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Toward A Better Competition Policy For The Media

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TOWARD A BETTER COMPETITION POLICY FOR THE MEDIA:
*THE CHALLENGE OF DEVELOPING ANTITRUST POLICIES THAT
SUPPORT THE MEDIA SECTOR'S UNIQUE ROLE IN OUR
DEMOCRACY.*

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It is difficult to formulate meaningful competition policy when there is a fierce debate over the current competitiveness of the media industry. After addressing the importance of the marketplace of ideas in our democracy, our article examines the current state of the media industry, including the response of traditional media to audience declines, the growth of new media, the impact of media consolidation (including its impact on minority and women ownership), and the role of the Internet. In response to recent calls for liberalizing cross-ownership rules to protect traditional media, our article outlines why conventional antitrust policy is difficult to apply in media markets, and how the concerns underlying media mergers differ from other industries. Our article recommends first that Congress should take the lead in formulating a national media policy, second, an agenda for the agencies to look beyond a merger's impact on advertising rates and more empirical work on media mergers' impact on the marketplace of ideas, and finally ways the government can promote access to the marketplace of ideas.

INTRODUCTION

Two concerns traditionally have been raised about large media enterprises. First, media giants may raise prices to consumers and

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‡ The authors, while at the U.S. Department of Justice Antitrust Division, investigated mergers and anticompetitive restraints in the media industry. The authors would like to thank Albert A. Foer, Matthew Gentzkow, Wolfgang Kerber, James Hamilton, Jeffrey Michael Hirsch, Robert H. Lande, Jonathan Sallet, Bernard Sharfman, Howard Shelanski, and Irwin Stelzer for their helpful comments. An earlier version of this article was part of the American Antitrust Institute's transition report for the incoming Administration. AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT (2008). The authors were the principal authors of a committee document that

advertisers above competitive levels. This concern about corporate market power cuts across all industries. The second concern is media-specific, namely society's political and cultural health is fostered by numerous, independent media, and excessive media concentration may threaten the public's access to important information or viewpoints.¹

The Obama administration will confront both concerns. As then-Senator Barack Obama and Senator John Kerry observed, the "thoughtful exchange of diverse viewpoints not only helps guarantee our freedoms as individuals, it ensures those in power can be held accountable for all that they do."² Given President Obama's concerns about media consolidation, a change in media policies is likely. But what form will such change take, especially given that traditional media are in flux? In response to declining audiences and advertising revenue, many traditional media have laid off journalists and cut back on news. The daily newspaper has been called an "endangered species"³ with one prediction that "more newspapers and newspaper groups will default, be shut down and be liquidated in 2009 and several cities could go without a daily print newspaper by 2010."⁴ What this means for antitrust policy is hotly contested. The financial setbacks of traditional media have led some to call for further relaxation of media ownership restrictions. This argument has been supported by the recognition that the Internet has lowered entry barriers and introduced new outlets.

accepted suggestions from, and was edited by, others at the AAI.

¹ William B. Shew & Irwin M. Stelzer, *A Policy Framework for the Media Industries in MARKETS AND THE MEDIA: COMPETITION, REGULATION AND THE INTERESTS OF CONSUMERS* 111 (M.E. Beasley et al., eds. 1996).

² U.S. Senators Barack Obama & John F. Kerry, *Media Consolidation Silences Diverse Voices*, POLITICO, Nov. 8, 2007, available at <http://www.politico.com/news/stories/1107/6758.html>.

³ Kevin J. Martin, *The Daily Show*, N.Y. TIMES, Nov. 13, 2007.

⁴ Michael Hirschorn, *End Times*, THE ATLANTIC, Jan./Feb. 2009, available at <http://www.theatlantic.com/doc/200901/new-york-times>.

Nonetheless, most Americans continue to get their news and information primarily from television and newspapers, and traditional media companies own many of the most popular Internet news sites. Critics of media consolidation have argued that it has had a negative impact on quality and choice. Moreover, they recognize that an emerging and increasingly more competitive new media market does not warrant ignoring antitrust enforcement in major media formats.

It is difficult for the incoming administration to formulate meaningful policy when there is a fierce debate about whether a problem really exists. Thus, our principal recommendation is to get a better grasp on the fundamental issues: Are media industries becoming more concentrated or not? Where is the audience going for its news? What weight should be given to alternatives such as blogs? Have there been adverse effects from prior media mergers? Have the predicted efficiencies occurred? Aside from price and output concerns, what is the impact on the quality and diversity of viewpoints when media outlets fall into the hands of fewer owners and those owners are less likely to include minority and women owners?

Part I of this article addresses the importance of the marketplace of ideas in our democracy. Part II examines the current state of the media industry, including the response of traditional media to audience declines, the growth of new media, the impact of media consolidation (including its impact on minority and women ownership), and the role of the Internet. Part III responds to the calls for liberalization to protect traditional media. We argue that media industries differ from other industries and one must move beyond a laissez-faire attitude. Part IV concludes with some proposals for the Obama administration.

I. HOW A VIBRANT MARKETPLACE OF IDEAS PROMOTES DEMOCRACY
AND THE FREE MARKET

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

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

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

⁶The marketplace of ideas is important to our democracy, in that democracy prospers when there is an unrestrained flow of information. First, to govern themselves, the electorate must have full access to “social, political, esthetic, moral and other ideas and experiences.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Second, the best test of truth is the success of an idea in gaining acceptance in free competition with other ideas. Just as competition produces the best widget, so too competition in the marketplace of ideas advances truth. See *U.S. v. Assoc. Press (“AP I”)*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945) (“AP II”). While to many this marketplace of ideas “is, and always will be, folly,” we, in our democracy, “have staked upon it our all.” *AP I*, 52 F. Supp. at 372; see also Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).

⁷*AP II*, 326 U.S. at 20.

⁸*Time Warner Ent. Co. v. FCC*, 240 F.3d 1126, 1128-29 (D.C. Cir. 2001).

expressive freedom.⁹

But a better reading of the First Amendment, one more in tune with Supreme Court precedent, is that “the right of the viewers and listeners,” not the right of the owners, “is paramount.”¹⁰ Mergers and acquisitions may have a positive or negative effect from the consumer’s standpoint. Mergers may create a strong voice where none existed before; on the other hand, they may reduce the number of voices and thus inhibit the robustness of debate. In tandem with First Amendment principles, the federal antitrust laws can promote the marketplace of ideas by reaching anticompetitive *private* restraints on this marketplace.¹¹ “[A]s the Supreme Court has recognized, in promoting diversity in sources of information,” wrote Judge Greene in the *AT&T* case, “the values underlying the First Amendment

⁹The argument that the government should not limit the rights of media conglomerates depends on several assumptions. First, it assumes that laws that regulate business conduct such as mergers are equivalent to laws that prohibit specific communicative content, which is the defining feature of censorship of speech. Second, the corporation is the ultimate and proper beneficiary of press freedom. Third, structural rules as appropriately evaluated under a heightened level of scrutiny. C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 127-28 (2006).

¹⁰ *Red Lion Broad. Co.*, 395 U.S. at 389. In *AP II*, Justice Black rejected AP’s argument that it should have the autonomy to control its own operations and its own associations with newspapers without government interference: “the First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary.” *AP II*, 326 U.S. at 20. That this is the proper interpretation may be seen from the fact that telephone companies, as common carriers, must carry expression that their owners would find objectionable, and from the widespread requirements that both broadcasters and cable systems must carry content that they would reject. Under this view, the application of antitrust laws is in tune with the First Amendment because “[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” *AP II*, 326 U.S. at 20.

¹¹ Stucke & Grunes, *supra* note 6, at 252. The Supreme Court and lower courts have made this link explicit. *See, e.g.*, *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 800 n.18 (1978) (“application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment”); *Red Lion Broad. Co.*, 395 U.S. at 390 (“the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee”).

coincide with the policy of the antitrust laws.”¹²

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

II. CONCERNS ABOUT THE COMPETITIVENESS OF THE MARKETPLACE OF IDEAS

Given the importance of a vibrant marketplace of ideas to our democracy and free market system, the Obama administration will face the ongoing debate over the health and competitiveness of the U.S. news media.¹⁵ We first examine the health and competitiveness of traditional

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

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

¹⁴ Baker, *supra* note 9, at 120-21.

¹⁵ Senator Kohl recently summarized the concerns that media consolidation has on the marketplace of ideas:

It's such a very important issue, media consolidation, because it has the

media, given its reduction of journalists and output. After looking at the growth of new media, we next examine the impact of media consolidation on the marketplace of ideas generally, and on women and minority ownership of the media in particular.

A. Health and Competitiveness of Traditional Media

The media industry is in flux. In recent years, some media conglomerates have shed,¹⁶ while others have increased, their holdings.¹⁷

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

ANTITRUST: So it sounds like you believe that this issue of preserving diversity of viewpoint should be a part—perhaps a big part—of the antitrust review.

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

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

¹⁶ In 2005, Viacom split into two separate companies: Viacom and CBS Corporation. In 2006, Clear Channel Communications and CBS, the largest and second largest radio holders, announced plans to sell some of their radio and television stations. Clear Channel announced selling 448 “non-core” radio stations, all in markets outside the top 100, and its entire television station group, which collectively contributed less than 10 percent of the company’s 2005 revenues. Press Release, Clear Channel Announces Plan to Sell Radio Stations Outside the Top 100 Markets and Entire Television Station Group, Nov. 16, 2006, <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1825> (last visited May 23, 2008). (As of its most recent 10-K, Clear Channel sold 217 non-core radio stations and reached definitive purchase agreements to sell 28 more “non-core” radio stations. In 2007, Clear Channel entered into a definitive agreement with an affiliate of

And traditional media companies have expanded their Internet holdings, or sought to collaborate with well-known Internet companies.¹⁸

Many traditional news media are losing their audience. Daily newspapers and alternative newsweeklies have lost circulation for their print editions,¹⁹ as their readership ages.²⁰ In recent years, ratings for cable

Providence Equity Partners Inc. to sell its television business. Subsequently, Providence informed Clear Channel that it is considering its options under the definitive agreement, including not closing the acquisition on the terms and conditions in the definitive agreement. <http://www.clearchannel.com/Investors/Documents/291.pdf>. After 2005, CBS sold 11 television and 39 radio stations in medium and smaller-markets, leaving it with 29 TV stations and 140 radio stations. John Eggerton, *CBS Sells Four Stations to Four Points Media Group Completes Deal, Divestiture of 50 Medium and Smaller-Market Stations*, BROADCASTING & CABLE, Jan. 10, 2008, <http://www.broadcastingcable.com/article/CA6521802.html> (last visited May 23, 2008). In 2007, Walt Disney Co. sold 22 big-city radio stations to Citadel for approximately \$2.7 billion. (Citadel's entire stock-market value dropped in 2008 to under \$300 million, which is a fraction of the value for its purchase of the Disney radio stations completed eight months earlier. Paul Farhi, *Strapped Owner Fires WMAL Host Chris Core*, WASH. POST, March 1, 2008, at C01.) The New York Times Company sold its television stations. On May 7, 2007, the New York Times Company sold its Broadcast Media Group, consisting of nine network-affiliated television stations, their related Web sites and the digital operating center, to Oak Hill Capital Partners, for approximately \$575 million. New York Times Company Annual Report (Form 10-K) at P1-P2 (Feb. 26, 2008).

¹⁷ In 2007, News Corporation, which has major holdings in filmed entertainment, television, cable network programming, direct broadcast satellite television, magazines, newspapers, and book publishing, acquired for approximately \$5.6 billion the Dow Jones & Company, Inc. Rivals Sirius Satellite Radio and XM Satellite Radio Holdings Inc. merged, unopposed by the DOJ. U.S. Dept. of Justice, Press Release, *Statement of the Department of Justice Antitrust Division on Its Decision To Close Its Investigation Of XM Satellite Radio Holdings Inc.'s Merger With Sirius Satellite Radio Inc.* (Mar. 24, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/231467.pdf. The FCC also approved the merger with minor conditions, even though the FCC earlier when auctioning the only two satellite digital audio radio service licenses specifically prohibited one company from owning both licenses. Cheryl Bolen, *XM, Sirius Accept Consent Decree to Secure FCC Approval of Merger*, BNA ANTITRUST & TRADE REG. DAILY, July 25, 2008.

¹⁸ *Network TV*, in 2008 PEJ Report, *supra* note 20.

¹⁹ Between 1950 and 2007, the circulation and number of United States daily newspapers has steadily declined from 1,772 newspapers with a collective daily circulation of 58,881,746 to 1,422 newspapers with a collective daily circulation of 50,742,000. NEWSPAPER ASSOCIATION OF AMERICA, *THE SOURCE—NEWSPAPERS BY THE NUMBERS* (2008), available at <http://www.naa.org/TrendsandNumbers/Total-Paid-Circulation.aspx>. This decline is attributable to evening newspapers; the number of morning newspapers (some of which are former afternoon newspapers) increased from 322 newspapers with a collective circulation over 24 million to 867 morning newspapers with a daily circulation over 44 million. *Id.*

and network national news and local televised news have declined.²¹ For the three traditional networks' evening newscasts, the number of viewers in 2006 was half its 1980 level, with the median age of the networks' nightly news viewers at 60 years.²² Between 1998 and 2006, the commercial radio audience has declined as well.²³ (A notable exception, National Public Radio, had an increase in listeners.²⁴) Americans have a less favorable view of the press, partly due to the perception of greater bias.²⁵ Although traditional media have attracted new readers to their websites, their online revenues have been unable to support their news operations.²⁶ Consequently, even The New York Times Company, with its popular online news website (which attracted 20 million unique users for the month of

²⁰ Project for Excellence in Journalism, *Newspapers*, in THE STATE OF THE NEWS MEDIA 2008 (2008) (in 2007, 33% of 18-to-24 year olds and 34% of 25-to-34-year olds read a newspaper in an average week), available at <http://www.stateofthenewsmedia.org/2008/index.php> [hereinafter 2008 PEJ Report].

²¹ *Overview*, 2008 PEJ Report, *supra* note 20. The average audience for the three main cable news channels declined in 2006. Project for Excellence in Journalism, *Cable TV*, in THE STATE OF THE NEWS MEDIA 2007 (2007), available at <http://www.stateofthemediamedia.org/2007/index.asp> [hereinafter 2007 PEJ Report]. In 2007, viewership increased by about 3%, but viewership overall is below levels from the early 2000s. *Cable TV*, in 2008 PEJ Report, *supra* note 20.

²² *Network TV*, 2007 PEJ Report, *supra* note 20. In 2007, viewership experienced a steeper decline of 5% or 1.2 million fewer viewers, and the median age of nightly news viewers increased to 61 years old. *Network TV*, in 2008 PEJ Report, *supra* note 20.

²³ The average number of radio listeners per quarter hour, based on Arbitron, has fallen 6.6 percent: from approximately 19.7 million to approximately 18.4 million. GEORGE WILLIAMS, FEDERAL COMMUNICATIONS COMMISSION, REVIEW OF THE RADIO INDUSTRY 2007 14-15, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf. The author of the report noted that further analysis was necessary to test whether there was a causal link between industry consolidation and this decline in listenership. Alternative explanations could include the availability of alternative products, such as satellite radio, Internet radio, and downloading of digital music.

²⁴ *Radio*, 2007 PEJ Report, *supra* note 20.

²⁵ *Overview*, 2007 PEJ Report, *supra* note 20. A recent national poll found significantly declining percentages of Americans saying they believe all or most of media news reporting. Just 19.6% of those surveyed could say they believe all or most news media reporting, down from 27.4% in 2003. Sacred Heart University News, *Americans Slam News Media on Believability* (Jan. 8, 2008), http://www.sacredheart.edu/pages/20786_americans_slam_news_media_on_believability.cfm (last visited May 23, 2008).

²⁶ *Overview*, 2008 PEJ Report, *supra* note 20.

October 2008, making it the fifth-ranked news site on the Internet in terms of total visitors), faces the prospect of defaulting on some \$400 million in debt, leading some to question its future viability.²⁷

B. Traditional Media's Reduction in Output

With circulation and advertising revenue declining, traditional media companies—the large broadcasters, newspaper and magazine publishers—generally have responded to these audience declines by reducing costs. Some cost savings may be a result of efficiencies such as back office savings, a move to cheaper delivery alternatives, or outsourcing certain functions. Many major media companies, however, continue to lay off journalists,²⁸ close news bureaus here²⁹ and abroad,³⁰ cut back on news coverage, and offer more “hit-and-run” and less investigative journalism.³¹

²⁷ Michael Hirschorn, *End Times*, THE ATLANTIC, Jan./Feb. 2009 (quoting Fitch Ratings), available at <http://www.theatlantic.com/doc/200901/new-york-times>.

²⁸ Between 2000 and 2005, newsroom staffing at daily newspapers declined by 3,000 or about 5%, with greater layoffs expected. From 2002 to 2006, news division staffing on the network televisions dropped about 10%. Layoffs at the major news magazines (such as Time, Newsweek) and network news programs had even greater percentages. *Overview*, 2008 PEJ Report, *supra* note 20. In contrast, newsroom staffing is increasing for local television news and the ethnic newspapers. *Id.*; see also DAVID H. WEAVER ET AL., THE AMERICAN JOURNALIST IN THE 21ST CENTURY: U.S. NEWS PEOPLE AT THE DAWN OF A NEW MILLENNIUM 2 (2007) (decline of approximately 6,000 full-time people or 5% working in the news between June 1992 and November 2002). The number of total newspaper employment, which increased between 1970 and 1990, has declined annually thereafter. NEWSPAPER ASSOCIATION OF AMERICA, THE SOURCE (data for 1970 – 2003), <http://www.naa.org/info/facts04/employment.html>.

²⁹ Stephen Foley, *The Writing's On The Wall For The Old-Style American Newspaper*, THE INDEPENDENT, Dec. 15, 2008, available at <http://www.independent.co.uk/news/media/press/the-writings-on-the-wall-for-the-oldstyle-american-newspaper-1066695.html>. As newspapers seek to cut costs further, for example, “more and more of them come to view Washington bureaus as luxuries they simply cannot afford” and “have eliminated more than 40 Washington regional reporter positions through layoffs, buyouts or attrition.” Jennifer Dorroh, *Endangered Species: Many newspapers are laying off the reporters who monitor the federal government from a local angle. The cost could be steep*, AJR, Dec./Jan. 2009, available at <http://www.ajr.org/Article.asp?id=4645>.

³⁰ *Newspapers*, in 2008 PEJ Report, *supra* note 20.

³¹ One study of news coverage in 48 media outlets and five media sectors found a number of stories “that were big events that flashed across the media landscape and then vanished almost instantly, with less follow-up than one might have expected.” *Overview*,

Radio stations carry less local news.³² Local television stations increased the production of news, but without significantly adding journalists, leading to less original reporting and greater reliance on non-original material³³ or sharing news with rival stations.³⁴ One weekly news magazine in 2008

in 2008 PEJ Report, *supra* note 20; see also Eric Alterman, *The News Business: Out of Print*, NEW YORKER, March 31, 2008, at 49. The major broadcast news networks, for example, have reduced staffing, halved the number of overseas news bureaus, and aired 46% fewer foreign stories since the late 1980s. *Network TV*, 2007 PEJ Report, *supra* note 20. Moreover, the historic 22 minutes of news in a 30-minute evening network news broadcast had shrunk by 2007 to an average of 18.6 minutes (ABC had an average of 18.1 minutes of news per night; CBS had 18.7 minutes; and NBC had 18.8 minutes). *Network TV*, in 2008 PEJ Report, *supra* note 20. As one newspaper industry analyst commented, rather than innovating “most newspaper companies concentrated on shoring up the profitability of their traditional newsprint-oriented business, chiefly through laying off employees, downsizing their newspapers and cutting back on circulation in distant areas of little interest to advertisers in their core markets.” John Morton, *Buffeted, Newspapers Are Paying The Price For Shortsighted Thinking*, AMERICAN JOURNALISM REV. (Oct./Nov. 2007), available at <http://www.ajr.org/Article.asp?id=4416>.

³² In 2006 radio stations on average aired each day 37.1 minutes of locally produced news, of which 20.2 minutes was aired during the morning drive. Bob Papper, *By The Numbers: News, Staffing and Profitability Survey*, COMMUNICATOR 34 (Oct. 2006) (RTNDA/Ball State University Survey), available at <http://www.rtna.org/media/pdfs/communicator/2006/oct/102006-22-34.pdf>. As the article notes, “There’s little positive news on the radio side. Both the average amount of news and average staff size fell from a year ago. While consolidation makes it difficult to track radio news over time, it’s clear that the overall trend is down. The typical radio news director oversees three to four stations, and more than three-quarters of radio news directors also have non-news responsibilities.”

³³ *Local TV*, 2007 PEJ Report, *supra* note 20; Statement of FCC Commissioner Michael J. Copps, Concurr and Dissents in Part in Promoting Diversification of Ownership in the Broadcasting Services et al., MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, and 04-228 (Dec. 18, 2007) (“We have witnessed the number of statehouse and city hall reporters declining decade after decade, despite an explosion in state and local lobbying.”).

³⁴ One estimate is that 200 local television stations get news from other news stations, and 37% of surveyed local news directors said in 2006 that they shared content with other local television stations. *Local TV*, in 2008 PEJ Report, *supra* note 20. For non-affiliated commercial television station, 50 percent of the news directors said they shared content in 2006, compared to none the year before. *Id.* See also *Some news-sharing alliances that emerged in 2008*, Associated Press, Jan. 4, 2009, <http://www.google.com/hostednews/ap/article/ALeqM5i7FAq8T8VDAgw6niCtOGIxaPo4XgD95GFR70Q>; Staci D. Kramer, *Washington Post, Baltimore Sun Will Share Some Sports, Maryland Coverage*, WASH. POST., Dec. 23, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/23/AR2008122302459.html>.

went monthly.³⁵ With the recent financial crisis, more newspapers are expected to cut home delivery, migrate from print to online-only editions, or shut down entirely.³⁶

Although their profit margins have shrunk, many daily newspapers and television stations remain profitable, indeed, more profitable than other industries.³⁷ This has led skeptics to dispute the claim that newspapers and

³⁵ Richard Perez-Pena, *U.S. News Will Become a Monthly Magazine*, N.Y. TIMES, Nov. 5, 2008.

³⁶ See Stephanie Clifford, *Christian Science Paper to End Daily Print Edition*, N.Y. TIMES, Oct. 29, 2008. Moreover, the ALBUQUERQUE JOURNAL, New Mexico's largest daily newspaper, announced in 2009 it was stopping home deliveries and rack sales in more than 30 communities around the state because of the economic downturn, leaving readers with online or mail delivery. This follows the Detroit Free Press and Detroit News, which in 2008, limited home delivery to three days a week (Thursday, Friday and Sunday), and the San Antonio (Texas) Express-News, which stopped home delivery and single-copy sales in parts of South Texas. *Albuquerque Journal To Halt Some Home Deliveries*, INT'L HERALD TRIB., Jan. 8, 2009, available at <http://www.ihf.com/articles/ap/2009/01/08/america/Albuquerque-Journal-Home-Deliveries.php>; *Dramatic Changes Unveiled at The News, Free Press*, DETROIT NEWS, Dec. 16, 2008, at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20081216/METRO/812160419>. In January 2009, Hearst announced that it was putting the Seattle Post-Intelligencer (and its interest in a joint operating agreement with the Seattle Times) up for sale, with the expectation that if no buyer was found within 60 days the paper would either become a Web-only operation or cease publishing entirely. *For sale: The P-I*, SEATTLE POST-INTELLIGENCER, Jan. 9, 2009, available at http://seattlepi.nwsource.com/business/395463_newspapersale10.html.

³⁷ As one newspaper industry analyst wrote, "Bad as 2007 has been, the publicly reporting companies still produced an average operating-profit margin of nearly 16 percent in the first half of the year--a level many businesses can never hope to achieve. Still, the average profit margin has been in steady decline since 2002, when it was 22.3 percent." John Morton, *Buffeted, Newspapers Are Paying The Price For Shortsighted Thinking*, AMERICAN JOURNALISM REV. (Oct./Nov. 2007), available at <http://www.ajr.org/Article.asp?id=4416>. That same analyst in reviewing the financials of publicly held newspapers through September 2008 noted that despite a nearly 40 percent decline in operating profits, the operating profit margins, subject to certain adjustments, were 11.3 percent. John Morton, *It Could Be Worse*, AMERICAN JOURNALISM REV., Dec./Jan. 2009, available at <http://www.ajr.org/Article.asp?id=4660>; see also *Newspapers, in 2008 PEJ Report*, *supra* note 20 (newspaper industry's pre-tax margin was approximately 18.5% in 2007); Statement of FCC Commissioner Michael J. Copps, *Concurs and Dissents in Part in Promoting Diversification of Ownership in the Broadcasting Services et al.*, MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, & 04-228 (Dec. 18, 2007) ("We shed crocodile tears for the financial plight of newspapers—yet the truth is that newspaper profits are about double the S&P 500 average."), available at

other traditional media are going the way of the buggy whip. Nonetheless, even before the recent recession, many publicly-traded media companies, despite double-digit profit margins, lost favor on Wall Street.³⁸ Some companies saddled by debt from recent acquisitions had a tougher time meeting their debt obligation during this recession, most notably the Tribune Company and Star Tribune of Minneapolis, which entered bankruptcy.³⁹ In this current recession, media companies' advertising revenues and profits are expected to deteriorate further.

C. Growth of New Media

Today consumers can access news and entertainment from personal digital audio and video devices (such as iPods, WiFi, mobile phones, WiMAX, and mp3 players), subscriber-based satellite digital radio service (with numerous niche formats), direct broadcast satellite systems, Internet

[279035A3.pdf](#). Likewise, the president of station brokerage business recently said, "Wall Street has walked away from broadcast investments because they don't see the growth that the industry has had over the past 20-30 years. Growth has slowed, but broadcasting is a tremendously high free-cash-flow business. . . . A television company has 35%-40% operating margin. You can't put your money in anything else that gets that kind of return." Paige Albiniak, *Private Property: Broadcasting moves away from Wall Street*, BROADCASTING & CABLE, Apr. 16, 2007, available at <http://www.broadcastingcable.com/article/CA6433752.html>. Felicity Barringer, *Fear of Cutbacks Rattles Papers In Philadelphia*, N.Y. TIMES, Oct. 23, 2000. Also local TV newsrooms, according to one survey, contribute on average 42 percent to a local television station's revenues. *Local TV*, in 2008 PEJ Report, *supra* note 20.

³⁸ Independent, publicly traded US newspapers lost 42% of their market value in the past three years. Eric Alterman, *The News Business: Out of Print*, NEW YORKER, March 31, 2008, at 48; *Newspapers*, in 2008 PEJ Report, *supra* note 20. With the dismantling of the second largest newspaper chain, Knight-Ridder, and radio giant Clear Channel Communications going private, another debate is the optimal corporate model for ownership, whether it be public, privately held, or non-profit trust. *Overview*, 2007 PEJ Report, *supra* note 20. By the end of 2008, approximately 30 U.S. newspapers were still up for sale. Kenneth Li, *Newspaper Asset Sales Draw Few Buyers*, FIN. TIMES, Dec. 18 2008. In contrast, stock prices of publicly-traded television owners, as of mid-2007, had two to three times the growth of the overall stock market. *Local TV*, in 2008 PEJ Report, *supra* note 20.

³⁹ John Morton, *It Could Be Worse*, AMERICAN JOURNALISM REV., Dec./Jan. 2009, available at <http://www.ajr.org/Article.asp?id=4660>; Richard Pérez-Peña, *At 3 Once-Thriving Papers, Prospects Continue to Dim*, N.Y. TIMES, Jan. 16, 2009, at http://www.nytimes.com/2009/01/16/business/media/16paper.html?_r=1&ref=business&pa

content providers, and HD Radio (multi-channel, multi-format digital radio services). The number of media outlets has multiplied.⁴⁰ With such technological innovations, consumers often can select the content they want, when and where they want it, from a variety of sources. Journalism is no longer passively consumed. Consumers can create news and participate in the news discourse through citizen publishing, blogging, YouTube and other developments.⁴¹ “Eighty percent of Internet users age 17 and older,” according to a 2007 study, “consider the Internet to be an important source of information for them—up from 66 percent in 2006—and higher than television (68 percent), radio (63 percent), and newspapers (63 percent).”⁴² And entry barriers are lower with the Internet.

But despite its increasing prominence as a place where people access news and advertisers spend money, the Internet remains a distribution medium, not a source of original news content. Although Internet companies invest in this medium, the investment has tended to be in technology and not in journalists. Internet sites unaffiliated with traditional media typically collect stories from various newspapers and wire services,

gewanted=print.

⁴⁰FCC, *Report And Order And Order On Reconsideration, in In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-244, 04-228, 99-360 (Released Feb. 4, 2008) [hereinafter *2008 FCC Report*]. The FCC noted in “absolute terms, dramatic changes have occurred over several decades with respect to the number and types of media ‘voices’ competing for the public’s attention.” The FCC noted the “hundreds of video programming channels available over cable and, later, by satellite distribution,” approximately 11.6 million subscribers to satellite radio, approximately 86 percent of U.S. households subscribe to video service provided by an MVPD, which includes cable, SMATV systems, direct broadcast satellite (DBS), fiberoptic network service, wireless cable, and other such delivery systems. 2008 FCC Report, *supra* note 32, at ¶ 24.

⁴¹ The number of web sites run by citizen journalists, according to one estimate, is approaching 1,500. *Online*, 2008 PEJ Report, *supra* note 20.

⁴² University of Southern California Press Release, Annual Internet Survey by USC Annenberg’s Center for the Digital Future Finds Shifting Trends Among Adults About the Benefits and Consequences of Children Going Online (Jan. 17, 2008), *available at* <http://annenberg.usc.edu/AboutUs/PublicAffairs/AbergNews/080117CDFsurvey.aspx>.

or comment on the news, but do little original local news coverage or investigative reporting.⁴³ Anecdotes exist of bloggers breaking a news story, but the available survey data “suggest most Americans have yet to accept them as significant news sources.”⁴⁴ The most popular Internet sites for news remain the domain of the largest media conglomerates.⁴⁵ Of the 20 most popular online news sites, 17 are owned by one of the 100 largest media companies.⁴⁶ Time Warner, the leading U.S. media company in advertising revenues since 1995, for example, controls two (AOL News and CNN) of the four most popular news websites.⁴⁷ Moreover, consumers spend on average 6 minutes online per day reading the news.⁴⁸ This (as other studies show) suggests that online news currently complements, rather than replaces, traditional news media.⁴⁹

Moreover, it is unclear whether the Internet will be sufficiently profitable to invest in local investigatory journalism. Approximately 85 percent of all online advertising dollars goes to four Internet sites (Google, Yahoo, AOL and MSN), and all but one percent goes to the top ten Internet sites.⁵⁰ As the recent financial failure of citizen journalism website, Backfence, reveals, “few of the estimated 500 or so ‘local-local’ news sites claim to show a profit . . . the overwhelming majority lose money,” and the

⁴³ For example, three of the five most popular news sites on the Web, according to one 2007 study, generated sparse original reporting: both Yahoo and AOL relied on wire services and other news outlets for 99% and 98%, respectively, of their lead news services. Google relied exclusively on news wires or other news outlets. *Online*, 2008 PEJ Report, *supra* note 20.

⁴⁴ *Online*, 2008 PEJ Report, *supra* note 20.

⁴⁵ *Online*, 2007 PEJ Report, *supra* note 20. The 100 largest media companies (in terms of 2005 revenues) owned 16 of the top 20 popular online news sites, as ranked by Nielsen/Net Ratings. *Id.*

⁴⁶ *Online*, 2008 PEJ Report, *supra* note 20.

⁴⁷ *Id.*

⁴⁸ *Online*, 2007 PEJ Report, *supra* note 20. In contrast, surveyed consumers spent 30 minutes watching TV news, 15 minutes reading a newspaper, and 16 minutes listening to news on the radio. *Id.*

⁴⁹ *Id.*

citizen journalism “business models remain deeply uncertain.”⁵¹ One pessimistic conclusion is that news reporting itself is at risk because of the shift of audiences and advertisers to the Internet: “the economic base supporting the most difficult and expensive journalistic undertakings is eroding.”⁵²

New technologies are bringing dynamic innovations, but the available evidence still points to the continuing importance of traditional media, especially newspapers and broadcast television, to the marketplace of ideas. In the same survey where users identified the Internet’s increased importance as an information source, “only small numbers of users believe that the Internet is a catalyst for political change: less than one-quarter of users (22 percent) believe that the Internet is a tool to encourage public officials to care more about what people think, while only 28 percent agree that using the Internet gives people more of a say in what government does.”⁵³ The workhorse for gathering the news and investigating stories, as the Federal Communications Commission (“FCC”) recently found from its available data, remains the local daily newspaper, followed by the local television station.⁵⁴ Newspapers and network television, found another

⁵⁰ *Online*, 2008 PEJ Report, *supra* note 20.

⁵¹ Paul Farhi, *Rolling the Dice*, AJR, June/July 2007 (quoting survey by J-Lab: The Institute for Interactive Journalism), available at <http://www.ajr.org/Article.asp?id=4343>. The citizen journalists surveyed however were quite upbeat: 51% said they didn't need to make money to keep going; 82% said they planned to continue "indefinitely;" 73% called their sites a "success," based largely on the impact in their communities; 82% said they provided opportunities for dialogue; 61% said they watchdogged local government; 39% said they helped the community solve problems; 27% said they increased voter turnout; and 17% said they increased the number of candidates running for office. J-Lab: The Institute for Interactive Journalism, Press Release, *CitMedia Sites Are Here to Stay* (Feb. 5, 2007), available at http://www.j-lab.org/fordstudy_pr.shtml.

⁵² Project for Excellence in Journalism, quoted in Baker, *supra* note 55, at 117.

⁵³ University of Southern California Press Release, Annual Internet Survey by USC Annenberg's Center for the Digital Future Finds Shifting Trends Among Adults About the Benefits and Consequences of Children Going Online (Jan. 17, 2008), available at <http://annenberg.usc.edu/AboutUs/PublicAffairs/AbergNews/080117CDFsurvey.aspx>.

⁵⁴ 2008 FCC Report, *supra* note 32, at ¶ 35 (Newspapers and, to a somewhat lesser

recent study, offer a wider variety of subject matter and are less likely to be dominated by a few mega-stories.⁵⁵ The Internet may provide readers more perspectives for international or national news,⁵⁶ but is not necessarily a close substitute for the local news in the local daily newspaper and on the local television news broadcast. Cable provides mainly national news⁵⁷; commercial radio covers little local news.

D. *The Impact of Media Consolidation*

Market failure in media industries poses different and greater concerns than in other industries. With many commodities, market failure manifests in higher prices. The consumer pays more. But market failure in the marketplace of ideas may not manifest itself simply with higher prices. Newspapers and other types of information-heavy media are what economists refer to as “credence goods.”⁵⁸ Their actual quality is difficult

extent, broadcast stations still continue to serve as the most organized, systematic gatherers of news and information in their communities). The record before the FCC demonstrated that “traditional media still represent the most important source for local news for the majority of individuals.” A Nielsen Survey indicated that 38.2 percent of all respondents consider broadcast television stations and 30.1 percent consider local newspapers “the most important source of local news or local current affairs.” *Id.* at ¶ 57. Thus, the FCC categorized “major” media voices “full-power commercial and noncommercial television stations and major newspapers” because “such sources are generally the most important and relevant outlets for news and information in local markets today.” *Id.*; *Overview*, in 2008 PEJ Report, *supra* note 20.

⁵⁵ *Overview*, in 2008 PEJ Report, *supra* note 20.

⁵⁶ *Online*, in 2008 PEJ Report, *supra* note 20 (based on 2007 study of lead news coverage on the five most popular news sites on the Web).

⁵⁷ A study of 885 hours of cable news over 2007 found that cable news focused on three to four topics per day, and on the news wires and “brief ‘tell stories’” for the balance. *Cable TV*, in 2008 PEJ Report, *supra* note 20. MSNBC spent more time on politics (28% of time surveyed) than Fox News (15%) or CNN (12%); Fox spent less time on the Iraq war (10% v. 18% on MSNBC and 16% on CNN), and more time on crime, celebrity, and the media (28% v. 19% on MSNBC & 16% on CNN). PEJ calculated that if one watched 5 hours of cable news in 2007, one saw on average: 35 minutes about campaigns and elections, 36 minutes about the debate over U.S. foreign policy, 26 minutes or more of crime, 12 minutes of accidents and disasters, 10 minutes of celebrity and entertainment, and less than 4 minutes about *health and health care* (3 minutes and 46 seconds); the *economy* (3:34), *environment* (1:25), *education* (1:22), and *science and technology* (1:00).

⁵⁸ See Neil W. Averitt & Robert H. Lande, *Using The “Consumer Choice” Approach To Antitrust Law*, 74 ANTITRUST L.J. 175, 207 (2007); Michael Darby & Edi Karni, *Free*

to determine even after being bought and consumed; it must be taken to some degree on faith.⁵⁹ A news channel may claim to be “fair and balanced” or “the most trusted name in news,” but consumers are ill-equipped to ascertain the veracity of these assertions regarding specific stories. Less competition thus may diminish the quality of reporting.⁶⁰ Another market failure unique to the media is self-censorship.⁶¹ If a

Competition and the Optimal Amount of Fraud, 16 J. L. & ECON. 67, 68-69 (1973) (“Credence qualities are those which, although worthwhile, cannot be evaluated in normal use. Instead the assessment of their value requires additional costly information The line between experience and credence qualities of a good may not always be sharp, particularly if they will be discerned in use, but only after the lapse of a considerable period of time.”).

⁵⁹ BARTHOLOMEW H. SPARROW, *UNCERTAIN GUARDIANS: THE NEWS MEDIA AS A POLITICAL INSTITUTION* 101-2 (1999).

⁶⁰ For example, during the presidential campaign, then Senator Obama made extended critical comments about the current state of U.S. antitrust policy in response to a question at a campaign stop in Oregon. He stated that he intended, if elected, to enforce the antitrust laws more strongly and singled out media consolidation as a particular cause for concern. The Senator’s comments came when there was significant debate about media consolidation in light of the current FCC’s relaxing of cross-ownership rules and the DOJ’s approval of the Sirius-XM satellite radio merger. While Senator Obama’s comments prompted an opinion piece from *The Nation* and a brief mention in the *Financial Times*, none of the 20 prominent newspapers surveyed by the American Antitrust Institute, independently reported the comments. The *Washington Post* website and the *New York Times* website carried a different Reuters article that covered the reaction of the U.S. legal community to Senator Obama’s comments on antitrust policy without mentioning Senator Obama’s concerns of media consolidation. Press Release, *American Antitrust Institute Notes Comments By Senator Obama On Media Concentration: Institute is Critical of Lack of Coverage by Mainstream Press* (May 22, 2008), available at http://www.antitrustinstitute.org/archives/files/AAI%20Press%20Release%20Obama%20Media%20Consolidation%205.22.08_052220081804.pdf. Likewise, as gasoline prices escalated during the 2008 presidential elections, so too did the debate over drilling in environmentally sensitive areas. But there was no empirical basis that such drilling would significantly affect gas prices. Instead, the U.S. Department of Energy projected that such drilling (which was estimated to add 200,000 barrels of oil per day at peak productions in 20 years) would be too small to significantly affect oil prices. Of the surveyed 267 television and cable news broadcasts in the summer of 2008 that mentioned the proposed drilling, however, only one broadcast mentioned this governmental study. Instead, as one study found, the major “media outlets provided daily repetition of the false claim that expanded drilling in environmentally sensitive zones would significantly lower gasoline prices.” Mark Weisbrot & Nichole Szembrot, Center for Economic & Policy Research Issue Brief: *Oil Drilling in Environmentally Sensitive Areas: The Role of the Media* 4 (Sept. 2008).

⁶¹ See, e.g., BAKER, *supra* note 9; BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (6th ed. 2000); ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION*

concentrated media industry is dependent upon major advertisers or government funding,⁶² the risk of self-censorship increases.⁶³ Both advertisers and politicians may seek to take advantage of this self-censorship for their own purposes. A case in point is the reported attempt by Illinois Governor Rod Blagojevich to induce the owner of the Chicago Tribune to fire members of the newspaper's editorial board who had been calling for the Governor's impeachment. The Tribune Company had been

POLITICS IN DUBIOUS TIMES 243 (1999); Statement of FCC Commissioner Michael J. Capps, Concurs and Dissents in Part in Promoting Diversification of Ownership in the Broadcasting Services et al., MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, and 04-228 (Dec. 18, 2007) (Commissioner heard "first-hand from editorial page editors who have told me they can cover any story, save one—media consolidation, and that they have been instructed to stay away from that one."). Journalists and media watchdogs have also expressed concern about the rise of self-censorship and the loss of journalistic independence following the increasing media concentration. *See, e.g.*, Trudy Lieberman, *You Can't Report What You Don't Pursue*, COLUM. JOURNALISM REV., May/June 2000, at 44, 44–49; Mark Crispin Miller, *Can Viacom's Reporters Cover Viacom's Interests?*, COLUM. JOURNALISM REV., Nov./Dec. 1999, at 50, 50. In enacting the 1992 Cable Act, Congress noted its "special concerns" about concentration of the media in the hands of a few who may control the dissemination of information. One concern was that "the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." Congress's second concern about "horizontal concentration is that it can be the basis of anticompetitive acts. For example, a market that is dominated by one buyer of a product, a monopsonist, does not give the seller any of the benefits of competition." S. Rep. No. 102–92, at 32–33 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1165–66. Congress sought to remedy these concerns in the 1992 Cable Act, with several provisions including the "must-carry," "subscriber limits" and "channel occupancy" provisions.

⁶² *See* WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 188 (2002), *available at* <http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm>.

⁶³ In a survey of journalists, editors, and news executives in the U.S., "more than one-third responded that news is not reported if it might hurt advertising revenues and thus harm the financial position of media firms." WORLD BANK, *supra* note 62, at 188. If the advertisers consolidate (such as department stores), this lessening of competition can also adversely affect media dependent on these advertisers (such as daily newspapers which relied on Macy's, Bloomingdales, Lord & Taylor, among others for advertising). The extent to which consolidation has adversely impacted newspapers overall is not evident from NAA data on newspaper revenues for retail and national advertising. <http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx> (last visited May 23, 2008). Although the failure of liberal talk show Air America had many causes, it is interesting that according to an ABC Radio Network memo, that 90 prominent advertisers, including Hewlett-Packard, Microsoft, Wal-Mart, Visa, Exxon-Mobil, Cingular and McDonalds, did not want their advertising running during any syndicated Air America

seeking state financial assistance as part of its effort to sell the Chicago Cubs; the Governor allegedly threatened to withhold that assistance unless changes were made to the composition of editorial board. According to an intercepted telephone conversation, the Governor's chief of staff reported to his boss that the owner of the Tribune "got the message."⁶⁴ Increased competition in the news market, on the other hand, can lead to lower bias.⁶⁵

The Internet today cannot prevent these media market failures. Commercial radio, instead of a good example for permitting greater consolidation, may be an example of its dangers. The Telecommunications Act of 1996 weakened the ownership limits on radio stations nationally and locally.⁶⁶ In analyzing radio mergers, the U.S. Department of Justice ("DOJ") considered their economic impact solely on advertisers and the rates they pay for advertising.⁶⁷ In its public filings, the DOJ did not refer

programming the ABC stations carried. *Radio*, in 2007 PEJ Report, *supra* note 20.

⁶⁴ Illinois Gov. Rod R. Blagojevich and his Chief of Staff John Harris Arrested on Federal Corruption Charges, U.S. Dept. of Justice Press Release 9-12 (Dec. 9, 2008), available at http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr1209_01.pdf; see also Affidavit in Support of Application for Criminal Complaint, United States v. Rod R. Blagojevich (N.D. Ill. Dec. 7, 2008), ¶¶ 69-85, available at http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr1209_01a.pdf.

⁶⁵ Matthew Gentzkow & Jesse M. Shapiro, *Media Bias & Reputation*, 114 J. POL. ECON. 280 (2006). The authors found that in high feedback settings (such as weather or sports reporting), bias is minimal. In slow feedback settings, competition impacts bias. Media firms in more competitive markets have stronger incentives to reveal important information; the authors show quantitatively that television news reports leading up to the 2000 elections were more equitable in their treatment of Bush and Gore in more competitive media markets. This finding was consistent with several other studies that show how competition among alternative sources of media reduces bias. *Id.* at 309.

⁶⁶ Section 202 of the Telecommunications Act of 1996 abolished the FCC's limits on the number of radio stations a single entity could own nationally. On March 7, 1996, the FCC in revising Section 73.3555 of its Rules (47 C.F.R. § 73.3555) eliminated the national multiple radio ownership rule and relaxed the local ownership rule. GEORGE WILLIAMS, FEDERAL COMMUNICATIONS COMMISSION, REVIEW OF THE RADIO INDUSTRY 1 2007, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf.

⁶⁷ Although a number of possible product markets exist (such as listenership and programming), the DOJ focused in its radio consent decrees on the mergers' impact on advertisers and advertising rates as evaluated under the U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶13,104, available at http://usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html

to other possible markets such as programming markets or listenership markets or consider consumer choice.

Significant ownership concentration ensued. Between March 1996 and March 2007, the number of commercial radio stations increased 6.8 percent, but the number of radio owners declined by 39 percent.⁶⁸ Over the

[*Horizontal Merger Guidelines*]. The consent decrees acknowledge that radio stations also compete on advertising services—for example, by offering live remote broadcasts from an advertiser's place of business—but this tends to be a value-added feature and is not the primary focus of the relief obtained. See, e.g., Competitive Impact Statement, *U.S. v. Bain Capital LLC*, 1:08-cv-00245 (D.D.C. filed Feb. 13, 2008), available at <http://www.usdoj.gov/atr/cases/f230100/230166.htm>; Complaint for Injunctive Relief, *U.S. v. Clear Channel Communications, Inc. and AMFM Inc.*, No. 00-2063 (D.D.C. filed Aug. 29, 2000) (complaint filed with consent decree), available at <http://www.usdoj.gov/atr/cases/f6300/6329.htm>; *U.S. v. CBS Corp.*, No. 98CV00819, 1998 U.S. Dist. LEXIS 10292, at *1 (D.D.C. Jun. 30, 1998) (proposed decree requiring divestiture of radio stations to cure anticompetitive effect in radio advertising market.); *U.S. v. Westinghouse Elec. Corp.*, No. 96 2563, 1997 U.S. Dist. LEXIS 3263, at *8 (D.D.C. Mar. 10, 1997) (same). Under the Horizontal Merger Guidelines' approach, whether radio advertising is a relevant product market is based in part on advertisers' likely response to a "small but significant and nontransitory increase" in the advertising rates of the merging radio stations. Some of the antitrust product market questions addressed in the radio merger consent decrees are (i) would large numbers of advertisers shift to other media, (ii) are there attributes of radio advertising that make other media poor substitutes to many advertisers, and (iii) can stations identify advertisers with strong radio preferences and selectively raise prices? Similarly, in assessing competitive effects, the DOJ inquires whether advertisers will end up paying more or getting less after a radio merger. Some of the issues addressed in these consent decrees are (i) have advertisers lost the ability to play one of the merging company's radio stations off against the other company's stations to get better advertising rates, (ii) can advertisers buy around the merged entity to reach a particular audience demographic, and (iii) after the merger, can advertisers reach their target audience with equivalent efficiency without using the merged company's radio stations? The DOJ's radio merger consent decrees do not address nonprice competition unrelated to advertising, including the quality of programming, listener choice, or the likely impact of these mergers on the marketplace of ideas.

⁶⁸ GEORGE WILLIAMS, FEDERAL COMMUNICATIONS COMMISSION, REVIEW OF THE RADIO INDUSTRY, 2007, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf. This trend was already apparent by 2001, by which the number of radio owners had already declined 25%. FCC REVIEW OF THE RADIO INDUSTRY 2001 2 (Sept. 2001). Likewise, the number of full-power television stations increased (from 875 in 1970 to 1,754 in 2006). Kiran Duwadi, Scott Roberts, and Andrew Wise, *Media Ownership Study Two: Ownership Structure and Robustness of Media*, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf. But the number of unique television owners decreased (from 491 to 480 in 2005). Letter from Jayetta Z. Hecker, Director, Physical Infrastructure Issues, Government Accountability Office, to The Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and the Internet, House Committee on Energy and Commerce 5 (Dec.

same period, the size of the nation's largest radio group owners increased. In 1996, the two largest radio group owners controlled 62 and 53 stations, respectively. By March 2007, the leading radio group, Clear Channel Communications, controlled over 1,100 radio stations.⁶⁹ One complaint, reported by the Project for Excellence in Journalism, was "that Clear Channel's domination was diminishing the quality of the AM/FM radio dial by monopolizing key markets and homogenizing content."⁷⁰ The former head of commercial radio Infinity Broadcasting and CBS and current CEO of Sirius XM recognized that commercial radio after the 1996 Act became "totally homogenized." Mel Karmazin advocated the radio consolidation "[s]trictly for business reasons. No one asked me if it was good for consumers."⁷¹

The ownership concentration in radio was felt on the local level.⁷² The number of local cross-ownerships between radio and television stations

14, 2007) available at <http://www.gao.gov/new.items/d08330r.pdf>. The number of newspapers remained about the same between 2002 and 2005, but the number of newspaper owners declined from 422 to 389.

⁶⁹ In 2008, the Clear Channel controlled 833 U.S. radio stations, 508 of which are located in the largest 100 Arbitron markets. Competitive Impact Statement, United States v. Bain Capital LLC, 1:08-cv-00245 (D.D.C. filed Feb. 13, 2008), available at <http://www.usdoj.gov/atr/cases/f230100/230166.htm>.

⁷⁰ *Radio*, in 2007 PEJ Report, *supra* note 20. Critics have also complained that it exerted a negative effect on American radio. Clear Channel as reported also

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

Clear Channel agrees \$18.7bn sale, BBC News, Nov. 16, 2006, <http://news.bbc.co.uk/2/hi/business/6155284.stm> (last visited May 23, 2008).

⁷¹ Phil Rosenthal, *Homogenized Radio Stations Bottle Up Growth*, CHICAGO TRIB., Nov. 11, 2007, at http://archives.chicagotribune.com/2007/nov/11/business/chisun_phil_1111nov11.

⁷² The average number of radio station owners across all metro markets declined from 13.5 in 1996 to 9.4 in 2007. GEORGE WILLIAMS, FEDERAL COMMUNICATIONS COMMISSION, REVIEW OF THE RADIO INDUSTRY, 2007, available at

increased.⁷³ One empirical study relied upon by the FCC showed that the amount of news for these cross-ownership stations was consistently less than their peers: “the average effect of radio cross-ownership on local news coverage is consistently negative,” *i.e.*, less news.⁷⁴ Not only were local radio markets more concentrated, but a few radio firms dominated local advertising. On the local level, the largest firm in each radio metro market has, on average, 46 percent of the market’s total radio advertising revenue; the largest two firms have, on average, 74 percent of the radio advertising revenue.⁷⁵ Although radio listening declined since 1998, radio advertising rates since 1996 have nearly doubled, suggesting that even on this dimension, the antitrust review may have been inadequate. As one recent FCC study concluded, the Consumer Price Index “increased approximately 3 percent per year during this time period, while the annual growth rate in radio prices was approximately 10 percent.”⁷⁶

The claim was frequently made in the 1990s that consolidation would allow radio owners to offer a more diverse array of formats.⁷⁷ But it is not evident that increased radio ownership concentration has led to greater

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf.

⁷³ The number of TV/radio station cross-ownerships in the same market increased from 273 television/656 radio stations in 2002 to 333 television/782 radio stations in 2005. Kiran Duwadi, Scott Roberts, & Andrew Wise, *Media Ownership Study Two: Ownership Structure and Robustness of Media*, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf.

⁷⁴ Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* 21 (Rev. Sept. 2007), available at <http://www.fcc.gov/ownership/studies.html>. The FCC relied upon this study as evidence of how newspapers can spread their fixed costs over other media to increase news content, which is discussed *infra* note ____.

⁷⁵ GEORGE WILLIAMS, FEDERAL COMMUNICATIONS COMMISSION, REVIEW OF THE RADIO INDUSTRY 2007,, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf.

⁷⁶ The CPI increased 29 percent during the same period. GEORGE WILLIAMS, FEDERAL COMMUNICATIONS COMMISSION, REVIEW OF THE RADIO INDUSTRY, 2007, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf.

⁷⁷ See, e.g., Matt Spangler, *Can't Find Nothin' on Radio?*, R&R (July 31, 1998), available at <http://www.radiodiversity.com/nothingonradio.html>.

program diversity. According to one FCC study, between 1996 and 2007, the average number of formats appears to have declined slightly for some of the large markets, while increasing slightly for most of the smaller ones. Overall, the variety of radio formats available to consumers has held steady.⁷⁸

The traditional deregulatory, anti-interventionist argument is that the free market will adjust to match viewer preferences, so that ownership does not matter. But in a study of FCC data, several consumer groups claim that less news is broadcast in cities where companies have been granted waivers to the FCC cross-ownership rules to allow them to own both newspapers and broadcasters, although the evidence is equivocal.⁷⁹

⁷⁸ GEORGE WILLIAMS, FEDERAL COMMUNICATIONS COMMISSION, REVIEW OF THE RADIO INDUSTRY, 2007, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf.

⁷⁹ See Further Comments of Consumers Union, Consumer Federation of America and Free Press (Oct. 27, 2007), at 6-8, 86-109, available at http://stopbigmedia.com/filing/critique_complete.pdf. The FCC noted that the empirical evidence in the record supported “both sides” concerning the relationship between newspaper/broadcast combinations and localism. The FCC concluded that on balance, the evidence “suggests” that “some” newspaper/broadcast cross-ownership combinations could enhance localism. 2008 FCC Report, *supra* note 32, at ¶ 42. The FCC relied in particular on one study of 29 cross-owned television stations in 27 markets, which concluded that “local television newscasts for cross-owned stations contain on average about 1-2 minutes more news coverage overall, or 4 to 8 percent more than the average for non-cross-owned stations.” Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (Rev. Sept. 2007) (“Media Ownership Study No. 6”), available at <http://www.fcc.gov/ownership/studies.html>. The study’s author, however, recognized several important caveats. First, the study’s sample was small: time and resource constraints limited him to “only three days during the week prior to the 2006 general elections on Tuesday, November 7th.” Media Ownership Study No. 6, at 8. His second important caveat to his study is that these 3 days may not be representative for the remainder of the year: “the behavior of local news stations may not be the same during the week just prior to the general elections compared to other times of the year” so “the findings of this study may not be representative of differences in local news coverage by cross-ownership throughout the rest of the year.” *Id.* at 9. A third important caveat is that he looked only at late-evening local news, which may not represent a station’s daily news coverage. A fourth caveat is that his analysis “cannot determine whether local television stations (cross-owned or not) present news in a balanced or biased manner.” *Id.* at 30. Some of the author’s findings were surprising nonetheless given the upcoming elections. Local stations broadcast approximately 26 minutes of total news coverage, with about 80% of this time devoted to local stories. But actual “local news, excluding sports and weather,

The debate concerns not only the quantity of independent media owners, but the extent to which programming is affected when a radio or television station is owned by a large out-of-market station group as opposed to a local independent owner.⁸⁰ There is some evidence that large public companies tend to sacrifice journalistic quality in pursuit of the bottom line. Good journalism is expensive, and yields social benefits that are not captured in the balance sheet. In a large study in 2003, the Project for Excellence in Journalism ranked television news programs from best to worst and divided stations into groups based on the size of the owner.⁸¹ PEJ found the news programs of the smallest owners to be 30 percent high quality, compared with 12 percent for the largest owners. Likewise, the smallest owners had 17 percent news programs graded as low quality, compared to 23 percent of the largest owners. In general, as ownership size

accounts for a little less than half (46%) of the total news time. Finally, state and local political coverage averages just about three minutes per newscast for the dates under study.” *Id.* at 16. The amount of incremental news coverage from cross-owned television stations was only “about 21 seconds.” *Id.* One FCC-sponsored peer review of this study concluded that given these caveats, “the empirical data in the study are so limited that the study’s conclusions do not and cannot possess the reasonable level of confidence necessary to provide policymakers with useful evidence on which to base their regulatory decisions. Put simply, the findings from a single three-day study of one type of news broadcast should not form the evidentiary basis for any sort of public policy making.” Kenneth Goldstein, Matthew Hale and Martin Kaplan, Invited Peer Review of FCC Media Ownership Study 6, MB Docket No. 06-121 (Oct. 30, 2007), available at http://www.fcc.gov/mb/peer_review/prstudy6a.pdf.

⁸⁰ As of 2005, a minority of the newspapers and commercial radio and television stations were locally owned: 210 of the nation’s 1381 commercial television stations, 4,827 of the 10,893 nation’s commercial radio stations, 444 of the nation’s 1445 newspapers. In contrast, the majority of non-commercial radio and television stations were locally owned: 1671 of 2697 non-commercial radio stations and 229 of the 383 non-commercial television stations. Kiran Duwadi, Scott Roberts, and Andrew Wise, *Media Ownership Study Two: Ownership Structure and Robustness of Media*, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf.

⁸¹ To examine size, the authors separated the TV companies studied into four categories, using the FCC rankings of audience reach. Their measurement of audience reach followed the FCC’s policy of discounting for the difference between the reach of UHF versus VHF stations.

increased, news quality decreased.⁸² On the other hand, the study also found that a television station's cross-ownership of a newspaper led to better grades. Stations in cross-ownership situations were more than twice as likely to receive an "A" grade as were other stations.⁸³

The FCC, during the Bush administration, allegedly ordered its staff to destroy all copies of a draft study that suggested greater media concentration would hurt local television news. Based on a review of 10,500 clips from local news programs broadcast in twenty markets, two FCC economists found that locally-owned television stations produced more local news—about five and one-half minutes more local news per half-hour program—than non-locally-owned stations.⁸⁴ The study's finding was said to have been at odds with the FCC, which was reportedly facing pressure from the broadcast industry to conclude that media ownership rules were too restrictive and should be loosened. In a meeting with their supervisor, the FCC economists were allegedly told, "the front office wasn't going to let it out, and the bureau chief wasn't going to let it out."⁸⁵

⁸² PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS? A FIVE-YEAR STUDY OF OWNERSHIP AND QUALITY 2003, *available at* (<http://www.journalism.org/node/243>). In analyzing content across local markets, James Hamilton similarly found that group-owned television stations carried fewer hard news stories, network affiliates did more stories in their local news programs about the network's entertainment programming, and that papers owned by chains covered a higher percentage of soft news topics. JAMES T. HAMILTON, *ALL THE NEWS THAT'S FIT TO SELL* 249 (2004).

⁸³ The study's authors, like the FCC in liberalizing the cross-ownership ban, thought that cross-ownership suggested that the joint resources of a newspaper and TV station freed up people to do more original work. But as their study revealed, the cross-owned stations actually scored lower on the enterprise index in general, and particularly in the area of sending out reporters to cover stories: "the generalized sign of higher quality at cross-owned stations, for some reason, did not include those stations doing more enterprise." *Id.*

⁸⁴ See John Dunbar, *FCC Quashed Contrary Reports: Research Supported Notion that Local Ownership of TV Stations Strengthened News*, RICHMOND TIMES-DISPATCH, Jan. 26, 2007, at A4.

⁸⁵ *Id.* Another reportedly suppressed FCC radio study indicated that over seven years there had been a 35% decline in the number of radio station owners, and that 70% of advertising revenue in markets that were examined was controlled by two firms. The Senate, during its confirmation hearings, questioned the incoming FCC chairman about this self-censorship, and the FCC thereafter posted drafts of the local news study and a copy of

E. Impact on Women and Minority Ownership of Media

As then-Senator Obama recognized, “[m]inority-owned radio stations, television stations and newspapers played an essential role in battling segregation during the civil rights movement.”⁸⁶ One of the starkest effects of consolidation in the radio and television industries has been its effect on minority and women ownership.

In broadcast radio, a study done by Free Press found that the percentage of women and minority radio station owners was lower in highly concentrated radio markets than in less concentrated markets. The less concentrated markets also tend to be the larger markets, where FCC ownership rules have limited to some extent the opportunities for consolidation. However, even if the size of the market and the level of minority population in the market are held constant, the study found that markets with minority owners are significantly less concentrated than markets without minority owners. A similar examination of female ownership shows that markets with a female-owned radio station are significantly less concentrated than markets without such stations. The Free Press study concluded: “One unambiguous consequence of further industry consolidation and concentration will be to diminish both the number of minority-owned stations and the number of female-owned stations. The FCC should seriously consider the effects on women and minority owners and their listeners before it moves to enact policies that will lead to increased market concentration.”⁸⁷

A similar trend has been seen in other media. A recent FCC-sponsored study on the impact of the relaxation of the television duopoly

the radio study.

⁸⁶ Obama & Kerry, *supra* note 2.

⁸⁷ Off The Dial: Female and Minority Radio Station Ownership in the United States (June 2007), http://www.freepress.net/docs/off_the_dial.pdf.

rule found that the major beneficiaries were the largest 25 television groups.⁸⁸ The losers were minorities and women. The study found that the percentage of minority and women owners declined significantly after the rule was relaxed in 1999. The specific findings were as follows:

- Across all markets in which minority-owned television stations operated between 1999 and 2006, the number of minority-owned television stations dropped by 27 percent.
- Minority owners were roughly three times more likely to leave a market than to enter it.
- Thirty-nine percent of minority owned stations in TV duopoly markets were sold to non-minority owners.
- Thirty-six percent of female-owned stations operating in duopoly markets were sold to male, non-minority owners.

Consequently, as the FCC-sponsored study concluded, the relaxation of the television duopoly rule benefited neither women nor minority owners.

Relaxation of the FCC ownership limits has tended to drive up valuations of stations, pricing potential purchasers (small businesses and broadcasters including minorities and women entrepreneurs and owners) out of the market. The rise in station prices may have benefited owners of existing stations by allowing them to sell out at higher prices. It may thereby have benefited a class of minority or women owners—the sellers—but it did not benefit the goal of preserving or increasing minority ownership or

⁸⁸ The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A9.pdf. The GAO found the FCC data on the gender, race, and ethnicity of radio and television station owners biennially through its Ownership Report for Commercial Broadcast Stations, or Form 323 “suffer from three weaknesses: (1) exemptions from filing for certain types of broadcast stations, such as noncommercial stations; (2) inadequate data quality procedures; and (3) problems with data storage and retrieval.” The GAO concluded from the available evidence from FCC and nongovernmental reports that ownership of broadcast outlets by these groups is “limited.” GAO, *supra* note 68, at 3.

ownership by women. “Racial and ethnic minorities make up 33 percent of our population,” said FCC Commissioner Copps, but they “own a scant 3 percent of all full-power commercial TV stations.”⁸⁹ As FCC Commissioner Adelstein added, “When it comes to ensuring that the ownership of the public’s airways—which are licensed to serve the public—look like the American people, the FCC’s legacy does not make us proud.”⁹⁰

The decrease in minority and women owners can also affect the news content in that community. Professor Joel Waldfogel argues that in industries with high fixed costs like broadcasting or newspapers, the market tends to favor the tastes of the majority over “preference minorities.” When fixed costs are high, a market can accommodate relatively fewer products than when fixed costs are low. Not only are these products more likely to target large rather than small groups, the relative size of the large group to the small group can actually make the smaller group less well off in terms of product targeting. Media markets are more similar to “winner takes all” political markets than is generally supposed.⁹¹ Professor Waldfogel uses the example of radio programming to show that formats that appeal to a particular group will not be offered unless that group is relatively large. The same is true with newspapers in the sense of how they position themselves. In other words, the market does not ensure that everyone goes home happy: “. . . I don’t get the sort of newspaper that I want just because

⁸⁹ Statement of FCC Commissioner Michael J. Copps, Concurr and Dissents in Part in Promoting Diversification of Ownership in the Broadcasting Services et al., MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, and 04-228 (Dec. 18, 2007).

⁹⁰ Statement of FCC Commissioner Jonathan S. Adelstein, Concurr and Dissents in Part in Promoting Diversification of Ownership in the Broadcasting Services et al., MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, and 04-228 (Dec. 18, 2007).

⁹¹ “In spite of the liberation rhetoric often used to describe the market, the same kinds of groups disadvantaged by majority rule – small groups with different preferences – can find themselves at a disadvantage in product markets as well. This raises a challenge to the common exhortation ‘let the market decide.’” JOEL WALDFOGEL, *THE TYRANNY OF THE*

I want it. I get what I want if many other people also want it. Second, a larger population preferring something else actually makes me worse off, thereby failing to avoid strains on social cohesion; this evidence stands in stark contrast with many idealized portraits of markets.”⁹²

Professor Waldfogel takes the analysis a step further, showing that the presence or absence of minority-targeted local media has a measurable effect on voting turnout. The presence of Spanish-language local television news raises Hispanic turnout from an average of 31 percent to about 40 percent in nonpresidential election years, or by about a third. In presidential years, the presence of Spanish-language local television news raises Hispanic turnout by about a sixth. “These are large effects,” Professor Waldfogel concludes.⁹³ In addition, he finds that the entry of a Spanish language local television news program results in an overall increase in Hispanic turnout by about 5 percentage points. Similarly, African-American voter turnout is about 10-15 percent higher in areas with a weekly newspaper or a radio station specifically targeted to African Americans. In addition, African-American voter turnout increases by a dramatic percentage in metropolitan areas that get a first radio station targeted to African Americans.

III. CALLS FOR LIBERALIZATION TO PROTECT TRADITIONAL MEDIA

With traditional media in flux and the growth of new media, some argue that antitrust should have a limited role in this industry and the FCC should ease restrictions on media ownership. We discuss in this Part whether the Obama administration should permit greater consolidation in the media industry. After critiquing the FCC’s justification in 2008 to relax media cross-ownership restrictions, we show why the number of media sources in

MARKET 6 (2007).

⁹² Waldfogel, *supra* note 91, at 57.

⁹³ Waldfogel, *supra* note 91, at 82.

a given community (or nationwide) may be a poor indicator of the marketplace's competitiveness.

A. Moving Beyond a Laissez-Faire Attitude

Before the economic crisis, the Bush administration generally had great faith that free market forces correct market failures, and little faith in government institutions promoting competition.⁹⁴ Even before our economy's unraveling, this view of markets generally, and media markets specifically, was empirically suspect.⁹⁵ In understanding these issues, the Obama administration cannot blindly rely on neo-classical economic theory's simplistic assumptions about human behavior or efficient

⁹⁴ Until the economic crisis (with mounting unemployment and home foreclosures, declining stock prices, and the United States' bailing out financial, insurance and automotive companies deemed too big to fail), the Bush administration generally surmised that: (1) free market forces are generally self-correcting and self-initiating, (2) absent governmental restraints, the free market will allocate resources efficiently, (3) the government is an exogenous force to be used sparingly for sustained market failure, (4) the government can do more harm than good, so the risk of false positives is greater than of false negatives, and (5) government bureaucrats are so susceptible to regulatory capture that the goals of competition policy, once inoculated from politics, will be value-free efficiency and consumer welfare. Stucke, *Better Competition Advocacy*, *supra* note 13. The federal antitrust agencies similarly had a hands-off approach, with a few exceptions, to the media industries. But in his last weeks, the FCC Chair reflected on the nation's economic crisis:

My philosophy throughout my time at the FCC including the last four years as chairman has been to pursue deregulation while paying close attention to its impact on consumers and the particulars of a given market; to balance deregulation with consumer protection. . . . We must also be creative and flexible in our approach making sure government is working for consumers. Most of that time that means getting out of the way. But sometimes we must recognize that there is a unique role only government can play. In order to have credibility calling for deregulation we must be willing to act in a targeted limited fashion when the market isn't properly working is important for another reason as well. As the current financial crisis has reminded us problems don't disappear if they are simply ignored. They can become bigger problems requiring the government to intervene in a larger way later.

Remarks by FCC Chairman Kevin J. Martin, *Balancing Deregulation and Consumer Protection*, The Reg-Markets Center Of The American Enterprise Institute (Jan. 8, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-287777A1.doc.

⁹⁵ See Stucke, *Better Competition Advocacy*, *supra* note 13, at 1009-12.

markets.⁹⁶ The purpose and benefits of a competitive marketplace of ideas differentiate media markets from other markets.

Ideally, the federal competition agencies in the Obama administration should do or sponsor more empirical work to understand better the competitive dynamics of media industries and how they differ from other industries. More empirical work is necessary—in particular, work that goes beyond advertising markets and includes nonprice competition. Currently, the FCC, under the 1996 Act, must justify empirically in its biennial review its existing ownership regulations. If the FCC cannot readily supply this empirical evidence, the courts have construed the 1996 Act as requiring the FCC to further deregulate.⁹⁷ Given the empirical difficulties in testing the correlation between media consolidation and viewpoint diversity, the current default standard effectively favors further media deregulation. We urge that before any further deregulation is undertaken, the Obama administration should study or sponsor studies of the effects of media consolidation to date.

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

The FCC in 2008 voted to relax media cross-ownership restrictions.⁹⁸

⁹⁶ See Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 521 (2007) (discussing the intersection of antitrust and behavioral economics); Maurice E. Stucke, *New Antitrust Realism*, GCP (Global Competition Policy) MAGAZINE, Jan. 2009, available at <http://ssrn.com/abstract=1323815>.

⁹⁷ Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, available at <http://ssrn.com/abstract=1121229>.

⁹⁸ The vote was three to two along party lines. The FCC adopted a presumption, in the top 20 Designated Market Areas (“DMAs”), that it is consistent with the public interest for one entity to own a daily newspaper and a radio station or, under the following circumstances, a daily newspaper and a television station, if (1) the television station is not ranked among the top four stations in the DMA and (2) at least eight independent “major media voices” remain in the DMA. In all other instances, the FCC will adopt a presumption that a newspaper/broadcast station combination would not be in the public interest, with two exceptions, and therefore emphasize that the FCC is unlikely to approve such transactions. Taking into account these respective presumptions, in determining whether the grant of a transaction that would result in newspaper/broadcast cross-ownership is in the public interest, the FCC will consider: (1) whether the cross-ownership will increase the

Then-FCC Chair Kevin Martin's proposal to loosen the newspaper-broadcast cross-ownership ban in the top 20 cities was more limited than his predecessor's attempt at wholesale transformation of the media ownership rules. Nonetheless, opposition was not long in coming. The U.S. Senate expressed its displeasure through a "resolution of disapproval,"⁹⁹ and the incoming FCC chair is believed to oppose the weakening of the cross-ownership rules.¹⁰⁰ Among other things, critics argued that Chairman Martin's proposal had a loophole that would allow cross-ownership in smaller markets, not just in the 20 largest markets.

The FCC's rationale for allowing owners of certain newspapers and television stations in the same market to merge is based on efficiencies: the merger will enable the owners to spread their high fixed costs for obtaining news over a greater audience. Thereby, the newspaper/television owner will have greater incentive to produce more news.¹⁰¹ The FCC's key assumption is that cross-ownership in "the largest markets can preserve the viability of newspapers without threatening diversity by allowing them to spread their operational costs across multiple platforms" and newspapers "can improve or increase the news offered by the broadcaster and the

amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast outlet, and if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations. The FCC discussed the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity. 2008 FCC Report, *supra* note 32, at Appendix A.

⁹⁹ John Dunbar, *Senate Votes To Roll Back Media Ownership Rule*, WASH. POST, May 16, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/16/AR2008051601386.html>.

¹⁰⁰ *Editorial: Media Ownership Rules Safe In FCC Nominee Julius Genachowski's Hands*, SEATTLE TIMES, Jan. 15, 2009, available at http://seattletimes.nwsource.com/html/editorialsopinion/2008633309_edital16fccboss.html.

¹⁰¹ 2008 FCC Report, *supra* note 32, at ¶ 35.

newspaper.”¹⁰² The FCC Chair defended relaxing the ownership restrictions to protect newspapers: “The newspaper industry has faced significant challenges recently and I feel we have to do all we can to ensure we continue to have a vibrant industry.”¹⁰³

Opponents have questioned whether the FCC should worry about newspapers’ financial health since newspapers are generally outside the scope of the agency’s expertise. Another question is whether the case has been made that the newspaper industry actually needs or would benefit from this particular type of regulatory relief. It is worth recalling that in 2000, The New York Times Co. Chairman Arthur Sulzberger Jr. said, “From a business perspective, we will not achieve the financial success that can be ours without entering the world of television.”¹⁰⁴ Seven years later, the Times sold its nine TV stations, and left its partnership with Discovery Communications on a joint TV channel.¹⁰⁵ What changed? Apparently, the expected synergies never materialized. Moreover, newspapers, including the NEW YORK TIMES, discovered that it was cheaper to shoot digital video of a news event and post it on the newspaper’s own website. This low cost video has proven to be popular with both viewers and advertisers.¹⁰⁶

Besides, less restrictive alternatives exist to a full newspaper/television station merger. Content-sharing arrangements are already in place in many markets, although apparently not in the very

¹⁰² *Id.*, at ¶ 24.

¹⁰³ Stephen Labaton, *Few Friends for Proposal on Media*, N.Y. TIMES, Nov. 14, 2007. The industry trade association, Newspaper Association of America, however, complained that the FCC’s three Republican Commissioners did not go far enough in relaxing the cross-ownership ban. *Id.*

¹⁰⁴ Frank Ahrens, *Newspaper-TV Marriage Shows Signs of Strain*, WASH. POST, Jan. 11, 2007, at D01.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Also two other companies announced splitting their assets. Belo will spin off its newspapers from its local television business. E.W. Scripps will spin off from its newspaper and local television assets its cable networks including HGTV into a new company. *Newspapers*, in 2008 PEJ Report, *supra* note 20.

largest markets.¹⁰⁷ Newspapers can and do collaborate with local television networks to promote their news content in ways that do not involve a full merger.

Finally, even if a newspaper/television station combination yields some efficiencies, one must ask: at what price? The inherent inefficiency of the marketplace of ideas sets it apart from mergers of ordinary commodities. In industries with high fixed costs and homogeneous products, a merger may enable firms to achieve economies of scale by rationalizing production lines. The machines run for longer periods, with greater output. Consumers in these industries may not desire product variety, so this loss of diversity is insignificant. But in the marketplace of ideas, a premium is placed on diversity of ideas.¹⁰⁸ Indeed, a concern with cost-savings efficiencies may point in the wrong direction when other values are at stake.¹⁰⁹ Cost-savings efficiencies may be beneficial when they yield greater output of better quality programming. But cost-savings alone are not dispositive: many competing independent news sources may confer a greater benefit to society than an efficient monopolist that produces a homogenous news product.¹¹⁰ Consequently, when cost-saving

¹⁰⁷ The GAO's recent survey of several media markets found agreements among stations to share content or agreements that allow one company to produce programming or sell advertising through two outlets. These agreements, "were prevalent in a variety of markets but not in the top three markets, suggesting that market size may influence the benefits that companies realize through such agreements." GAO, *supra* note 68, at 2.

¹⁰⁸ While the newspaper venture may be more efficient, the marketplace of ideas would be diminished. *See, e.g., Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) ("[a] market in which every newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one").

¹⁰⁹ As the former FTC Chairman noted, "an occasional loss of efficiency as a result of antitrust enforcement can be tolerated and is to be expected if antitrust is to serve other legitimate values." Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1074 (1979). *See also* Baker, *supra* note 9, at 43-44.

¹¹⁰ It might be very efficient if all the newspapers combined their news collection operations into one operation. News collection generally has high fixed costs. To report a story may cost the same if you have one reader or a million readers. This cost is reduced with each additional newspaper that is sold or read. Under one operation, the newspapers

efficiencies are claimed in media mergers, the Obama administration should recognize the tension between cost-savings efficiencies arising from product homogenization, on the one hand, and a media policy seeking greater diversity in the marketplace of ideas.

C. Number of Media Sources May Be a Poor Indicator of Competitiveness

In relaxing its cross-ownership rules, the FCC noted the number of television and radio stations on the air since 1975 increased: the number of radio and television stations increased by approximately 76 and 83.5 percent, respectively.¹¹¹ It is a mistake, however, to confuse the number of media outlets with the robustness of competition in the marketplace of ideas.

Ordinarily for commodity goods with a downward sloping demand curve an increase in output is a good proxy of increased competitiveness. But in the media industry, the increase in outlets delivering news “has generally not meant covering a broader range of stories.”¹¹² Media industries may differ from other industries for several reasons.

First, “the number of independently owned media outlets in a given

could eliminate their back offices, duplicate news bureaus, etc. The joint venture could better utilize its scarce resources, and achieve significant cost savings unattainable outside the venture. This joint venture may produce a lower-cost newspaper, with a lower newsstand price—so instead of paying fifty cents, one may pay a quarter for the newspaper. The American Antitrust Institute expressed similar concerns following the computer system failure of the Voter News Service during the 2002 midterm election. The Voter News Service is a joint venture among five major TV news organizations (ABC, CBS, NBC, Fox, and CNN), and the Associated Press, which is designed to produce and analyze election exit polling information. Until the 1988 election, the major news organizations did their own exit polling and made their election predictions independently. In 1990, ABC, NBC, CBS and CNN formed the Voter Research & Surveys, combining their exit polling operations as a cost saving measure. All six major news organizations now rely on the same data and the same models, rather than compete to predict election results the most accurately. Following the 2000 elections, AAI blamed the networks' erroneous reporting of the presidential election results on the void of competition and urged the government to break up the VNS. *See AAI Calls, Again, For Breakup of Voters News Service* (Nov. 19, 2002), <http://www.antitrustinstitute.org/Archives/215.ashx> (last visited May 23, 2008).

¹¹¹ 2008 FCC Report, *supra* note 32, at ¶ 24.

¹¹² *Overview*, in 2007 PEJ Report, *supra* note 20.

market,” as the GAO found, “is not always a good indicator of how many independently produced local news or other programs are available in a market.”¹¹³

Second, an increase in output (more media outlets) could simply mean fewer owners controlling more outlets. As discussed *supra*, between March 1996 and March 2007, the number of commercial radio stations *increased* 6.8 percent, but the number of radio owners *decreased* by 39 percent. Likewise, the number of full-power television stations significantly increased, while the number of unique television owners decreased. The number of newspapers remained about the same between 2002 and 2005, but the number of newspaper owners also declined.¹¹⁴

Third, media sources are not interchangeable or of equal weight. Some defense counsel in a media merger justify an “all media market,” as many local outlets carry some news or advertising. But the empirical evidence shows the continuing importance of the local daily newspaper, followed by the local television station in gathering and investigating news. Thus to observe that 40 media outlets exist in one city may say little about the competitiveness of the marketplace of ideas. Typically, many publications cover discrete commodities (such as autos or real estate), are targeted for specific religious or ethnic audiences, or are limited to community events. Given the “relatively unanimous support” that consumers “continue predominantly to get their local news from daily

¹¹³ In five markets which the GAO surveyed, the television stations were participating in operating agreements. The five markets were Nashville, Tennessee; Wilkes Barre/Scranton, Pennsylvania; Springfield, Missouri; Myrtle Beach/Florence, South Carolina; and Terre Haute, Indiana. For example, in Wilkes Barre/Scranton, the GAO identified eight television stations. But one owner of two stations participated in an agreement with a third station and the remaining four television stations participated in two separate agreements—each agreement covering two stations. Thus, while there are eight television stations and seven owners in Wilkes Barre/Scranton, there are actually only three loose commercial groupings in the market. GAO, *supra* note 68, at 7.

¹¹⁴ See *supra* note --**.

newspapers and broadcast television,”¹¹⁵ allowing these two dominant news sources to merge can pose greater risk to the marketplace of ideas than allowing a newspaper to acquire other less news-intensive media.¹¹⁶

Fourth, even if two competing television stations had comparable weight, it is problematic, or as Judge Learned Hand asserted “impossible,” to treat different news services as “interchangeable.”¹¹⁷ In *Associated*

¹¹⁵ 2008 FCC Report, *supra* note 32, at ¶ 57.

¹¹⁶ In 2003, the FCC introduced a “Diversity Index” that sought to give its media ownership framework an empirical footing. The Diversity Index was modeled on the Herfindahl-Hirschman Index (“HHI”) used by the federal antitrust agencies in merger cases. The FCC selected which media to include based on consumers’ reported preferences. It then weighted the media based on their popularity (for example, television stations received a greater weight than newspapers). To apply the Diversity Index in a specific market, the FCC counted the number of media outlets in the market. Each outlet of a certain type of media was given an equal weight with every other outlet of the same type. Finally, the FCC summed the squares of the weighted ownership shares to calculate the market’s Diversity Index score. The Court of Appeals for the Third Circuit rejected the FCC’s Diversity Index for a number of reasons, including the equal weighting of outlets. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 402-3 (3rd Cir. 2004). As the Third Circuit wrote, “[a] Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America [the NEW YORK TIMES] also requires us to abandon both logic and reality.” The FCC subsequently recognized that its Diversity Index is an inaccurate tool for measuring diversity, that some aspects of diversity may be difficult to quantify, and thus abandoned its Diversity Index. 2008 FCC Report, *supra* note 32, at ¶¶ 16-17. Professor Eli Noam and DOJ attorney Brian Hill have each suggested alternatives to the Diversity Index designed to remedy the shortcomings the Third Circuit identified. Professor Noam proposes adding a measure of the number of voices in a market to generate a combined number that corrects the concentration index by giving better scores to markets with more distinct voices. The insight behind this approach is that one is better off with the choice of more radio stations on the dial or another newspaper at the kiosk even if these outlets do not draw large crowds. Eli Noam, *How to measure media concentration*, available at <http://www.citi.columbia.edu/elinoam/FT/8-30-04/measure.htm>. Mr. Hill proposes an entirely new formula that he argues is better able to satisfy the major two assumptions that both the FCC and Third Circuit thought were critical: (1) diversity in a media market should not decrease with ownership concentration; and (2) the contribution to diversity of an individual entity, its diversity importance, should increase with the weighted market shares of that entity’s outlets. Brian Hill, *Measuring Media Market Diversity: Concentration, Importance, and Pluralism*, 58 FED. COMM. L.J. 169, available at <http://www.law.indiana.edu/fclj/pubs/v58/no1/HillPDF.pdf>. In this regard, a recent thoughtful article highlighted the challenges of empirically capturing substantive viewpoint diversity. See Daniel E. Ho and Kevin M Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, available at http://search.ssrn.com/sol3/papers.cfm?abstract_id=1121229.

¹¹⁷ *AP I*, 52 F. Supp. at 372.

Press, newspapers, which were excluded from the dominant AP news service joint venture, could obtain news from other news services. This did not mitigate the competition concerns. Nor was the fact that readers could read the AP news stories in one local newspaper determinative. A newspaper reflects the biases and views of its writers, editors, and owners. One newspaper may downplay and truncate a news wire story; the other newspaper may carry it as a headline. These are not fungible commodities. Thus, the media marketplace is not about consumers switching from one homogeneous product to another. Rather, it should be concerned with the net increase in consumer welfare from having many competing and diverse news sources and editorial voices. As Judge Hand stated about the marketplace of ideas, “it is only by cross-lights from varying directions that full illumination can be secured.”¹¹⁸ Unlike restraints on ordinary commodities (where consumers may turn to less-desirable alternatives but the overall societal impact is insignificant), for restraints in the media, the alternatives may be inherently unsatisfactory and the costs imposed on society may be significant.¹¹⁹

Finally, media markets are subject to their own particular economic logic. Decisions by broadcasters about how to cover news, for example, are affected by the number of viewers attracted to “hard” versus “soft” news, the value advertisers place on reaching those viewers, what competitors are doing, and the existence (or lack thereof) of public interest requirements.¹²⁰

IV. SOME PROPOSALS FOR THE OBAMA ADMINISTRATION

Given the importance of the marketplace of ideas to our democracy and free-market economy, the importance of traditional media to the marketplace of ideas, and the unique dangers of market failure in this

¹¹⁸ *AP I*, 52 F. Supp. at 372.

¹¹⁹ See *AP II*, 326 U.S. at 28 (Frankfurter, J., concurring).

¹²⁰ Hamilton, *supra* note 82, at 13-24.

marketplace, it is unwise to continue the current ad hoc policies toward media consolidation. We argue in this Part why it is time for the Obama administration to examine the way information flows in the marketplace of ideas, the potential bottlenecks, and mechanisms to promote competition in the marketplace of ideas. We recommend first a coherent media policy, second, an agenda for the agencies to look beyond a merger's impact on advertising rates and more empirical work on media mergers' impact on the marketplace of ideas, and finally ways the government can promote access to the marketplace of ideas.

A. A Coherent Media Policy

Congress recently held a range of hearings on media-related topics, including specific media mergers, the "digital future," net neutrality, piracy, the role of private equity, as well as FCC oversight hearings. Ideally, a national media policy would emerge from such hearings, including media specific legislation and new ways to further the other goals of any media policy, such as localism and diversity.¹²¹

Other countries, including Germany, England, Norway, Sweden, and the Netherlands, have taken steps to limit concentration and promote editorial independence.¹²² Some possibilities discussed by Professor Baker and others include requiring more extensive pre-merger review, applying presumptions against media mergers under certain defined circumstances, barring certain types of transactions entirely, explicitly taking editorial independence into account, giving journalists a say or even a veto in merger decisions, imposing some non content-based access requirements on dominant firms, changing tax and subsidy policies, and strengthening

¹²¹ It would be useful for Congress during the next Administration to identify best practices relating to media ownership and ways to promote minority ownership.

¹²² For a survey of various nations' approaches to media mergers, see ORG. FOR ECON. CO-OPERATION & DEV., MEDIA MERGERS 16 (2003), available at <http://www.oecd.org/dataoecd/15/3/17372985.pdf>.

antitrust enforcement through more objective criteria (*e.g.*, presumption of illegality based on market share).¹²³

Today's *ad hoc* piece-meal policy work by each regulatory fiefdom is inadequate. Congress needs to intercede, clearly define the policy goals, and legislate media-specific competition laws. To accomplish this task, Congress should establish a commission composed of diverse stakeholders to examine further these issues on media ownership, conduct hearings, and make recommendations, which Congress can implement. Notably in the last great depression of the 1930s, the congressional Temporary National Economic Committee investigated the state of competition in various industries. As the DOJ later reported, this empirical analysis was helpful. The factual data from this effort "revealed the urgent need for a vigorous attack on monopoly power and concentration of economic resources and gave added impetus in 1938 and subsequently to the effort to reverse or at least check the trend toward concentration which had prevailed for most of the preceding half century, and to overcome some of the obstacles to effective enforcement of the antitrust laws."¹²⁴

Nor should media policy be left exclusively to one federal agency's domain. Each agency should have a defined role in preserving the marketplace of ideas. The roles should be complementary, and further the overall policy objectives. Today, apart from occasional consultations about a particular transaction or new policy, the federal agencies tend to operate in a vacuum. A telecommunications merger may not necessarily violate the Clayton Act, but fail the FCC's ownership restrictions, or vice versa. In essence, one does not necessarily follow from the other.¹²⁵

¹²³ BAKER, *supra* note 9, at 163-89.

¹²⁴ U.S. DEPARTMENT OF JUSTICE, A STUDY OF THE DEVELOPMENT OF THE ANTITRUST LAWS AND CURRENT PROBLEMS OF ANTITRUST ENFORCEMENT, SUBMITTED TO THE U.S. SENATE SUBCOMMITTEE ON MONOPOLY 9 (May 23, 1952).

¹²⁵ *See, e.g.*, U.S. v. Radio Corp. of Am., 358 U.S. 334, 350 n. 18 (1959) (stating that

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

For some media industries, the federal antitrust agencies examine only the merger's likely impact on advertising rates¹²⁶ (and do not revisit the market post-merger to determine if it predicted correctly).¹²⁷ But reduced price competition for advertising and programming is not the only (or even primary) potential anticompetitive effect from a media merger. Indeed, if the focus were solely advertising, one misses an important part of the

while the FCC may deny applications under its public interest standard where antitrust violations exist, "its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall the United States from subsequently challenging those transactions.").

¹²⁶ In the 2002 Biennial Review Order, the FCC defined advertising as the primary economic market in which broadcast stations and newspapers derive their primary sources of revenue. The FCC concluded that for purchasers of advertising time, "newspapers, television, and radio are not good substitutes and therefore make up distinct product markets." Thus, the only "economic" market in which broadcast stations and newspapers compete is advertising, and thus the only relevant product market is advertising. Report & Order and Notice of Proposed Rule Making, 2002 Biennial Regulatory Review et al., MB Docket Nos. 02-277, 01-235, 01-317, 00-244, and 03-130 ¶ 331 (released July 2, 2003). The FCC in liberalizing its media cross-ownership rules in 2008 continued to support that conclusion and found "no reason to deviate from the defined product market." The FCC continues to believe that newspaper/broadcast combinations "cannot adversely affect competition in *any* relevant product market." 2008 FCC Report, *supra* note 32, at ¶ 39 n. 131 (emphasis added). This is nonsense. In reaching this position, the FCC relied on statements by media companies Gannett and Hearst (who have an interest in the outcome of the FCC's rules) that "very little advertising substitution exists between daily newspapers and broadcast outlets." Report & Order and Notice of Proposed Rule Making, 2002 Biennial Regulatory Review et al., MB Docket Nos. 02-277, 01-235, 01-317, 00-244, and 03-130 ¶ 332 (released July 2, 2003). The FCC ignores Gannett's and Hearst's contrary representations in their SEC filings which emphasizes the competition between newspapers and television. *See* Gannett Co., Inc. 10-K, filed Feb. 28, 2008 (newspapers and affiliated Web sites "compete with other media for advertising principally on the basis of their performance in helping to sell the advertisers' products or services and their advertising rates. . . . Most of the company's newspapers compete with other newspapers published in nearby cities and towns and with free-distribution and paid-advertising weeklies, as well as other print and non-print media, including magazines, television, direct mail, cable television, radio, outdoor advertising and Internet media."); Hearst Argyle Television Inc. 10-K, filed Feb. 28, 2008 (its broadcast television stations "compete for advertising revenues with other broadcast television stations, as well as with a variety of other media, such as newspapers, radio stations, magazines, outdoor advertising, transit advertising, yellow page directories, direct mail, the Internet and MVPDs serving the same market.").

competitive landscape.

All media compete to varying degrees with other media for advertising dollars. This is of particular importance in the newspaper, television, and radio industries, where the competition extends beyond advertising prices. National newspapers, such as the NEW YORK TIMES and WALL STREET JOURNAL, compete against other media for national advertisements; daily newspapers compete against craigslist for classified ads. By June 2006, Google had 45% of advertising revenue for search engines; but when it comes to news, Google is primarily an aggregator with little investment in the traditional newsgathering function.¹²⁸ Likewise, craigslist in some cities is a significant competitor for online classified ads; but craigslist has no traditional news gathering function.¹²⁹ Thus, Google and craigslist may be formidable competitors to the traditional media for certain advertisers, but are not competitive threats for newsgathering. This increase in *advertising* competition does not translate into competition for better journalism (indeed the reverse may be true as many major newspapers are downsizing staff, reducing newshole, and eliminating news bureaus). If advertising were the sole focus, the traditional news media in a community could freely merge given craigslist, Google, and other vehicles for online advertising.

It is important to any media policy to consider media mergers' impact on other policy objectives besides lower advertising rates. Media consolidation may adversely affect, for example, nonprice editorial

¹²⁷ See Stucke, *Behavioral Economists*, *supra* note 96, at 575-79.

¹²⁸ *Online*, in 2007 PEJ Report, *supra* note 20. The 100 largest media companies (in terms of 2005 revenues) owned 16 of the top 20 popular online news sites, as ranked by Nielsen/Net Ratings. *Id.*

¹²⁹ Started as a hobby by Craig Newmark in early 1995, craigslist provides local classifieds and forums for 450 cities worldwide. With more than 9 billion page views and more than 30 million people using craigslist each month, the Internet site publishes each month more than 30 million new classified ads and 2 million new job listings. Craigslist,

competition,¹³⁰ and non-economic policy considerations, such as localism and diversity.

The next issue is what mechanism should be implemented to promote these values, and what should be antitrust's role? The DOJ historically and recently has challenged anticompetitive restraints in the print media based in part on its impact on the marketplace of ideas, specifically the loss of editorial competition.¹³¹ The DOJ is challenging currently the loss of the editorial competition involving abuses of a newspaper joint operating agreement.¹³² In its complaint involving two leading West Virginia newspapers, the United States alleged how local daily newspapers, such as the CHARLESTON GAZETTE and the CHARLESTON DAILY MAIL, provide a unique package of attributes for their readers, which other media cannot substitute.¹³³ In challenging a market allocation scheme between the nation's two largest alternative newsweekly publishers, the DOJ described the competition between the defendants' alternative newsweeklies. Readers

Factsheet, <http://www.craigslist.org/about/factsheet.html> (last visited May 23, 2008).

¹³⁰ It is well accepted, and a matter of everyday experience, that price is not the sole measure of competition. Companies can, and often do, compete on other dimensions, such as quality, service, and innovation. Newspapers historically invested in editorial content to attract readers, which in turn attracted advertisers.

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

¹³² Complaint, *U.S. v. Daily Gazette Co.*, Civ. Act. No. 2:07-0329 (S.D. W.Va. filed May 22, 2007), available at <http://www.usdoj.gov/atr/cases/f223400/223469.htm>.

¹³³ The DOJ's complaint notes how newspapers provide national, state, and local news in a timely manner and in a convenient, hardcopy format. The news stories featured in such newspapers are more detailed, when compared to the news reported by radio or television, and they cover a wide range of topics of interest to local readers, not just major news highlights. Newspapers are portable and allow the reader to read the news, advertisements, and other information at his or her own convenience. Readers also value other features of local daily newspapers, such as calendars of local events, movie and TV listings, classified advertisements, commercial advertisements, legal notices, comics, syndicated columns, and obituaries. Most readers of local daily newspapers in the Charleston area do not consider weekly newspapers, radio news, television news, Internet news, or any other media to be adequate substitutes for the two local daily newspapers serving the Charleston area.

and advertisers benefited with better editorial coverage, heavily discounted advertising rates, and higher quality service.¹³⁴ The U.S. Federal Trade Commission (“FTC”), under Chairman Pitofsky, was sensitive to the marketplace of ideas in the merger between AOL and Time Warner.¹³⁵

But for other media industries, such as radio and television, the federal antitrust agencies examine the merger’s impact only on advertising rates. Considering a merger’s impact on editorial competition for some media and not others makes little sense.

But the larger issue is whether this is suitable for antitrust inquiry. Some argue that the competition agencies should look beyond a media merger's impact on advertising rates and services and consider its impact on nonprice competition, which includes editorial competition¹³⁶ and choice.¹³⁷ Others argue that editorial competition involves non-economic concerns better left to other agencies, such as the FCC. Although the federal courts have found that editorial competition among newspapers is cognizable

¹³⁴ For example, in challenging the defendants’ market allocation scheme, the United States discussed the evidence of the intense editorial competition. The defendants’ alternative newsweeklies responded to the other’s editorial changes and improvements by introducing new or better features or increasing investigative journalism to recapture the readers’ attention to its publication. The different, and at times opposing, views and positions of the defendants’ competing alternative newsweeklies provided “readers with alternative viewpoints of important local events affecting social, political, esthetic, and moral issues.” Competitive Impact Statement, *United States v. Village Voice Media, LLC, and NT Media, LLC*, Civil Act. No. 1:03CV0164 (N.D. Oh. filed 02/03/2003), available at <http://www.usdoj.gov/atr/cases/f200700/200715.htm>.

¹³⁵ *America Online and Time Warner*, Dkt. No. C-3989. See Federal Trade Comm’n, Press Release, *FTC Approves AOL/Time Warner Merger with Conditions* (Dec. 14, 2000), available at <http://www.ftc.gov/opa/2000/12/aol.htm>.

¹³⁶ See Stucke & Grunes, *supra* note 6, at 270–73.

¹³⁷ See Neil W. Averitt & Robert H. Lande, *Using The “Consumer Choice” Approach To Antitrust Law*, 74 ANTITRUST L.J. 175, 207 (2007). For example, if the broadcast networks were to combine their news operations, but each independently set its own advertising rates, the merger might not be challenged if the marketplace of ideas were excluded from the analysis. Even though the evening news would remain free, and the advertising rates would remain competitive, the nonprice competition among the news networks would be eliminated. This is because the loss of this editorial diversity could not be readily replaced.

under the federal competition laws,¹³⁸ there remains the concern that a particular administration may use editorial competition as a vehicle to punish or support a media company, based on the media's views toward the administration and its policies.¹³⁹ Despite these differences, we do not advocate that the government agencies make normative judgments about whether the WALL STREET JOURNAL would be a better newspaper in the hands of the Murdochs, Grahams, or Sulzbergers.

¹³⁸ The more recent decisions are *United States v. Daily Gazette Co.*, No. 2:07-03292008, WL 2895899, at *6 (S.D.W.Va. June 19, 2008); *Reilly v. MediaNews Group, Inc.*, No. C 06-04332 SI, 2007 WL 1068292, at *3 (N.D. Cal. 2007) (Judge Illston held that the alleged loss of editorial competition was sufficient for antitrust injury). *See also Hawaii v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241, 1249–50 (D. Haw. 1999), *aff'd*, 203 F.3d 832 (9th Cir. 1999).

¹³⁹ President Lyndon B. Johnson, for example, permitted a merger between two Houston banks in exchange for favorable coverage in the *Houston Chronicle*. MICHAEL R. BESCHLOSS, *TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963-64* (1997) ([LBJ wants a letter from saying] "'the paper is going to support your administration as long as you're there. Sincerely, your friend, John Jones.'" . . . I don't see a damn thing wrong with that . . . Both Justice and Treasury will un-cock me right quick if I [approve the merger] . . . and I ain't going to do it, George, unless [Chronicle president] John Jones is willing to say to me that he's my friend."). After receiving the letter, the Administration cleared the bank merger.

President Nixon used the antitrust laws as a sword of Damocles against the media networks. President Nixon in 1971 discussed intimidating the nation's three major television networks by keeping the constant threat of an antitrust suit hanging over them. In a July 2, 1971 taped recorded discussion, aide Charles W. Colson told Nixon that whether filing an antitrust case against ABC, NBC and CBS "is good or not is perhaps not the major political consideration. But keeping this case in a pending status gives us one hell of a club on an economic issue that means a great deal to those three networks . . . something of a sword of Damocles." Nixon responded, "Our gain is more important than the economic gain. We don't give a goddam about the economic gain. Our game here is solely political. . . . As far as screwing them is concerned, I'm very glad to do it."

"If the threat of screwing them is going to help us more with their programming than doing it, then keep the threat," said Nixon. "Don't screw them now. [Otherwise] they'll figure that we're done." As for the antitrust actions, the White House kept the DOJ from filing suit until April 1972, when the government accused the networks of restraining trade and monopolizing prime-time entertainment with their own programs. The suits were dismissed without prejudice in 1974 after the government was unable to identify the requested documents. BERNARD M. HOLLANDER, *ORAL HISTORY: FIFTY-EIGHT YEARS IN THE ANTITRUST DIVISION: 1949-2007*, at 174-79 (June 2008). The Ford administration renewed the complaints and subsequent consent decrees curtailed prime-time productions by the networks. Walter Pincus & George Lardner Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, WASH. POST, Dec. 1, 1997, at A1, available at <http://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm>.

Instead, one mechanism to promote a vibrant marketplace of ideas and avoid these normative judgments may be in revising the structural ownership requirements (such as FCC caps on ownership). In addition, antitrust should have a role if direct evidence of market power exists.¹⁴⁰ Direct evidence of past anticompetitive restraints in that market, or natural experiments in other geographic markets (for example, evidence of anticompetitive effects where one of the merging parties recently acquired its direct competitor) should establish a *prima facie* violation under Section 7 of the Clayton Act. Another category of potential concern is the transmission/content arena, when a company that dominates the transmission of information seeks to enter the content side.¹⁴¹

¹⁴⁰ See Stucke & Grunes, *supra* note 6, at 299-302.

¹⁴¹ This was the situation in the *AT&T* case. *AT&T*, 552 F. Supp. at 223–24, *aff'd sub nom. Md. v. U.S.*, 460 U.S. at 1001. And it may arise in a merger between a major cable operator and movie studio (the anticompetitive effects of which prompted in part the 1992 Cable Act). Congress found, in enacting the 1992 Cable Act, that a cable operator has an incentive to favor its affiliated programmers. But a cable operator also has an incentive to offer an attractive package of programs to its subscribers. When these two incentives are in conflict, “the operator may, as a rational profit-maximizer, compromise the consumers' interests.” *Time Warner Ent. Co. v. U.S.*, 211 F.3d 1313, 1322 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001). This scenario arose in a consent decree involving Time Warner's acquisition of Turner Broadcasting System. *Time Warner Inc., Turner Broad. Sys., Inc., Tele-Communications, Inc., and Liberty Media Corp.*, Dkt. No. C-3709 (Feb. 3, 1997). The FTC believed that its enforcement action was wholly consistent with the goals of Congress in enacting the 1992 Cable Act in providing greater access to programming and promoting competition in local cable markets. Statement of Chairman Pitofsky, and Commissioners Steiger and Varney in *Time Warner Inc., Turner Broad. Sys. Inc., Tele-Communications, Inc., and Liberty Media Corp.*, Dkt. No. C-3709 (Feb. 3, 1997). One of the consent decree provisions required Time Warner to place a rival to its newly acquired CNN on certain of its cable systems. The FTC responded that this narrowly drawn provision was designed to restore the incentives Time Warner would otherwise have had to carry rivals to CNN but for the fact of this acquisition. The FTC believed that Time Warner's acquisition of CNN, as alleged in the complaint, gave it both the ability and incentive to make entry of competing news services more difficult, by denying them access to its extensive distribution system. Letter to Brian P. Lamb, C-SPAN, from FTC Secretary Donald S. Clark, in response to Lamb's comment about the FTC's consent decree regarding the acquisition of Turner Broadcasting System, Inc. by Time Warner Inc., and Tele-Communications, Inc.'s and Liberty Media Corporation's Proposed Acquisitions of Interests in Time Warner, Dkt. No. C-3709 (Feb. 3, 1997). The FTC observed that courts have upheld against First Amendment challenge regulations specifically designed to address competitive concerns arising from vertically-integrated cable companies' monopoly

C. Promoting Access to the Marketplace of Ideas

Given traditional media's high fixed costs and significant entry barriers,¹⁴² concentrated media ownership can hinder competition. The Obama administration should affirmatively examine how information flows in the marketplace of ideas, and what remedial steps can remove any bottlenecks.

The Supreme Court of late has displayed great faith in regulation to diminish the likelihood of and remedy anticompetitive harm.¹⁴³ It would be a mistake, however, to believe that regulatory dictates alone could replicate a competitive marketplace of ideas. In addition to the risks of imperfect information and regulatory capture, government regulators, unlike private actors (who, at times, bear the costs of their mistakes), may undertake anticompetitive actions because of weaker incentives to avoid mistakes,

control over distribution. What is also interesting is that the FTC abstained from determining which rival to CNN must be carried on the cable network. "In this case, there is even greater reason to avoid a more intrusive role, since programming content would be unavoidably implicated—the selection of one competitor over another inevitably determines to some degree the content of the new entry. In addition, excessive involvement in the selection process could conflict with the goal that the antitrust laws, and antitrust remedies, are intended to protect competition, not competitors." Statement of Chairman Pitofsky, and Commissioners Steiger and Varney in *Time Warner Inc., Turner Broad. Sys. Inc., Tele-Communications, Inc., and Liberty Media Corp.*, Dkt. No. C-3709 (Feb. 3, 1997). A similar concern arose in the AOL/Time Warner merger, prompting restrictions against AOL Time Warner from discriminating on the basis of corporate affiliation in the transmission of content. See Analysis of Proposed Consent Order to Aid Public Comment, *America Online, Inc., and Time Warner Inc.*, Dkt. No. C-3989, available at <http://www.ftc.gov/os/2000/12/aolanalysis.pdf>; see also *FTC Backs AOL-Time Warner Merger*, J. RECORD, Dec. 15, 2000, available at 2000 WL 14300520 (quoting Chairman Robert Pitofsky) ("Our concern here was with access, that these two powerful companies would create barriers that would injure competitors"); *AOL Merger Clears Last Big Hurdle*, WASH. POST, Dec. 15, 2000, at A1 (quoting Commissioner Leary) ("I had and I continue to have concerns about these content issues.").

¹⁴² Television, cable, and radio have regulatory barriers and high fixed costs. Newspapers have high fixed "first copy" costs. Publishing the first copy of a newspaper is high, given the reporting and editorial costs, the infrastructure to print newspapers, and costs to solicit advertisers. The marginal cost of producing the second, third, and fourth copies is very low and remains low up to the newspaper's printing capacity. See WORLD BANK, *supra* note--, at 183.

¹⁴³ *Verizon Commc'ns Inc. v. Trinko*, 540 U.S. 398, 412 (2004).

political myopia, and the lack of direct accountability to the public.¹⁴⁴ As Alfred Kahn stated, the “essential task of public policy in a free enterprise system should be to preserve the framework of a fair field and no favors, letting the results take care of themselves.”¹⁴⁵ Similarly, to prevent the formation of monopolies, the United States historically focused on maintaining competitive market structures, rather than regulatory dictates.¹⁴⁶

Thus, the best remedy for media monopolies is to prevent their formation, through (i) structural mechanisms (such as cross-ownership restrictions and caps on ownership both nationally and in local markets), (ii)

¹⁴⁴ François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. OF ECON. 847, 850 (2004). For example, the Federal Energy Regulatory Commission’s merger review policies were recently criticized for relying on data supplied by the regulated entities, rather than conducting its own independent fact gathering and analysis of market definition. Sara Stefanini, *Think Tank Urges FERC to Reform Merger Policies*, COMPETITION LAW 360, March 15, 2007, available at <http://competition.law360.com/Secure/ViewArticle.aspx?id=20553>; see also Comments of Diana Moss at FERC Technical Conference on Electricity Merger Policy (March 14, 2007), available at http://www.antitrustinstitute.org/Archives/FERC_comments.ashx.

¹⁴⁵ Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 39 (1953).

¹⁴⁶ Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 178-79 (2002) (FTC enforcement efforts during the 1990s were directed toward preserving open access to markets). Thus, Section 1 focuses on concerted activity to eliminate competitors, and raise entry barriers. Section 7 prevents mergers that tend to create a monopoly. Attempts to monopolize violate Section 2. See Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1116463>. The 1996 Telecommunications Act was deregulatory in its approach, continuing the shift of the telecommunications industry away from a heavily regulated industry (with behavioral restrictions) to the aspired open competition (with structural restrictions). Congress’s intent, as expressed by the 1996 Act, is that the antitrust analysis should be primarily conducted by the federal antitrust agencies and not by the FCC. While the FCC’s “public interest” standard and ownership control regulations touch upon antitrust issues, Congress wanted the DOJ and the FTC independently and carefully to review media mergers and their impact on competition in the marketplace of ideas. The legislative history of the savings clause to the Telecommunications Act of 1996 shows that the FCC regulatory scheme does not preempt antitrust review of media mergers generally, and the marketplace of ideas specifically. Stucke & Grunes, *supra* note 6, at 288-94. However, aside from political and ideological concerns about lax or zealous antitrust enforcement, conventional antitrust policy is not easy to apply in media markets. See Howard Shelanski, *Antitrust Law as Mass-Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 373 (2006).

removal of bottlenecks and any government-imposed entry barriers, and (iii) active and informed antitrust enforcement to enjoin anticompetitive media mergers. The Obama administration, for example, should be vigilant of any onerous government regulations that reduce the media's independence or distort the provision of information. This means keeping the media independent and free from governmental control or improper influence.¹⁴⁷

The Obama administration should also examine mechanisms to foster the free flow of information. Under an evolutionary economic perspective, not only is experimentation critical, but also the dissemination of information of that experimentation and feedback thereto.¹⁴⁸ Division of labor has increased specialization of knowledge, whereby individuals know much about a limited area. This specialization of knowledge can increase transaction costs (namely, ascertaining the measurement and performance characteristics of goods and services outside one's area of expertise).¹⁴⁹ Moreover, the dispersion of information in society and the attendant search costs can inhibit our understanding of the sources of poor economic performance and thwart dynamic efficiency. This is precisely where the government can play a key role in further "integrating the dispersed knowledge essential to efficient production in a world of specialization."¹⁵⁰ In facilitating "the greatest possible centralization of information, and

¹⁴⁷ The World Bank noted, "[h]igher levels of perceived media freedom or independence are associated with lower levels of perceived corruption, regardless of differences in a country's level of income." WORLD BANK, *supra* note--, at 182.

¹⁴⁸ A positive feedback loop for example may emerge from the learning effects from diffused technologies. For example, as end-users experiment and alter a particular technology, the suppliers learn from this diffusion. In the next round, the suppliers, in turn, can offer this greater diffusion of offerings, which various users can further modify. RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 402 (1982); *see also* Moreau, *supra* note 144, at 869.

¹⁴⁹ DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 73 (2005).

¹⁵⁰ *Id.*, at 164.

diffusion of it from the centre,”¹⁵¹ the government can more cheaply inform market participants. This does not mean having the government evaluate or filter the information’s content. Instead, the government can evaluate what additional steps to promote the free flow of information, and reduce search costs.¹⁵² These steps may include creating antitrust safe harbors for private individuals to (1) publicly disseminate price, wage, and other information,¹⁵³ or (2) promote novel forms of information dissemination, such as prediction markets, whereby individuals bet on future outcomes.¹⁵⁴ To foster accountability—and lower the media’s search costs—the

¹⁵¹ JOHN STUART MILL, ON LIBERTY 123 (David Bromwich & George Kateb eds., Yale Univ. Press 2003).

¹⁵² For example, the government can promote benchmarks so that consumers can readily compare prices of goods, such as retail fuel prices, mattresses and cell phone services. In markets with many sellers, buyers may have high search costs to identify the lowest-priced seller. Increased price transparency may make it easier for buyers to compare prices and bargain shop, reducing their search costs. Retail fuel prices can be moderately affected if websites publish the comparative prices at local pumps on a timely basis, and government should be vigilant against any private restraints to inhibit this transparency; and in locations where private resources do not make this information available, local governments might well step in.

¹⁵³ Making historical price, supply, or cost data may also enable each competitor to benchmark its performance to an industry standard. For such exchanges, the federal antitrust agencies have outlined some steps to mitigate litigation risks by (1) having a third party, e.g., a purchaser, government agency, consultant, academic institution, or trade association, collect the data, (2) basing the information provided by the participants on data more than three months old, (3) having at least five providers report data upon which each disseminated statistic is based, with no individual provider’s data representing more than 25 percent on a weighted basis of that statistic, and (4) aggregating any information disseminated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 63 (1996), <http://www.usdoj.gov/atr/public/guidelines/0000.pdf>; see also Letter from R. Hewitt Pate, Assistant Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., to Diana West, Internationally Board-Certified Lactation Consultants (May 25, 2004), available at <http://www.usdoj.gov/atr/public/busreview/203831.pdf> (explaining that the Division would not challenge the collection of fee information for a survey among competitors, which would be collected following the principles outlined in the Health Care Guidelines). For a further discussion of the antitrust risks of the dissemination of price information, see generally Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency*, 19 ANTITRUST 81 (2005).

¹⁵⁴ See KENNETH J. ARROW ET AL., AEI-BROOKINGS JOINT CTR., STATEMENT ON PREDICTION MARKETS 2 (2007), available at <http://wvm.com/abstract=984584>.

government can also promote its own transparency and remove restraints in accessing such information.¹⁵⁵

CONCLUSION

Although some may argue that the current recession deserves far greater attention than a coherent media policy, this is short-sighted. A vibrant marketplace of ideas is too important to our democracy. The media can inform the electorate, serve as a watchdog on corporate and political organizations, enhance market efficiency, and advance the discourse of public policy. One cannot rely on flawed laissez-faire beliefs that unregulated market forces will provide the efficient level of information. Nor can one assume that the current haphazard patchwork of media policies will remedy the current ailments in the media industry today or promote the unrestrained flow of information.

Instead, the Obama administration must undertake a more empirical analyses of how media markets work, and ensure that any competition policy toward media mergers be in furtherance of, and driven by, a national media policy, as set by Congress. Sole reliance on enforcement by the FCC or federal antitrust agencies has proven to be too ad hoc, too haphazard, and not particularly effective. Aside from political and ideological concerns about lax or zealous antitrust enforcement, conventional antitrust policy is not easy to apply in media markets, and a combination of new legislation and more informed antitrust enforcement to: (i) promote, or at least not diminish, the media's contribution to the marketplace of ideas; (ii) have antitrust merger policies complement FCC policy, which together should provide some of the necessary legal framework for a vibrant marketplace of

¹⁵⁵ The Freedom of Information Act, 5 U.S.C. § 552 (2000), for example, was enacted to foster this transparency. For a critique of its success and shortcomings in recent years, see generally ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006).

ideas; and (iii) understand from a 21st Century perspective, all of the values, including noneconomic values, such as localism and diversity, that are important to preserving a healthy marketplace of ideas.