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Antitrust and the Marketplace of Ideas

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The United States is in the midst of a merger wave that is transforming media ownership. Disney's acquisition of CapCities/ABC, Viacom's acquisition of CBS, and AOL's acquisition of Time Warner are among the more visible examples, but there have been hundreds of other transactions both large and small. Media mergers have been a growing cause for concern among scholars, members of Congress, and the public, and have led to calls for heightened antitrust scrutiny and new legislation.

As media mergers continue to occur, an important question for the antitrust agencies and the courts is how to evaluate their competitive effects. Thus, for example, the U.S. Department of Justice in its recent consent decrees involving radio mergers has focused on a given merger's impact on advertising rates in a local geographic market. In contrast, we believe that the antitrust analysis of a media merger should be expanded to include its impact on the "marketplace of ideas." The "marketplace of ideas," as we explore in this article, consists of competition among various news and entertainment sources. The concept is based on the underlying belief that truth prevails in the widest possible dissemination of information from diverse and antagonistic sources. Antitrust enforcers can elect to ignore the marketplace of ideas in their analysis of media mergers and instead focus solely on a merger's impact on price competition. We believe that this narrow approach to media mergers is incorrect, or at least incomplete. If antitrust review continues to focus on particular horizontal overlaps and competitive effects are measured only in terms of advertising dollars or programming costs, large-scale anticompetitive media mergers will likely escape enforcement action.

Federal Trade Commission Chairman Robert Pitofsky wrote, more than twenty years ago, that excessive concentration of economic power will breed antidemocratic political pressures.[1] Any antitrust policy that

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neglected such concerns would "be unresponsive to the will of Congress."[2] After reviewing the legislative history, Chairman Pitofsky stated, "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[3] The marketplace of ideas not only represents such a political value as expressed by Chairman Pitofsky, but it is also, as we explore in this article, a form of nonprice economic competition.

Part I of this article begins with an overview of the marketplace of ideas, its relevance to the current crop of media mergers, and the approach under the Horizontal Merger Guidelines[4] if the marketplace of ideas is excluded from the antitrust analysis. Part II then examines the support for the proposition that the antitrust analysis of a media merger should be expanded to include the merger's impact on the marketplace of ideas. We review the legislative histories of the Sherman and Clayton Acts, and relevant case law—particularly the Supreme Court decisions in *Associated Press*[5] and *Turner Broadcasting*.[6]

While we believe that the antitrust agencies should consider the marketplace of ideas in their analyses, we recognize that legitimate concerns exist about government intervention in the media. Part III explores some of the pros and cons of evaluating a media merger's impact on the marketplace of ideas. We recognize the complexities of any antitrust analysis of the marketplace of ideas, and its potential dangers to the First Amendment.

In Part IV we consider whether the marketplace of ideas should be the exclusive concern of the Federal Communications Commission (FCC) and/or whether additional antitrust legislation is needed. Finally, in Part V we offer several modest proposals as to how the concept of the marketplace of ideas might be incorporated into the antitrust analysis. Our proposals, however, are meant as a starting point out of this thicket, not a destination.

The authors invite any comments, which can be e-mailed to Maurice.Stucke@usdoj.gov and Allen.Grunes@usdoj.gov.

[1] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

[2] *Id.* at 1052.

[3] *Id.* at 1051.

[4] U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992, revised 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter Horizontal Merger Guidelines].

[5] Associated Press v. United States, 326 U.S. 1 (1945).

[6] Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) (*Turner*).

I. BACKGROUND OF "MARKETPLACE OF IDEAS"

A. WHAT IS THE "MARKETPLACE OF IDEAS"?

The "marketplace of ideas" is defined as a sphere in which intangible values compete for acceptance.[7] Its beneficial social value is based on the theory that truth prevails in the widest possible dissemination of information from diverse and antagonistic sources. The term, as used in this article, is usually traced to Justice Holmes's famous dissent in *Abrams v. United States*.[8] For Justice Holmes, the theory of the Constitution, as embodied in the First Amendment, is that "the ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[9] Justice Holmes added that we should be "eternally vigilant against attempts to check the expression of opinions that we loathe" unless they raise an imminent threat to the country.[10]

The marketplace of ideas is important to our democracy, in that democracy prospers when there is an unrestrained flow of information. As Justice Holmes wrote, 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. As Judge Learned Hand wrote, it "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selec-

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[7] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1383 (Merriam-Webster 1986).

[8] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[9] *Id.* at 630. Thomas Jefferson likewise noted that truth prevails in this marketplace, writing, "[I]n every country where man is free to think and to speak, differences of opinion will arise from difference of perception, and the imperfection of reason; but these differences when permitted, as in this happy country, to purify themselves by free discussion, are but as passing clouds overspreading our land transiently and leaving our horizon more bright and serene." Thomas Jefferson, Letter to Benjamin Waring, 1801, *in* 10 THE WRITINGS OF THOMAS JEFFERSON 235 (MEMORIAL EDITION 1904).

Alexis de Tocqueville also touched upon this concept in his observations of America in his 1831 travels. He viewed the American press skeptically—observing that three-quarters of the American newspaper was filled with advertisements, with the remainder containing political news and anecdotes. Given the low entry barriers that allowed the proliferation of local newspapers in America, each newspaper had limited power individually (in contrast to the centralized press in France at the time). Yet, when he viewed the American press collectively in this marketplace, de Tocqueville concluded that the "opinions established under the dominion of the freedom of the press in the United States are often more tenacious than those formed elsewhere under the dominion of censorship." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 178 (Harvey Mansfield & Delba Winthrop trans. & eds., 2000).

[10] *Abrams*, 250 U.S. at 630.

tion."[11] Also, to govern themselves, the electorate must have full access to "social, political, esthetic, moral and other ideas and experiences."[12] While as Judge Hand noted, to many this marketplace of ideas "is, and always will be, folly," we, in our democracy, "have staked upon it our all."[13]

An essential goal of the First Amendment then is to promote this marketplace of ideas by achieving "the widest possible dissemination of information from diverse and antagonistic sources."[14] The First Amendment itself promotes the marketplace of ideas by restricting to varying degrees *governmental* restraints on speech.[15] The antitrust laws, we argue, also promote the marketplace of ideas by reaching anticompetitive *private* restraints on this marketplace. The Supreme Court and lower courts have made this link explicit. In *FCC v. National Citizens Committee for Broadcasting*, for example, the Court stated that "application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment."[16] Similarly, in *Red Lion Broadcasting*, the Court stated that "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."[17]

Thus, an important 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, by companies, or by any individual. As Judge Greene wrote in the *AT&T* case, "as the Supreme Court has recognized, in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws."[18]

B. THE ISSUE IS TIMELY AND RIPE

The issue of whether the antitrust analysis should include a merger's impact on the marketplace of ideas is timely and ripe for consideration.

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

[12] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[13] *Associated Press*, 52 F. Supp. at 372.

[14] *Associated Press*, 326 U.S. at 20.

[15] The First Amendment, after all, begins with "Congress shall make no law . . ." U.S. CONST. amend. I.

[16] 436 U.S. 775, 800 n.18 (1978).

[17] 395 U.S. at 390.

[18] United States v. AT&T, 552 F. Supp. 131, 184 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

Moreover, as media mergers continue, this issue will remain—and, indeed, may take on increasing significance.

In recent years, the media appears to be consolidating. AOL has acquired Time Warner, which in turn acquired Turner Broadcasting System; Viacom acquired CBS, which had merged with Westinghouse; Disney acquired CapCities, which had acquired ABC; News Corp. acquired Twentieth Century Fox and Metromedia TV.[19] Whether American media are becoming more competitive or more concentrated is an empirical question. It is beyond doubt, however, that media firms on the scale of the larger manufacturing firms have arisen in recent years, with annual revenues in the tens of billions of dollars.[20]

As this consolidation occurs, especially after the enactment of the Telecommunications Act of 1996,[21] the issue of antitrust review of the marketplace of ideas is increasingly raised—usually by the press and elected officials rather than by the antitrust agencies.[22] Underlying the

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[19] COLUMBIA JOURNALISM REVIEW's Internet site identifies the holdings of the major media companies. *See* http://www.cjr.org/owners/.

[20] Eli Noam, *Media Concentration in the United States: Industry Trends and Regulatory Response, available at* http://www.vii.org/papers/medconc.htm. As Eli Noam has observed, it is not obvious that media concentration is increasing. First, although firms have been growing in size, the media market as a whole (which Professor Noam defines as the market for broadcast, cable, print, and content) has also been growing rapidly. Second, firms have been crossing lines that once divided the media, telecommunications, and computer industries. There have been significant changes from the early 1980s, when CBS, NBC, and ABC collectively had more than 90 percent of television viewership, AT&T had 80 percent of local telephone service as well as almost 100 percent of long distance service, and IBM accounted for more than 75 percent of the computer market. Under Eli Noam's preliminary estimations, the overall concentration of the information industry has remained "fairly consistent" during the merger-intensive period of 1983–1984 through 1998. It declined from 1993 to 1995, and then rose again to levels that are (depending on the index used) either still slightly lower than before or slightly higher. *See* Eli Noam, Are American Media Becoming More Concentrated? A Decade's Empirical Evidence (Preliminary Working Draft, Oct. 1998), *available at* http://www.tprc.org/abstracts98/noam.txt. This reflects, for Professor Noam, that the growth of the industry has kept pace with the growth of its participants. He is currently preparing a book for publication that seeks to answer this empirical question. ELI NOAM, MEDIA CONCENTRATION IN AMERICA (forthcoming).

[21] Pub. L. 104-104, 110 Stat. 56 (codified in scattered sections of Titles 15, 18 & 47 of the United States Code (West Supp. 1997)).

[22] *See, e.g.*, Bryan Gruley, *Pitofsky Will Test Marketplace of Ideas Theory in FTC's Review of Time Warner-Turner Deal*, WALL ST. J., Oct. 9, 1995, at A14, *available at* 1995 WL 9903008; James Bock, *Citizen Kane as Conglomerate*, BALTIMORE SUN, Apr. 3, 1996, at 2A, *available at* 1996 WL 6612466; Alexandra Marks, *Big Radio Merger Fuels Concern over Diversity*, CHRISTIAN SCIENCE MONITOR, June 24, 1996, at 8, *available at* 1996 WL 5042456; Alexandra Marks, *Mergers May Give Viewers Less Choice*, CHRISTIAN SCIENCE MONITOR, July 11, 1996, at 1, *available at* 1996 WL 5042828; Michael J. Mandel, *All these Mergers Are Great, But . . .*, BUS. WK., Oct. 18, 1999, at 48, *available at* 1999 WL 27295621; Press Release, Sen. Paul Wellstone, *Wellstone Wants Tougher FCC and Antitrust Review of Media and Telecom Mergers* (Oct. 7, 1999), *available at* 1999 WL 28845779.

policy discussions in this area is the concern that regulatory liberalization has not led to openness and competition but rather to a new level of media concentration. As Senator Michael DeWine observed:

> In radio, in newspapers, and now in television, we are beginning to see the trend toward consolidation that has swept through so many other industries during the last few years. While many of these mergers have been pro-competitive, and helped provide consumers with a better product at a better price, we need to be especially careful when we are dealing with companies that provide information—because the free flow of information is crucial for a democracy to function. We *must* have competition in the marketplace of ideas, and excessive concentration will hinder that competition.[23]

Even a media conglomerate expressed the same concerns about the marketplace of ideas when Tele-Communications, Inc. (TCI) proposed acquiring Paramount. Rival Viacom (which was much smaller at the time) sought to challenge the transaction in part based on its impact on the marketplace of ideas. As Viacom alleged in its complaint: "Indeed, the power that TCI would have to control programming and cable distribution is dangerous enough by itself, but when coupled with the publishing, television and motion picture production and other interests of Paramount, the threat to competition—and fundamental First Amendment principles—is substantially increased."[24]

Similar allegations were directed publicly at Viacom when it sought to acquire CBS. Notably the Chairman and the Ranking Member of the Senate Subcommittee on Antitrust, Business Rights and Competition both recognized that

> [m]ergers like Viacom-CBS often have the potential to bring efficiencies to the marketplace, and bring benefits to both the businesses involved and consumers . . .
>
> [However] the sheer size and scope of this proposed merger—the latest among large media and entertainment companies—require us to take a close look at its impact on both the antitrust landscape and the marketplace of ideas. Indeed, by adding CBS' stable of television and radio interests to its already significant cable, film and publishing holdings, Viacom will dramatically increase its ability to influence the information delivered to consumers.[25]

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[23] Hearing on the Viacom/CBS Merger: Media Competition and Consolidation in the New Millennium Before the Senate Antitrust, Business Rights, and Competition Subcommittee, 106th Cong., Oct. 28,1999 (prepared opening statement of Sen. Michael DeWine).

[24] Amended Complaint ¶ 191, Viacom Int'l v. Tele-Communications, Inc., No. 93 Civ. 6658 (KC) (S.D.N.Y.). Viacom ended up acquiring Paramount.

[25] Statement by U.S. Senators Michael DeWine and Herbert Kohl, Chairman and Ranking Member of the Senate Subcommittee on Antitrust, Business Rights, and Competition, on the Proposed Viacom-CBS Merger, 106th Cong., Sept. 7, 1999, *available at* 1999 WL 2226549.

Echoing the concerns raised by Justice Frankfurter in his concurring opinion in *Associated Press v. United States*,[26] Senator DeWine stated in connection with the Viacom/CBS merger: "This is not a mere commodity we're talking about. It's something more fundamental—information in a democracy."[27]

More recently, the marketplace of ideas arose in AOL's acquisition of Time Warner. "In evaluating AOL Time Warner and, indeed, Internet and media competition generally, one of our primary concerns has been ensuring that content is delivered on a nondiscriminatory basis in order to promote the greatest possible diversity of expression and competition in the marketplace of ideas," Senators DeWine and Kohl wrote to FCC Chairman William Kennard and FTC Chairman Robert Pitofsky.[28] The two senators again were interested in this transaction's impact on the marketplace of ideas: "Is this merger the beginning of the end of the Internet as an effective counterweight to traditional media outlets," the two senators asked, "or is this just another step on the road to making the Internet a more useful and usable source of information?"[29]

Chairman Pitofsky likewise recently addressed these concerns in describing the interplay between antitrust analysis and diversity of expression. In an interview in the *Washington Post* about the AOL-Time Warner transaction, Chairman Pitofsky repeated Justice Frankfurter's concerns in *Associated Press*, stating:

> Antitrust is more than economics . . . . And I do believe if you have issues in the newspaper business, in book publishing, news generally, entertainment, I think you want to be more careful and thorough in your investigation than if the very same problems arose in cosmetics, or lumber, or coal mining. I mean, if somebody monopolizes the cosmetics fields, they're going to take money out of consumers' pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond what the wholesale price of the books might be.[30]

The parties in AOL/Time Warner eventually entered a consent decree, which was "intended to ensure that this new medium, characterized by

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[26] 326 U.S. at 27–28.

[27] Karl Taro Greenfeld, *The CBS-Viacom Merger*, TIME, Sept. 20, 1999, at 48, *available at* 1999 WL 25725375.

[28] Paige Albiniak, *Routing Favoritism*, BROADCASTING & CABLE, May 15, 2000, at 14, *available at* 2000 WL 12310124; *see also* Robert B. Reich, *AOL-Time Warner's Kingly Prerogative*, AM. PROSPECT, Feb. 14, 2000, at 56, *available at* 2000 WL 4739703.

[29] Peter S. Goodman & John Schwartz, *Deal Stirs Concerns About Internet Access*, WASH. POST, Jan. 11, 2000, at E1, *available at* 2000 WL 2279315.

[30] Alec Klein, *A Hard Look at Media Mergers*, WASH. POST, Nov. 29. 2000, at E1, *available at* 2000 WL 29918451 (quoting Robert Pitofsky, FTC Chairman).

openness, diversity and freedom, will not be closed down as a result of this merger."[31]

The issue of a media merger's impact on the marketplace of ideas will persist and even build, so long as media mergers continue. The issue then is whether a media merger's impact on the marketplace of ideas is an appropriate consideration for the federal antitrust agencies.

C. Approach If Marketplace of Ideas is Not Part of Antitrust Analysis

We argue in this article that the federal antitrust agencies should consider the implications of media mergers on the marketplace of ideas. In contrast to our proposed approach, the Department of Justice in its recent radio merger consent decrees evaluates the mergers' impact on advertising rates under the Horizontal Merger Guidelines and is silent on the marketplace of ideas. For example, in the matter of Clear Channel's acquisition of AMFM, the Department of Justice alleged in its complaint that the sale of radio advertising time was a relevant product, and higher advertising prices and lower quality of service to advertisers were the likely competitive effects.[32] The focus in this and other Department of Justice consent decrees is on advertising price competition as evaluated under 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.

The first question under the Horizontal Merger Guidelines for the radio mergers is: what is the relevant product or service? Is it the airing

[31] Statement by FTC Chairman Pitofsky, in Dec. 14, 2000, FTC Press Release, "FTC Approves AOL/Time Warner Merger with Conditions," *available at* http://www.ftc.gov/opa/2000/12/aol.htm. As part of the consent decree, which is effective for a five-year term, AOL Time Warner is (1) required to open its cable system to competitor Internet Service Providers (ISPs); (2) prohibited from interfering with the content passed along its bandwidth contracted for by ISPs not affiliated with AOL Time Warner; and (3) prevented from discriminating on the basis of affiliation in the transmission of content, or from entering into exclusive arrangements with other cable companies with respect to ISP services. *Id.*; *see also* Analysis of Proposed Consent Order to Aid Public Comment filed in *In the Matter of America Online, Inc., and Time Warner Inc.*, Docket No. C-3989, *available at* http://www.ftc.gov/os/2000/12/aolanalysis.pdf.

[32] Complaint for Injunctive Relief, United States v. Clear Channel Communications, Inc. and AMFM Inc., No. 00-2063 (D.D.C. filed Aug. 29, 2000) (complaint filed with consent decree), *available at* http://www.usdoj.gov/atr/cases/f6300/6329.htm; *see also* United States v. CBS Corp. and American Radio Sys. Corp., 63 Fed. Reg. 18,036 (1998) (proposed decree requiring divestiture of radio stations to cure anticompetitive effect in radio advertising market); United States v. Westinghouse Elec. Corp. and Infinity Broad. Corp., 61 Fed. Reg. 63,861 (1996) (same).

of radio programming that is "consumed" by the listening audience? Or is it the sale of advertising time—stated otherwise, the "sale" of the listening audience to advertisers? There is a potential tension here because more advertising (up to a point) is viewed as "good" by advertisers but as "bad" by listeners.

While there are a number of possible product markets, the Antitrust Division has focused in its radio consent decrees on the mergers' impact on advertisers and advertising rates. Under the Guidelines's 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. Would large numbers of advertisers shift to other media? Are there attributes of radio advertising that make other media poor substitutes to many advertisers? Can stations identify advertisers with strong radio preferences and selectively raise prices? These are some of the antitrust product market questions addressed in the radio merger consent decrees.[33]

Similarly, in assessing competitive effects, the Antitrust Division inquires whether advertisers will end up paying more or getting less after a radio merger.[34] Some of the issues addressed in these consent decrees include: Have advertisers lost the ability to play one of the merging company's radio stations off the other company's stations to get better advertising rates? Can advertisers buy around the merged entity to reach a particular audience demographic? Put another way, after the merger, can advertisers reach their target audience with equivalent efficiency without using the merged company's radio stations?

The Antitrust Division'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. This is in contrast to a recent newspaper merger, where the Antitrust Division challenged the merger in part based on the loss of editorial competition.[35]

The federal antitrust agencies in the future will likely evaluate under the Horizontal Merger Guidelines the media merger's impact on advertisers and the rates they pay for advertising. We propose that the federal

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[33] *See, e.g.*, Complaint for Injunctive Relief ¶¶ 11–14, United States v. Clear Channel Communications, Inc. and AMFM Inc., No. 00-2063 (D.D.C. filed Aug. 29, 2000), *available at* http://www.usdoj.gov/atr/cases/f6300/6329.htm.

[34] *Id.* ¶¶ 21–25.

[35] Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995), *aff'd*, 139 F.3d 1180 (8th Cir. 1998). We discuss later in this article this case and other newspaper mergers as support for our proposition.

antitrust agencies not confine their analyses to the merger's impact on advertising rates. Instead, the agencies should look beyond a media merger's impact on advertising rates and services and consider its impact on nonprice competition, which includes the marketplace of ideas. The next section outlines the support in the legislative history of the antitrust laws and case law for analyzing the marketplace of ideas under the antitrust laws.

II. ANTITRUST REVIEW OF THE MARKETPLACE OF IDEAS IS CONSISTENT WITH LEGISLATIVE HISTORY AND CASE LAW

A. LEGISLATIVE HISTORY OF THE SHERMAN AND CLAYTON ACTS SUPPORTS INCLUSION OF MARKETPLACE OF IDEAS IN ANTITRUST ANALYSIS

Three interrelated points from the legislative history of the Sherman and Clayton Acts support inclusion of the marketplace of ideas in the antitrust analysis of media mergers. First is the belief that, unless checked, industries may concentrate to such a degree that they could hamper our democracy. Second, if such concentration is not checked in its incipiency, more intrusive and undesirable governmental regulation may be required—which would be especially undesirable to the media industry. Third, the marketplace of ideas is subject to antitrust scrutiny. As the co-sponsor of the 1950 Amendments to the Clayton Act stated, communities clearly benefit from this competing "clash of opinion," and the antitrust laws are intended to preserve this form of competition.

1. *Sherman Act*

One concern in the debates leading to the passage of the Sherman Act[36] was that a monopolist, unless checked, could hamper our democracy. Senator Sherman described a monopoly as a "kingly prerogative" inconsistent with our democratic ideals, that "should be subject to the strong resistance of the State and national authorities."[37] If our democracy will "not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[38]

As later observed by the Supreme Court, the

> main cause which led to the legislation was the thought that it was required by the economic conditions of the times; that is, the vast

[36] 26 Stat. 209, 15 U.S.C. §§ 1–7.

[37] 21 CONG. REC. 2457 (1890).

[38] *Id.*

> accumulation of wealth in the hands of corporations and individuals, . . . and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.[39]

As Justice Harlan expressed it, "the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations. . . ."[40] This "economic slavery" was perceived as a threat to our democracy. Similarly, Judge Learned Hand noted in *Alcoa* that intertwined in the antitrust laws was "the belief that great industrial consolidations are inherently undesirable, regardless of their economic results."[41] The court, quoting Senator Sherman, found that Congress in 1890 intended to put an end to great aggregations of capital because of the helplessness of the individual before them:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.[42]

Congress's concerns then with trusts and monopolies were at their origins not rooted in technical analysis of possible efficiencies; rather, our democratic values were at the core of the debate.

2. *The Clayton Act as Amended by the Celler-Kefauver Amendments of 1950*

Mergers, including media mergers, are primarily reviewed under Section 7 of the Clayton Act[43] rather than the Sherman Act. The legislative history of the Celler-Kefauver Act, which amended Section 7, reveals concern about political as well as economic values.[44]

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[39] Standard Oil Co. v. United States, 221 U.S. 1, 50 (1910).

[40] *Id.* at 83 (Harlan, J., concurring and dissenting).

[41] United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945).

[42] *Id.* at 428 n.1 (quoting 21 CONG. REC. 2460).

[43] 15 U.S.C. § 18.

[44] Section 7's usefulness in preventing anticompetitive mergers was diminished as a result of a series of Supreme Court decisions beginning shortly after its enactment in 1914. In 1950, Congress amended Section 7 by passage of the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (codified at 15 U.S.C. §§ 18, 21).

Overall, the dominant themes pervading Congress's consideration of the Celler-Kefauver amendments were the perception of a "rising tide of economic concentration in the American economy"[45] and the belief "that increased economic concentration might threaten other fundamental values of a non-economic nature."[46] Moreover, the House debates show that Congress was concerned not only about industrial products, such as coal, steel, and oil. Significantly, Congress debated the marketplace of ideas, specifically the loss of editorial competition resulting from newspaper mergers.

> Mr. ELLSWORTH. I am thinking of the type of mergers that have taken place over the country, the merger of newspapers in cities or towns where there are two newspapers, and the competition is virtually destructive to each, and ultimately they reach an agreement whereby one will sell to the other. Would this act prevent any such thing?
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> Mr. CELLER. I think this act might be construed to prevent that kind of merger. In my humble opinion there should be preclusion of merging one newspaper with another where the effect would be only one newspaper. In any community there should be clash of opinion. We should not have opinion all one-sided. There should be both sides submitted to the populace. Any community formerly supplied with two papers would be at a disadvantage if they combined.[47]

In the 1950 debates, Senator Kefauver also spoke broadly about the dangers that economic power may have on our democracy, stating that "When [the American people] lose the power to direct their own economic welfare they also lose the means to direct their political future."[48] And the Senator referred to the threat this economic power poses to our democracy:

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.[49]

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[45] Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

[46] 4 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3611 (1978).

[47] House Debate, 81st Cong., 1st Sess., Aug. 15, 1949, *reprinted in* 4 KINTNER, *supra* note 46, at 3481.

[48] *Id.* at 3611.

[49] 96 CONG. REC. 16,452 (1950) (remarks of Sen. Kefauver).

More broadly, the idea that concentration brought about by mergers threatens political values was already well developed when Congress took up the Celler-Kefauver amendments. It was alluded to in the original Clayton Act debates.[50] It gained prominence in 1938, when President Franklin D. Roosevelt in his message to Congress advocated strengthening the antitrust laws because the alternatives were more intrusive.[51] And in 1948 the FTC issued a report declaring:

> No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest.[52]

B. Leading Supreme Court Cases on the Marketplace of Ideas

The debate on the antitrust treatment of the marketplace of ideas can be traced through the majority and dissenting opinions in two Supreme Court decisions decided nearly fifty years apart: *United States v. Associated Press*[53] and *Turner Broadcasting System v. FCC*.[54] We focus on these two Supreme Court cases because the majority and dissenting justices describe the types of concerns that the antitrust agencies should now address. But both the majority and dissenting justices believed, as do we, that the antitrust laws apply to private restraints that impede the free flow of information in the marketplace of ideas. Thus, the divergence between the majority and the dissent is not whether antitrust laws should apply to this marketplace. Instead, the divergences are in three areas: whether the government is remedying a problem in the marketplace of ideas (or creating a problem); the standard of proof for establishing the antitrust injury; and the scope of the relief needed. The essence of

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[50] The House Committee Report to the original Clayton Act stated, "[t]he concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions." H.R. Rep. No. 627, 63d Cong., at 19 (1914), *reprinted in* 2 Kintner, *supra* note 46, at 1089, 1099.

[51] The President said that the rise in private power threatened democratic institutions and could call forth a dramatic and matched response. Consequently, the "enforcement of free competition is the least regulation a business can expect." Message from President Franklin D. Roosevelt to the Congress Transmitting Recommendations Relative to the Strengthening and Enforcement of the Antitrust Laws, Apr. 29, 1939, *reprinted in* 4 Kintner, *supra* note 46, at 3408.

[52] Report of the Federal Trade Commission, The Merger Movement: A Summary Report (1948), *reprinted in* 4 Kintner, *supra* note 46, at 3456.

[53] 326 U.S. 1 (1945).

[54] 512 U.S. 622 (1994).

the Court's debate lies in how—not whether—the government should proceed into the thicket of the marketplace of ideas.

1. *Associated Press*

The seminal decision on the applicability of the antitrust laws on private restraints in the marketplace of ideas is *United States v. Associated Press,*[55] where the United States challenged under the Sherman Act the organization's restraints on new members joining the Associated Press (AP), and the restraints on AP members selling news to nonmembers. It was more difficult for newspapers that competed with AP-member newspapers to join the AP than newspapers that did not compete with an AP-member newspaper. But AP was not the sole news service in the United States, nor was it shown that access to AP was essential to a newspaper's growth. Instead, newspapers, such as the *New York Daily News,* had sizeable increases in their circulation before becoming AP members.[56] Moreover, the lower court found that AP did not monopolize or dominate the collection of, furnishing of, access to, or transmission of news.[57] Instead, at least two significant news collection rivals performed functions similar to the AP.[58] And many newspapers (more than 300 of the 1,274 members of AP) also subscribed to these rival news collection agencies.[59]

The heart of the government's case was that AP had, by concerted action, set up a system of bylaws that prohibited all AP members from selling news to nonmembers, and that granted each member powers to block its nonmember competitors from membership. A divided three-judge district court panel held that the bylaws in their current form were unlawful, and entered an injunction.[60] In affirming, the Supreme Court majority did not rest its decision on microeconomic market definitions and on demand substitutability issues. Nor did the majority of justices jump through the typical antitrust hoops of defining a relevant market, determining market share and the restraints' impact on price, and examining issues of entry or expansion by the other news wire services. Rather, the majority was satisfied that AP was sufficiently large to impact the marketplace of ideas, in that it was "a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed

[55] 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd,* 326 U.S. 1 (1945).

[56] *Associated Press,* 52 F. Supp. at 367.

[57] *Associated Press,* 326 U.S. at 42.

[58] *Associated Press,* 52 F. Supp. at 366.

[59] *Id.* at 367.

[60] *Id.* at 375.

to be of prime consequence."[61] The fact "that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act."[62]

Second, for both the lower court and Supreme Court, this case was not about a competitive restraint that affected the price of ordinary commodities, such as peanuts or potatoes. It was about who we are as a nation. Justice Frankfurter brought home this sentiment in his concurring opinion:

> [While a commercial enterprise, AP] has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.[63]

In contrast, the dissenting justices were alarmed by the prospect that the antitrust laws might be used for political meddling into the press. First, Justice Roberts questioned whether the news could ever be monopolized—as "the events happening in the world are as open to all men as the air or the sunlight" so "[s]urely the supply of reporters is not less difficult to monopolize than the events to be reported."[64]

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[61] *Id.* at 18 (quoting 52 F. Supp. at 373 (internal quotations omitted)). Judge Hand noted that 81 percent of the morning newspapers of the United States and 59 percent of the evening papers were members of AP. *Id.* at 366.

[62] *Associated Press*, 326 U.S. at 17.

[63] *Id.* at 27–28 (Frankfurter, J., concurring). Moreover, writing for the majority, Justice Black found that applying the antitrust laws to the media did not violate the First Amendment—rather it comports with the obligation of the United States under that Amendment:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

Id. at 20.

[64] *Id.* at 43 (Roberts, J., dissenting).

Second, the dissenting justices were disturbed by governmental intervention in the marketplace of ideas, believing that the majority's approach would likely cause more damage to the First Amendment than any private restraint by AP. Justice Murphy noted this was the first time "the Sherman Act has been used as a vehicle for affirmative intervention by the Government in the realm of dissemination of information."[65] Such intrusion, the dissenting justices feared, would be "the first step in the shackling of the press."[66] While no higher standard of proof is required for an antitrust violation by the media, Justice Murphy urged the Court to be "particularly vigilant"—given the implications of the government regulating the press.[67] Before the government is entitled "to enjoin a combination or conspiracy alleged to be in restraint of news dissemination it must be shown by competent evidence that such combination or conspiracy has in fact resulted in restraints or will inevitably produce actual restraints in the future."[68]

In *Associated Press,* the majority and dissenting justices believed, as do we, that the antitrust laws apply to private restraints that impede the free flow of information in the marketplace of ideas. The debate concerned the standard of proof for establishing the antitrust injury and the scope of the relief needed.

2. *Turner Broadcasting*

The debate between the majority and dissenting justices in *Associated Press* resurfaced forty-nine years later, in *Turner Broadcasting System v. FCC,*[69] concerning the constitutionality of the "must-carry" provisions of the 1992 Cable Act.[70] The issue in *Turner* did not directly involve the

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[65] *Id.* at 51 (Murphy, J., dissenting).

[66] *Id.* at 48 (Roberts, J., dissenting).

[67] *Id.* at 52–53 (Murphy, J., dissenting).

[68] *Id.*

[69] 512 U.S. 622 (1994).

[70] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act). In enacting the 1992 Cable Act, the Senate was concerned about the dramatic increase in concentration of the cable media:

> By 1990, the five largest cable operators served nearly half the country's cable subscribers. S. REP. at 32. Witnesses testified that as a result of this increase in concentration "the large MSOs [multiple system operators] have the market power to determine what programming services can 'make it' on cable." S. REP. at 33, 1992 U.S.C.C.A.N. at 1167. Based upon this and related evidence, the Congress found that "[t]he potential effects of . . . concentration [in the cable industry] are barriers to entry for new programmers and a reduction in the number of media voices available to consumers." 47 U.S.C. § 521(a)(4). It also found that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." *Id.* § 521(a)(6).

antitrust laws. Rather, the issue was whether the must-carry provisions of the 1992 Cable Act passed constitutional muster. But the same antitrust concerns as in *Associated Press* about the marketplace of ideas surfaced: the standard of proof for establishing the antitrust injury, and the scope of the relief needed.

At issue in *Turner* was whether a transmitter of media (the cable system operator) that is vertically integrated with the content provider (a studio) could use its market power to exclude rival media. A cable system operator can select the stations it will carry on its cable system. Congress passed the 1992 Cable Act, in part, to address concerns that cable system operators would favor their own programming—e.g., that Time Warner cable would carry programs and movies created by Warner Bros. studios—rather than carry local independent programs. The Act requires a cable system with more than 300 subscribers and twelve channels to set aside up to one-third of its channels for local commercial broadcast stations that request carriage.[71] The debate before the Supreme Court in *Turner* was in part whether the rival (non-integrated) commercial broadcasters were sufficiently disadvantaged by the vertically integrated cable owners, and whether the marketplace of ideas would diminish as a result. The Court also considered whether cable systems (apart from their incentives to favor their own content) would have any incentive to carry a competing communications medium.

The plurality in *Turner* remanded for more fact finding, namely, whether the threat to the commercial broadcasters was real.[72] This entailed additional inquiry: first, whether many broadcast stations would be dropped or repositioned in the absence of the statute; and second, whether the affected broadcasters, if dropped, would suffer financial difficulties as a result.[73] After eighteen months of additional fact finding, the three-judge district court, in a divided opinion, granted summary judgment for the FCC and other federal defendants.[74] The district court found that the expanded record contained substantial evidence to support Congress's predictive judgment that the must-carry provisions further important governmental interests in preserving cable carriage of local broadcast stations, and that the provisions are narrowly tailored to promote those interests. The district court concluded that the must-

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Time Warner Entm't v. United States, 211 F.3d 1313, 1319–20 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001).

[71] 47 U.S.C. § 534(b)(1)(B).

[72] *Turner*, 512 U.S. at 668.

[73] *Id.* at 667.

[74] 819 F. Supp. 32, 51 (D.D.C. 1993).

carry provisions were content-neutral "industry specific antitrust and fair trade" legislation narrowly tailored to preserve local broadcasting beset by several things: monopoly power in most cable systems, growing concentration in the cable industry, and concomitant risks of programming decisions driven by anticompetitive policies.[75] The Supreme Court affirmed in *Turner II*.[76] Justice Breyer, who cast the deciding fifth vote, affirmed solely on First Amendment diversity principles, and did not join the anticompetitive rationale of the remaining four affirming justices.[77]

Both the majority and dissenting justices recognized that the antitrust laws can be applied to the marketplace of ideas. The Court in *Turner*, as in *Associated Press*, concluded that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[78] This follows from the Court's earlier opinions stating that the First Amendment confers "no right" to broadcasters "to an unconditional monopoly of a scarce resource."[79] In a medium "not open to all," there is no sanctuary in the First Amendment "for unlimited private censorship."[80] The dissenting justices agreed, stating, "when separated from anticompetitive conduct, this interest in preserving a 'multiplicity of broadcast programming sources' becomes poorly defined."[81]

But the debate in *Turner*, as in *Associated Press*, hinged on the standard of proof for an antitrust injury in this marketplace of ideas. A plurality of justices were concerned that the cable companies would use their "bottleneck monopoly power" to exclude local commercial television stations from their cable networks.[82] The 1992 Cable Act sought to eliminate restraints on fair competition in the cable industry. By owning "the essential pathway for cable speech"—namely, the cable hook-ups—a cable operator could prevent its subscribers from obtaining access to programming it chose to exclude.[83] By virtue of their control over these

[75] *Id.* at 40, 45–47.

[76] Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997) (*Turner II*).

[77] *Id.* at 225–26.

[78] *Turner*, 512 U.S. at 663.

[79] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391 (1969).

[80] *Id.* at 392.

[81] *Turner II*, 520 U.S. at 232 (O'Connor, Scalia, Thomas & Ginsburg, JJ., dissenting); *see also Turner*, 512 U.S. at 682–83 (O'Connor, Scalia & Ginsburg, JJ., concurring in part and dissenting in part).

[82] *Turner*, 512 U.S. at 661.

[83] *Id.* at 656. Evidence indicated that before 1984 cable operators had equity interests in 38 percent of cable programming networks. By the late 1980s, 64 percent of new cable programmers were held in vertical ownership. *Turner II*, 520 U.S. at 198. By 1994, the 10 largest multiple system operators controlled 63 percent of the nation's cable systems. *Id.*

facilities, cable operators were in a unique position to exercise control over the dissemination of ideas. Cable operators, "unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."[84] Justice Stevens compared the must-carry mechanism to the relief that might be appropriate for a threatened violation of the antitrust laws.[85]

In upholding the must-carry provisions, the plurality did not focus on market definition. Five justices observed that broadcast television "is but one of many means for communication."[86] Instead of traditional antitrust market definition, these justices emphasized the importance of broadcast television as a source of information for Americans: "by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression."[87]

The dissenting justices in *Turner*, as in the dissent forty-nine years earlier in *Associated Press*, seemed more concerned about the potential of harm to the First Amendment by governmental regulation, and the requisite proof required before government intervention. For the dissent in both *Turner* and *Associated Press*, government power, rather than private power, poses the main threat to the First Amendment and the marketplace of ideas.[88] Thus, even if some commercial broadcasters would be adversely affected by the cable operators, the 1992 Cable Act, in the dissenters' view, was impermissibly overbroad. These justices recognized

at 206. And by 1994, MSOs serving about 70 percent of the nation's cable subscribers held equity interests in cable programmers. *Id.* at 207. The dissenting justices did not dispute these facts. *Id.* at 236.

[84] *Turner*, 512 U.S. at 656.

[85] *Id.* at 672 (Stevens, J., concurring). But as *Turner II* made clear, the long-standing federal policy of preserving a multiplicity of broadcast outlets applies to cases even where the conduct that threatens it is not motivated by anticompetitive animus or does not rise to the level of an antitrust violation. *Turner II*, 520 U.S. at 194 (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984); United States v. Midwest Video Corp., 406 U.S. 649, 665 (1972) (plurality opinion) (FCC regulations "were . . . avowedly designed to guard broadcast services from being undermined by unregulated [cable] growth"); National Broadcasting Co. v. United States, 319 U.S. 190, 223–24 (1943) ("'While many of the network practices raise serious questions under the antitrust laws, . . . [i]t is not [the FCC's] function to apply the antitrust laws as such'")).

[86] *Turner II*, 520 U.S. at 194.

[87] *Id.* at 194. The *Turner* plurality noted that 40 percent of American households continue to rely on over-the-air signals for television programming. Despite the growing importance of cable television and alternative technologies, "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *Turner Broadcasting Sys.*, 512 U.S. at 663 (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968)).

[88] *Turner*, 512 U.S. at 685 (O'Connor, Scalia, Ginsburg & Thomas JJ., concurring in part and dissenting in part).

that cable operators are indeed monopolists and viewers' preferences will not always prevail; but to safeguard the cable operators' First Amendment rights, relief must be tailored to those particular showings of an actual antitrust injury. Thus, relief would have been limited to only those commercial broadcasters "that are put in danger of bankruptcy, without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event."[89]

C. OTHER EXAMPLES WHERE MARKETPLACE OF IDEAS IS PART OF ANTITRUST ANALYSIS

Beyond the Supreme Court's *Associated Press* and *Turner* decisions, a number of lower courts have considered the impact of a restraint or merger on the marketplace of ideas. Examples include the AT&T break-up and several newspaper mergers and Joint Operating Agreements (JOAs), which are discussed below.

1. *Break-Up of the Bell System*

The marketplace of ideas arose as an issue in the break-up of the Bell System, one of the milestones of antitrust enforcement. The complaint in *AT&T*, filed in 1974, alleged that the Bell System had used its control over local telephone service to monopolize long-distance service and the manufacture of telecommunications equipment.[90] Defendants countered that their actions had been sanctioned by the FCC and state law. During the trial, the parties negotiated a proposed decree. The decree required AT&T to divest its local regional Bell telephone operating companies (BOCs), required the BOCs to provide interconnection on a nondiscriminatory basis, barred the BOCs from providing any product or service other than local telephone service, and freed AT&T from the constraints of a 1956 decree. With certain modifications, the federal district court found that the proposed consent decree was within the reaches of the public interest.[91]

Before the consent decree, the Bell System simply distributed information provided by others; it was not involved in the business of generating

[89] *Id.* at 683 (O'Connor, Scalia, Ginsburg, JJ., concurring in part and dissenting in part). In *Turner II*, the four dissenting justices noted that Congress had placed limits upon the number of cable channels that a cable operator can use for its own affiliated programming. 520 U.S. at 252 (citing 47 U.S.C. § 533(f)(1)(B)). These limits addressed for the dissenting justices any anticompetitive concerns about the vertically integrated cable operator's monopoly.

[90] For a brief history of the 1974 case and earlier government cases, see PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW § 4.4 (2d ed. 1999).

[91] United States v. AT&T, 552 F. Supp. 131, 226–34 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

its own information. The district court was concerned that after the consent decree, AT&T could use its market power to stifle the marketplace of ideas via the electronic publishing industry, which in the early 1980s, was "still in a fragile state of experimentation and growth and . . . electronic information can still most efficiently and most economically be distributed over AT&T's long distance network."[92] The district court felt that the electronic publishing sector held "promise to become an important provider of information—such as news, entertainment, and advertising—in competition with the traditional print, television, and radio media"; indeed, as Judge Greene observed, "it has the potential, in time, for actually replacing some of these methods of disseminating information."[93]

But if, after the consent decree was entered, AT&T could both generate and transmit information, the district court opined,

> there would be a substantial risk not only that it would stifle the efforts of other electronic publishers but that it would acquire a substantial monopoly over the generation of news in the more general sense. Such a development would strike at a principle which lies at the heart of the First Amendment: that the American people are entitled to a diversity of sources of information.[94]

To address the court's concerns, and prevent AT&T from extending its monopoly to the dissemination of news and information, the district court required as a condition of its approval of the proposed decree, that the decree would be modified to preclude AT&T from entering the field of electronic publishing until the risk of its domination of that field abated.[95]

In reaching this determination and effectively forcing the parties to modify the consent decree, Judge Greene noted that the policy of enhancing the diversity of the marketplace of ideas was appropriate in the context of antitrust regulation: "as the Supreme Court has recognized, in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws."[96] Also in reaching this determination, the district court evaluated the marketplace of ideas—not under the microeconomic narrowest-product-market

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[92] *Id.* at 223. The court defined electronic publishing as information disseminated to an unaffiliated person through some electronic means, such as pay television and electronic publications. *Id.* at 181 & n.208.

[93] *Id.* at 223.

[94] *Id.* at 224.

[95] *Id.* at 180–81, 185–86.

[96] *Id.* at 184 (citing FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800 n.18 (1978)).

approach—but in the context of general trends in concentration in the marketplace of ideas. From this vantage point, Judge Greene observed the "unremitting trend toward concentration in the ownership and control of the media" since the 1950s:[97]

> Diversity has disappeared in many areas; newspapers have gone out of business; others have merged; and much of the flow of news and editorial opinion appears more and more to be controlled and shaped by the three television networks and a handful of news magazines and metropolitan newspapers.
>
> This concentration presents obvious dangers even today. Unless care is taken, both the concentration and the attendant dangers will be significantly increased by the new technologies. Indeed, it is not at all inconceivable that electronic publishing, with its speed and convenience will eventually overshadow the more traditional news media, and that a single electronic publisher would acquire substantial control over the provision of news in large parts of the United States.[98]

It is unclear whether Judge Greene would have reached this result under the current Horizontal Merger Guidelines, which emphasize price competition in narrowly defined markets.

2. *Editorial Competition Between Newspapers*

Courts also have analyzed the marketplace of ideas under the antitrust laws in the context of restraints or mergers involving local daily newspapers.

In newspaper mergers, the courts and antitrust agencies routinely consider a merger's impact on editorial competition (which is akin to the marketplace of ideas). First Amendment principles come into play, as the Supreme Court has found that newspapers are "essential" to the effective functioning of our political system.[99] A "vigorous and dauntless press" for the Supreme Court was "a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society."[100] As Justice Clark explained, "[B]y interpreting to the citizen the policies of his government and vigilantly scrutinizing the official conduct of those who administer the state, an independent press

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[97] 552 F. Supp. at 184.

[98] *Id.* The district court concluded that the restriction on electronic publishing "should only remain in effect for the period necessary to establish conditions conducive to free and fair competition" and announced its intention to remove the prohibition, upon motion, seven years from the entry of the decree. *Id.* at 186. The restriction was in fact lifted at the end of that seven-year period. *See* United States v. Western Elec. Co., 1989-2 Trade Cas. (CCH) ¶ 68,673 (D.D.C. July 28, 1989).

[99] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 602 (1953).

[100] *Id.*

stimulates free discussion and focuses public opinion on issues and officials as a potent check on arbitrary action or abuse."[101]

Given newspapers' essential role in the marketplace of ideas (and our democratic system), it is not surprising that the Court has analyzed the editorial competition among newspapers under the antitrust laws. This editorial competition is viewed as a form of economic competition. Newspapers ordinarily derive their revenue from the sale of advertising space and the sale of the newspaper itself. But the commercial success of a newspaper depends on the success of the news and editorial operations.[102] "The quality, circulation, and advertising revenues of a newspaper are interrelated."[103] The more attractive the newspaper is to its targeted audience, the more readers it attains. The more readers it attains, the better is the newspaper's ability to attract advertisers. Consequently, in describing the daily newspaper business, the Supreme Court stated, "[t]here can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce."[104]

The importance of editorial competition, and its economic significance, recently arose in a decision involving the termination of a JOA.[105]

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[101] *Id.* Judge Learned Hand shared this view, noting that a newspaper "serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible." *Associated Press*, 52 F. Supp. at 372.

[102] United States v. Citizen Publ'g Co., 280 F. Supp. 978, 985 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969).

[103] *Id.*

[104] Lorain Journal Co. v. United States, 342 U.S. 143, 151 (1951) (citing Associated Press v. United States, 326 U.S. 1, 14 (1945), and Associated Press v. National Labor Relations Bd., 301 U.S. 103 (1937)). The *Lorain Journal* refused to sell advertising space to any business that bought time on a new radio station in a nearby town. The Supreme Court held that this refusal to deal constituted an attempt to monopolize. The Court noted that the defendant's refusal to accept advertising was aimed at preserving the local newspaper's "substantial monopoly" in the mass dissemination of local and national news. *Lorain Journal*, 342 U.S. at 147.

Justice Douglas also expressed his deep concern regarding the effects of newspaper monopolies:

> Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude—and to make money.
>
> The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse . . . .

WILLIAM O. DOUGLAS, THE GREAT RIGHTS 124–25, 127 (E. Cahn ed., 1963) (quoted in Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 253 (1974)).

[105] A JOA is a Faustian bargain whereby the newspapers obtain a limited immunity from the antitrust laws under the Newspaper Preservation Act (NPA), 15 U.S.C. § 1801 *et seq.*

The federal district court held, and the Ninth Circuit did not disagree, that the editorial competition in a JOA is cognizable under the antitrust laws, and its elimination would "deprive newspaper readers of free and open competition in the sale of daily newspapers and their differing editorial and reportorial voices. . ."[106] The district court was not persuaded that this competition between editorial voices "involves some 'non-economic social goal' rather than trade or commerce."[107] Rather, the district court found that "trade or commerce" within the meaning of the antitrust laws generally comprises "commercial competition in the marketing of goods and services" and thus includes editorial competition.[108]

This exemption enables the local daily newspapers to combine business functions (such as advertising, sales, printing, and distribution). But, in exchange for this exemption, the newspapers must maintain separate editorial and reporting staffs and produce separate newspapers (except in some cases, where the newspapers may produce a joint newspaper on Sundays). The purpose of this limited antitrust exemption is to preserve the editorial competition between local daily newspapers when one of the newspapers might otherwise exit the market. 15 U.S.C. § 1801 (NPA's preamble states "In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community or metropolitan area where a joint operating agreement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.") Thus, "a primary intent of the Newspaper Preservation Act was to promote the diversity of editorial voices among newspapers." Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 480 (9th Cir. 1983); *see also* 116 CONG. REC. 23,156 (1970) (Congressman Buchanan stating, "[t]he Newspaper Preservation Act is, in my judgment, urgently needed to assure the separate news and editorial voices in our Nation's newspapers. In this important sense it will preserve, rather than adversely affect, free competition.").

[106] Hawaii v. Gannett Pac. Corp., 99 F. Supp.2d 1241, 1249–50 (D. Haw.), *aff'd*, 203 F.3d 832 (9th Cir. 1999). In addition to depriving newspaper readers of free and open competition in the sale of daily newspapers and their differing editorial and reportorial voices, the termination of the JOA and closing of one of the newspapers would deprive advertisers of free and open competition in the market for the differentiated advertising audiences represented by the two local newspapers, and would deprive creators of news, editorial, and entertainment content of free and open competition for their output. *Id.* at 1250.

[107] *Id.* at 1249.

[108] *Id.* (citing Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)).

In contrast to *Gannett*, Judge Vaughn Walker in a JOA termination case involving the *San Francisco Chronicle* and *Examiner* gave little attention to its impact on the marketplace of ideas. Reilly v. Hearst Corp., 107 F. Supp.2d 1192 (N.D. Cal. 2000). The media industry, in his view, did not lend itself well to traditional antitrust analysis. Judge Walker believed that under the "old paradigm," a merger between San Francisco's two largest daily newspapers might well have posed an unquestionable threat of undue concentration. But that threat is less clear today. *Id.* at 1201. A new paradigm exists today where the Internet, television, radio, direct-mail and free dailies have the "actual and potential ability" to deprive the merging newspapers a significant level of business. *Id.* at 1200–01. Whether these alternative media can sufficiently replace the lost editorial competition between the historic newspaper rivals was left unanswered. This is surprising—especially given Judge Walker's reference to some questionable goings-on that came to light during the trial.

Recognizing the important role newspapers play in the marketplace of ideas and that editorial competition is a form of economic competition, courts have enjoined or ordered the unwinding of transactions in which such editorial competition may be substantially lessened.[109] As in any antitrust merger analysis, the courts define relevant markets. For newspapers, the courts typically have viewed the editorial competition and advertising competition among local daily newspapers as two relevant product markets.[110] These courts have recognized that news comes from many sources: newspapers, television, radio, magazines, and more recently the Internet. These sources all arguably compete for the public's attention. But these courts have found that both the format and nature of information in local daily newspapers distinguish them from news and entertainment provided by other sources. Daily local newspapers provide a "unique package" of information to their readers. National newspapers lack the local news and advertising. Radio and television are primarily dedicated to entertainment, and their news content lacks the breadth and depth of daily newspapers. After recognizing editorial competition between daily local newspapers as a relevant and distinct antitrust product market, the courts then have enjoined acquisitions (or undone completed transactions) that threaten to substantially lessen that competition.[111]

D. Conclusions from Legislative History and Case Law

Thus, the legislative history of the antitrust laws, significant Supreme Court decisions, and case law support the inclusion of the marketplace of ideas in the antitrust analysis of media mergers. The legislative history

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During trial, evidence was presented that senior Hearst executives sought to suppress critical news stories about the transaction. *See* Reynolds Holding, *Hearst Insisted Examiner Hold Story on Chronicle*, S.F. CHRONICLE, June 9, 2000, at A1, *available at* 2000 WL 6484201. And the court found that Hearst offered "to 'horse trade' favorable editorial coverage of the mayor in return for [Mayor] Brown's support" of Hearst's acquisition of its traditional rival *The San Francisco Chronicle*. *Reilly*, 107 F. Supp.2d at 1207. How these other media under Judge Walker's new paradigm will prevent such diminution in quality (from self-censorship and horse trading) is not addressed.

[109] *See* Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995), *aff'd*, 139 F.3d 1180 (8th Cir. 1998) (ordering rescission of asset purchase agreement); United States v. Citizen Publ'g Co., 280 F. Supp. 978 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969) (ordering divestiture of acquired newspaper and modification of JOA); United States v. Times Mirror Co., 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968) (ordering complete divestiture).

[110] *Community Publishers*, 892 F. Supp at 1156–57 (collecting cases); *see also* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 610 (1953) ("[E]very newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space.") (case concerned solely advertising market).

[111] *See Community Publishers*, 892 F. Supp. at 1179; *Citizen Publ'g*, 280 F. Supp. at 993–94; *Times Mirror*, 274 F. Supp. at 623–24.

and case law highlight three important themes: First, the antitrust laws apply in preserving the "clash of opinion"[112] in the marketplace of ideas. The Court, in *Associated Press* and subsequent cases, has made clear that application of the antitrust laws to newspapers (as well as other media) "is not only consistent with, but is actually supportive of the values underlying, the First Amendment."[113]

A second theme is that the courts have looked beyond microeconomic market definitions, and, in particular, beyond an advertising product market. The courts mainly note the size of the defendants, the number of media outlets defendants reach, and the restraints' presumptive impact on the marketplace of ideas. But the courts typically do not define relevant markets and assign market shares. The exception would be the newspaper cases, where the courts have overwhelmingly defined a relevant product market as the editorial competition among local daily newspapers.

A third theme is that the courts have not outlined any bright-line antitrust standards for the marketplace of ideas. Judge Learned Hand in *Associated Press* raised the complexities of these issues, but he specifically declined to resolve them:

> We need not therefore say how important the control of news in any supposititious case must be in order to demand relief; it is enough that in the case at bar AP is a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of prime consequence. Wherever may be the vanishing point of public concern with any particular source of information, that point is far beyond this service.[114]

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[112] House Debate, 81st Cong., 1st Sess., Aug. 15, 1949, *reprinted in* 4 KINTNER, *supra* note 46, at 3481 (statement of Rep. Celler).

[113] FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 800 n.18 (1978) (citing Associated Press v. United States, 326 U.S. 1 (1945); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Citizen Publ'g Co. v. United States, 394 U.S. 131, 139–40 (1969); United States v. Radio Corp. of Am., 358 U.S. 334, 351–52 (1959)). But since the FCC in *National Citizens* relied "primarily on First Amendment rather than antitrust considerations," the fact that the antitrust laws were fully applicable to newspapers was not a complete answer to the issues in that case. *National Citizens*, 436 U.S. at 800 n.18. The marketplace of ideas also arose in other media industries, such as motion pictures. In *United States v. Paramount Pictures*, 334 U.S. 131 (1948), the Court had "no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." *Id.* at 166. The Court stated that First Amendment issue "would be focused here if we had any question concerning monopoly in the production of moving pictures." *Id.* But because monopoly in production was eliminated as an issue, the Court did not have to include the marketplace of ideas in its analysis. *Id.*

[114] *Associated Press*, 52 F. Supp. at 373.

As the majority and dissenting opinions in *Associated Press* and *Turner* reflect, the ongoing debate is not whether the marketplace of ideas should be included in the analysis. The larger issues are what should be the appropriate standard of proof and scope of relief.

III. PROS AND CONS OF INCLUDING THE MARKETPLACE OF IDEAS

As the previous section discussed, the case law and legislative history support including the marketplace of ideas in the antitrust analysis of media industries. But should the federal antitrust agencies in reviewing the current crop of media mergers consider the merger's impact on the marketplace of ideas? This section weighs the pros and cons of including the marketplace of ideas as part of the antitrust analysis. The main purpose of the section is not to declare a winner in this debate. As this section outlines, there are legitimate concerns about analyzing the marketplace of ideas under the antitrust laws. For example, the marketplace of ideas is difficult to quantify. Also, governmental intrusion in media mergers may undermine this marketplace. We raise these concerns—not to shoot them down like ducks at an arcade—but to emphasize that any governmental antitrust review should incorporate these concerns in evaluating a media merger.

A. SIX CONCERNS WITH MAKING THE MARKETPLACE OF IDEAS PART OF ANTITRUST ANALYSIS

Legitimate concerns arise if the marketplace of ideas is included in antitrust analysis. We identify six such concerns.

One concern is that the marketplace of ideas is not economic competition under the antitrust laws. To the extent that it seeks to protect "diversity," it reflects non-economic political and social policy, which may be better left to Congress and the FCC. For those with a libertarian bent, the "marketplace of ideas" analysis is nothing more than the government's shackling its values and political agenda onto the press. Some critics operate under the belief that the federal antitrust agencies are merely the pawns of well-connected political groups that disrupt efficiency-enhancing transactions,[115] while other observers worry that the government, even with good intentions, will cause more harm than good

[115] As one critic surmised, "[b]ecause they respond to the demands of competitors, labor unions, and other well-organized groups having a stake in stopping mergers that promise to increase economic efficiency, the antitrust authorities all too often succeed, not in keeping prices from rising, but in keeping them from falling." William Shughart II, *The Government's War on Mergers: The Fatal Conceit of Antitrust Policy,* Cato Policy Analysis No. 323 (Oct. 22, 1998).

to free speech. This was of particular concern to the dissenting justices in *Associated Press.* Unlike the majority, they felt that the nation's experience in World War II dictated caution in this arena. The tragic history in Europe demonstrated how "despotic governments may interfere with the press and other means of communication in their efforts to corrupt public opinion and to destroy individual freedom."[116]

A second concern is that this marketplace of ideas is not readily susceptible to antitrust analysis under the Horizontal Merger Guidelines. Initially, one defines the relevant market under the Horizontal Merger Guidelines using price. One starts, under Section 1.11 of the Horizontal Merger Guidelines, by determining the customers' likely response to a "small but significant and nontransitory increase in price" for the merging parties' narrowly defined products. Determining a "small but significant and nontransitory increase in price" would be problematic in the marketplace of ideas. Many media outlets, such as radio and network television, do not have a readily definable price for their news. When one watches the evening network news, one "pays" a nominal amount—the depreciation of one's television set and the electricity required. But one does not directly pay.[117] Also, how would one compare the disparate prices for those media outlets with a fee: the monthly Internet fee versus cable versus a newspaper's newsstand price versus a magazine subscription?

Moreover, the market definition analysis under the Horizontal Merger Guidelines typically focuses on the degree of substitutability among products. A legitimate concern, then, is how does one measure the degree of substitutability in a broader marketplace of ideas? What is prized in the marketplace of ideas is diversity among differentiated products rather than substitutability. The focus is not only on consumers' shifting between ABC and CBS evening national news as the primary news source, but having many independent voices supplying the marketplace with

[116] *Associated Press,* 326 U.S. at 51–52 (Murphy, J., dissenting).

[117] One may indirectly pay via prices affected by the advertised products. For example, the consumer may indirectly pay for a program by purchasing the advertised product, or other products the prices of which are affected by the prices of advertised products. But is advertising competition a good proxy for the marketplace of ideas? No doubt there is some relationship between the two: a highly rated program, such as *60 Minutes,* may command higher advertising rates. But advertising rates, which are determined in part by the ability to reach a targeted demographic group, may be influenced by competition outside the marketplace of ideas, such as direct mail and billboards. Thus, an acquisition may substantially lessen competition on the marketplace of ideas, but not advertising rates, and vice versa.

Also, if all the broadcast networks combined their news operations, but each determined its own advertising rates, the nightly news might still be aired for free, and the ad rates might remain unchanged, but the nonprice editorial competition would be substantially lessened.

news. In the marketplace of ideas, it may be more harmful to lose a non-substitutable alternative than it would be if two close substitutes merge.

Also, how could one assign market shares objectively? Should an influential news source with a limited but powerful readership be assigned a greater market share in the marketplace of ideas than *Entertainment Tonight*? There is a risk that the government will inject its values and preferences into the media by valuing certain programming more than others.

A third concern is the *General Dynamics* problem. In *United States v. General Dynamics Corp.*, the Court recognized that "[e]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete."[118] Only in examining "its structure, history and probable future" does one provide "the appropriate setting for judging the probable anticompetitive effect of the merger."[119] Even if one could define markets and assign market shares in the marketplace of ideas, just how reliable would these historic market shares be under dynamic market conditions? Historic market shares arguably are meaningless in the dynamic marketplace of ideas. With the rapid proliferation and evolution of the Internet and satellite television, the historical market shares of the old print and broadcast media may overstate the media's future competitive significance.

A fourth and related concern is determining the acceptable thresholds of market concentration in the marketplace of ideas. Should the concentration levels mirror the levels outlined in Section 1.5 of the Horizontal Merger Guidelines? Or should the threshold concentration levels be higher (given the concerns of governmental intrusion in the marketplace of ideas) or lower (given the concerns of restraints on information affecting the stability of democracy)? The D.C. Circuit recently raised this issue with respect to the FCC's cable ownership restriction:

> We have some concern how far such a theory may be pressed against First Amendment norms. Everything else being equal, each additional "voice" may be said to enhance diversity. And in this special context, every additional splintering of the cable industry increases the number of combinations of companies whose acceptance would in the aggregate lay the foundations for a programmer's viability. But at some point, surely, the marginal value of such an increment in "diversity" would not qualify as an "important" governmental interest. Is moving from 100 possible combinations to 101 "important"? It is not clear to us how a court could determine the point where gaining such an increment

[118] 415 U.S. 486, 501 (1974).

[119] *Id.* at 498 (quoting Brown Shoe Co. v. United States, 370 U.S. at 322 n.38); *see also* Horizontal Merger Guidelines, *supra* note 4, § 1.521.

> is no longer important. And it would be odd to discover that although a newspaper that is the only general daily in a metropolitan area cannot be subjected to a right of reply, it could in the name of diversity be forced to self-divide. Certainly the Supreme Court has not gone so far.[120]

A fifth concern is that the marketplace of ideas left alone will do a better job in diversifying itself than would federal or state authorities. Restrictions on ownership may actually stymie diversity rather than promote it. Peter Steiner and others have argued that a monopolist may more likely offer a broader array of programming than if radio outlets were independently owned.[121] For example, if the network news operations were combined under a joint venture, the venture could then expend resources on covering a broader array of topics and areas. Thus, four news bureaus in Washington, D.C., would not all cover the President.[122] Instead, money could be invested in news bureaus in other regions of the world. A related argument is that by denying media outlets the efficiencies of combining their operations, the ownership restrictions may increase the costs of doing business, hamper growth, limit funds to invest in new and diverse programming, and ultimately lead to the demise of smaller media outlets.[123] Thus, this concentration may be inevitable as firms seek to capture efficiencies.

A sixth concern is that a larger corporation may actually be well positioned to combat government censorship and support First Amendment freedoms.[124] Smaller companies may be an ineffective counterweight to government censorship—lacking the deep financial pockets and might of *The New York Times* and *Washington Post*.[125]

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[120] Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1135 (D.C. Cir. 2001) (citation omitted).

[121] *See, e.g.*, Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1017 & n.56 (1996) (citing Peter O. Steiner, *Program Patterns and Preferences, and the Workability Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 212-17 (1952)).

[122] But note that the pooling of resources could also lead to a suboptimal level of investment and other serious problems, as apparently happened in the November 2000 presidential election with Voter News Service, a consortium set up by five networks and AP to tabulate election results through exit polling and to convey the results to the six clients. *See* Joan Konner, James Risser & Ben Wattenberg, *Television's Performance on Election Night 2000: A Report for CNN* (Jan. 29, 2001).

[123] *See In re* Revision of Radio Rules and Polices, 7 F.C.C. Rcd. 2755, 2774 (1992).

[124] Brenner, *supra* note 121, at 1027.

[125] If this were true, however, one would expect that the majority of First Amendment cases litigated before the Supreme Court would involve the media conglomerates. One would also expect that the ACLU and similar organizations would favor media mergers as a safeguard to the First Amendment. Yet, Burt Neuborne, a First Amendment scholar and former legal director of the ACLU, has argued that the First Amendment does not disable government from acting to prevent excessive media concentration. *See* Burt Neuborne, *Media Concentration and Democracy, Panel Three Commentary*, 1999 ANN. SURV.

B. CONCERNS IF "MARKETPLACE OF IDEAS" WERE EXCLUDED FROM ANTITRUST ANALYSIS

The six concerns outlined above—while significant—do not ultimately outweigh the three concerns that would arise if the marketplace of ideas were excluded from the antitrust analysis.

1. *Antitrust Laws Encompass Economic Nonprice Competition*

If price competition for advertising and programming were the only concerns in a media merger, we would likely miss an important part of the competitive landscape. 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. This is of particular importance in the Internet, broadcast television, and radio industries, where the competition extends beyond advertising prices. Consequently, the impact of a restraint or acquisition on nonprice competition is a legitimate subject for antitrust inquiry.

Recent commentary recognizes the pitfalls of focusing solely on an acquisition's impact on price, and advocates looking beyond price effects in merger analysis. Neil W. Averitt and Robert H. Lande note that, "[i]n certain sectors of the economy—for example, high-tech or media-related industries—diversity of options may be far more important to consumers than price competition."[126] They recognize that price may be an inadequate barometer of competition in the marketplace of ideas:

> If the owner of one communications medium were to buy another firm of the same kind, the acquisition might not concentrate the market sufficiently to threaten price competition. Being competitive, the market might also soon produce the product menu that consumers desire, in terms of types and formats of shows. But the market would inevitably sustain a loss of editorial diversity, and this cannot be recreated through the normal mechanism of nonprice competition among the surviving firms; the new products would necessarily bear the editorial stamp of their common owner. This suggests that media mergers should be carefully scrutinized for loss of nonprice competition along the dimension of diversity in programming and, where that loss is sufficiently severe, that they be challenged under the Clayton Act, even if there has been no showing of harm to price competition.[127]

AM. L. 277, 277 (2000); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1057 (1999); Burt Neuborne, *First Amendment for the Rich?*, THE NATION, Oct. 9, 2000, at 25.

[126] Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 715 (1997).

[127] *Id.* at 752–53 (footnote omitted).

Averitt and Lande use the example of a merger from five to four in the book publishing industry. While such a merger may not lead to higher prices or fewer price options, it "might well lead to a quantifiable loss of editorial diversity and, thus, to a narrowing of the competing marketplace options expressed in terms of the types of titles offered."[128] This loss of options, for Averitt and Lande, is sufficient for an antitrust suit under the "ordinary, universal standards of Section 7, once that Section has been properly construed to recognize the role of options and of nonprice competition."[129]

Likewise, the U.S. Court of Appeals for the Second Circuit has recognized certain nonprice competition involving the broadcasting industry. An alleged conspiracy that both reduced "networks' national competition with alternative programming and reduced local stations' competition with alternative distribution systems" was found to be a legitimate antitrust injury.[130] Besides eliminating "[a]ctual and potential price competition," the conspiracy allegedly restricted output "and millions of consumers have lost or risk losing the opportunity to receive higher quality television reception and additional programming options."[131] Similarly, other courts have recognized that nonprice competition can be an important antitrust consideration,[132] and that price alone may be in certain industries an unreliable indicator of market power.[133]

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[128] *Id.* The increasing concentration in the book publishing industry (where, according to one participant, five conglomerates control over 80 percent of book sales) has prompted some concern from within the industry. *See* ANDRE SCHIFFRIN, THE BUSINESS OF BOOKS: HOW INTERNATIONAL CONGLOMERATES TOOK OVER PUBLISHING AND CHANGED THE WAY WE READ (2000).

[129] Averitt & Lande, *supra* note 126, at 753. Another approach has been to expand the concept of "market power" to account for not only microeconomic conceptions of market power but also the economic power derived from firm size. *See* Rudolph Peritz, *Some Realism About Economic Power in a Time of Sectorial Change*, 66 ANTITRUST L.J. 247 (1997).

[130] Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 103–04 (2d Cir. 2000).

[131] *Id.*

[132] *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 52 (1911) ("The evils which led to the public outcry against monopolies and to the final denial of the power to make them [include] [t]he danger of deterioration in quality of the monopolized article which it was deemed was the inevitable result[] of the monopolistic control over its production and sale."). *See also* FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 423–24 (1990) (antitrust laws serve to protect quality of legal advocacy); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (Sherman Act reflects legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services).

[133] A federal district court recently conceded that a defendant with an 80 to 95 percent market share displayed "few of the indicia economists associate with dominant market power." United States v. Franklin Elec. Co., 130 F. Supp.2d 1025, 1029 (W.D. Wis. 2000). The monopolist was unable to charge supracompetitive prices when it was the only player in the relevant market between 1988 and 1995. *Id.* at 1034–35. And its variable margins (net sales less variable costs) "were flat" during its period as a monopolist. *Id.* at 1029.

The FTC and DOJ also have recognized nonprice competition in their recent Antitrust Guidelines for Collaborations Among Competitors, where the theory of market power incorporates nonprice competition: "The creation, increase, or facilitation of market power will likely increase the ability and incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."[134] These Guidelines specifically recognize that sellers "also may exercise market power with respect to significant competitive dimensions other than price, such as quality, service, or innovation."[135] This is a notable improvement over the Horizontal Merger Guidelines, which were heavily oriented toward price—from questions of market definition to entry—and which relegated nonprice competition to one footnote.[136]

Nonprice competition happens everyday and is an important aspect of economic competition. One cannot simply limit the antitrust analysis to tidy industries where price is the sole or primary facet of competition.[137] Consequently, the fact that the antitrust inquiry into the marketplace of ideas may involve nonprice competition should not be a deterrent.

2. *Shortcomings of Applying Horizontal Merger Guidelines Rigidly*

The microeconomic approach under the Horizontal Merger Guidelines does not neatly fit all industries. The Guidelines are not gospel, nor do they claim to be: they make clear that "mechanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws."[138] Merely because the antitrust analysis of a particular industry (or the marketplace of ideas) does not neatly fit the confines of the Horizontal Merger Guidelines does not justify ignoring the antitrust issues. This is hardly a sound basis for rejecting an antitrust review of the marketplace of ideas.

But that did not end the court's inquiry. Instead, the district court was persuaded by the extensive evidence that the monopolist during that same time period "was not overly concerned about either making improvements in its product or providing excellent service" and enjoined a joint venture with the only competitor that subsequently emerged. *Id.* at 1035–36.

[134] Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors § 3.33 (2000), *available at* http://www.ftc.gov.os/2000/04/ftcdojguidelines.pdf [hereinafter Competitor Collaboration Guidelines].

[135] *Id.* § 3.3 n.30.

[136] *See* Horizontal Merger Guidelines, *supra* note 4, § 0.1 n.6 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation.").

[137] "[F]acts cannot be ignored simply because present methods do not permit them to be described with full scientific rigor." Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, 68 ANTITRUST L.J. 545, 556 (2000).

[138] Horizontal Merger Guidelines, *supra* note 4, § 0.

As both sides of the bar recognize, a rigid application of the market definition standards in the Horizontal Merger Guidelines may provide misleading answers as to a transaction's anticompetitive effects. This issue often arises with mergers involving highly differentiated branded consumer products—where the likely post-merger unilateral effects are more informative than the market definition. For example, suppose that two brands are each other's closest substitutes (say, Coke and Pepsi), and repositioning by other brands to occupy that brand's space would be unlikely post-merger. Is market definition that important? If Coke acquired Pepsi, and Coke unilaterally could raise the price of either—or both—of its brands post-merger, it would not really matter how narrowly or broadly one defined the product market. The product market conceivably could include other branded colas, private-label colas, other branded carbonated soft-drinks, or all other beverages that compete for the consumers' purchase. But the likely post-merger outcome would remain the same—namely, a unilateral price increase of Coke and/or Pepsi. If post-merger the parties unilaterally can raise and maintain the price for one or both of their brands, then it does not really matter how broadly or narrowly one defines the product market.

A federal district court moved in this direction in *FTC v. Staples, Inc.*[139] There the district court's analysis did not rest on functional interchangeability of office supply products sold through different outlets. (After all, you can get the same legal pad if you purchase it from a stationery store, drug store, or Staples.) Rather, the court was swayed by the localized competition between the merging parties and the differences in pricing in geographic markets when one faced competition from the other.[140]

Another limitation with a rigid Merger Guidelines approach is that it is problematic, or as Judge Learned Hand asserted "impossible," to treat different news services as "interchangeable."[141] The fact in *Associated Press* that excluded newspapers could obtain news from other news services did not mitigate the antitrust concerns. Nor was the fact that readers could read the AP news stories in one local newspaper determinative.

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[139] 970 F. Supp. 1066 (D.D.C. 1997).

[140] *Id.* at 1075–76, 1079–80; *see also* Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, ANTITRUST, Spring 1997, at 21, 25 (market shares may not capture likely post-merger price increase in mergers involving close substitutes among differentiated products); Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Spring 1996, at 23; Christopher A. Vellturo, *Creating an Effective Diversion: Evaluating Mergers with Differentiated Products*, ANTITRUST, Spring 1997, at 16 (reflecting on why mergers involving highly differentiated products often present antitrust issues that require a cautious consideration of "traditional (homogeneous product) Merger Guidelines analysis"); Peritz, *supra* note 129.

[141] *Associated Press*, 52 F. Supp. at 372.

A newspaper reflects the biases and views of its writers, editors, and perhaps owners. One newspaper may downplay and truncate a news wire story, while the other newspaper may carry it as a headline. These are not fungible commodities. Thus, the marketplace is not about consumers switching from one homogeneous product to another. Rather, it is the net increase in consumer welfare from having many competing news sources and editorial voices. As Judge Hand aptly stated about the marketplace of ideas—and it bears repeating—"it is only by cross-lights from varying directions that full illumination can be secured."[142] Unlike restraints on ordinary commodities (where consumers may turn to less-desirable alternatives but the overall societal impact is not significant), for restraints in the media, the alternatives may be inherently unsatisfactory and the costs imposed on society may be significant.[143]

3. *Risks to Democracy from Concentration of Media Ownership*

The increasing number of media mergers has spurred the concern that these mergers may threaten our democracy by restricting the free flow of information in the marketplace of ideas. The concern about concentration of the media has several facets.

One concern, as expressed by FTC Chairman Pitofsky, is that excessive concentration of economic power may breed antidemocratic political pressures.[144] As the legislative histories of the Sherman and Clayton Acts evince, one purpose of the antitrust laws is to deter the effects that market power has on our democracy. Lawrence Sullivan agrees:

> To argue, as do the Chicago economists, that antitrust ought to be used solely to inhibit expressions of market power in a technical economic sense, is not only to miss much in the history and development of the law, but to ignore much of its potential . . . The political consensus that supports antitrust comes from other sources. Americans continue to value institutions the scale and the workings of which they can comprehend. Many continue to value the decentralization of decision making power and responsibility. Many favor structures in which power in one locus may be checked by power in another. Antitrust, broadly conceived and sensitively administered, may contribute to the realization of these values.[145]

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[142] *Id.*

[143] *See Associated Press*, 326 U.S. at 28 (Frankfurter, J., concurring).

[144] Pitofsky, *supra* note 1. When asked his views on media mergers, FTC Chairman Pitofsky recommended reading his 1979 article. *See* Bryan Gruley, *Pitofsky Will Test Marketplace of Ideas Theory in FTC's Review of Time Warner-Turner Deal*, WALL ST. J., Oct. 9, 1995, at A14, *available at* 1995 WL 9903008.

[145] Lawrence A. Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1222–23 (1977). *See also* Eleanor M. Fox, *Antitrust, Competitiveness, and the World Arena: Efficiencies and Failing Firms in Perspective*, 64

A second related concern is that, absent vigorous antitrust scrutiny of media mergers, more onerous regulations will likely ensue. If the free market is allowed to develop under antitrust rules that are blind to all but select economic values, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.[146] As discussed above, Congress shared this concern when it amended and strengthened the Clayton Act in 1950. And this concern applies equally today to the marketplace of ideas, which is not immune from market failure. Senator Orrin Hatch noted that with respect to the Internet, antitrust scrutiny today may prevent more onerous regulations tomorrow:

> I believe competition is critical to the future of the Internet, and to ensure its deregulated characteristic. Competition has created the robust Internet economy that we are experiencing today, with unprecedented investments in new software products, services and technologies. In this regard, I believe that antitrust law–and its timely enforcement, as established through sound legal and economic principles–can serve as the least restrictive and most attractive alternative to government regulation. As I have said before, proper enforcement of antitrust laws today, will and should, avoid heavy-handed regulation of the Internet tomorrow.[147]

If the government elects to ignore the marketplace of ideas, and if this market becomes hampered by anticompetitive restraints, one simply does not want the government later to recreate this lost competition through behavioral regulations on media monopolies. As Judge Greene, the Justice Department, and others concluded, behavioral restrictions on AT&T were unsuccessful in curbing that monopoly. Rather, the goal under the Clayton Act is to prevent the creation via mergers of these media monopolies in the first place, and not wait until the anticompetitive practices fully manifest themselves.[148]

ANTITRUST L.J. 725, 728–29 (1996) ("the competition system is a fundamental prong of a vision of political economy compatable with and likely to stabilize democratic institutions, as we are reminded by the democracy/free enterprise revolutions in Central Europe.").

[146] Pitofsky, *supra* note 1, at 1051.

[147] Comments by Sen. Orrin Hatch, *available at* http://www.senate.gov/~hatch/press172.html.

[148] "Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with probabilities, not with certainties. . . . And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).

A third concern is that media concentration may give rise to undesirable media self-censorship. This is one of the concerns that led to 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.[149] One Congressional concern is 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."[150] 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."[151] Congress sought to remedy these concerns in the 1992 Cable Act, with several provisions including the "must-carry,"[152] "subscriber limits"[153] and "channel occupancy" provisions.[154] In upholding the latter two provisions of the 1992 Cable Act, Judge Douglas Ginsburg wrote:

> As with the must-carry obligation, [Congress's] concern was not with what a cable operator might say, but that it might not let others say anything at all in the principal medium for reaching much of the public. ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas"). The must-carry obligation and the subscriber limits provision both preserve for consumers some competition in the provision of programming. The must-carry obligation preserves competition between broadcasters and the cable operator, while the subscriber limits preserve competition between the cable operator and its affiliated programmers on the one hand and unaffiliated providers of cable programming on the other. By placing a value upon diversity and competition in cable programming the Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers.
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[149] S. REP. NO. 102-92, at 32–33 (1991), 1992 U.S.C.C.A.N. at 1165–66.

[150] *Id.*

[151] *Id.*

[152] The must-carry provisions of the 1992 Cable Act require a cable system with more than 300 subscribers and 12 channels to set aside up to one-third of its channels for local broadcast stations that request carriage. 47 U.S.C. § 534(b)(1)(B). This provision was the focus in the Supreme Court's decision in *Turner,* discussed above.

[153] The subscriber limits provision directs the FCC to limit the number of subscribers a cable operator may reach. 47 U.S.C. § 533(f)(1)(A).

[154] The channel occupancy provision directs the FCC to limit the number of channels on a cable system that may be devoted to video programming in which the operator has a financial interest. *Id.* § 533(f)(1)(B).

> Indeed, the same unique characteristic of the cable medium that justified the imposition of the must-carry obligation is also invoked by the Government to justify the subscriber limits, namely, "the bottleneck monopoly power exercised by cable operators." In *Turner I* this bottleneck power was seen to jeopardize the viability of broadcast television; in this case, it arguably threatens diversity and competition in the provision of cable programming.[155]

The D.C. Circuit concluded that Congress drew reasonable inferences, based upon substantial evidence, that increases in the concentration of cable operators threatened diversity and competition in the cable industry.[156]

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.[157] Whether self-censorship is direct evidence of the exercise of market power in the marketplace of ideas is a thorny issue. Self-censorship arguably is a reduction in output. A monopolist may kill an otherwise newsworthy story when publication may negatively impact its profits. We often hear this concern with conglomerates acquiring media outlets—as control of the media falls into fewer hands, the greater the concern about self-censorship. In certain instances, this may very well be direct evidence of market power. Recall that truth prevails in a competitive marketplace of ideas. If a market is plagued with falsities or material omissions reflecting the media's self-interests, this may evidence market failure. But in other cases, this self-censorship may be the legitimate activity of journalists. Not every bit of news is published (or, in our opinion, should be). As Justice Burger noted:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[158]

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[155] Time Warner Entm't v. United States, 211 F.3d 1313, 1317–18 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001) (citations omitted).

[156] *Id.* at 1319–20.

[157] *See, e.g.*, ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999); BEN H. BAGDIKIAN, THE MEDIA MONOPOLY (6th ed. 2000); Mark Crispin Miller, *Can Viacom's Reporters Cover Viacom's Interests?*, COLUM. JOURNALISM REV., Nov./Dec. 1999, at 50.

[158] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (footnote omitted); *see also* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (distinguishing prior cases, which "involve[d] no intrusions upon speech or assembly, no prior restraint or restriction on

Journalists routinely exercise judgment in editing news. That is part of their craft: to highlight and emphasize certain news, while silently passing other news. And an "elementary First Amendment proposition" is that the "government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor."[159] Moreover, journalists may mutually agree to redact the name of a rape victim in their articles. It is unlikely that this coordinated practice is per se illegal as an output reduction. Thus, drawing the line between editorial freedom and illegal output reduction is itself difficult, and penalizing a newspaper for not publishing a story may itself be unconstitutional under the First Amendment.

Yet, the concern of a merger giving rise to self-censorship prompted in part the Antitrust Division to challenge International Telephone and Telegraph's (ITT) attempted takeover in the 1960s of the American Broadcasting Company (ABC). ITT was described as "a sprawling international conglomerate" of 433 separate boards of directors that derived at that time about 60 percent of its income from its significant holdings in at least forty foreign countries.[160] ABC in 1966 was similarly large, controlling 399 theaters in 34 states, 5 VHF television stations, 6 AM and 6 FM stations (all in the top 10 broadcasting markets), and one of the 3 major television networks and one of the 4 major radio networks in the world. Its 137 primary television network affiliates could reach 93 percent of the then 50 million television homes in the United States, and its radio network affiliates could reach 97 percent of the then 55 million homes with radio receivers.[161]

Three FCC Commissioners raised concerns about this transaction. "As it seemed to Commissioners Bartley and Cox and to me [Johnson] when we dissented from the Commission's approval of the merger in June, 1967, a company whose daily activities require it to manipulate governments at the highest levels would face unending temptation to manipulate ABC news."[162] The three dissenting FCC Commissioners concluded: "We simply cannot find that the public interest of the American citizenry is served by turning over a major network to an international enterprise whose fortunes are tied to its political relations with the foreign officials

what the press may publish, and no express or implied command that the press publish what it prefers to withhold.").

[159] *Miami Herald*, 418 U.S. at 261 (White, J., concurring).

[160] Nicholas Johnson, *The Media Barons and the Public Interest: An FCC Commissioner's Warning*, ATLANTIC MONTHLY, June 1968, *available at* http://www.theatlantic.com/unbound/flashbks/media/johnsonf.htm.

[161] *Id.*

[162] *Id.*

whose actions it will be called upon to interpret to the world."[163] A majority of FCC Commissioners approved the transaction. It ultimately was the Antitrust Division that asked the U.S. Court of Appeals to enjoin the transaction, in part to protect ABC's journalistic independence. After the Justice Department brought suit, ITT abandoned the transaction.

IV. ARE THE FEDERAL ANTITRUST AGENCIES EQUIPPED TO REVIEW THE MARKETPLACE OF IDEAS?

Some argue that the issue of a merger's impact on the marketplace of ideas should be left to the FCC and/or Congress. This section addresses two points. First, whether antitrust review should be left to the FCC, and second, whether the current antitrust laws are sufficiently flexible to include analysis of the marketplace of ideas.

A. THE FCC REGULATORY SCHEME DOES NOT PREEMPT ANTITRUST REVIEW OF THE MARKETPLACE OF IDEAS

Any claim that the marketplace of ideas is best left to the FCC ignores Congress's intent in enacting the Telecommunications Act of 1996.[164] The 1996 Act is deregulatory in its approach, continuing the shift of the telecommunications industry away from a heavily regulated industry (with behavioral restrictions) to 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 Justice Department and the FTC independently and carefully to review media mergers and their impact on competition in the marketplace of ideas. As reflected in the legislative history of the savings clause to the Telecommunications Act of 1996, the FCC regulatory scheme does not preempt antitrust review of media mergers generally, and the marketplace of ideas specifically.

1. *Congressional Intent of the Telecommunications Act of 1996*

The Telecommunications Act of 1996 was intended to foster competition in the marketplace of ideas. It sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all

[163] *Id.*

[164] Pub. L. 104-104, 110 Stat. 56 (codified in scattered sections of Titles 15, 18 & 47 of the United States Code (West Supp. 1997)).

telecommunications markets to competition."[165] One can regulate monopolies with command-and-control behavioral-type regulations. Another mechanism is to eliminate regulatory entry barriers, and rely on the antitrust laws. The theme underlying the 1996 Telecommunications Act was to open the telecommunications industry to competition, rather than have the FCC continue to regulate the behavior of incumbent monopolies. Opening the industry to competition was viewed as a means of promoting competition in the marketplace of ideas.[166]

Even before the 1996 Telecommunications Act, Congress believed that regulation was a poor surrogate for competition. As Senator Howard Metzenbaum and others voiced, the "federal and state regulation of the telecommunications industry has been and will continue to be a poor substitute for aggressive antitrust review."[167] While attempting to "approximate the results of vigorous competition," regulations can be readily circumvented.[168] Likewise, Judge Bazelon, speaking only for himself, stated in 1980 that:

> [T]he way to avoid the Hobson's choice inevitable in the present regulatory scheme is to move away from "behavioral" regulation toward what might be called "structural" regulation of the media. The former approach scrutinizes the conduct of the licensee, as the FCC does today. The latter approach would employ antitrust concepts, limitations on cross-ownership, and the like to insure diversity in broadcasting while minimizing government attention to broadcast content.[169]

So Congress focused in the 1996 Telecommunications Act on applying the antitrust laws to ensure competition—rather than relying on post hoc regulations by the FCC. One risk in deregulating the telecommunications industry could be an increase in anticompetitive practices. Consequently, Congress entrusted the federal antitrust authorities with the task of ensuring competition in the marketplace of ideas. As Congressman Conyers stated:

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[165] Telecommunications Act of 1996, S. REP. No. 104-230 (1996), *available at* 1996 WL 54191, at *1.

[166] As Rep. Gilchrest stated, "with the advent of the information age, we need to recognize the need for competition among information media so that the free marketplace of ideas can be communicated through a free marketplace of information outlets. This bill seeks to exploit the market's ability to maximize quality, maximize consumer choice, and minimize prices." 142 CONG. REC. H1175.

[167] *Consolidation in Telecommunications Industry—Senator Metzenbaum's Views*, 7 Trade Reg. Rep. (CCH) ¶ 50,126.

[168] *Id.*

[169] Leflore Broad. Co. v. FCC, 636 F.2d 454, 458 n.26 (D.C. Cir. 1980) (citing Bazelon, *The First Amendment and the "New Media" New Directions in Regulating Telecommunications*, 31 FED. COMMUN. L.J. 212–13 (1979)).

> [T]he antitrust laws and the Antitrust Division must remain at the very center of the telecommunications debate. Antitrust law is synonymous with low prices and consumer protection—and that is exactly what we need in our telecommunications industry. The Antitrust Division is the principal government agency responsible for antitrust enforcement. Its role in the MFJ has given it decades of expertise in telecommunications competition issues. The Division has unrivaled expertise in making predictive judgments and in assessing marketplace effects. The FCC by contrast has no antitrust background, and is facing the threat of significant downsizing.[170]

The applicability of the antitrust laws to the marketplace of ideas is reinforced in the legislative history of the 1996 Telecommunications Act's antitrust savings clause, which states that the Act does not "modify, impair, or supersede the applicability of any antitrust laws."[171] Thus, the 1996 Telecommunications Act, under the clear terms of this savings clause, does not preempt the antitrust statutes.[172]

Moreover, Congress in 1996 eliminated the last antitrust safe-haven by repealing Section 221(a) of the Communications Act.[173] Before 1996, the Communications Act of 1934 had a general antitrust savings clause,[174] with one exception. This exception precluded antitrust review of telephone mergers. This section provided that when any two telephone companies merge, the FCC should determine whether the merger will be "of advantage to the persons to whom service is to be rendered and in the public interest."[175] If so, the FCC could render the transaction immune from "any Act or Acts of Congress making the proposed transaction unlawful."[176] Congress enacted section 221(a) "in the days when local telephone service was viewed as a natural monopoly."[177] And as

[170] 142 CONG. REC. H1145 (statement of Rep. Conyers).

[171] Section 601(b)(1) of the Telecommunications Act of 1996, *reprinted in* 47 U.S.C. § 152, Historical and Statutory Notes.

[172] The continued importance of the antitrust laws in the media industry was also mentioned by President Clinton in signing the 1996 Act: "This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully." President Clinton's Remarks on Signing The Telecommunications Act of 1996, Feb. 8, 1996, at 13. Likewise, Rep. Conyers described the antitrust savings clause as "all-important" since it ensures that "any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws. Telco-cable mergers and all other broadcast, media, or telecommunications transactions will be fully subject to antitrust review, regardless of how they are treated under the bill or the FCC." 142 CONG. REC. H1171 (statement of Rep. Conyers).

[173] 47 U.S.C. § 221(a) (*repealed by* Telecommunications Act of 1996, Pub. L. 104-104, Title VI, § 601(b)(2), Feb. 8, 1996, 110 Stat. 143).

[174] 47 U.S.C. § 313(a).

[175] 47 U.S.C. § 221(a) (*repealed* 1996).

[176] *Id.*

[177] S. REP. NO. 104-230 (1996), *available at* 1996 WL 54191, at *450.

Congress noted, "[i]n a world of regulated monopolies, this idea made sense."[178] But the 1996 Telecommunications Act sought to foster competition in the deregulated local telephone service. Because this exemption from antitrust scrutiny was contrary to this goal, Congress repealed this exemption in the 1996 Telecommunications Act. As the Senate Report to the 1996 Telecommunications Act states,

> By returning review of mergers in a competitive industry to the DOJ, this repeal would be consistent with one of the underlying themes of the bill—to get both agencies back to their proper roles and to end government by consent decree. The Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws. The repeal would not affect the Commission's ability to conduct any review of a merger for Communications Act purposes, *e.g.* transfer of licenses. Rather, it would simply end the Commission's ability to confer antitrust immunity.[179]

Clearly, the shift has been away from regulation to open competition. Accompanying this shift is the deemphasis of FCC regulations and the increasing role of antitrust scrutiny. Thus, mergers that may substantially lessen competition in the marketplace of ideas should fall squarely on the Department of Justice and the FTC. FCC Chairman Michael Powell has recently stated that he would like to see the FCC do less competition analysis, believing that such analysis is better left to the antitrust agencies.[180]

2. *FCC's Public Interest and Common Ownership Standards Do Not Preempt Antitrust Analysis*

Just as the FCC statutes do not expressly preempt antitrust regulation, so too the FCC's "public interest" standard and restrictions on common ownership do not adequately address a media merger's impact on the marketplace of ideas.

In issuing licenses to broadcasters, the FCC must determine under the public interest standard if the "public convenience, interest, or neces-

[178] *Id.*

[179] *Id.* at *442.

[180] *FCC: Chairman Leery of Antitrust Duties*, CHI. TRIB., Mar. 29, 2001, at 2, *available at* 2001 WL 4056462. Commissioner Powell also noted that the FCC lacks the antitrust expertise. *See* Opening Statement of Michael K. Powell, FCC Commissioner, Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce, Mar. 17, 1999. Moreover, this has been the FCC's position since at least the 1940s. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 223–24 (1943) (quoting 1941 FCC report that it is not FCC's function to apply the antitrust laws to questionable network practices); United States v. Radio Corp. of Am., 358 U.S. 334, 350 n.18 (1959).

sity will be served thereby."[181] This public interest standard arises because the media neither owns the airwaves nor has an absolute right to broadcast over the airwaves.[182] The airwaves belong to the people, so broadcasters receive only a license under 47 U.S.C. § 307(a). The FCC's public interest standard was drafted broadly as "a supple instrument to effect congressional desires 'to maintain * * * a grip on the dynamic aspects of radio transmission' and to allay fears that 'in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.'"[183] As the Supreme Court has recognized, the values underlying the First Amendment principle of diversity in dissemination of information to the American public coincide with the policies of the antitrust laws.[184] So while the FCC "does not have power to enforce the antitrust laws as such, it is permitted to take antitrust policies into account in making licensing decisions pursuant to the public-interest standard."[185] As the Court noted, "in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication."[186]

The public interest standard is a flexible one that encompasses the "broad aims of the Communications Act."[187] Among these broad aims is to realize the desire of Congress to implement a "pro-competitive, deregulatory national policy framework designed to . . . open[ ] all telecommunications markets to competition . . . ."[188]

While the public interest standard addresses in part certain antitrust goals, this FCC standard does not preempt the antitrust laws. First, as discussed above, the FCC's regulations generally, and the public interest standard in particular, do not preempt the antitrust laws. Rather, the public interest standard addresses a broader goal, which has in part

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[181] 47 U.S.C. § 307(a).

[182] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 394 (1969) ("Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them.") (citing 47 U.S.C. § 301).

[183] *Id.* at 394–95 (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 137–38 (1940)).

[184] *See* FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 800 n.18 (1978).

[185] *Id.* at 795.

[186] United States v. Radio Corp. of Am., 358 U.S. 334, 351–52 (1959).

[187] Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., Memorandum Opinion and Order, FCC 98-225 ¶ 9 (1998).

[188] *Id.*

antitrust underpinnings.[189] Second, as Congressman Hyde noted in the legislative debates on the 1996 Telecommunications Act, "[a] public interest review by the FCC simply is not a strong enough tool to prevent these giants from destroying competition and recreating a monopoly system through a series of megamergers."[190] By returning the review of telecommunications mergers in a competitive industry to the DOJ, the 1996 Telecommunications Act "is consistent with one of the underlying themes of the bill—to get both agencies back to their proper roles and to end Government by consent decree."[191] The FCC would carry out the policies of the Communications Act, and "the DOJ should be carrying out the policies of the antitrust laws."[192]

For the same reasons, the FCC's restrictions on common ownership do not preempt the antitrust laws. Over the years, the FCC has imposed ownership limits within and across different media. In broadcasting, for example, it has adopted rules limiting the number of outlets that a single entity can own in a local market and nationally. The Commission justified these rules as principally designed to prevent concentration, enhance competition, and promote diversity of voices.[193]

These structural ownership restrictions were loosened under the 1996 Telecommunications Act. There are no restrictions on the number of television or radio stations that any one entity can own nationwide. Nationally, a single owner can own television stations that reach up to 35 percent of television households. Locally, a single owner can own as many as eight radio stations in a metropolitan area (the caps work on a graduated basis).[194] Also, the 1996 Act permitted greater common

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[189] *See National Citizens*, 436 U.S. at 795–96 (noting that the Commission may properly consider antitrust issues and collecting cases); *Radio Corp. of Am.*, 358 U.S. at 351–52 (observing that in certain cases the Commission may find that antitrust considerations alone would prevent the public interest standard from being satisfied); FCC v. RCA Comm., Inc., 346 U.S. 86, 94 (1953) (noting that "[t]here can be no doubt that competition is a relevant factor in weighing the public interest"); Nat'l Broad. Co. v. United States, 319 U.S. 190, 222–23 (1943) (holding that the Commission may consider the effect of a broadcast license applicant's anticompetitive conduct on the public interest).

In *Radio Corp. of America*, 358 U.S. at 346, Chief Justice Warren held that FCC approval of a media transaction under its public interest standard does not bar the antitrust agencies from attacking the transaction under the antitrust laws. The legislative history of the Communications Act of 1934 revealed that the FCC was "not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." *Id.*

[190] 142 CONG. REC. H1158 (statement of Rep. Hyde).

[191] *Id.*

[192] *Id.*

[193] Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 582–84 (2000).

[194] 47 C.F.R. § 73.3555(a)(1).

ownership of different media outlets—for example, a single owner can own both a broadcast television network and a cable system—and the ban on the ownership of television stations and cable systems in the same local market was eliminated.

But these ownership restrictions are not intended to foreclose antitrust scrutiny. In certain instances, the FCC in construing ownership regulations may reach contradictory results, as in *FCC v. National Citizens Committee for Broadcasting.*[195] The regulations prospectively barred formation or transfer of newspaper-broadcast combinations in the same market, and also provided for divestiture of existing combinations with the possibility of waivers. The FCC ordered divestiture only in sixteen egregious cases. Most of these were in smaller markets where the Commission found that the newspaper-broadcast combinations had an "effective monopoly" in the "local marketplace of ideas as well as economically."[196] The Supreme Court concluded that "it was hardly unreasonable for the Commission to confine divestiture to communities in which there is common ownership of the only daily newspaper and either the only television station or the only broadcast station of any kind encompassing the entire community with a clear signal."[197] The Court noted that the FCC's studies had shown that newspapers and television were the two most widely utilized media sources for local news and discussion of public affairs.[198] But the FCC permitted such media combinations in other cities for non-economic reasons. The Antitrust Division contended that the FCC's regulations did not go far enough and that the FCC had inadequately justified its decision not to order divestiture on a more widespread and consistent basis.[199]

Consequently, FCC regulations do not preempt antitrust analysis. A telecommunications merger may violate the Clayton Act even though it satisfies the FCC's public interest standard and ownership restrictions. In essence, one does not necessarily follow from the other.[200] Moreover, Congress clearly intended that the Justice Department and the FTC review media mergers under the antitrust laws. These federal antitrust agencies must conduct their own independent analysis under the anti-

[195] 436 U.S. 775 (1978).

[196] *Id.* at 787.

[197] *Id.* at 814–15.

[198] *Id.* at 815.

[199] *Id.* at 789. (The United States, represented by the Antitrust Division, had been made a respondent pursuant to 28 U.S.C. ¶¶ 2344 & 2348.)

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

trust laws of whether the transaction may substantially lessen competition in the marketplace of ideas. This is consistent not only with the legislative history of the antitrust laws, but with the 1996 Telecommunications Act as well—in having the antitrust laws and Antitrust Division at the center of the telecommunications debate.[201]

B. REINTERPRETING EXISTING LAW OR IS NEW LEGISLATION NECESSARY?

After the CBS/Viacom deal was announced, Senator Paul Wellstone suggested that Congress may need to consider a new legislative framework to address the growing problem of media consolidation.[202] While additional legislation specifically aimed at media mergers has several benefits, such legislation is not required. The current antitrust laws are sufficiently flexible to allow federal antitrust agency review of the marketplace of ideas.

One benefit of additional legislation is that courts grant "substantial" deference to Congress for legislation that is "intended to forestall the abuse of monopoly power."[203] To uphold a content-neutral statute, the Court will inquire under an "intermediate scrutiny" standard whether: (1) the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress; (2) the act furthers an important or substantial interest unrelated to the suppression of free speech; and (3) the legislation burdens speech no more than is essential to the furtherance of that interest.[204] This is a much easier standard than that of a plaintiff in a typical antitrust case.

A second benefit of new legislation is that it may avoid the problem, identified by the majority in *Turner II*, of a "considerable expense and delay inherent in antitrust litigation, and the great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator," that can make the antitrust remedies inadequate.[205] Many independent broadcasters "simply are not in a position to engage in complex antitrust litigation, which involves extensive

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

[201] 142 CONG. REC. H1172 (statement of Rep. Conyers).

[202] *See* Remarks of Senator Paul Wellstone on the Acquisition of CBS by Viacom Before the Senate Judiciary Committee Subcommittee on Antitrust, Business Rights, and Competition (Oct. 28, 1999), *available at* http://www.senate.gov/~wellstone/On_the_Record/Floor_Statements/Floor_Statements-1999/cbsmerger2.htm.

[203] *Turner II*, 520 U.S. at 225 (Stevens, J., concurring).

[204] *Id.* at 189.

[205] *Id.* at 222–23.

discovery, significant motions practice, appeals, and the payment of high legal fees throughout."[206]

A third benefit is that new legislation may avoid the courts "assess[ing] competing economic theories and predictive judgments, as we would in a case arising, say, under the [existing] antitrust laws."[207]

We do not oppose statutory reform of the antitrust laws. But the current antitrust statutes—by express design—are sufficiently flexible. In fact, Judge Learned Hand stated more than fifty years ago that the antitrust statutes are a "legislative warrant" as "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case."[208] As evidenced in the 1996 Telecommunications Act, Congress adopted this view in entrusting to the federal antitrust agencies the task of reviewing mergers in the telecommunications industry with the current antitrust laws.[209] One benefit that the current antitrust laws have over an industry-specific regulation is this flexibility. Today's antitrust laws can keep abreast of changes in the industry (more so perhaps than antitrust laws that are tailored to the industry as it exists today).

V. RESOLUTION AND ONE SUGGESTED APPROACH

Given the importance of the marketplace of ideas to our democracy, the fear of governmental interference should not deter the antitrust

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[206] *Id.* at 223.

[207] *Id.* at 207–08.

[208] *Associated Press*, 52 F. Supp. at 370.

[209] If new legislation is considered for the media industry, a survey by Oxford University, *available at* http://www.medialaw.ru/e_pages/laws/ero_union/e-conc.htm, on the European principles of media ownership regulation and transparency may be of interest. The purpose of this survey was to assist a working group of Russian media law experts in the drafting of a policy recommendation on media ownership. The survey outlines 12 key policy instruments used to control media market concentration and those effecting ownership in media markets in Europe: (1) General competition law and specific provisions under competition law directed towards the media; (2) regulating media and telecommunications operators through licensing of national services; (3) requiring the promotion of media pluralism as a pre-requisite to license-issuing; (4) lowering entry barriers to markets through legal decisions and economic incentives (tax relief, financial assistance); (5) promoting media which are seen to provide diversity of content or represent minority views; (6) providing financial assistance to content providers providing a variety of content; (7) guaranteeing the high quality and availability of public service broadcasting (by instituting "must-carry" rules on cable, satellite and digital providers); (8) adopting legal instruments to safeguard editorial independence and freedom of expression; (9) requiring high transparency of company reports and activities; (10) monitoring ownership patterns in media markets and making this information publicly available; (11) ensuring open networks and universal service for Internet users; and (12) preventing gateway monopolies of new services.

agencies from evaluating a merger's impact on the marketplace of ideas. The focus of the debate—as in *Associated Press* and *Turner*—should be on how to take this marketplace into account.

This article does not attempt to outline all the factors or issues, or suggest a bright-line standard of illegality under the Clayton Act. This may be inappropriate, given the fact-intensive inquiry for each merger, and the evolving nature of the industry. Instead, we propose three modest points in reviewing media mergers under the antitrust laws.

The first proposal is that the antitrust agencies should look beyond price effects generally, and advertising prices specifically, in media mergers and consider other nonprice dimensions of economic competition, such as diminished quality and choice. Second, efficiencies need to be viewed against the backdrop of the marketplace of ideas. Third, direct evidence of anticompetitive effects should be given significant weight by the agencies and the courts.

A. LOOKING BEYOND PRICE EFFECTS—THE MARKETPLACE OF IDEAS AS A FORM OF NONPRICE COMPETITION

The antitrust laws should apply to competition in the marketplace of ideas, which is a form of nonprice competition. Given the very nature of media as a marketplace of information, a diversity of news options may be more important to consumers than ordinary price competition. One does not directly pay for broadcast television. Rather, the broadcasters compete for the viewer's attention with diverse and varied programming. This benefits the viewer with better broadcasting and the broadcaster with higher advertising rates.

If the broadcast networks were to combine their news operations, but each independently set its own advertising rates, the merger might not be challenged if the marketplace of ideas were excluded from the analysis. Even though the evening news would remain free, and the ad rates would remain competitive, the nonprice competition among the news networks would be eliminated. This is because the loss of this editorial diversity could not be readily replaced. As the district court found in *Gannett*,

> no monetary amount will be able to compensate for the loss of the [daily local newspaper's] editorial and reportorial voice, the elimination of a significant forum for the airing of ideas and thoughts, the elimination of an important source of democratic expression, and the removal of a significant facet by which news is disseminated in the community.[210]

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[210] Hawaii v. Gannett Pac. Corp., 99 F. Supp.2d 1241, 1253–54 (D. Haw.), *aff'd*, 203 F.3d 832 (9th Cir. 1999).

Thus, we propose that such nonprice competition in the marketplace of ideas be considered in evaluating media mergers.

B. DIFFERENT ROLE OF EFFICIENCIES—TENSION BETWEEN ECONOMIC EFFICIENCY (AND HOMOGENIZATION) AND THE SOCIAL GOAL OF FRAGMENTED MARKETPLACE OF IDEAS

Our second proposal is that efficiencies need to be reconciled with certain natural inefficiencies in the marketplace of ideas. We do not propose that one must quantify the loss of diversity in a media merger and then compare this loss to the merger's increased efficiencies. This loss of competition in the marketplace of ideas—while real—might not be readily quantifiable. And even if one could compare the two in dollar terms, it may not be that meaningful.

Efficiencies are not always dispositive when a higher ideal, such as diversity, is prized. Many independent news sources may confer a greater benefit to society than a highly efficient monopolist that produces a homogenous news product. As FTC Chairman Pitofsky 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."[211] Chief Justice Warren also observed in the Clayton Act's legislative history that a certain amount of inefficiency was the price paid for decentralized market power:

> [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.[212]

So too, an inefficient democracy may be valued more than an efficient authoritarian state: "[t]he wastes of democracy are among the greatest obvious wastes, but we have compensations in democracy which far outweigh that waste and make it more efficient than absolutism."[213]

The inherent inefficiency of the marketplace of ideas sets it apart from mergers of ordinary commodities, which may enable firms to achieve

[211] Pitofsky, *supra* note 1, at 1074.

[212] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); *see also* Wesley A. Cann, Jr., *Section 7 of the Clayton Act and the Pursuit of Economic 'Objectivity': Is There Any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273, 299–300 (1985) (citing cases where courts have recognized that competition and resulting efficiencies give way to other social values).

[213] LOUIS BRANDEIS, THE CURSE OF BIGNESS 105 (1934) (quoted in United States v. Columbia Steel Co., 334 U.S. 495, 534–35 n.1 (1948) (Douglas, J., dissenting)).

economies of scale. "Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies."[214] In industries with high fixed costs and homogeneous products, a merger may enable the parties to rationalize production lines—whereby the machines are running for longer time periods, with greater output. Consumers in these industries may not desire product variety, and this loss of diversity is insignificant.

Indeed, an analysis concerned with efficiencies may point in the wrong direction. 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 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.

But in the marketplace of ideas, a premium is placed on diversity of ideas. While the newspaper venture may be more efficient, the marketplace of ideas would be diminished. As Judge Easterbrook observed, "[a] market in which every newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one."[215] So, while consumers are paying less, they may be getting less as well. This would raise the interesting scenario where the negative impact on quality (nonprice competition) would outweigh a readily quantifiable efficiency (newspaper readers saving, say, a quarter per day).

Consequently, when efficiencies are claimed in media mergers, one should recognize the tension between the efficiencies that arise from the homogenization and uniformity of products, on the one hand, and the desire for diversity in the marketplace of ideas. We as a society may value a certain degree of inefficiency for a greater value—such as a diverse marketplace of ideas.

C. BACK TO BASICS: DIRECT EVIDENCE OF ACTUAL OR LIKELY RESTRAINTS IN THE MARKETPLACE OF IDEAS

Our third proposal is the following: when direct evidence establishes that a combination has substantially lessened or will inevitably produce

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[214] *See* Horizontal Merger Guidelines, *supra* note 4, § 4.

[215] Paddock Publ'ns, Inc. v. Chicago Trib. Co., 103 F.3d 42, 45 (7th Cir. 1996).

actual restraints on news dissemination in the future, the combination should be enjoined under the antitrust laws. This should be the case even where market definition would be problematic.

In everyday life, one can get entangled in routines. One no longer knows the purpose of the routine. Rather, the routine is shifted on the shoulders of the new generation, with the admonition: follow it as it has been followed. So, too, courts and antitrust authorities can develop the routine of defining markets and measuring market shares and lose sight of the bigger picture.

Why does one define markets and measure shares in the first place? This exercise provides circumstantial evidence of market power. But if one has direct evidence of market power, does one still need to backtrack and fashion relevant markets and market shares? The Supreme Court and lower courts have said no:

> Since the purpose of the inquiry into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.[216]

Market share is just one pathway to estimating market power, which is the ultimate consideration. "When there are better ways to estimate market power, the court should use them."[217] A plaintiff then has two paths: it can show market power by either direct evidence or circumstantial evidence. The latter is traditionally shown by defining markets, measuring market share, etc. Because the "purpose of the market definition and market power inquiry is to determine whether an arrangement has the potential for genuine adverse effects on competition," "[p]roof of actual detrimental effects can obviate the need for the inquiry into market power."[218]

Plaintiffs should prevail if direct evidence of market power exists. At a minimum, then, the approach by dissenting Justice Murphy in *Associated*

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[216] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (internal quotations and citations omitted); *see also* Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000); Competitor Collaboration Guidelines, *supra* note 134, § 3.3 ("[W]here the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.") (footnotes omitted).

[217] Ball Mem'l Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1336 (7th Cir. 1986).

[218] Great W. Directories, Inc. v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1384 (5th Cir. 1995), *amended*, 74 F.3d 613 (5th Cir. 1996); *see also* Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir. 1996).

Press should be a step forward in today's antitrust climate. Namely, before the "Government is entitled to enjoin a combination or conspiracy alleged to be in restraint of news dissemination it must be shown by competent evidence that such combination or conspiracy has in fact resulted in restraints or will inevitably produce actual restraints in the future."[219] Such direct evidence of restraints in the past, or that the combination will inevitably produce actual restraints in the future, should be probative.

The next issue is what types of direct evidence would suffice for such antitrust review. One category is the transmission/content arena, when a company that dominates the transmission of information seeks to enter the content side. This was the situation in the *AT&T* case. And it also 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."[220] But while this evidence and "a bit of economic common sense"[221] may suffice for Congress, the courts may likely demand more from the antitrust agencies.

This scenario also arose in a consent decree involving Time Warner's acquisition of Turner Broadcasting System.[222] 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.[223] 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

[219] *Associated Press*, 326 U.S. at 52–53 (Murphy, J., dissenting).

[220] Time Warner Entm't v. United States, 211 F.3d 1313, 1322 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001).

[221] *Id.*

[222] Time Warner Inc., Turner Broad. Sys., Inc., Tele-Communications, Inc., and Liberty Media Corp., Dkt. No. C-3709 (Feb. 3, 1997).

[223] 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).

and incentive to make entry of competing news services more difficult, by denying them access to its extensive distribution system.[224] 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.[225]

Finally, it is worth repeating that direct evidence is only one avenue. It is not the exclusive avenue. Often in merger cases no such direct evidence will exist. That necessitates the route through circumstantial evidence—by defining markets, etc. The Horizontal Merger Guidelines approach may be uninformative in defining a relevant market in the marketplace of ideas. Public choice theory may be one avenue—where the merger eliminates an important source of content in the marketplace of ideas. Another avenue, as the courts have done previously in this context, is to view the marketplace of ideas broadly by, for example, measuring the defendants' reach (as measured by the percentage of the populace they reach). Small increases in concentration would be subject to scrutiny. Cases like *Philadelphia National Bank*[226] may still have force where the product involves the marketplace of ideas and not ordinary wares like peanuts or potatoes.

More needs to be done in this arena, as media mergers continue. The purpose of this article is to propose that the marketplace of ideas belongs in the antitrust analysis of media mergers. Ultimately, it will be left to the ingenuity of lawyers and economists to refine the standards applicable to the uniqueness of the marketplace of ideas.

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[224] 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 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. As the FTC noted, "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).

[225] *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.

[226] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).