes everything. It erodes old bottlenecks, blurs the lines between media, makes “conventional industry classifications decreasingly relevant[,]” creates convergence, and lays the foundation for “diversity, accessibility and affordability.”<sup>239</sup> These purported developments are offered to support Compaine’s claim that a policy maker ought to examine the converged media as a whole to determine if there is concentration. When this is done, the analyst could reasonably agree that media power “is no longer so concentrated.”<sup>240</sup> These developments also might appear to justify his view that the problem may be “information overload and fragmentation[, not] concentration and scarcity.”<sup>241</sup>

#### 4. The Internet: The Critique

This now ubiquitous invocation of the Internet is, in the end, misleading.<sup>242</sup> When Compaine says that “[t]he difference between the Internet and newspapers, books, records or television is that [the Internet] can be all [of] those things[,]”<sup>243</sup> he invokes a notion of convergence that supports his inclusion of all media into one category. Clearly he is right that policy analysis requires some rethinking of when there is concentration. This point, however, is not so new. Technological change always affects the relevance of particular concentrations. Before television, the only way to see a movie was to attend a screening at a movie theatre. A company that owned all the local theatres could determine which movies people (in that area) could see. Today, a movie may also be available on free over-the-air television, pay cable, satellite video broadcasts, videotape rental, and, either now or soon, Internet streaming.<sup>244</sup> Putting aside when the “format is the message”—such as drive-in movies for teenagers—concentration within one traditional media segment does not *necessarily* imply concentration in provision of particular content.

Further consideration shows that, in itself, Compaine’s observation hardly provides a persuasive argument for lumping all media together or

239. *Id.* at 541, 575.

240. *Id.* at 579 (quoting Meyer, *supra* note 210).

241. *Id.* at 578. As noted, *supra* note 209, each term presents a separate issue. A possible view is that both information overload and concentration are problems, and that *neither* has much to do with fragmentation or scarcity.

242. Like investors in the dot.com bubble of the late 1990s, other free market advocates invoke the Internet as eliminating all old problems. See, e.g., Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995); Noam, *supra* note 208. They are right to see it as bringing important changes, but most structural problems that previously were thought to justify policy responses remain. BAKER, *supra* note 162, at 285-307.

243. COMPAINÉ & GOMERY, *supra* note 189, at 575.

244. Cf. discussion of *Paramount Pictures*, *supra* text accompanying notes 81-85.

for rejecting concentration as a problem. Part of the problem is the earlier discussed distinction between content creation and content delivery. Admittedly, digital technology significantly reduces the cost or difficulty of making some media content. Largely, however, the Internet is a distribution system. It enables new and cheaper distributional activities of both pull (e.g., search engine) and push (e.g., spam) and more routine (e.g., online subscriptions, group emailing lists, individualized email) sorts. It does not itself create content. Any media convergence generated by the Internet is somewhat like that of ubiquitous super-stores—the WalMarts where a customer can buy either a winter coat or a country ham. The store itself creates neither; nor does the store make winter coats the equivalent or a substitute for country hams. Even though the internet, like the store, has made access to media products or communications much easier, monopoly power could still exist over either any product sold at the store or any type of content delivered over the Internet. Of course, a person might sometimes trade-off reading an “online” report on peace negotiations in the Middle East against watching an episode of the Simpsons (now on TV, but surely soon to be “online”). But surely, the better prediction is that, like the coat and ham at WalMart, these two contents are not particularly competitive within most people’s preference functions. Many separate firms making sit-coms would not reduce the concern with concentration if only one source provides quality well-researched information about the Middle East (or about local government or about corporate affairs). By itself, the Internet does not guarantee plurality in either category. As someone who frequently checks both Alternet and the BBC home page online, I must admit that diversity can be added by reducing the importance of *geographically* limited distribution. This hardly means, however, that it creates a convergence in content categories or guarantees within a single category multiple quality creators from whose competing content recipients can choose.

Of course, Internet distribution can affect the economic incentives for product creation—but the nature of its impact is difficult to predict. Abstract economics suggests simultaneous, opposing pressures. First, a reduction in distribution costs, which is a major contribution of the Internet, can increase the likelihood of concentration in the creation of professional quality media content.<sup>245</sup> When delivery and copy costs are low, the incentive increases to use resources to make the most widely appealing “first copy” because all the return from audience sales can be used to pay for the cost of creation. These increased expenditures tend to concentrate the audience on purchasing (or “spending” their time, which is then sold to advertisers, on) these “better” products (whose purchase

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245. BAKER, *supra* note 162, at 290-92 (discussing this point as well as a counter tendency).

price need not go up). This effect tends to reduce the number of diverse products available.<sup>246</sup> In contrast, when delivery costs are higher, increasing the audience for a particular product is less valuable (because part of the audience's value is lost in paying for delivery). The resulting incentive is to provide for the more intense but more varied needs or interests of individual audience members.

This incentive for narrowing diversity is not, however, the only effect of reduced delivery costs. Like with any lowering of costs of providing a product and hence lowering of potential price, the reduced delivery costs can increase the demand for the now less expensive media products. Reduced costs also allow more people to try to become content creators—that is, they lower barriers to entry. Most dramatically, this change can enable a voluntary economy of non-commodified content creators—greatly increasing diversity and content creation. Thus, on the one hand, lower distribution costs can make new, more diversified product offerings cheaper and, thus, more prominent. But, on the other hand, they generate an incentive to make greater first copy expenditures that attract larger audiences, thereby reducing the likelihood that small-audience content creators will succeed commercially. This effect is to increase concentration—what might be called the “Hollywood effect.” The dominance of these two opposing pressures can hardly be predicted abstractly. Aspects of both are likely to be present to differing degrees in different content domains.

So the Internet changes things. Does it eliminate the reason for concern with media concentration and the need for responsive legal policymaking? Consider, as five possible concerns about concentration, its effect on: (i) the creation of diverse, quality content; (ii) the ability to reach a large and desired audience; (iii) power over public opinion; (iv) a democratic distribution of communicative power; and (v) availability of existing diverse content to someone seeking it.

First, if a crucial matter in the communications order is enterprises' use of resources to create quality content, the amount and way the Internet changes things is unclear. As noted above, as primarily a distribution system, the Internet in itself does not create content and, thus, does not directly increase or decrease reasons for any concern with concentrated

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246. In economic terms, any increase in expenditures on content creation (first copy costs) will cause an increase in demand (if selling price remains constant). That increased expenditure can be profitable at a *lower* increase of audience (demand) the less the increased sales go to pay for distribution and copies (and, hence, the more of it is available for the expenditure on content). Formally, if  $F$  = first copy costs,  $A$  = audience size,  $P$  = price, and  $V$  = distribution and copy costs per audience member (variable costs), the condition for increasing expenditures on content is:  $\Delta F \leq \Delta A * P - \Delta A * V$ , or  $\Delta F \leq \Delta A (P - V)$ , which shows that the amount  $F$  can increase is directly related to a reduction of  $V$ .

power over content creation. The economic changes brought by the distribution may even give some reason to expect greater concentration or a reduction of diversity of expensive-to-create content. Thus, issues of concentration in various categories of content creation remain robustly relevant.

Second, although it might seem that the internet makes it easier for “speakers” to reach large and desired audiences, if the structure encourages audiences’ reliance on a few internet suppliers for most content, this advantage may be illusory—leaving reason to be concerned with concentration. Third, and similarly, even if the Internet reduces distribution costs such that audiences are technically cheaper to reach, if the economic changes result in a few “portals” becoming dominant, the concern with concentrated, undemocratic concentration of power over public opinion could increase. Fourth, despite its democratic potential, the Internet, like the printing press, the mail, and the phone before it, does not in itself democratize power to participate effectively in public debate. On the other hand, as a cheaper and more flexible communication mechanism, it can increase democratic (or more personal or commercial) communications among those already organized or connected.

Fifth, because of the combination of easy and cheap “publishing” and search capacities, the Internet may substantially alleviate the concern that concentrated media will be a bottleneck that denies access to already created communicative material that a person wants (and is willing to make some effort to obtain). Of course, technological design choices such as the form of search engines, imposition of filters by major service providers, and similar matters—all potentially subject to legal regulation—could reduce this contribution. Nevertheless, foreclosure of existing diverse content to persons seriously seeking it has long not been a key issue for the communication order (at least in discursively free, non-authoritarian societies). In the United States and most other industrialized democratic states, the issues of greater concern have involved; first, whether existing materials are provided in a manner that gives them appropriate public or political salience—or is only the content controlled by a few entities in fact socially and politically dominant. And, second, there is the issue not of opportunities merely to talk or show home movies, but of the availability and distribution of the *resources* needed to research and produce appealing, informative quality contributions to public discourse. It is not obvious that the Internet itself eliminates reasons for concerns about these matters. In some respects, it could even make the problems more acute.

Thus, although the Internet certainly changes the competitive situation in various ways, there is no reason to believe that it eliminates even narrow antitrust concerns with concentration in various areas of *content creation*. Potential power of control over major portals remains an area for

policy concern. Most excitingly, there is some possibility that the Internet will increase the number of “volunteer” (that is, non-profit oriented) publishers. But most dangerously, it also could lead—as firms such as AOL Time Warner or Disney presumably hope—to increased concentration in the production of professional quality media and an increase in the portion of the time that people spend on these concentrated media.

### C. *Sociology of Production—Journalistically Determined Content*

Max Weber once suggested that, in the modern world, “the highest ranking career official is more likely to get his way in the long run than his nominal superior, the cabinet minister . . . .”<sup>247</sup> He argued that because bureaucratic administration was technically the most efficient means of exercising authority, it was indispensable and inescapable.<sup>248</sup> “Even in the case of revolution . . . , the bureaucratic machinery will normally continue to function just as it has for the previous legal government.”<sup>249</sup> In a sense, this argument downplays the power of the political leader. The “apparatus makes ‘revolution,’ in the sense of the forceful creation of entirely new formations of authority, more and more impossible . . . because of the [apparatus’] increasingly rationalized inner structure.”<sup>250</sup> The rationalized daily activities of the huge number of officials organized in the bureaucratic apparatus, not the wishes of those with formal power, determine many aspects of life. Maybe a similar point could be made about ownership’s role in relation to the media.<sup>251</sup>

Media critics bemoan seeing only a world as portrayed by Murdoch. Nevertheless, it could be argued that these media critics attribute to Murdoch (and other media barons) a power that ownership simply does not provide, a power that one person (or a small handful of people) could not exercise. Daily news is produced by the collective action of many journalists and editors who operate with set routines and behave largely according to professional standards. An owner is simply not in a position

247. MAX WEBER, *ECONOMY AND SOCIETY* 224 (1968).

248. *Id.* at 223; *see also id.* at 988.

249. *Id.* at 224.

250. *Id.* at 989. As I have discussed elsewhere, Weber (as well as Marx) argued that the structure of the market even more clearly determines behavior, making the specific identity and wishes of the owner irrelevant. That, however, relates more to the somewhat different point made in Part III-A, *supra*. I have also described circumstances under which Weber’s conclusions may not apply. BAKER, *supra* note 184, at ch.5.

251. I am not aware that the argument advanced in this part occurs in the scholarly literature, possibly because of the reasons I reject it here. I present and reply to the argument because of hearing versions of it in conversations with those educational progressive people who resist the claim that concentrated (or corporate) media ownership is a major problem.

to dictate the practice of journalism and it is this practice, not ownership, that mostly determines the content of the news that people receive. Parallel, even if slightly weaker, claims can be made about the assertedly more creative world of entertainment content as well as about genres such as magazine writing.

The sociology of content production received significant scholarly development beginning in the 1970s by a group of scholars who showed how the professional and institutional culture of news organizations, journalistic work habits, and newsroom imperatives centrally affect how the media construct the news.<sup>252</sup> Although this work was not specially aimed at making the point offered here—that ownership matters little—the point here requires only a small step beyond these insightful investigations. The conclusion would be that media content is determined largely by the practices of the people who create it and that these practices are only minimally subject to the directives of owners. Rather than being controlled by owners, these practices are overwhelmingly determined by some combination of professional education, on-the-job acculturation, and institutional or organizational imperatives that themselves often reflect the economic necessities of media production.

A critic of ownership concentration might point to various *ad hoc* examples of owners effectively intervening. An owner might order an editor to endorse the owner's choice for President or to avoid any reporting, certainly any positive reporting, about a few individuals. This type of intervention, however, is relatively rare, in part because editors stand up for the professional norm that the owner not intrude on editorial decisions.<sup>253</sup> But even if these intrusions sometimes occur, probably much more significant are the paper's endorsements of minor candidates and ballot issues about which the paper's readers are less likely to have independent views. Some distant owner or CEO, some Murdoch, is typically ignorant of these local races and issues. Intrusion hardly ever does or could occur. Even more importantly, the real significance of a paper's journalism lies much more in the day to day reporting that highlights one or another set of issues that sets the public agenda or

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252. See, e.g., EDWARD JAY EPSTEIN, *NEWS FROM NOWHERE* (1973); MARK FISHMAN, *MANUFACTURING THE NEWS* (1980); HERBERT J. GANS, *DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK AND TIME* (1979); GAYE TUCKMAN, *MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY* (1978).

253. Cf. Pat Guy, *More Newspapers Elect Not to Choose Candidates*, USA TODAY, Oct. 26, 1992, at 6B (describing presidential endorsement as one where publishers or owners want to have a say, but that involvement can produce "blood on the editorial board room floor," according to an editor who threatened to resign when his former publisher at the *Miami Herald* ordered an endorsement of Reagan); Howard Kurtz, *The Pol and the Pendulum*, WASH. POST, July 8, 2002, at C1 (stating editor of the *Pine Bluff Commercial* resigned in protest when ordered by a local owner to endorse a republican candidate for a House seat).

establishes and reinforces one or another general frame of social thought and public perception. These matters, however, inevitably reflect professional and institutional cultures of the news professionals, not directives of owners.

I will not try to survey this sociological literature here. It is not only generally informative but also right to imply (assuming that it does) that the influence of owners can easily be overstated. In a sense, this literature delivers a message much like the adult's insight concerning the young child's vision of an all powerful President running every aspect of the country. The President's prominence, both in the press and in the child's imagination, is overwhelming. However, in the face of Congress, an entrenched civil service, decisions made before she assumes office, and the necessity of delegation—not to mention stubborn facts about the real world—her power to actually change what is done constructively (as opposed to the power to initiate world destructive violence) is distinctly limited. So it may be for media owners. They can close down a media entity—but control over the communications it produces may be largely beyond their power.

That is the possible claim. The basically correct observations, however, only go so far. Despite the important adult (or scholarly) corrective about Presidential power, the power is real. So too is that of a media owner (or CEO or other top management). She may not have unbridled power over the editorial product. However, owners or CEO's have substantial power excisable and exercised in a variety of both subtle and unsubtle ways.

First, ownership or top management can make choices about profit targets or expected rates of return. These choices often translate into newsroom budgets and size of journalistic staff, factors that matter to the nature of the media product. Even the decline in newspaper audiences over the last quarter century may reflect in significant part media owners' increasing their targeted rates of return.<sup>254</sup> Publishers increase returns by increasing per copy prices, intentionally cutting back circulation to marginal portions of the audience least valued by advertisers,<sup>255</sup> or by lowering editorial budgets that degrade the product.<sup>256</sup> Next, although the

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254. CRANBERG ET AL., *supra* note 198, at 25, 90-97 (describing how shedding circulation to those least valued by advertising has been a profit-based strategy, especially employed by publicly owned chain newspaper firms).

255. In deciding not to advertise in the *New York Post*, a Bloomingdale executive reportedly explained, "[The *Times*] readers are our customers; your readers are our shoplifters." MARTIN MAYER, *MAKING NEWS* 84-85 (1993). Similarly, Otis Chandler once explained that he avoided circulation among black readers—what Blankenburg describes as disenfranchisement—because of their lack of value to the *Los Angeles Times*' advertisers. See Blankenburg, *supra* note 199, at 398; see also STEPHEN BATES, *IF NO NEWS, SEND RUMORS* 198-99 (1989); BAGDIKIAN, *supra* note 9, at 116.

256. BAKER, *supra* note 7, at 67-69; Blankenburg, *supra* note 199.

sociological studies are surely right about the major role of workplace and professional routines, culture, and norms in determining the ultimate content produced, owners either directly or through top management whom owners do select can substantially affect the creation of the workplace culture and notions of acceptable and unacceptable routines. Third, owners can also vary dramatically in their orientation toward expertise, ideology, or diversity among employees. These factors mean that owners' choice of employees—or their choice of those employees (e.g., top editors) who choose other employees—can have tremendous consequences for the newsroom capabilities, culture, and biases that can translate into the orientation of the content finally produced. Finally, although direct interventions may be rare, their occasional occurrence can queue the direction and stimulate the practice of employee self-censorship, which journalists report to be a major determinant of content creation in most corporately owned media.

Thus, sociological investigators are right to the extent that they discover an important element of owner impotence. They are also right to emphasize matters of routine, workplace culture, and professionalism as major determinants of media content. It would be wrong, however, to understand these insights as showing that owners do not have huge amounts of power over content and over the construction of media content, power that is mostly exercised only indirectly.

#### IV. PROBLEMS POSED BY OWNERSHIP

The increasingly dominant Chicago School version of antitrust identifies one potential problem with media or any other form of concentration—creating power to raise prices above a competitive level for the purpose of obtaining monopoly profits, with the result that the firm restricts production below efficient levels.<sup>257</sup> Part III showed that ownership matters even when it does not raise this antitrust concern. However, responsive legal policies require a more specific account of the way ownership matters. In addition to possible antitrust violations, this section identifies six problems, as well as one potential benefit, of concentration.

##### A. *Six Problems and a Doubtful Benefit*

###### 1. The Bottom Line

Part III-A showed that the nature of media markets leaves owners with considerable decisionmaking discretion largely due to the availability of

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257. See *supra* text accompanying notes 88-89. Cf. Stucke & Grunes, *supra* note 10.

potential monopoly profits and that the exercise of this discretion can have a significant impact on the media content “their” media provides.<sup>258</sup> Policy should, if possible, aim to get ownership in the hands of people most likely focused on providing quality content—which almost irrespective of what is meant by “quality,” requires people less focused on the bottom line.<sup>259</sup> By being less focused on profits, these preferred owners may simply avoid maximum exploitation of their monopoly product by keeping prices comparatively low (although still above cost), with the result that people will benefit by the products greater availability. Given that newspaper reading is a major factor determining political participation<sup>260</sup> (and, one suspects, can also affect the quality of participation), William Blankenburg has argued that the decision over price is a major form of editorial policy, and that the choice to maximize profits not only “suppresses information” but even fails to treat the “expelled subscribers” as “citizens.”<sup>261</sup>

More importantly, non-profit maximizing media owners could “spend” their potential monopoly profits on content attributes that produce significant benefits for the public even though the expenditures do not produce revenue gains. These benefits could be characterized as positive externalities produced by better journalism.<sup>262</sup> When a paper or other

258. Putting quotes around “their” reflects the discussion in Part III-C of media workers being the primary determinants of media content. In *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), the Court objected to a law “because of its intrusion into the function of editors.” (emphasis added). In *Associated Press v. United States*, 326 U.S. 1, 20 (1945), relied on in *Miami Herald* and even more so in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), the Court emphasized that “the First Amendment does not sanction repression of [freedom of the press] by private interests” nor does it “afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.” *Associated Press*, 326 U.S. at 20. If the press is identified with editors and journalists, the owners could be the “private interest”; the media corporation could be the “non-governmental combination.” It is not clear that the First Amendment requires, although it presumably allows, identification of the press with the suppliers of capital (or the “owners”) as opposed to, say, the editors or other employees when the two conflict. Cf. European notion of “internal press freedom,” *supra* note 171.

259. This claim assumes that consumers and citizens are better served by the media devoting efforts and resources toward widely providing quality content beyond the extent required for profit-maximization. For doubters, the arguments of both economic theory and democratic theory supporting this assumption are surveyed in BAKER, *supra* note 162.

260. See, e.g., RUY A. TEIXEIRA, WHY AMERICANS DON’T VOTE 88 (1987).

261. Blankenburg, *supra* note 199, at 398. Cf. CRANBERG ET AL., *supra* note 198, at 96, 149-50 (describing how the *St. Petersburg Times* and *New London Day*, two papers owned by charitable organizations, devote much more of their resources to journalism, generating better quality at less price to the reader, thereby obtaining more circulation—for example, the *St. Petersburg Times*, has not only become the largest circulation paper in Florida, it has a 44% penetration rate in high black areas as compared to more typical paper penetration rates in the teens).

262. BAKER, *supra* note 162, ch. 3. In traditional welfare economic terms, the claim is that these “preferred” owners make “unprofitable” expenditures that produce significant positive externalities, thereby moving closer to the “efficient” or consumer welfare maximizing content

media entity is profitable but could be made more profitable by cutting the newsroom budget, the public interest in quality media is served by having owners (or editors) who would make the first choice. Society benefits by owners' willingness to exercise "social responsibility" or otherwise emphasize journalistic or creative quality rather than merely maximize the bottom line. Of course, legally mandating social responsibility is inconsistent with a free press.<sup>263</sup> However, the law properly considers the impact of legal structural regulation of ownership on the likelihood of producing or undermining more responsible ownership.

From a policy perspective, the question is whether it is possible to identify legally specifiable *categories* of people or systems of ownership control that are more likely to avoid a maniacal focus on the bottom line.<sup>264</sup> Attention must also be given to preventing restrictions on ownership being manipulated for ideological purposes.<sup>265</sup> Although many more premises are needed to support these conclusions, I suggest that some relevant categories can be described. For example, owners living in the community where the media product is distributed and owners closer to journalistic/editorial process are generally likely to exercise more desirable decisionmaking control and to be relatively more concerned with quality and less single-mindedly focused on profit. Their identity is likely more at stake in relation to the quality of the product, an effect reinforced by being personally close to the consumers and professionally close to the journalism critics who evaluate them primarily on the basis of content quality and not merely the firm's economic success. Producing a quality media product can further their standing in their community or their profession. If these suspicions are correct, they support at least the following policy preferences: disfavoring control by *non-media* conglomerates—journalism executives have described their worst nightmare as being controlled by corporate bosses who do not understand

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expenditures.

263. *Miami Herald*, 418 U.S. at 256.

264. The FCC already recognizes that these types of considerations might be relevant for public policy when it directed public comments to address whether structural separation should be mandated between two different, jointly-owned media entities both engaged in production of local news. See *In re Cross-Ownership of Broadcast Stations & Newspapers*, MM Docket No. 01-235, *supra* note 198.

265. Manipulation may be merely the epitaph applied to rules chosen to favor those whose ideology one objects. Herman and Chomsky argue private capitalist ownership operates ideologically under the conditions of the modern market to favor the views of the dominant power groups in society. EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* (1988). The best hope to avoid objectionable manipulation is to make explicit normative defenses of the preferences built into any rule structure. The identification of capitalist ownership with the First Amendment is justified if the logic of the identification is adequately defended, but is simply ideological if not required by available and appealing understandings of the First Amendment and if alternative ownership structures can be shown to better serve democratic and audience values.

the media;<sup>266</sup> disfavoring ownership by media conglomerates or publicly traded newspaper chains<sup>267</sup> (especially when not necessary for the media entity's existence<sup>268</sup>); favoring not only local ownership but also ownership or at least control by the professionals who staff the media entity. These considerations, for example, explain the FCC's past policy of favoring both local ownership and integration of ownership and control in comparative licensing decisions.<sup>269</sup>

## 2. An Undemocratic Distribution of Power

The "Berlusconi impropriety" could serve as the label for the democratic concern with the distribution of communications power.<sup>270</sup> Once it is recognized that audience preferences do not completely control media content, it should be clear that media influence over public opinion and the democratic process will not be distributed in a democratic one-citizen/one-vote or even a one-consumer/one-dollar manner. Complete equality of communicative power is probably not an appropriate goal.<sup>271</sup> Still, a democracy should be concerned both that all groups have a real share and that no one group or individual have too disproportionately large

266. *See supra* note 168.

267. The primary complaint of Cranberg et al. related to the changed structure and pressures created by *public* ownership, although they also noted that large corporate ownership (even if not public) might generate many of the problems they identify. CRANBERG ET AL., *supra* note 198, at 106. They do favor encouraging other forms of ownership—e.g., by charitable foundation. *Id.* at 148-52. Their primary recommendations, however, seem to accept that public corporate ownership will continue to dominate, but suggest changes in compensation structure (i.e., not tied to profits but to quality), different structures of board of directors, and related changes that could lead to less focus on short term profitability and more to creating quality journalism. *Id.* at 142-46. Although all these reforms seem well thought out, it is not clear why a public company would adopt them voluntarily, and it is not clear whether the authors were proposing that the changes be legally mandated or the form that such mandate would take.

268. This consideration could provide support for allowing existing entities to launch new outlets or numbers but not to purchase (non-failing) existing media entities. *See* C. Edwin Baker, *Mergerphobia*, THE NATION 520-21 (Nov. 8, 1993).

269. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395 (1965). In invalidating a use of such criteria, one problem identified by the Court of Appeals related not to the wisdom of this type of control but the failure of the desired ownership being maintained "for an appreciable period of time." *Bechtel v. FCC*, 10 F.3d 875, 879 (D.C. Cir. 1993). From the perspective advanced here—the goal of producing quality journalism rather than maximizing profits — the competitive bidding auction procedure that the FCC adopted in 1998, Competitive Bidding Order, FCC 98-194 (rel. Aug. 18, 1998), to replace the comparative hearings (which certainly had their own problems), has a perverse effect. It gives the license to the bidder who predicts herself as being best able and willing to squeeze maximum profits from the license, a goal that I argue above is directly contrary to the public interest in quality journalism or programming.

270. Silvio Berlusconi, assertedly the richest person in Italy, bought the three main private television networks and then used them to twice get himself elected Prime Minister.

271. BAKER, *supra* note 184, at 37-46.

a share of media power. This democratic concern goes a long way to justifying the early FCC local and national limits on broadcast licenses, which were inexplicable on the basis of a narrow antitrust analysis.<sup>272</sup> The aim is explicitly to have a society in which the organs of public opinion formation are maximally dispersed within the population. This perspective makes largely irrelevant an antitrust search for evidence that the concentration causes economic inefficiencies.<sup>273</sup> Dispersal of media power, like dispersal of voting power, is simply a key attribute of a system considered to be democratic.

### 3. Democratic Safeguards

A dispersal of media ownership likely provides, and concentration often undermines, two valuable safeguards to the well-being of a democratic society. Dispersal can support performance of the “checking function” or watchdog role. It is also likely to reduce the media’s own vulnerability to certain types of corruption.<sup>274</sup>

Exposure of abuses of power and of failures of management provides the basis for identifying the press as a so-called Fourth Estate, a role emphasized by Justice Potter Stewart as justifying its constitutional protection.<sup>275</sup> This watchdog function is a major benefit provided by the media that is predictably under-produced even when ownership is dispersed. Still, it is plausible to expect that a larger number of competing “watchdogs,” each of which competes to discover abuse, will better perform this role than would only a few. A likely “synergy” of media mergers is to reduce resources committed to investigative journalism. Each outlet of the merged firm can often sell the same investigative journalism, the same exposés, thereby reducing the total amount the merged firm needs to spend on information gathering. In addition, a greater ownership pluralism will likely increase the angles pursued by these media watchdogs.

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272. See *supra* note 133 and accompanying text.

273. As noted, as long as the FCC enforced ownership restrictions, they were so much tougher than antitrust requirements that antitrust enforcement was irrelevant, a situation that has clearly changed since the FCC eliminated or greatly relaxed most of its rules restricting ownership. See *supra* note 86.

274. Both claims admittedly depend on empirical factors. Thus, the claims ideally need empirical support and may not hold under some circumstances.

275. Although the attribution has been disputed, according to Thomas Carlyle, “[Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous [sic] to us in these times,” *quoted in* Justice Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975). See generally Vince Blasi, *The Checking Value in First Amendment Theory*, 3 AM. BAR FOUND. RES. J. 521 (1977); Justice William J. Brennan, *Address*, 32 RUTGERS L. REV. 173 (1979).

Dispersal also creates a second safeguard. Those that most need to be watched, those with political or economic power, often seek to control or co-opt the media. Control or corruption is likely to be easier the fewer media entities these co-opters need to control. A few can be purchased, threatened, bribed, intimidated, or appealed to. Control of larger numbers of *influential* media is more difficult.<sup>276</sup> Safety is even greater if different influential media entities have a variety of different financial bases and organizational structures. A particular structure may be vulnerable to a particular form of either intentional or market-based corruption.<sup>277</sup> However, that vulnerability often will not exist equally within portions of the media differently structured, especially those with different financial bases.

Even among media dependent on public funding, dispersal of editorial control generates a degree of safety. Consider the advantages of public broadcast stations each making its own policies and programming decisions as compared to a centralized system. If public broadcasting as a category has strong support in public opinion, a funding system in which government budget reductions apply to all public broadcasters would be a blunt, expensive, and easily opposed tool to use as a means to reign in a single offending station. In contrast, even if technically possible, politically a government decision to cut off only an individual offending station for its critical exposé would be too overtly censorious to have a good chance of success. Such a move would generate both strong public criticism and possibly an effective First Amendment legal challenge. In economic or public choice language, the single crusading station will have effectively externalized much of the political “cost” of its “offending” action on the other public broadcasters. The larger group can use its reservoir of collective public support to defeat the government’s attempt at retaliation.

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276. Unfortunately for those who think the Internet has solved all the policy issues regarding media and ownership, the caveat that the media be “influential” is important. Mere exposure of dissident views on some theoretically accessible public media often accomplishes little, as earlier but long ignored exposures of various abuses in the alternative press has often shown. There is a sense in which the public reality to which people in power must respond exists only when stories are reported and given adequate prominence by public media entities recognized by them and the public to be significant. An important empirical issue needing more investigation for purposes of understanding democratic practice involves the lines of communication and dispersion of stories between media at different levels.

277. Given the common complaint that government supported media will not be effective watchdogs, James Curran’s observation that during Thatcher’s reign, the government was subject to “more sustained, critical scrutiny [by public broadcasters] than [by] the predominantly right-wing national press.” James Curran, *Mass Media and Democracy Revisited*, in *MASS MEDIA AND SOCIETY* 81, 88 (James Curran & Michael Gurevitch eds., 2d ed. 1996). His conclusion, from this and other examples, was that “[s]tate-linked watchdogs can bark, while private watchdogs sleep.” *Id.* at 89.

#### 4. Media Vulnerability to External Pressures: or “Lean and Mean”

Well, maybe not mean, but independent. Conglomerate ownership can make the entity and, hence, its editorial product more vulnerable to co-opting or censorious outside pressure. When a media entity is part of a conglomerate in multiple lines of business, either governmental or powerful private groups may find themselves both able and willing to put serious economic pressure on one portion of the conglomerate in order to induce the media entity to mute critical reporting. Even pure media conglomerates are subject to this vulnerability when an outside entity or group, a government licensor or corporate advertiser, is able to impose pressure on one element of the conglomerate. President Nixon, wanting to retaliate against the Washington Post for breaking the Watergate story, famously planned to create difficulties for the Post’s broadcast licenses in the license renewal process.<sup>278</sup> The greatest policy fear, of course, is that the mere vulnerability will influence initial journalistic decisions—a form of self-censorship—or prevent them from seeing the light of day. If independent, book publishing should be relatively immune from advertiser pressure. But advertisers apparently exercised power over *Reader’s Digest*, a magazine that like most is heavily dependent on advertising, to get its book publishing subsidiary to cancel publication of a book critical of the advertising industry.<sup>279</sup> Similarly, Dupont’s threat of withdrawal of advertising apparently got Time, Inc., to get its associated Fortune book club to drop the distribution of a book critical of Dupont.<sup>280</sup>

CBS, at the last minute, pulled a *60 Minutes* show in which Jeffrey Wigand, a former high level tobacco company employee, would report on tobacco company executives’ knowingly false congressional testimony.<sup>281</sup> Commentators speculated that CBS’s decision reflected its conglomerate interests.<sup>282</sup> Lawrence Tisch, the major owner and head of Loews Corporation, which then owned CBS, purportedly feared that broadcasting the interview could provoke a lawsuit against CBS that would impede his negotiations to sell CBS to Westinghouse.<sup>283</sup> More to the point here,

278. *Hearings Pursuant to H.R. Res. 802 Before the House Comm. on the Judiciary*, 93rd Cong., 2d Sess., bk. VIII, 321-23 (1974).

279. *Pleasantville’s Velvet Trap*, PUBLISHER’S WKLY, June 17, 1968, at 49, *discussed in* Bagdikian, *supra* note 9, at 163.

280. MARTIN A. LEE & NORMAN SOLOMON, UNRELIABLE SOURCES: A GUIDE TO DETECTING BIAS IN NEWS MEDIA 75 (1990); *see also* BAKER, *supra* note 7, at 46.

281. *See* Editorial, *Second Thoughts at ‘60 Minutes,’* ST. LOUIS POST-DISPATCH, Nov. 28, 1995, at 180.

282. *Id.*; Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Freedom of Expression*, 53 VAND. L. REV. 1879 (2000).

283. Walter Goodman, *Covering Tobacco: A Cautionary Tale*, N.Y. TIMES, Apr. 2, 1996, at

however, Wigand's exposé was arguably contrary to Tisch's conglomerate interests.<sup>284</sup> In addition to CBS, Loews owned Lorillard, a tobacco company that was in the process of buying several tobacco brands from Brown & Williamson, the company that the *60 Minutes* broadcast would expose.<sup>285</sup> Moreover, Tisch's son, who was President of Lorillard, would be one of the people whom the *60 Minutes* program would suggest had committed perjury before Congress.<sup>286</sup>

In another case with a happier ending, drug companies apparently threatened retaliation against the *New York Times* when the *NYT* began publishing a series of stories concerning problems with prescription medicines.<sup>287</sup> At first it might seem that the *NYT* would not be vulnerable to pressure since the drug companies did not themselves advertise much in the paper.<sup>288</sup> Nevertheless, the *NYT* owned several medical magazines and the drug companies threatened to withdraw advertising in these publications.<sup>289</sup> In this case, legitimate journalism prevailed. The *NYT* published—and it sold the medical magazines!<sup>290</sup> But the example certainly illustrates the danger created by conglomerate ownership.

## 5. Internal Distortions

The flip side of conglomerate vulnerability to outside pressure is the conglomerate owners' own incentives for distortion. Ownership by an entity that has substantial non-media economic interests creates opportunities and incentives to mold content to serve the firm's overall corporate interests. Media ownership can be used as leverage over outsiders, leverage whose value (and the potential for its journalistically corrupt use) is increased to the extent the media owner has important outside economic interests that can benefit. For example, during Murdoch's campaign to get licenses for an airline he hoped to start, he reportedly found it profitable to promise Jimmy Carter the support of his *New York Post*.<sup>291</sup>

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C16; Editorial, *supra* note 281.

284. See Goodman, *supra* note 283; Netanel, *supra* note 282, at 1923-24.

285. Netanel, *supra* note 284, at 1924.

286. See *id.*

287. Ben H. Bagdikian, *Newspaper Mergers*, COLUM. JOURNALISM REV. 19-20 March/April 1997, discussed in BAGDIKIAN, *supra* note 9, at 162-63.

288. *Id.*

289. *Id.*

290. *Id.*

291. SCHIFFRIN, *supra* note 186, at 132. Other examples could be given. *E.g.*, *cf. id.* at 133 (describing decision not to publish a book by Chris Patten that was critical of China at the time Murdoch's media enterprises were seeking entry into China). Schiffrin asserts: "To Murdoch, the use of publishing to achieve other ends was simply business as usual." *Id.* at 132.

Simply as a media entity, strong professional demands, and some economic incentives, encourage the media to maintain the integrity of its content—incentives that lead to newspapers' self-portrayal of maintaining a sturdy wall of separation between church and state, that is, between the journalism and the business or advertising side of its operations. Of course, this separation can and does break down. Still, the media entity benefits to the extent that its audiences see its editorial decisions as professional, not self-interested. The problem is that conglomerate ownership inevitably increases the contrary incentives already produced by advertisers. These potentially strong incentives will sometimes outweigh the incentive for providing uncorrupted journalism. It will do so even more if the corruption of content can avoid being too obvious, for example, by becoming ingrained "self-censorship" or "business as usual" such that no "smoking gun," possibly not even a conscious failure, can be identified. Thus, unsurprisingly, overt molding of editorial content will be observed only occasionally. Still, editors report routinely avoiding investigations in areas where their reporting could be embarrassing to the enterprise's outside interests—often having to do with land use, convention or sports facility development or other local issues. Likewise, content is sometimes consciously designed to be beneficial to the conglomerate's overall political interests or to promotion of its other (media or non-media) products. Even greater is the danger of unconscious, routinized molding of content along lines of enterprise interests.

The point, of course, is not to demonize people like Murdoch nor conglomerates like General Electric or Loews. Rather, the point is to see how conglomerate ownership creates both the economic vulnerability to outside pressure to corrupt the journalistic enterprise and the internal incentives to trade journalistic integrity for other conglomerate economic interests. Desirable responses can take two forms: resistance or (partial) structural removal of the incentives for distortion. Both systematic enterprise and heroic individual resistance occurs. Strengthened professional norms impede these forms of distortion. Still, one wonders why society should tolerate structures that unnecessarily sacrifice careers of courageous journalists to this economic logic? When does the need for structural change become obvious? The most direct response is to eliminate (or at least reduce) the structural incentives for corruption by avoiding the form of ownership that generates them. Ownership by non-media corporations could be prohibited and media conglomerates could be disfavored.

## 6. Inefficient Synergies

Corporate management justify media mergers to their stockholders (and governmental regulators) with loud claims about profitable and

efficiency-serving “synergies.” As it turns out, many media enterprises during the 1990s and since have apparently found profitable synergies difficult to realize. Still, sometimes some cost savings or interactive benefits undoubtedly exist. The merged entertainment company may benefit by selling the same highly promoted fictional character or story in new mediums—in a theatre-released movie, a television show, a book, a magazine excerpt, a CD based on the movie sound track, and, especially in relation to children-oriented media, as subsidiary branded products or computer games characters. By clever placements, the enterprise can also cross-promote its various products. Its broadcast news division or its popular magazine can do stories about its movie studio’s release of the “outstanding” new movie or television series. They can also offer in depth reports about the program’s star character, about its Oscar or Academy Award potential, or other related matters of equally “great public concern.” Similarly, after the merger, the local broadcast station and newspaper can share reporters, reducing outlays on local affairs reporting, or at least requiring reportorial cooperation, eliminating the wasted expense of doing the reporting twice from scratch.

“Profitable,” however, does not mean in the “public interest.” Often these “synergies” or efficiency “gains” occur by creating market-dominating media goods. Although profitable for the firm, these may provide less value to the public (even as measured by the economic criterion of “willingness and ability to pay in a market”) than would the media goods they drive out of existence. In other cases, these synergies reflect cost saving from reducing expenditures that previously provided significant positive externalities.

Consider the first point. Market success means that an audience (or the advertisers) value a product in excess of its immediate cost. Thus, the merged firms’ new (or newly expanded) synergistic products undoubtedly provide value to society.<sup>292</sup> Nevertheless, monopolistic competition among media goods can result in the competitive success of products that *cause* the failure of competing media products that still would produce more “consumer surplus” than do the prevailing goods.<sup>293</sup> This can occur when the new “synergistic” product provokes a slight downward shift in the demand for the alternative media products, causing some to fail even though they would still generate more value for potential customers than they cost to produce.<sup>294</sup> This potential excess value becomes lost consumer

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292. That is, “undoubtedly” unless the content produces bad consequences not taken into account by purchasers—negative externalities of some sort, for instance, increased levels of societal violence.

293. BAKER, *supra* note 7, at 44-71.

294. Of course, this problem would not exist if it were not for media goods being unlike goods hypothesized in standard models of pure competition. Media goods’ low copy costs mean they are

surplus. Of course, the lost consumer surplus can be either more or less than the surplus generated by the new competing product.<sup>295</sup> A *net* loss is most likely to occur when the prevailing (synergist) product's demand curve is flatter than that of the media products that it competitively eliminates—a criterion generally suggesting the prevailing product has a larger audience. Or it can occur when the firm providing the prevailing product needs and is better able to price discriminate, for example, by selling the product in multiple “windows,” a possibility often supported by the merger. These two scenarios describe contexts where the dominating product produces comparatively little consumer surplus, with the net result that though the synergistic product produces some value for society, it produces a net loss due to the lost surplus of the products it displaces. The problem with mergers is that often their profitability is predicated precisely on the hope of increasing opportunities for effective price discrimination or for creating “blockbuster,” best selling products. These enterprise hopes should translate into public interest worries. The danger is that these synergies will damage consumer welfare by eliminating more valued media alternatives.

The second welfare loss has also already been discussed using different conceptual foci. It occurs when synergies transform characteristics of the media entity or eliminate (duplicative) practices that have significant positive externalities. Thus, the earlier discussion of investigative journalism as a democratic safeguard observed that the benefits due to the media's exposure or deterrence of official or corporate malfeasance go equally to people other than the paper's readers or purchasers. The result is inadequate (monetary) incentives, leading to the prediction that the market will under-supply this type of journalism. As noted, mergers can exacerbate this under-production if, for example, one “synergy” of merging a newspaper and a local television station is that they can now get by with the amount of (or less) investigative journalism previously done by only one of the two.<sup>296</sup> “Synergy” from the perspective of the merging firms is net social welfare loss from the perspective of the individuals who make up society.

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normally sold at a price above marginal cost and where the marginal cost is less than average cost. The problem also would not exist if the seller/producer could adequately price discriminate so as to internalize more of the media product value.

295. Formally, if synergistic Producer A produces a surplus (producer plus consumer) of  $a$ , and puts out of business Producers B, C, and D, which at the point where they fail are still producing consumer surplus of  $b$ ,  $c$ , and  $d$ , the social welfare question is whether  $a > b + c + d$  or whether  $a < b + c + d$ . Neither Producer A's market success nor abstract theory gives reason to predict one or the other outcome, although the discussion in the text above tries to describe situations where the second alternative is more likely.

296. See *supra* text accompanying notes 275.

This example shows that an apparently profitable and efficient merger from the perspective of the firm can be costly for society even though it does not create a power over prices troubling to antitrust regulators. The profit maximization perspective that normally guides the firm and the social welfare perspective that should guide policy diverge. In the first discussion above, the welfare loss reflects the consequences of monopolistic competition between new synergistically produced goods and other media goods. The second sees welfare losses due to synergies that reduce expenditures on activities that produce significant positive externalities.

### 7. Public Benefits of Concentrated Media?

Any policy analysis must also consider possible benefits of media concentration. Merger proponents often argue that mergers can benefit the public both as consumers and as citizens. These empirical claims cannot be dismissed (or empirically assessed) here. Still, some comments about reasons for doubt and some comments about the stronger claims are appropriate.

Merger proponents often suggest great consumer benefits. My impressionist observation is that the subsequent experience with the conglomerate mega-mergers of the 1990s more often shows mergers to have been disappointments even from the corporate (or, at least, the stockholder) point of view.<sup>297</sup> If so, an observer might wonder if ego aggrandizement or personal financial interests of corporate leadership, not consumer benefits or even corporate economic benefits, has been the major driving force behind media mergers. But suppose that the merger does make real economic sense for the corporate entities involved. What does that imply?

The central problem with the assertion that mergers produce social benefits is knowing where to find evidence. As a rule of thumb, profitability relates directly to efficiency at producing (or distributing) goods or services valued by the public. Therefore, increased profitability is often taken as evidence that there is a benefit to society. But the last six topics of this section show that this relation can be dead wrong in the media context. Media mergers *can* disserve consumer welfare even if the merger does not create antitrust violations and does create profitable

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297. As I write this, Robert Pittman, COO of AOL Time Warner and possibly the major pitchman for the synergistic advantages of the merger two years before of the two companies, resigned under pressure. Amy Harmon, *Shake-up at AOL: The Former Executive*, N.Y. TIMES, July 19, 2002, at C1. Although the general burst of the dot.com bubble may merit a substantial part of the blame, the company stock had lost 80% of its value since the merger, leading some to question the merits of the synergy theory. *Id.*; David D. Kirkpatrick, *Man in Middle of AOL Deal Is Now in Center of a Storm*, N.Y. TIMES, July 27, 2002, at A1.

efficiencies for the merged firm. Do they in any particular case? The potential divergence between the corporate and societal perspective highlights the evidentiary difficulty. It also suggests that claims by potential merger participants may reflect narrow self-interest connected at best to greater profitability but with *no necessary connection* to any public benefit. The empirical burden requires the advocate of mergers to rely on arguments other than reference to market data. This empirical problem is intensified by the difficulty of determining and weighing any purported benefits. These will all involve contestable evaluations.<sup>298</sup> Here, I merely assert that consequences for the media's democratic and cultural roles are the most important and ought to dominate policy making absent strong evidence of extraordinary consumer benefits.

Independent commentators most commonly claim on behalf of larger corporate entities that these entities will be better able than smaller independent media entities to stand up to outside pressures or will be able to finance expensive investigative reporting. Of course, this empirical claim is difficult to assess. Eric Sevareid, one of our most prominent television news commentators of the last generation, may have gotten it right when he said: "the bigger the information media, the less courage and freedom of expression they allow. Bigness means weakness . . . . Courage in the realm of ideas goes in inverse ratio to the size of the establishment."<sup>299</sup>

Some explanations of Sevareid's claims are plausible. The likelihood of a media entity's standing up to economic and other pressures may have less to do with financial resources and much more to do with a journalistic decisionmaker's courage and commitment to the integrity of their journalism. *Even if* this type of courage and commitment were distributed equally among heads of small and large media news entities, its presence would be more common if there were simply more heads—that is, if there

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298. In a luncheon seminar attended by the author at the Joan Shorenstein Center at Harvard University during the 1992 academic year, Nich Nicholas, Jr., former head of Time, Inc., and then co-CEO of Time-Warner until being fired in early 1991, defended the merits of the merger, see RICHARD M. CLURMAN, *TO THE END OF TIME* 348-356 (Touchstone ed., 1993). Central among his claims of how the merger benefitted the public was that without the merger, most of the public would not have the 500 cable channels that they would now have by 1995. Although I (and most people) still do not have 500 channels, I wondered at the time why I would want them—would not a few channels of quality programming suffice?

299. McDonald, *The Media's Conflict of Interests*, *CENTER MAG.* 15, 24 (1976), quoted in BAKER, *supra* note 7, at 267. Relying on their own experience as owner/editors of a small family owned Kentucky newspaper, Pat and Tom Gish used dramatic examples to forcefully illustrate their claim—the possibility of a paper such as his doing effective advocacy and exposé journalism depended on not being owned by a newspaper chain. See Pat Gish & Tom Gish, *We Still Scream: The Perils and Pleasures of Running a Small-Town Newspaper*, in *THE BUSINESS OF JOURNALISM* 3-25 (William Serrin ed., 2000).

is less media concentration.<sup>300</sup> Moreover, sociological and psychological factors suggest the distribution will not be random. Courageous, committed journalists may be more likely to lead small journalistic enterprises than to have risen to the top in media conglomerates. These independent editors and owners may identify more with the journalistic endeavor than with their own institutional advancement. On the other hand, risky exposés or innovative experiments may threaten institutional security or advancement, a factor that may increasingly motivate employees of larger corporate entities whose position gives them more to lose.<sup>301</sup> If exposés (of creativity—think “independent film”) cut too much against the grain and do not produce any obvious financial benefits, their development or publication may be least likely to receive support within corporatized media entities that have the least internalized professional commitments to journalism or creativity.

If these speculative empirical hypotheses are right, they provide additional reasons to disfavor media concentration. Interestingly, they could also have implications for the appropriate design of public media institutions. They might support, for example, dispersing and decentralizing editorial authority in public broadcasting rather than creating a unified system with authority located at the center.

### B. *Ownership to Serve a Democracy: Diversity of Ownership*

Section A identified objections to ownership concentration beyond any antitrust problem such as anti-competitive power over pricing. There remains the question of the implications for concentration policy of an affirmative vision of the role of the media in a democratic society. I now turn briefly to that issue.<sup>302</sup>

No democratic theory condones government censorship. It is also widely thought that much censorship of journalism or creativity by private power is similarly objectionable. All democratic theories assert that the media should perform a “checking” or “watchdog” or “fourth estate”

300. The claim is that if *percentages* are the same, a higher *number* of owners deciding in favor of exposés will increase the number of meaningful exposés. This would not follow if the smaller number of committed, courageous leaders within the concentrated context could assure that each of their subunits choose a strong investigative stance. Thus, my claim implicitly assumes that cautious conglomerate heads will be more effective at inducing avoidance among subordinates (e.g., editors of entities owned by the conglomerate) than their courageous counterparts will be at the opposite. Another way to put this is that the “safer” response will be more likely given increasing potential decisionmakers there are that must sign off on “risky” decisions that could be damaging to the entity—that is, caution is the more likely default rule.

301. CRANBERG ET AL., *supra* note 198, at 104 (suggesting public ownership of papers encouraged more risk aversion as well as more overwhelming focus on financial performance).

302. This part is based on BAKER, *supra* note 162, part II, *revised* from C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317 (1998).

function.<sup>303</sup> Any ownership structure that impedes this performance should be presumptively condemned. Beyond these points, different visions of democracy offer differing affirmative visions of how media can serve a democratic society.

In what I label “complex democracy”<sup>304</sup>—a concept quite close to Habermas’s “discourse theory of democracy”<sup>305</sup>—the media have the following central functions in addition to its watchdog role. First, the media should be an instrument of a society-wide public sphere that addresses common problems, values, and solutions—and allows all groups to participate in a society-wide discussion of the “common good.” Second, the media should provide a means for identity of interest groups to determine when their own concerns are at stake and to mobilize for political participation in a pluralist, society-wide bargaining process. Finally, groups do not come into existence with unchanging interests on their sleeves. The media must provide societal subgroups, especially “subaltern” or marginalized and oppressed groups,<sup>306</sup> a realm for their own exploration and identification of their own common good and self-definition.

Looking solely at the first of these three functions, as do some “republican” or “deliberative” democratic theorists, the central problem is not concentration but the media’s “social responsibility.” Monopoly or conglomerate media enterprises, *as long as* they do not deny access to any groups and *as long as* they produce good and inclusive journalism aimed at finding, promoting, and elaborating the common good, perfectly fit society’s democratic needs of supporting a society-wide public sphere.<sup>307</sup> Too much dispersal of ownership may even threaten a social fragmentation that would frustrate a common discourse about the common good.<sup>308</sup>

This complacent view of concentration must be rejected by complex democrats once they add the latter two functions to the tasks required of a democratic media. To perform these, different societal subgroups need their own media. Admittedly, these subgroups (or their members) do not *necessarily* need to own their own independent media. Avenues of regular

303. See Baker, *supra* note 302, at 324-25.

304. BAKER, *supra* note 162, at 143-47.

305. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996); Jürgen Habermas, *Three Normative Models of Democracy*, in 1 CONSTELLATIONS 1 (1994).

306. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109, 137 (Craig J. Calhoun ed., 1992).

307. Despite not necessarily favoring deconcentration regulation, this approach is not anti-regulatory. For example, it may find access rules—or fairness doctrine type requirements—very beneficial.

308. See CASS SUNSTEIN, REPUBLIC.COM 72-75 (2001).

and effective media access might suffice. Still, a wide distribution of ownership or control would justify much greater confidence that the media will serve these groups' democratic needs. More specifically, complex democracy has two primary implications for media ownership. First, in addition to society-wide media organized or owned in a way most likely to lead them to be dedicated to social responsibility, ownership of much of the media should be widely dispersed. Second, the democratic need is not simply for many competing, separately owned media enterprises, in other words, for lack of concentration. Democracy also requires that the ownership or control be widely dispersed among the various segments of society. When this occurs, the resulting source diversity is valuable independent of whether it produces content diversity—although it seems predictable that it will produce some particular sorts of diversity in content.

Of course, under existing conditions, any likely market system is likely to provide *some* media serving each of these multiple democratic functions. The real policy issue is whether the market will inadequately nourish some democratic functions and the media corresponding to them. Or, for present purposes, the issue is whether existing ownership concentration creates a democratic imbalance. Reasons to suspect that this is the case have been canvassed above.

## V. CONCLUSION: IMPLICATIONS FOR POLICY

Although not detailed enough to suggest an ideal media ownership policy, the present discussion supports a number of conclusions. First, general antitrust enforcement should continue vigorously. Moreover, whether or not in other areas of the economy antitrust law should be largely restricted to economic efficiency concerns and monopolistic power over pricing, it should not be so limited in the media arena.

Second, at least two considerations support subjecting media ownership to additional regulation. Pragmatically, the advantage of dual legal regime and dual agency enforcement is that lack of political will within one agency or narrow judicial interpretation of laws enforced by one agency will be less damaging. More fundamentally and conceptually, media specific concerns reflecting both features of media economics and special democratic roles of the media require media specific polices. Antitrust laws, even on their broadest interpretation, simply do not respond to all the media specific reasons to limit concentration. An expansive antitrust law interpretation may be sensitive to a merged entity's power to narrow consumer's content choice even when the merger did not lead to any power over pricing.<sup>309</sup> However, antitrust law's focus on consumers

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309. See, e.g., Averitt & Lande, *supra* note 97, at 752-53. See also Stucke & Grunes, *supra*

is unlikely to embody the democratic concerns with assuring maximum numbers of separate owners participating in the “marketplace of ideas” or with democratic worries about concentrated power to influence public opinion. For these purposes, the FCC’s now largely abandoned rules strictly limiting national ownership of different broadcast entities made great sense. Similar points apply to the earlier FCC policy preferences for local ownership and for an integration of ownership and management or control. Even though not always effective—for example, subsequent license transfers regularly defeated the goal of using these preferences in comparative licensing proceedings—these policies served important media-specific values that are not so easily assimilated into antitrust policy. Thus, the discussion here supports generally more stringent, somewhat differently focused, media-specific rules relating to ownership, probably combined with a second enforcement agency (such as the FCC).

Ideal policies cannot be spelled out in the abstract. At best, the affirmative vision of the media’s democratic role can help guide policies that respond to particular contextual and variable conditions. Nevertheless, the argument here suggests the wisdom of James Curran’s recommendation that legal policy support a variety of organization and structural forms.<sup>310</sup> Specifically, Curran envisions five media sectors, each organized on a somewhat different structural and financial basis, each with its own set of goals or functions, and each responsive to somewhat different incentives.<sup>311</sup> This plurality may provide security in that neither government nor market corruption of the media is likely to be equally powerful within or equally damaging to all the organizational forms. Thus, this plurality of media structures supports the media’s checking function. Moreover, this diversity is likely to enable the media to better perform its multiple democratic assignments.

Curran’s proposal relates to a final point about media ownership. The concerns with ownership relate, in the end, to whom has control over media content and how these people will use this power. That is, an ideal policy will be concerned with more issues than mere ownership concentration. Rules structuring control of decisionmaking *within* media entities respond to the same value-based concerns. *Which* groups of people or *which* individuals, with relations to various wider societal groups,

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note 10.

310. James Curran, *Rethinking Media and Democracy*, in *MASS MEDIA AND SOCIETY* 120, 140-48 (James Curran & Michael Gurevitch eds., 3d ed., 2000).

311. His five sectors are: core sector (his model here is a social responsibility oriented public broadcast system such as the BBC), civic media sector (performing many of the pluralistic democratic functions described above), professional sector (controlled by media professionals and serving ideals internal to their profession), private enterprise sector, and a social market sector (compensating for inadequacies of the market and developing new forms of competition). *Id.*

should exercise control is also important—as implicitly recognized by the former FCC policy favoring racial diversity in ownership. The general democratic goal is increased pluralism of sources and viewpoint as well as of content or subject categories.

