11-2009

Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy

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CONNECTICUT LAW REVIEW

VOLUME 42 | NOVEMBER 2009 | NUMBER 1

Article

Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy

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It is difficult to formulate meaningful competition policy when there is a fierce debate over the current competitiveness of the media industry. After addressing the importance of the marketplace of ideas in our democracy, this Article examines the current state of the media industry, including the response of traditional media to audience declines, the growth of new media, the impact of media consolidation (including its impact on minority and women ownership), and the role of the Internet.

In response to recent calls for liberalizing cross-ownership rules to protect traditional media, this Article outlines why conventional antitrust policy is difficult to apply in media markets, and how the concerns underlying media mergers differ from other industries. This Article recommends first that Congress should take the lead in formulating a national media policy; second, an agenda for the agencies to look beyond a merger's impact on advertising rates and more empirical work on media mergers' impact on the marketplace of ideas; and finally, ways the government can promote access to the marketplace of ideas.

ARTICLE CONTENTS

Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy

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I. INTRODUCTION

Two concerns traditionally have been raised about large media enterprises. First, media giants may raise prices to consumers and advertisers above competitive levels. This concern about corporate market power cuts across all industries. The second concern is media-specific: namely, society's political and cultural health "is fostered by numerous, independent media," and excessive media concentration may threaten the public's access to important information or viewpoints.[1]

The Obama administration is confronting both concerns. In response to declining audiences and advertising revenue, many traditional media have laid off journalists and cut back on news. The daily newspaper has been called an "endangered species"[2] with one prediction that "'more newspapers and newspaper groups will default, be shut down and be liquidated in 2009 and several cities could go without a daily print newspaper by 2010.'"[3] What this means for antitrust policy is hotly contested.

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

1 William B. Shew & Irwin M. Stelzer, *A Policy Framework for the Media Industries*, *in* MARKETS AND THE MEDIA: COMPETITION, REGULATION AND THE INTERESTS OF CONSUMERS 109, 111 (M.E. Beesley ed., 1996).

2 Kevin J. Martin, *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, at A0; *see also* John Nichols & Robert McChesney, *The Death and Life of Great American Newspapers*, NATION, Mar. 18, 2009, http://www.thenation.com/doc/20090406/nichols_mcchesney.

3 Michael Hirschorn, *End Times*, ATLANTIC, Jan./Feb. 2009, http://www.theatlantic.com/doc/200901/new-york-times.

The financial setbacks of traditional media have led some to call for further relaxation of media ownership restrictions. On March 17, 2009, for example, the Speaker of the U.S. House of Representatives asked the U.S. Department of Justice ("DOJ") to take a broader view of media competition in the Bay Area. As the Hearst Corporation's *San Francisco Chronicle* reported, "House Speaker Nancy Pelosi, worried about the fate of *The Chronicle* and other financially struggling newspapers, urged the Justice Department Monday to consider giving Bay Area papers more leeway to merge or consolidate business operations to stay afloat."[4] Thereafter, newspaper publishers and owners asked Congress to relax the antitrust laws to allow newspapers to work together to develop new business models.[5] The acting chair of the Federal Communications Commission ("FCC"), Michael Copps, said that his agency may reconsider the FCC restrictions on combined ownership of broadcast television stations and newspapers.[6] The FCC should "visit this whole problem before long."[7] But in 2007 and 2008, Commissioner Copps vigorously opposed relaxing the media cross-ownership rules, and advocated for "tough" FCC rules "to redress our localism and diversity gaps."[8] In dissenting when the FCC voted to relax these media cross-ownership restrictions, Commissioner Copps observed how the experts "demonstrate[d]—*in the record before the FCC, using the FCC's own data*—that cross-ownership leads to less total newsgathering in a local market. And that has large and devastating effects on the diversity and vitality of our civic dialogue."[9]

Others favor media deregulation because the Internet has lowered entry barriers and introduced new outlets. Nonetheless, most Americans continue to get their news and information primarily from television and newspapers, and traditional media companies own many of the most popular Internet news sites. Critics of media consolidation have argued, like FCC Commissioner Copps, that it has had a negative impact on quality and choice. Moreover, they recognize that an emerging and increasingly more competitive new media market does not warrant ignoring antitrust

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[4] Zachary Coile, *Pelosi Goes to Bat to Keep Bay Area Newspapers Alive*, S.F. CHRON., Mar. 17, 2009, at A8. For our response to the Speaker's concerns, see Maurice E. Stucke, *Concentrated Media is Something We Can't Ignore: A Response to Speaker Pelosi*, (Univ. of Tennessee Coll. of Law Research Paper No. 58, May 2009), *available at* http://ssrn.com/abstract=1369763.

[5] Evan Hessel, *Can a News Cabal Save Newspapers?*, FORBES, May 11, 2009, http://www.forbes.com/2009/05/08/newspapers-anti-trust-business-media-adcollusion.html.

[6] Todd Shields, *FCC Head Says Agency Should Reconsider Newspaper Ownership Rule*, BLOOMBERG, Mar. 26, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYAdWOXUq9FA.

[7] *Id.*

[8] Michael J. Copps, Comm'r of the FCC, Concurs and Dissents in Part to FCC Adopting Rules Promoting Diversification of Ownership in the Broadcasting Services 1 (Dec. 18, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A3.pdf.

[9] *Id.* at 4.

enforcement in major media formats.

Given President Obama's concerns about media consolidation,[10] a change in media policies is likely. But what form will such change take, especially given that traditional media are in flux? It is difficult for the Obama administration to formulate meaningful policy when there is a fierce debate about whether a problem really exists. Thus, our principal recommendation is to get a better grasp on the fundamental issues: Are media industries becoming more concentrated or not? Where is the audience going for its news? What weight should be given to alternatives such as blogs? Have there been adverse effects from prior media mergers? Have the predicted efficiencies occurred? Aside from price and output concerns, what is the impact on the quality and diversity of viewpoints when media outlets fall into the hands of fewer owners, and those owners are less likely to include minority and women owners?

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

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

A competitive "marketplace of ideas"[11] plays an important role in our democracy. Its beneficial social value is based on the theory that truth prevails in the widest possible dissemination of information from diverse and antagonistic sources.[12] 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. Thus, democracy prospers when there is an unrestrained flow of information. To govern themselves, the

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[10] *See* Sen. Barack Obama & Sen. John F. Kerry, *Media Consolidation Silences Diverse Voices*, POLITICO, Nov. 7, 2007, http://www.politico.com/news/stories/1107/6758.html ("[T]houghtful exchange of diverse viewpoints not only helps guarantee our freedom as individuals, it ensures those in power can be held accountable for all that they do.").

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

[12] *See* United States v. Assoc. Press (*AP I*), 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (*AP II*) (1945).

electorate must have full access to "social, political, esthetic, moral, and other ideas and experiences . . . ."[13] While to many this marketplace of ideas "is, and always will be, folly," we, in our democracy, "have staked upon it our all."[14] An essential goal of the First Amendment is to promote this marketplace of ideas by restricting to varying degrees *governmental* restraints on speech, and achieving "the widest possible dissemination of information from diverse and antagonistic sources . . . ."[15]

The question invariably arises whether the First Amendment restricts the government's ability to regulate media ownership or, rather, supports such an effort. Some media owners see attempts to limit ownership as burdening their ability to speak to as many people as they can through the acquisition of additional media. This interpretation of the First Amendment, supported by statements by the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*,[16] views the beneficiaries as corporations and the First Amendment as a vehicle to keep government away from their expressive freedom.

This argument that the government should not limit the rights of media conglomerates depends on several assumptions. First, it assumes that laws that regulate business conduct such as mergers are equivalent to laws that prohibit specific communicative content, which is the defining feature of censorship of speech. Second, it assures that the corporation is the ultimate and proper beneficiary of press freedom. Third, it assumes that "structural rules are appropriately evaluated under a heightened [level of] scrutiny."[17]

A better reading of the First Amendment, one more in tune with Supreme Court precedent, is that "'the right of the viewers and listeners,'" not the right of the owners, "'is paramount.'"[18] Mergers and acquisitions may have a positive or negative effect from the consumer's standpoint. Mergers may create a strong voice where none existed before; on the other hand, they may reduce the number of voices and thus inhibit the robustness of debate. In tandem with First Amendment principles, the federal

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

[14] *AP I*, 52 F. Supp. at 372; *see also* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 249 (2001).

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

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

[17] C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 127–29 (2007).

[18] *Red Lion Broad. Co.*, 395 U.S. at 390. In *AP II*, Justice Black rejected AP's argument that it should have the autonomy to control its own operations and its own associations with newspapers without government interference: "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." *AP II*, 326 U.S. at 20. That this is the proper interpretation may be seen from the fact that telephone companies, as common carriers, must carry expressions that their owners would find objectionable, and from the widespread requirements that both broadcasters and cable systems must carry content that they would reject. Under this view, the application of antitrust laws is in tune with the First Amendment because "[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Id.*

antitrust laws can promote the marketplace of ideas by reaching anticompetitive *private* restraints on this marketplace.[19] The Supreme Court and lower courts have made this link explicit.[20] "[A]s the Supreme Court has recognized, in promoting diversity in sources of information," wrote Judge Greene in *United States v. AT&T*, "the values underlying the *First Amendment* coincide with the policy of the antitrust laws."[21] Some have argued that consideration of First Amendment values should persuade antitrust officials to seek a higher than usual level of competition in media markets.[22]

In promoting a competitive marketplace of ideas, competition agencies, in turn, can promote the objectives of competition generally. An independent and competitive media, for example, informs policy makers of the unintended social effects of their policies, provides a voice to pressure the government for change, serves as a catalyst for institutional change to promote competition policy, increases political accountability, and reduces corruption, which hampers any competition policy.[23] As Professor Ed Baker writes:

> Concentrated communicative power creates demagogic dangers for a democracy, reduces the number of owners who can choose to engage in watchdog roles, may reduce the variety in perspectives among the smaller group of people who hold ultimate power to choose specific (varying) watchdog projects, and multiplies the probable conflicts of interest that can muzzle these watchdogs.[24]

III. CONCERNS ABOUT THE COMPETITIVENESS OF THE MARKETPLACE OF IDEAS

Given the importance of a vibrant marketplace of ideas to our democracy and free market system, the Obama administration is already

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[19] Stucke & Grunes, *supra* note 14, at 252.

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

[21] United States v. AT&T Co. 552 F. Supp. 131, 184 (D.D.C. 1982) (emphasis added).

[22] *See, e.g.*, Wilfred Rumble, *The FCC's Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F. L. REV. 793, 794–95 (1994). For a general review of such arguments, see 1 FEDERAL TRADE COMM'N, PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION 22 (Dec. 14–15, 1978) (remarks of Professor Monroe Price, UCLA Law School).

[23] For a discussion how an independent competitive media can advance the goals of competition policy, see Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 1020–25 (2008).

[24] BAKER, *supra* note 17, at 120–21.

engulfed in the ongoing debate over the health and competitiveness of the U.S. news media.[25] This section first examines the health and competitiveness of traditional media, given its reduction of journalists and output. After looking at the growth of new media, this section next examines the impact of media consolidation on the marketplace of ideas generally, and on women and minority ownership of the media in particular.

A. *Health and Competitiveness of Traditional Media*

The media industry is in flux. In recent years, some media conglomerates have shed,[26] while others have increased, their holdings.[27]

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[25] Senator Kohl summarized the concerns that media consolidation has on the marketplace of ideas:

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

Larry Fullerton & Mark Whitener, *Interview with U.S. Senator Herb Kohl [D-Wi], Chairman, Antitrust Subcommittee*, 21 ANTITRUST 7, 12 (2007).

[26] In 2005, Viacom split into two separate companies: Viacom and CBS Corporation. In 2006, Clear Channel Communications and CBS, the largest and second largest radio holders, announced plans to sell some of their radio and television stations. Clear Channel announced selling 448 "non-core" radio stations, all in markets outside the top 100, and its entire television station group, which collectively contributed less than ten percent of the company's 2005 revenues. Press Release, Clear Channel Announces Plan to Sell Radio Stations Outside the Top 100 Markets and Entire Television Station Group (Nov. 16, 2006), *available at* http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1825. In 2007, Clear Channel sold 217 non-core radio stations and reached definitive purchase agreements to sell twenty-eight more "non-core" radio stations. CLEAR CHANNEL CORP., ANNUAL REPORT (FORM 10-K), at 4 (Dec. 31, 2007), *available at* http://www.clearchannel.com/Investors/Documents/291.pdf. In 2008, Clear Channel completed the planned divestiture of its non-core radio stations and the sale of its television business. CLEAR CHANNEL CORP., ANNUAL REPORT (FORM 10-K), at 3 (Feb. 27, 2009), *available at* http://www.clearchannel.com/Investors/Documents/320.pdf. Today, according to its website, Clear Channel operates "over 800 radio stations reaching more than 110 million listeners every week across all 50 states." Clear Channel

And traditional media companies have expanded their Internet holdings or sought to collaborate with well-known Internet companies.[28]

Many traditional news media are losing their audience. Daily newspapers and alternative newsweeklies have lost circulation for their print editions[29] as their readership ages.[30] In recent years, ratings for cable and network national news and local televised news have declined.[31] For the three traditional networks' evening newscasts, the number of viewers in 2006 was half its 1980 level, with the median age of the networks'

Communications, Inc., Fact Sheet, http://clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1564&p=hidden (last visited Sept. 26, 2009). After 2005, CBS sold eleven television and over forty radio stations in medium and smaller-markets. John Eggerton, *CBS Sells Four Stations to Four Points Media*, BROADCASTING & CABLE, Jan. 10, 2008, *available at* http://www.broadcastingcable.com/article/CA6521802.html. By the end of 2008, CBS owned thirty broadcast TV stations and 137 radio stations. CBS CORP., ANNUAL REPORT (FORM 10-K), at I-1, I-2 (Feb. 25, 2009), *available at* http://www.cbscorporation.com/investors/form_10k/2008_10-K.pdf. In 2007, Walt Disney Co. sold twenty-two big-city radio stations to Citadel for approximately $2.7 billion. Citadel's entire stock-market value dropped in 2008 to under $300 million, which is a fraction of the value for its purchase of the Disney radio stations completed eight months earlier. Paul Farhi, *Strapped Owner Fires WMAL Host Chris Core*, WASH. POST, Mar. 1, 2008, at C01. On May 7, 2007, The New York Times Company sold its Broadcast Media Group, consisting of nine network-affiliated television stations, their related Web sites and the digital operating center, to Oak Hill Capital Partners, for approximately $575 million. THE NEW YORK TIMES CO., ANNUAL REPORT (FORM 10-K), at P.1–P.2 (Feb. 26, 2008), *available at* http://www.nytco.com/investors/financials/annual_reports_2007.html.

[27] In 2007, News Corporation, which has major holdings in filmed entertainment, television, cable network programming, direct broadcast satellite television, magazines, newspapers, and book publishing, acquired the Dow Jones & Company, Inc. for approximately $5.6 billion. Paul R. LaMonica, *News Corp. Wins Fight for Dow Jones*, CNNMONEY, July 31, 2007, http://money.cnn.com/2007/07/31/news/companies/dowjones_newscorp/index.htm. Rivals Sirius Satellite Radio and XM Satellite Radio Holdings Inc. merged, unopposed by the DOJ. Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. 1 (Mar. 24, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/231467.pdf. The FCC also approved the merger with minor conditions, even though earlier when the FCC auctioned the only two satellite digital audio radio service licenses, it specifically prohibited one company from owning both licenses. Cheryl Bolen, *XM, Sirius Accept Consent Decree to Secure FCC Approval of Merger*, ANTITRUST & TRADE REG. DAILY (BNA) (July 25, 2008).

[28] Project for Excellence in Journalism, *Network TV*, *in* THE STATE OF THE NEWS MEDIA 2008 (2008) [hereinafter 2008 PEJ Report], *available at* http://www.stateofthenewsmedia.org/2008/index.php.

[29] Between 1950 and 2008, the circulation and number of United States daily newspapers have declined from 1772 newspapers with a collective daily circulation of 53,829,000 to 1408 newspapers with a collective daily circulation of 48,597,000. NEWSPAPER ASSOCIATION OF AMERICA, THE SOURCE–NEWSPAPERS BY THE NUMBERS (2009), *available at* http://www.naa.org/TrendsandNumbers/Total-Paid-Circulation.aspx. This decline is attributable to evening newspapers; the number of morning newspapers (some of which are former afternoon newspapers) increased from 322 newspapers with a collective circulation over twenty-four million to 872 morning newspapers with a daily circulation over forty-two million. *Id.*

[30] *See Newspapers*, *in* 2008 PEJ Report, *supra* note 28 (stating that in 2007, 33% of 18-to-24 year olds and 34% of 25-to-34 year olds read a newspaper in an average week).

[31] *Overview*, *in* 2008 PEJ Report, *supra* note 28. The average audience for the three main cable news channels declined in 2006. Project for Excellence in Journalism, *Cable TV*, *in* THE STATE OF THE NEWS MEDIA 2007 (2007), *available at* http://www.stateofthemedia.org/2007/index.asp [hereinafter 2007 PEJ Report]. In 2007, viewership increased by about three percent, but viewership overall is below levels from the early 2000s. *Cable TV*, *in* 2008 PEJ Report, *supra* note 28.

nightly news viewers at sixty years.[32] Between 1998 and 2006, the commercial radio audience declined as well[33]—a notable exception, National Public Radio, had an increase in listeners.[34] Americans have a less favorable view of the press, partly due to the perception of greater bias.[35] Although traditional media have attracted new readers to their websites, their online revenues have been unable to support their news operations.[36] Newspaper advertising revenue declined 7.9% in 2007 and 16.6% in 2008.[37] Consequently, even The New York Times Company, with its popular online news website (which attracted twenty million unique users for the month of October 2008, making it the fifth-ranked news site on the Internet in terms of total visitors), faced the prospect of defaulting on some $400 million in debt, leading some to question its future viability.[38]

B. *Traditional Media's Reduction in Output*

With print circulation, viewership, and advertising revenue declining, traditional media companies—the large broadcasters, newspaper and magazine publishers—generally have responded to these audience declines by reducing costs. Some cost savings may be a result of efficiencies such as back office savings, a move to cheaper delivery alternatives, or outsourcing certain functions. Many major media companies, however,

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[32] *Network TV*, *in* 2007 PEJ Report, *supra* note 31. In 2007, viewership experienced a steeper decline of five percent or 1.2 million fewer viewers, and the median age of nightly news viewers increased to sixty-one years old. *Network TV*, *in* 2008 PEJ Report, *supra* note 28.

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

[34] *Radio*, *in* 2007 PEJ Report, *supra* note 31.

[35] *Overview*, *in* 2007 PEJ Report, *supra* note 31. A recent national poll found significantly declining percentages of Americans saying they believe all or most of media news reporting. Just 19.6% of those surveyed could say they believe all or most news media reporting, down from 27.4% in 2003. Sacred Heart University, *Americans Slam News Media on Believability*, SACRED HEART UNIV. NEWS, Jan. 8, 2008, http://www.sacredheart.edu/pages/20786_americans_slam_news_media_on_believability.cfm.

[36] *Overview*, *in* 2008 PEJ Report, *supra* note 28.

[37] Richard Pérez-Peña, *Newspaper Ad Revenue Could Fall as Much as 30%*, N.Y. TIMES, Apr. 15, 2009, at B0.

[38] Hirschorn, *supra* note 3. In 2008, the Times's newspaper advertising revenue declined 14.2%. Richard Pérez-Peña, *Times Co. Suspends its Dividend to Raise Cash*, N.Y. TIMES, Feb. 20, 2009, at B6. To meet its significant debt payments, the Times in 2009 suspended dividends for the first time in four decades as a publicly traded company, borrowed $250 million from a Mexican billionaire, and is seeking to sell its interest in the Boston Red Sox and to arrange a sale-leaseback of a portion of its head-quarters building. *Id.* The Times lost $74.5 million in the first three months of 2009, and in its negotiations with *The Boston Globe*'s unions threatened to close that newspaper. Clark Hoyt, *When Your Sister Is the Story*, N.Y. TIMES, May 10, 2009, at 8.

continue to lay off journalists,[39] close news bureaus here[40] and abroad,[41] cut back on news coverage, and offer more "hit-and-run" and less investigative journalism.[42] Radio stations carry less local news.[43] Local television stations increased the production of news, but without significantly adding journalists, leading to less original reporting and greater reliance on non-original material[44] or sharing news with rival

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[39] Between 2000 and 2006, newsroom staffing at daily newspapers declined by 3000 or about five percent, with greater layoffs expected. From 2002 to 2006, news division staffing on the network televisions dropped about ten percent. Layoffs at the major news magazines (such as *Time* and *U.S. News & World Report*) and network news programs had even greater percentages. *Overview*, *in* 2008 PEJ Report, *supra* note 28. In contrast, newsroom staffing is increasing for local television news and the ethnic newspapers. *Id.*; *see also* DAVID H. WEAVER ET AL., THE AMERICAN JOURNALIST IN THE 21ST CENTURY: U.S. NEWS PEOPLE AT THE DAWN OF A NEW MILLENNIUM 1–2 (2007) (noting a decline of approximately 6000 full-time people or five percent working in the news between June 1992 and November 2002). The number of total newspaper employment, which increased between 1970 and 1990, has declined annually thereafter. NEWSPAPER ASS'N OF AMERICA, FACTS ABOUT NEWSPAPERS 2004, *available at* http://www.naa.org/info/facts04/employment.html (providing data for 1970–2003).

[40] Stephen Foley, *The Writing's on the Wall for the Old-Style American Newspaper*, INDEP., Dec. 15, 2008, http://www.independent.co.uk/news/media/press/the-writings-on-the-wall-for-the-oldstyle-american-newspaper-1066695.html. As newspapers seek to cut costs further, for example, "more and more of them come to view Washington bureaus as luxuries they simply cannot afford" and "have eliminated more than 40 Washington regional reporter positions through layoffs, buyouts or attrition." Jennifer Dorroh, *Endangered Species: Many Newspapers are Laying off the Reporters Who Monitor the Federal Government from a Local Angle*, AM. JOURNALISM REV. (Dec./Jan. 2009), *available at* http://www.ajr.org/Article.asp?id=4645.

[41] *Newspapers*, *in* 2008 PEJ Report, *supra* note 28.

[42] One study of news coverage in forty-eight media outlets and five media sectors found a number of stories "that were big events that flashed across the media landscape and then vanished almost instantly, with less follow-up than one might have expected." *Overview*, *in* 2008 PEJ Report, *supra* note 28; *see also* Eric Alterman, *The News Business: Out of Print*, NEW YORKER, Mar. 31, 2008, at 48. The major broadcast news networks, for example, have reduced staffing, halved the number of overseas news bureaus, and aired forty-six percent fewer foreign stories since the late 1980s. *Network TV*, *in* 2007 PEJ Report, *supra* note 31. Moreover, the historic 22 minutes of news in a 30-minute evening network news broadcast had shrunk by 2007 to an average of 18.6 minutes (ABC had an average of 18.1 minutes of news per night; CBS had 18.7 minutes; and NBC had 18.8 minutes). *Network TV*, *in* 2008 PEJ Report, *supra* note 28. As one newspaper industry analyst commented, rather than innovating, "most newspaper companies concentrated on shoring up the profitability of their traditional newsprint-oriented business, chiefly through laying off employees, downsizing their newspapers and cutting back on circulation in distant areas of little interest to advertisers in their core markets." John Morton, *Buffeted: Newspapers are Paying the Price for Shortsighted Thinking*, AM. JOURNALISM REV. (Oct./Nov. 2007), *available at* http://www.ajr.org/Article.asp?id=4416.

[43] In 2006, radio stations on average aired each day 37.1 minutes of locally produced news, of which 20.2 minutes was aired during the morning drive. Bob Papper, *By the Numbers: News, Staffing and Profitability Survey*, COMMUNICATOR, Oct. 2006, at 34, *available at* http://www.rtnda.org/media/pdfs/communicator/2006/oct/102006-22-34.pdf. As the article notes:

> There's little positive news on the radio side. Both the average amount of news and average staff size fell from a year ago. While consolidation makes it difficult to track radio news over time, it's clear that the overall trend is down. The typical radio news director oversees three to four stations, and more than three-quarters of radio news directors also have non-news responsibilities.

Id. at 22.

[44] *Local TV*, *in* 2007 PEJ Report, *supra* note 31; Copps, *supra* note 8, at 6 ("We have witnessed the number of statehouse and city hall reporters declining decade after decade, despite an explosion in state and local lobbying.").

stations.[45] One weekly news magazine in 2008 went monthly.[46] With the recent financial crisis, more newspapers are expected to cut home delivery,[47] reduce the number of days they publish,[48] migrate from print to online-only editions,[49] or shut down entirely.[50]

Although their profit margins have shrunk, many daily newspapers and television stations remain profitable, indeed, more profitable than other industries.[51] This has led skeptics to dispute the claim that newspapers and

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[45] One estimate is that 200 local television stations get news from other news stations, and thirty-seven percent of surveyed local news directors said in 2006 that they shared content with other local television stations. *Local TV*, *in* 2008 PEJ Report, *supra* note 28. For non-affiliated commercial television stations, fifty percent of the news directors said they shared content in 2006, compared to none the year before. *Id.*; *see also Some News-sharing Alliances that Emerged in 2008*, ASSOCIATED PRESS, Jan. 5, 2009; Staci D. Kramer, *Washington Post, Baltimore Sun Will Share Some Sports, Maryland Coverage*, PAID CONTENT, Dec. 23, 2008, http://paidcontent.org/article/419-washington-post-baltimore-sun-will-share-some-news/.

[46] Richard Pérez-Peña, *U.S. News Will Become a Monthly Magazine*, N.Y. TIMES, Nov. 5, 2008, at B3.

[47] The *Albuquerque Journal*, New Mexico's largest daily newspaper, announced in 2009 it was stopping home deliveries and rack sales in more than thirty communities around the state because of the economic downturn, leaving readers with online or mail delivery. This follows the *Detroit Free Press* and *Detroit News*, which in 2008, limited home delivery to three days a week (Thursday, Friday, and Sunday), and the *San Antonio (Texas) Express-News*, which stopped home delivery and single-copy sales in parts of South Texas. *See* Sue Major Holmes, *Albuquerque Journal to Halt Some Home Deliveries*, ALLBUSINESS, Jan. 8, 2009, http://www.allbusiness.com/marketing-advertising/marketing-advertising-channels/11928025-1.html; *Dramatic Changes Unveiled at the News, Free Press*, DETROIT NEWS, Dec. 17, 2008.

[48] Richard Pérez-Peña, *4 Michigan Markets Will Lose Daily Newspapers, as Ailing Industry Tries to Cope*, N.Y. TIMES, Mar. 24, 2009, at B8 (noting that three former daily Michigan newspapers are now publishing only three days per week).

[49] *See, e.g.*, Stephanie Clifford, *Christian Science Paper to End Daily Print Copies*, N.Y. TIMES, Oct. 29, 2008, at B8 (stating that the *Christian Science Monitor* will appear online instead of in weekly print). In January 2009, Hearst announced that it was putting the *Seattle Post-Intelligencer* (and its interest in a joint operating agreement with the *Seattle Times*) up for sale, with the expectation that if no buyer was found within sixty days the paper would either become a web-only operation or cease publishing entirely. Dan Richman & Andrea James, *For Sale: The P-I*, SEATTLE POST-INTELLIGENCER, Jan. 9, 2009, at A1. No buyer was found, and the P-I ceased producing a print edition. Dan Richman & Andrea James, *Seattle P-I to Publish Last Edition Tuesday*, SEATTLE POST-INTELLIGENCER, Mar. 16, 2009, at News-W. Advance Publications replaced its 174-year-old *Ann Arbor News* with primarily a Web-based operation. Pérez-Peña, *supra* note 48.

[50] For example, in early 2009, E.W. Scripps Co. closed its newspaper, the *Rocky Mountain News*. Paul Beebe, *Are Newspapers Sinking?*, SALT LAKE TRIBUNE, Mar. 15, 2009.

[51] As one newspaper industry analyst wrote:

> Bad as 2007 has been, the publicly reporting companies still produced an average operating-profit margin of nearly 16 percent in the first half of the year—a level many businesses can never hope to achieve. Still, the average profit margin has been in steady decline since 2002, when it was 22.3 percent.

Morton, *supra* note 42. That same analyst in reviewing the financials of publicly held newspapers through September 2008 noted that despite a nearly 40% decline in operating profits, the operating profit margins, subject to certain adjustments, were 11.3%. John Morton, *It Could Be Worse*, AM. JOURNALISM REV. (Dec./Jan. 2009), *available at* http://www.ajr.org/Article.asp?id=4660; *see also Newspapers*, *in* 2008 PEJ Report, *supra* note 28 (newspaper industry's pre-tax margin was approximately 18.5% in 2007); Copps, *supra* note 8 ("We shed crocodile tears for the financial plight of newspapers—yet the truth is that newspaper profits are about double the S&P 500 average."). Likewise, the president of a station brokerage business said that:

> Wall Street has walked away from broadcast investments because they don't see

other traditional media are going the way of the buggy whip. Nonetheless, even before the recent recession, many publicly-traded media companies, despite double-digit profit margins, lost favor on Wall Street.[52] Some companies saddled by debt from recent acquisitions had a tougher time meeting their debt obligation during this recession, notably the Tribune Company, Philadelphia Newspapers, and Star Tribune of Minneapolis, which entered bankruptcy.[53] In this current recession, media companies' advertising revenues and profits are expected to deteriorate further.

C. *Growth of New Media*

Today, consumers can access news and entertainment from personal digital audio and video devices (such as iPods, WiFi, mobile phones, WiMAX, and mp3 players), subscriber-based satellite digital radio service (with numerous niche formats), direct broadcast satellite systems, Internet content providers, and HD Radio (multi-channel, multi-format digital radio services). The number of media outlets has multiplied.[54] With such technological innovations, consumers often can select the content they want, when and where they want it, from a variety of sources. Journalism is no longer passively consumed. Consumers can create news and participate in the news discourse through citizen publishing, blogging, YouTube, and other developments. The number of web sites run by citizen

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> the growth that the industry has had over the past 20–30 years. . . . Growth has slowed, but broadcasting is a tremendously high free-cash-flow business. . . . A television company has 35%–40% operating margin. You can't put your money in anything else that gets that kind of return.

Paige Albiniak, *Private Property: Broadcasting Moves Away from Wall Street*, BROADCASTING & CABLE, Apr. 16, 2007, *available at* http://www.broadcastingcable.com/article/CA6433752.html; *see also* Felicity Barringer, *Fear of Cutbacks Rattles Papers in Philadelphia*, N.Y. TIMES, Oct. 23, 2000, at C1 (noting the doubling profit margins of two Philadelphia papers). Also local TV newsrooms, according to one survey, contribute on average forty-two percent to a local television station's revenues. *Local TV*, *in* 2008 PEJ Report, *supra* note 28.

52 Independent, publicly traded U.S. newspapers lost forty-two percent of their market value between 2005 and 2008. Alterman, *supra* note 42, at 48; *Newspapers*, *in* 2008 PEJ Report, *supra* note 28. With the dismantling of the second largest newspaper chain, Knight-Ridder, and radio giant Clear Channel Communications going private, another debate is the optimal corporate model for ownership, whether it be public, privately held, or non-profit trust. *Overview*, *in* 2007 PEJ Report, *supra* note 31. By the end of 2008, approximately thirty U.S. newspapers were still up for sale. Kenneth Li, *Newspaper Asset Sales Draw Few Buyers*, FIN. TIMES, Dec. 18, 2008. In contrast, stock prices of publicly-traded television owners, as of mid-2007, had two to three times the growth of the overall stock market. *Local TV*, *in* 2008 PEJ Report, *supra* note 28.

53 Morton, *supra* note 42; Richard Pérez-Peña, *Bankruptcy Protection Filing at Minneapolis Star Tribune*, N.Y. TIMES, Jan. 16, 2009, at B3.

54 In the Matter of 2006 Quadrennial Regulatory Review, 23 F.C.C.R. 2010, 2015, 2042 (2008) [hereinafter 2008 FCC Report]. The FCC noted in "absolute terms, dramatic changes have occurred over several decades with respect to the number and types of media 'voices' competing for the public's attention." *Id.* at 2024. The FCC noted the "hundreds of video programming channels available over cable and, later, by satellite distribution," approximately 11.6 million subscribers to satellite radio, approximately eighty-six percent of U.S. households subscribe to video service provided by an MVPD, which includes cable, SMATV systems, direct broadcast satellite ("DBS"), fiberoptic network service, wireless cable, and other such delivery systems. *Id.*

journalists, according to one estimate, is approaching 1500.[55] "Eighty percent of Internet users age 17 and older," according to a 2007 study, "consider the Internet to be an important source of information for them—up from 66 percent in 2006—and higher than television (68 percent), radio (63 percent), and newspapers (63 percent)."[56] And entry barriers are lower with the Internet.

But despite its increasing prominence as a place where people access news and advertisers spend money, the Internet remains a distribution medium, not a source of original news content. Although Internet companies invest in this medium, the investment has tended to be in technology and not in journalists. Internet sites unaffiliated with traditional media typically collect stories from various newspapers and wire services, or comment on the news, but do little original local news coverage or investigative reporting. For example, three of the five most popular news sites on the Web, according to one 2007 study, generated sparse original reporting: both Yahoo and AOL relied on wire services and other news outlets for ninety-nine percent and ninety-eight percent, respectively, of their lead news services. Google relied exclusively on news wires or other news outlets.[57] Anecdotes exist of bloggers breaking a news story, but the available survey data "suggest most Americans have yet to accept them as significant news sources."[58] The most popular Internet sites for news remain the domain of the largest media conglomerates.[59] Of the twenty most popular online news sites, seventeen are owned by one of the 100 largest media accompanies.[60] Time Warner, the leading U.S. media company in advertising revenues between 1995 and 2008, for example, controls two (AOL News and CNN) of the four most popular news websites.[61] Moreover, consumers spend on average six minutes online per day reading the news.[62] This (as other studies show) suggests that online news currently complements, rather than replaces,

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[55] *Online*, *in* 2008 PEJ Report, *supra* note 28.

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

[57] *Online*, *in* 2008 PEJ Report, *supra* note 28.

[58] *Id.*

[59] *Online*, *in* 2007 PEJ Report, *supra* note 31. The 100 largest media companies (in terms of 2005 revenues) owned sixteen of the top twenty popular online news sites, as ranked by Nielsen/Net Ratings. *Id.*

[60] *Online*, *in* 2008 PEJ Report, *supra* note 28.

[61] *Id.* Time Warner lost the top spot in 2009 to Comcast Corporation. Bradley Johnson, *U.S. Media Revenue Set for Historic 2009 Decline*, ADVERTISING AGE, Oct. 5, 2009, *available at* http://adage.com/mediaworks/article?article_id=139445.

[62] *Online*, *in* 2007 PEJ Report, *supra* note 31. In contrast, surveyed consumers spent thirty minutes watching TV news, fifteen minutes reading a newspaper, and sixteen minutes listening to news on the radio. *Id.*

traditional news media.[63]

Moreover, it is unclear whether the Internet will be sufficiently profitable to invest in local investigative journalism. Approximately eighty-five percent of all online advertising dollars goes to four Internet sites (Google, Yahoo, AOL, and MSN), and all but one percent goes to the top ten Internet sites.[64] As the financial failure of the citizen journalism website, Backfence, reveals, "few of the estimated 500 or so 'local-local' news sites claim to show a profit . . . the overwhelming majority lose money," and the citizen journalism "business models remain deeply uncertain."[65] Although the citizen journalists surveyed were quite upbeat,[66] one pessimistic conclusion is that news reporting itself is at risk because of the shift of audiences and advertisers to the Internet: "'[T]he economic base supporting the most difficult and expensive journalistic undertakings is eroding.'"[67]

New technologies are bringing dynamic innovations, but the available evidence still points to the continuing importance of traditional media, especially newspapers and broadcast television, to the marketplace of ideas. In the same survey where users identified the Internet's increased importance as an information source:

> [O]nly small numbers of users believe that the Internet is a catalyst for political change: less than one-quarter of users (22 percent) believe that the Internet is a tool to encourage public officials to care more about what people think, while only 28 percent agree that using the Internet gives people more of a say in what government does.[68]

The workhorse for gathering the news and investigating stories, as the FCC recently found from its available data, remains the local daily newspaper, followed by the local television station.[69] The record before the FCC demonstrated that "traditional media still represent the most important

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[63] *Id.*

[64] *Online*, *in* 2008 PEJ Report, *supra* note 28.

[65] Paul Farhi, *Rolling the Dice*, AM. JOURNALISM REV. (June/July 2007), *available at* http://www.ajr.org/Article.asp?id=4343 (quoting a survey by J-Lab: The Institute for Interactive Journalism).

[66] Fifty-one percent said they didn't need to make money to keep going; 82% said they planned to continue "indefinitely;" 73% called their sites a "success," based largely on the impact in their communities; 82% said they provided opportunities for dialogue; 61% said they watchdogged local government; 39% said they helped the community solve problems; 27% said they increased voter turnout; and 17% said they increased the number of candidates running for office. Press Release, J-Lab: The Institute for Interactive Journalism, CitMedia Sites are Here to Stay (Feb. 5, 2007), *available at* http://www.j-lab.org/about/press_releases/citmedia_sites_are_here_to_stay/.

[67] BAKER, *supra* note 17, at 117 (quoting the Project for Excellence in Journalism).

[68] Press Release, USC Annenberg School for Communication, *supra* note 56.

[69] 2008 FCC Report, *supra* note 54, at 2030. Newspapers and, to a somewhat lesser extent, broadcast stations still continue to serve as the most organized, systematic gatherers of news and information in their communities.

source for local news for the majority of individuals." A Nielsen Survey indicated that 38.2% of all respondents consider broadcast television stations and 30.1% consider local newspapers "the most important source of local news or local current affairs."[70] Thus, the FCC categorized "major" media voices "full-power commercial and noncommercial television stations and major newspapers" because "such sources are generally the most important and relevant outlets for news and information in local markets today."[71] Newspapers and network television, found another recent study, offer a wider variety of subject matter and are less likely to be dominated by a few mega-stories.[72] The Internet may provide readers with more perspectives for international or national news,[73] but is not necessarily a close substitute for the local news in the local daily newspaper and on the local television news broadcast. Cable provides mainly national news;[74] commercial radio covers little local news.

D. *The Impact of Media Consolidation*

Market failure in media industries poses different and greater concerns than in other industries. With many commodities, market failure manifests in higher prices. The consumer pays more. But market failure in the marketplace of ideas may not manifest itself simply with higher prices. Newspapers and other types of information-heavy media are what economists refer to as "credence goods."[75] Their actual quality is difficult to determine in isolation even after being purchased and consumed; it must be taken to some degree on faith.[76] A news channel may claim to be "fair

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[70] *Id.* at 2042.

[71] *Id.*; *see also Overview*, *in* 2008 PEJ Report, *supra* note 28.

[72] *Overview*, *in* 2008 PEJ Report, *supra* note 28.

[73] *Online*, *in* 2008 PEJ Report, *supra* note 28 (basing statements on a 2007 study of lead news coverage on the five most popular news sites on the Web).

[74] A study of 885 hours of cable news over 2007 found that cable news focused on three to four topics per day, and on the news wires and "brief 'tell stories'" for the balance. *Cable TV*, *in* 2008 PEJ Report, *supra* note 28. MSNBC spent more time on politics (28% of time surveyed) than Fox News (15%) or CNN (12%); Fox spent less time on the Iraq war (10% versus 18% on MSNBC and 16% on CNN), and more time on crime, celebrity, and the media (28% versus 19% on MSNBC and 16% on CNN). *Id.* PEJ calculated that if one watched five hours of cable news in 2007, one saw on average: thirty-five minutes about campaigns and elections, thirty-six minutes about the debate over U.S. foreign policy, twenty-six minutes or more of crime, twelve minutes of accidents and disasters, ten minutes of celebrity and entertainment, and less than four minutes about health and health care (3:46); the economy (3:34), environment (1:25), education (1:22), and science and technology (1:00). *Id.*

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

[76] BARTHOLOMEW H. SPARROW, UNCERTAIN GUARDIANS: THE NEWS MEDIA AS A POLITICAL INSTITUTION 101–02 (1999).

and balanced" or "the most trusted name in news," but consumers may be ill-equipped to ascertain the veracity of these assertions regarding specific stories. Thus, competition allows "consumers to judge quality more accurately because they can benchmark one firm's reporting against the other."[77]

Less competition thus may diminish the quality of reporting. For example, during the 2008 presidential campaign, then Senator Obama made extended critical comments about the current state of U.S. antitrust policy in response to a question at a campaign stop in Oregon. He stated that he intended, if elected, to enforce the antitrust laws more strongly and singled out media consolidation as a particular cause for concern. The Senator's comments came when there was significant debate about media consolidation in light of the current FCC's relaxing of cross-ownership rules and the DOJ's approval of the Sirius-XM satellite radio merger. While Senator Obama's comments prompted an opinion piece from *The Nation* and a brief mention in the *Financial Times*, none of the twenty prominent newspapers surveyed by the American Antitrust Institute ("AAI") independently reported the comments. *The Washington Post*'s website and *The New York Times*'s website carried a different *Reuters* article that covered the reaction of the U.S. legal community to Senator Obama's comments on antitrust policy without mentioning Senator Obama's concerns of media consolidation.[78] Likewise, as gasoline prices escalated during the 2008 presidential election, so too did the debate over drilling in environmentally sensitive areas. But there was no empirical basis that such drilling would significantly affect gas prices. Instead, the U.S. Department of Energy projected that such drilling (which was estimated to add 200,000 barrels of oil per day at peak productions in twenty years) would be too small to significantly affect oil prices. Of the 267 surveyed television and cable news broadcasts in the summer of 2008 that mentioned the proposed drilling, however, only one broadcast mentioned this governmental study. Instead, as one study found, the major "media outlets provided daily repetition of the false claim that expanded drilling in environmentally sensitive zones would significantly lower gasoline prices."[79]

Another market failure unique to the media is self-censorship.[80]

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[77] Matthew Gentzkow & Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. ECON. PERSP. 133, 142 (2008) [hereinafter Gentzkow & Shapiro, *Market for News*].

[78] Press Release, American Antitrust Inst. Notes, Comments by Senator Obama on Media Concentration: Institute is Critical of Lack of Coverage by Mainstream Press, The American Antitrust Inst. (May 22, 2008), *available at* http://www.antitrustinstitute.org/archives/files/AAI%20Press%20 Release%20Obama%20Media%20Consolidation%205.22.08_052220081804.pdf.

[79] Mark Weisbrot & Nichole Szembrot, *Oil Drilling in Environmentally Sensitive Areas: The Role of the Media* 2–4 (Center for Econ. & Policy Research Issue Brief Sept. 2008), *available at* http://www.cepr.net/documents/publications/media_drilling_2008_09.pdf.

[80] *See, e.g.*, BAKER, *supra* note 17, at 40–41 (stating that pressures to please media advertisers

Journalists and media watchdogs have expressed concern about the rise of self-censorship and the loss of journalistic independence following the increasing media concentration.[81] Likewise, in enacting the 1992 Cable Act, Congress noted its "special concerns" about concentration of the media in the hands of a few who may control the dissemination of information. One concern was that "the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." Congress's second concern about "horizontal concentration is that it can be the basis of anticompetitive acts. For example, a market that is dominated by one buyer of a product, a monopsonist, does not give the seller any of the benefits of competition."[82]

If a concentrated media industry is dependent upon major advertisers or government funding, the risk of self-censorship increases.[83] In a survey of journalists, editors, and news executives in the U.S., "more than one-third responded that news is not reported if it might hurt advertising revenues and thus harm the financial position of media firms."[84] If the advertisers consolidate (such as department stores), this lessening of competition can also adversely affect media dependent on these advertisers (such as daily newspapers which relied on Macy's, Bloomingdales, Lord & Taylor, among others for advertising).[85] Although the failure of liberal talk show *Air America* had many causes, it is interesting that according to an ABC Radio Network memo, that ninety prominent advertisers, including Hewlett-Packard, Microsoft, Wal-Mart, Visa, Exxon-Mobil, Cingular, and McDonalds, did not want their advertising running during any syndicated *Air America* programming the ABC stations carried.[86] Both advertisers

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inevitably leads to self-censorship); BEN H. BAGDIKIAN, THE MEDIA MONOPOLY (6th ed. 2000); ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 243 (1999) (stating that public broadcasting systems self-censor so as to not upset the wealthy ruling class that supports them); Copps, *supra* note 8, at 2 (explaining that the Commissioner heard "first-hand from editorial page editors who have told me they can cover any story, save one—media consolidation, and that they have been instructed to stay away from that one").

[81] *See, e.g.*, Trudy Lieberman, *You Can't Report What You Don't Pursue*, 39 COLUM. JOURNALISM REV. 44, 44–49 (2000); Mark Crispin Miller, *Can Viacom's Reporters Cover Viacom's Interests?*, 38 COLUM. JOURNALISM REV. 50, 50 (1999).

[82] S. REP. NO. 102-92, at 29, 30 (1991). Congress sought to remedy these concerns in the 1992 Cable Act, with several provisions including the "must-carry," "subscriber limits," and "channel occupancy" provisions. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at 47 U.S.C. §§ 534(b)(1)(B) ("must-carry"), 533(f)(1)(A) ("subscriber limits"), 533(f)(1)(B) ("channel occupancy") (2000)).

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

[84] *Id.*

[85] The extent to which consolidation has adversely impacted newspapers overall is not evident from NAA data on newspaper revenues for retail and national advertising. Newspaper Association of America, Advertising Expenditures, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited May 23, 2008).

[86] *Radio*, *in* 2007 PEJ Report, *supra* note 31.

and politicians may seek to take advantage of this self-censorship for their own purposes. A case in point is the reported attempt by former Illinois Governor Rod Blagojevich to induce the owner of the *Chicago Tribune* to fire members of the newspaper's editorial board who had been calling for the Governor's impeachment. The Tribune Company had been seeking state financial assistance as part of its effort to sell the Chicago Cubs; the Governor allegedly threatened to withhold that assistance unless changes were made to the composition of the newspaper's editorial board. According to an intercepted telephone conversation, the Governor's chief of staff reported to his boss that the owner of the *Tribune* "got the message."[87]

Increased competition in the news market, on the other hand, can lead to lower supply-driven bias.[88] The authors of one empirical study, for example, found that in high feedback settings (such as weather or sports reporting), bias is minimal.[89] In slow feedback settings, competition impacts bias. Media firms in more competitive markets have stronger incentives to reveal important information; the authors show quantitatively that television news reports leading up to the 2000 presidential elections were more equitable in their treatment of Bush and Gore in more competitive media markets. This finding was consistent with several other studies that show how competition among alternative sources of media reduces supply-driven bias.[90]

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[87] Press Release, U.S. Dep't of Justice, Illinois Gov. Rod R. Blagojevich and his Chief of Staff John Harris Arrested on Federal Corruption Charges, 10–12 (Dec. 9, 2008), *available at* http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr1209_01.pdf; *see also* Affidavit in Support of Application for Criminal Complaint, United States v. Rod R. Blagojevich (N.D. Ill. Dec. 7, 2008), ¶¶ 69–85, *available at* http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr1209_01a.pdf.

[88] Supply-driven bias means distorted, self-censored, or biased news coverage that primarily originates with the media firms (i.e., on the supply side) and deviates from the news coverage that consumers prefer. In contrast, demand-driven bias is when consumers demand biased news coverage that comports with their pre-existing beliefs. *See, e.g.*, Gentzkow & Shapiro, *Market for News*, *supra* note 77, at 134, 144.

[89] Matthew Gentzkow & Jesse M. Shapiro, *Media Bias & Reputation*, 114 J. POL. ECON. 280, 305 (2006).

[90] *Id.* at 309. The authors discuss elsewhere how increasing the number of independently-owned firms can limit a media market's supply-driven bias in (i) increasing the likelihood that the media remain independent when governments attempt to manipulate the news; (ii) reducing the risk of information being suppressed or distorted when news providers have an interest in manipulating consumers' beliefs; and (iii) driving media firms to invest in providing timely and accurate coverage. Gentzkow & Shapiro, *Market for News*, *supra* note 77, at 135–44. But media competition, as the authors note, may be ineffective in disciplining consumer-demand-driven bias. To avoid having their personal beliefs challenged, consumers may demand biased news coverage, and trade-off accuracy of a news source for confirmation of their pre-existing beliefs. *Id.* at 144–45. It is true that consumers are not perfectly objective and rational Bayesians (in that they readily update prior factual beliefs whenever appraised of reliable information). Their reasoning can be driven by directed goals, which can bias their beliefs about themselves, other people, and events, their use of inferential rules, and their evaluation of scientific evidence. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 482–95 (1990). Although subject to information-processing biases, many people are not delusional. They will eventually accept evidence challenging their pre-existing beliefs. *Id.* at 490

Commercial radio, instead of a good example for permitting greater media consolidation, may be an example of its dangers. The Telecommunications Act of 1996 (the "1996 Act") weakened the ownership limits on radio stations nationally and locally.[91]

In analyzing radio mergers, the DOJ considered their economic impact solely on advertisers and the rates they pay for advertising.[92] Although a number of possible product markets exists (such as listenership and programming), the DOJ focused in its radio consent decrees[93] on the mergers' impact on advertisers and advertising rates as evaluated under the Horizontal Merger Guidelines.[94] Under the Horizontal Merger Guidelines' approach, whether radio advertising is a relevant product market is based in part on advertisers' likely response to a "small but significant and nontransitory increase" in the advertising rates of the merging radio stations.[95] The consent decrees acknowledge that radio stations also compete for 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. Some of the antitrust product market questions addressed in the radio merger consent decrees are as follows: (i) Would large numbers of

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(noting that people will attempt to be rational and believe undesirable evidence if they cannot otherwise refute it). Consequently, when a higher percentage of cable Fox News viewers (thirty-three percent) erroneously believed that weapons of mass destruction were found in Iraq by October 2003 compared to the overall sample (twenty-two percent), one empirical issue is the extent to which media persuades consumers versus consumers choose media sources that match their own political beliefs. Stefano DellaVigna & Ethan Kaplan, *The Political Impact of Media Bias*, *in* FACT FINDER, FACT FILTER: HOW MEDIA REPORTING AFFECTS PUBLIC POLICY (Roumeen Islam ed., forthcoming) (manuscript *available at* http://www.econ.berkeley.edu/~sdellavi/wp/mediabiaswb07-06-25.pdf). However, in seeking to maintain their large diverse audiences, mainstream media may avoid catering too much to the biases of particular consumers. For if perceived as too liberal (or conservative), they risk alienating other moderate conservative (or liberal) consumers. Consequently, by switching to another less blatantly biased media sources, the more objective (and thus marginal) consumer of a particular mainstream news outlet may protect the more biased consumers of that media.

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

[92] *See, e.g.*, Joel I. Klein, Acting Assistant Att'y Gen., Dep't of Justice, Address at the ANA Hotel: DOJ Analysis of Radio Mergers (Feb. 19, 1997), *available at* 1997 WL 70922.

[93] *See, e.g.*, Competitive Impact Statement, United States v. Bain Capital, LLC, No.1:08-cv-00245, at 5–7 (D.D.C. filed Feb. 13, 2008), *available at* http://www.usdoj.gov/atr/cases/f230100/230166.htm; Complaint for Injunctive Relief, United States v. Clear Channel Communications, Inc. and AMFM Inc., No. 00-2063, at 2–3 (D.D.C. filed Aug. 29, 2000), *available at* http://www.usdoj.gov/atr/cases/f6300/6329.htm (complaint filed with consent decree); United States v. CBS Corp., No. 98CV00819, at 1–2 (D.D.C. Jun. 30, 1998), 1998 U.S. Dist. LEXIS 10292 (proposed decree requiring divestiture of radio stations to cure anticompetitive effect in radio advertising market); United States v. Westinghouse Elec. Corp., No. 96 2563, at 1–2 (D.D.C. Mar. 10, 1997), 1997 U.S. Dist. LEXIS 3263.

[94] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997), *available at* http://www.ftc.gov/bc/docs/hmg080617.pdf.

[95] *See id.* at 4.

advertisers shift to other media?; (ii) Are there attributes of radio advertising that make other media poor substitutes to many advertisers?; and (iii) Can stations identify advertisers with strong radio preferences and selectively raise prices? Similarly, in assessing competitive effects, the DOJ inquires whether advertisers will end up paying more or getting less after a radio merger. Some of the issues addressed in these consent decrees include: (i) Have advertisers lost the ability to play one of the merging companies' radio stations off against the other company's stations to get better advertising rates?; (ii) Can advertisers buy around the merged entity to reach a particular audience demographic?; and (iii) After the merger, can advertisers reach their target audience with equivalent efficiency without using the merged company's radio stations?[96] The DOJ's radio merger consent decrees do not address nonprice competition unrelated to advertising, including the quality of programming, listener choice, or the likely impact of these mergers on the marketplace of ideas. Nor does the DOJ refer to other possible markets such as programming markets or listenership markets or consider consumer choice.

Significant ownership concentration ensued. Between March 1996 and March 2007, the number of commercial radio stations increased 6.8%, but the number of radio owners declined by 39%.[97] This trend was already apparent by 2001, by which time the number of radio owners had already declined 25%.[98]

Over the same period, the size of the nation's largest radio group owners increased: "In 1996, the two largest radio group owners controlled 62 and 53 stations, respectively. By March 2007, the leading radio group, Clear Channel Communications, controlled over 1,100 radio stations."[99] One complaint, reported by the Project for Excellence in Journalism, was "that Clear Channel's domination was diminishing the quality of the AM/FM radio dial by monopolizing key markets and homogenizing content."[100] The former head of commercial radio Infinity Broadcasting

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[96] *See supra* note 93.

[97] WILLIAMS, *supra* note 33, at 1.

[98] FCC, REVIEW OF THE RADIO INDUSTRY, 2001, at 3 (Sept. 2001), *available at* http://www.fcc.gov/mb/policy/docs/radio01.pdf.

[99] WILLIAMS, *supra* note 33, at 1. In 2008, the Clear Channel controlled 833 U.S. radio stations, 508 of which are located in the largest 100 Arbitron markets. Competitive Impact Statement, *Bain Capital LLC*, No. 1:08-cv-00245, at 3–4.

[100] *Radio, in* 2007 PEJ Report, *supra* note 31. Critics have also complained that it exerted a negative effect on American radio. Clear Channel also reported that:

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

Clear Channel Agrees $18.7bn Sale, BBC NEWS, Nov. 16, 2006, http://news.bbc.co.uk/2/hi/business/6155284.stm.

and CBS and current CEO of Sirius XM, Mel Karmazin, recognized that commercial radio after the 1996 Act became "totally homogenized."[101] Karmazin advocated the radio consolidation "[s]trictly for business reasons. No one asked [him] if it was good for consumers."[102]

Radio was not alone in this trend toward concentration. Likewise, the number of full-power television stations increased,[103] but the number of unique television owners decreased.[104] The number of newspapers remained about the same between 2002 and 2005, but the number of newspaper owners declined from 422 to 389.[105]

The ownership concentration in radio was felt on the local level.[106] The number of local cross-ownerships between radio and television stations increased.[107] One empirical study relied upon by the FCC showed that the amount of news for these cross-ownership stations was consistently less than their peers: "[T]he average effect of radio cross-ownership on local news coverage is consistently negative," i.e., less news.[108] Not only were local radio markets more concentrated, but a few radio firms dominated local advertising. On the local level, the largest firm in each radio metro market has, on average, forty-six percent of the market's total radio advertising revenue; the largest two firms have, on average, seventy-four percent of the radio advertising revenue.[109] Although radio listening declined since 1998, radio advertising rates between 1996 and 2006 have nearly doubled, suggesting that even on this dimension, the antitrust review may have been inadequate. As one recent FCC study concluded, the Consumer Price Index "increased approximately 3 percent per year during this time period, while the annual growth rate in

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[101] Phil Rosenthal, *Homogenized Radio Stations Bottle up Growth*, CHICAGO TRIB., Nov. 11, 2007, at C3.

[102] *Id.*

[103] Letter from JayEtta Z. Hecker, Dir., Physical Infrastructure Issues, Gov't Accountability Office, to The Honorable Edward J. Markey, Chairman, Subcomm. on Telecomms. and the Internet, House Comm. on Energy and Commerce 5 (Dec. 14, 2007), *available at* http://www.gao.gov/new.items/d08330r.pdf (875 in 1970 to 1754 in 2006) [hereinafter GAO].

[104] Kiran Duwadi et al., *Media Ownership Study Two: Ownership Structure and Robustness of Media 11*, at 11 tbl.5, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf (between 2002 and 2005 number of television stations increased from 1739 to 1764 as the number of unique television station owners decreased from 491 to 480).

[105] *Id.*

[106] The average number of radio station owners across all metro markets declined from 13.5 in 1996 to 9.4 in 2007. WILLIAMS, *supra* note 33, at 8.

[107] The number of TV/radio station cross-ownerships in the same market increased from 273 television/656 radio stations in 2002 to 333 television/782 radio stations in 2005. Duwadi et al., *supra* note 104, at 6, 8, 11.

[108] Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* 21 (Rev. Sept. 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A7.pdf. The FCC relied upon this study as evidence of how newspapers can spread their fixed costs over other media to increase news content, which is discussed *infra* notes 113–21 and accompanying text.

[109] WILLIAMS, *supra* note 33, at 2.

radio prices was approximately 10 percent."[110]

The claim was frequently made in the 1990s that consolidation would allow radio owners to offer a more diverse array of formats.[111] But it is not evident that increased radio ownership concentration has led to greater program diversity. According to one FCC study, between March 1996 and March 2007, the average number of formats appears to have declined slightly for some of the large markets, while increasing slightly for most of the smaller ones. Overall, the variety of radio formats available to consumers has held steady.[112]

The traditional deregulatory, anti-interventionist argument is that the free market will adjust to match viewer preferences, so that ownership does not matter. But in a study of FCC data, several consumer groups claim that less news is broadcast in cities where companies have been granted waivers to the FCC cross-ownership rules to allow them to own both newspapers and broadcasters, although the evidence is equivocal.[113]

While the FCC noted that the empirical evidence in the record supported "both sides concerning the relationship between newspaper/broadcast combinations and localism," the FCC concluded that "[o]n balance . . . the evidence suggests that some newspaper/broadcast cross-ownership combinations can enhance localism."[114] The FCC, however, relied in particular on one study of twenty-nine cross-owned television stations in twenty-seven markets, which concluded that "local television newscasts for cross-owned stations contain on average about 1–2 minutes more news coverage overall, or 4–8% more than the average for non-cross-owned stations."[115]

But the study's author recognized several important caveats. First, the study's sample was small: time and resource constraints limited him to "only three days during the week prior to the 2006 general elections on Tuesday, November 7th."[116] The second caveat was that these three days may not be representative for the remainder of the year.[117] A third caveat is that he looked only at late-evening local news, which may not represent a station's daily news coverage. A fourth caveat is that his analysis "cannot determine whether local television stations (cross-owned or not)

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110 The CPI increased twenty-nine percent during the same period. *Id.* at 16.

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

112 WILLIAMS, *supra* note 33, at 2.

113 *See* Further Comments of Consumers Union, Consumer Federation of America and Free Press (Oct. 27, 2007), at 6–8, 86–87, *available at* http://stopbigmedia.com/filing/critique_complete.pdf.

114 2008 FCC Report, *supra* note 54, at 2034.

115 Milyo, *supra* note 108, at 1.

116 *Id.* at 8.

117 *Id.* at 9 ("[T]he behavior of local news stations may not be the same during the week just prior to the general elections compared to other times of the year" so "the findings of this study may not be representative of differences in local news coverage by cross-ownership throughout the rest of the year.").

present news in a balanced or biased manner."[118] Some of the author's findings were surprising nonetheless given the upcoming elections. Local stations broadcast approximately twenty-six minutes of total news coverage, with about eighty percent of this time devoted to local stories. But actual "local news, excluding sports and weather, accounts for a little less than half (46%) of the total news time. Finally, state and local political coverage averages just about three minutes per newscast for the dates under study."[119] The amount of incremental news coverage from cross-owned televisions stations was only "about [twenty-one] seconds."[120] One FCC-sponsored peer review of this study concluded that, given these caveats:

> [T]he empirical data in the study are so limited that the study's conclusions do not and cannot possess the reasonable level of confidence necessary to provide policymakers with useful evidence on which to base their regulatory decisions. Put simply, the findings from a single three-day study of one type of news broadcast should not form the evidentiary basis for any sort of public policy making.[121]

The media consolidation debate concerns not only the quantity of independent media owners, but the extent to which programming is affected when a radio or television station is owned by a large out-of-market station group as opposed to a local independent owner. As of 2005, a minority of the newspapers and commercial radio and television stations were locally owned: 210 of the nation's 1381 commercial television stations, 4827 of the 10,893 nation's commercial radio stations, and 444 of the nation's 1445 newspapers. In contrast, the majority of non-commercial radio and television stations were locally owned: 1671 of 2697 non-commercial radio stations and 229 of the 383 non-commercial television stations.[122] There is some evidence that large public companies tend to sacrifice journalistic quality in pursuit of the bottom line. Good journalism is expensive, and yields social benefits that are not captured in the balance sheet. In a large study in 2003, the Project for Excellence in Journalism ("PEJ") ranked television news programs from best to worst and divided stations into groups based on the size of the owner.[123] PEJ found the news

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[118] *Id.* at 30.

[119] *Id.* at 16.

[120] *Id.*

[121] Kenneth Goldstein et al., *Invited Peer Review of FCC Media Ownership Study 6*, MB Docket No. 06-121, Oct. 30, 2007, at 1, *available at* http://www.fcc.gov/mb/peer_review/prstudy6a.pdf.

[122] Duwadi et al., *supra* note 104, at 6, 8, 9.

[123] To examine size, the authors separated the TV companies studied into four categories, using the FCC rankings of audience reach. Their measurement of audience reach followed the FCC's policy of discounting for the difference between the reach of UHF versus VHF stations. PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS? A FIVE-YEAR

programs of the smallest owners to be 30% high quality, compared with 12% for the largest owners. Likewise, the smallest owners had 17% news programs graded as low quality, compared to 23% of the largest owners. In general, as ownership size increased, news quality decreased.[124] On the other hand, the study also found that a television station's cross-ownership of a newspaper led to better grades. Stations in cross-ownership situations were more than twice as likely to receive an "A" grade as were other stations.[125]

Two FCC economists also prepared a draft study in 2004 which examined the question whether local ownership of television stations had any impact on the amount of local news broadcast by the stations. The authors found that locally-owned television stations produced more local news—about five and one-half minutes more local news per half-hour program—than non-locally-owned stations.[126] The study was not finalized and its conclusions were not made public at the time.[127] It was later alleged that the study was suppressed because the study's findings were at odds with the FCC, which was reportedly facing pressure from the broadcast industry to conclude that media ownership rules were too restrictive and should be loosened. Allegations were also made that the FCC staff were ordered to destroy all copies of the draft.[128] In an internal investigation of these allegations, the FCC's Office of Inspector General found it likely that the study was not released for legitimate reasons, and it was unable to find evidence that anyone at the FCC ordered the draft to be

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STUDY OF OWNERSHIP AND QUALITY 2003, 1–2, 7 n.5 (2003), *available at* http://www.journalism.org/node/243.

[124] *Id.* at 3. "In analyzing content across local markets . . . [James Hamilton similarly] found that group-owned television stations carried fewer hard news stories, network affiliates did more stories in their local news programs about the network's entertainment programming, and that papers owned by chains covered a higher percentage of soft news topics." JAMES T. HAMILTON, ALL THE NEWS THAT'S FIT TO SELL 249 (2004).

[125] The study's authors, like the FCC in liberalizing the cross-ownership ban, thought that cross-ownership suggested that the joint resources of a newspaper and TV station freed up people to do more original work. But as their study revealed, the cross-owned stations actually scored lower on the enterprise index in general, and particularly in the area of sending out reporters to cover stories: "[T]he generalized sign of higher quality at cross-owned stations, for some reason, did not include those stations doing more enterprise." PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 123, at 12.

[126] Peter J. Alexander & Keith Brown, Do Local Owners Deliver More Localism? Evidence From Local Broadcast News (Jan. 15, 2004) (FCC Working Paper), *available at* http://www.fcc.gov/ownership/materials/already-released/doownersdeliver011504.pdf.

[127] Before Kevin Martin's confirmation hearings as the incoming FCC Chair, Senator Barbara Boxer received a copy of the report "'indirectly from someone within the FCC who believed the information should be made public.'" John Dunbar, *Media Study Was Ordered Destroyed, Lawyer Says*, ASSOCIATED PRESS, Sept. 14, 2006 (quoting Boxer spokeswoman Natalie Ravitz).

[128] *Id.*; *see also* John Dunbar, *FCC Quashed Contrary Reports: Research Supported Notion that Local Ownership of TV Stations Strengthened News*, RICHMOND TIMES DISPATCH, Jan. 26, 2007, at A4.

destroyed.[129] But Senator Boxer and FCC Commissioner Michael Copps were unconvinced by the Inspector General's conclusions.[130]

Also during the Bush administration, the staff of the FCC's Media Bureau prepared a draft report titled "Review of the Radio Industry 2003."[131] This draft report indicated that over seven years there had been a thirty-five percent decline in the number of radio station owners, and that the largest two firms in each radio market had, on average, seventy-four percent of the market's radio advertising revenue.[132] The draft report was similar in format and methodology to other annual reports, but unlike the earlier reports the 2003 report was not released. It later was revealed that the Chief of the FCC's Media Bureau in an internal email said that he was "not inclined to release this one unless the story can be told in a much more positive way. This is not the time to be stirring the 'radio consolidation' pot."[133] As with the draft study on local television news, there were allegations that the draft radio report was suppressed for political reasons. The FCC's Inspector General concluded that the decision not to go forward with the release process was permissible and not an attempt to conceal information. However, the Inspector General was troubled by the aftermath of the decision, noting that the staff may have been instructed to deny that a draft report even existed.[134]

E. *Impact on Women and Minority Ownership of Media*

As then-Senator Obama recognized, "[m]inority-owned radio stations, television stations and newspapers played an essential role in battling segregation during the civil rights movement."[135] One of the starkest effects of consolidation in the radio and television industries has been its

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[129] *See* FED. COMMUNICATIONS COMM'N, OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT, OCTOBER 1, 2007–MARCH 31 2008, at 33, *available at* http://www.fcc.gov/oig/SAR_FCC_OIG_04302008.pdf [hereafter OIG Semiannual Report].

[130] See John Eggerton, FCC Didn't Quash Studies, Says Inspector General: No Evidence FCC Under Former Chairman Powell Destroyed or Suppressed Media-Ownership Reports, BROADCASTING & CABLE, Oct. 5, 2007, available at http://www.broadcastingcable.com/article/100044-FCC_Didn_t_Quash_Studies_Says_Inspector_General.php. Commissioner Copps noted:

> [The OIG Semiannual Report] doesn't include interviews with key FCC staff. It declined to seek interviews with FCC officials all the way up the chain of command. And it doesn't explain why a study that reached striking and exceedingly relevant conclusions wasn't finalized and made a part of the record, even though supervising economists concluded that the technical flaws could be easily fixed. The nagging feeling remains that we don't yet have the entire story.

Id.

[131] FED. COMMUNICATIONS COMM'N, MEDIA BUREAU, REVIEW OF THE RADIO INDUSTRY 2003 (Sept. 2003), *available at* http://www.fcc.gov/ownership/materials/already-released/review090003.pdf.

[132] *Id.* at 2.

[133] OIG Semiannual Report, *supra* note 129, at 35.

[134] *Id.* at 36–37.

[135] Obama & Kerry, *supra* note 10.

effect on minority and women ownership.

In broadcast radio, a study done by Free Press found that the percentage of women and minority radio station owners was lower in highly concentrated radio markets than in less concentrated markets. The less concentrated markets also tend to be the larger markets, where FCC ownership rules have limited to some extent the opportunities for consolidation. However, even if the size of the market and the level of minority population in the market are held constant, the study found that markets with minority owners are significantly less concentrated than markets without minority owners. A similar examination of female ownership shows that markets with a female-owned radio station are significantly less concentrated than markets without such stations. The Free Press study concluded:

> One unambiguous consequence of further industry consolidation and concentration will be to diminish both the number of minority-owned stations and the number of female-owned stations. The FCC should seriously consider the effects on women and minority owners and their listeners before it moves to enact policies that will lead to increased market concentration.[136]

A similar trend has been seen in other media. A recent FCC-sponsored study on the impact of the relaxation of the television duopoly rule found that the major beneficiaries were the largest twenty-five television groups.[137] The losers were minorities and women. The study found that the percentage of minority and women owners declined significantly after the rule was relaxed in 1999. The specific findings were as follows:

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

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[136] *Off the Dial: Female and Minority Radio Station Ownership in the United States*, FREE PRESS, June 2007, at 31, *available at* http://www.freepress.net/files/off_the_dial.pdf.

[137] ALLEN S. HAMMOND ET AL., THE IMPACT OF THE FCC'S TV DUOPOLY RULE RELAXATION ON MINORITY AND WOMEN OWNED BROADCAST STATIONS 1999–2006, at 3, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A9.pdf. The GAO found the FCC data on the gender, race, and ethnicity of radio and television station owners biennially through its Ownership Report for Commercial Broadcast Stations, or Form 323 "suffer from three weaknesses: (1) exemptions from filing for certain types of broadcast stations, such as noncommercial stations; (2) inadequate data quality procedures; and (3) problems with data storage and retrieval." The GAO concluded from the available evidence from FCC and nongovernmental reports that ownership of broadcast outlets by these groups is "limited." GAO, *supra* note 103, at 3.

> the female owned stations operating in duopoly markets [were] sold to non-female, non-minority owners.[138]

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

Relaxation of the FCC ownership limits has tended to drive up valuations of stations, pricing potential purchasers (small businesses and broadcasters including minorities and women entrepreneurs and owners) out of the market. The rise in station prices may have benefited owners of existing stations by allowing them to sell out at higher prices. It may thereby have benefited a class of minority or women owners—the sellers—but it did not benefit the goal of preserving or increasing minority ownership or ownership by women. "Racial and ethnic minorities make up 33 percent of our population," said FCC Commissioner Copps, but they "own a scant 3 percent of all full-power commercial TV stations."[139] As former FCC Commissioner Adelstein added, "When it comes to ensuring that the ownership of the public's airways—which are licensed to serve the public—look like the American people, the FCC's legacy does not make us proud."[140]

The decrease in minority and women owners can also affect the news content in that community. Professor Joel Waldfogel argues that in industries with high fixed costs like broadcasting or newspapers, the market tends to favor the tastes of the majority over "preference minorities."[141] When fixed costs are high, a market can accommodate relatively fewer products than when fixed costs are low. Not only are these products more likely to target large rather than small groups, the relative size of the large group to the small group can actually make the smaller group less well off in terms of product targeting. Media markets are more similar to "winner takes all" political markets than is generally supposed.[142] Professor Waldfogel uses the example of radio programming to show that formats that appeal to a particular group will not be offered unless that group is relatively large. The same is true with newspapers in the sense of how they position themselves. In other words, the market does not ensure that everyone goes home happy:

> I don't get the sort of newspaper that I want just because I

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[138] HAMMOND ET AL., *supra* note 137, at 3, 48, 56.

[139] Copps, *supra* note 8, at 5.

[140] Statement of FCC Commissioner Jonathan S. Adelstein, Concurs and Dissents in Part in Promoting Diversification of Ownership in the Broadcasting Services et al., 2 (Dec. 18, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279035A4.pdf.

[141] JOEL WALDFOGEL, THE TYRANNY OF THE MARKET 5 (2007).

[142] *See id.* at 6. "In spite of the liberation rhetoric often used to describe the market, the same kinds of groups disadvantaged by majority rule—small groups with different preferences—can find themselves at a disadvantage in product markets as well. This raises a challenge to the common exhortation 'Let the market decide.'" *Id.*

> want it. I get what I want if many other people also want it. Second, a larger population preferring something else actually makes me worse off, thereby failing to avoid strains on social cohesion. This evidence stands in stark contrast with many idealized portraits of markets.[143]

Professor Waldfogel takes the analysis a step further, showing that the presence or absence of minority-targeted local media has a measurable effect on voter turnout. The presence of Spanish-language local television news raises Hispanic voter turnout from an average of thirty-one percent to about forty percent in nonpresidential election years, or by about a third. In presidential years, the presence of Spanish-language local television news raises Hispanic turnout by about a sixth. "These are large effects," Professor Waldfogel concludes.[144] In addition, he finds that the entry of a Spanish language local television news program results in an overall increase in Hispanic turnout by about five percentage points. Similarly, African American voter turnout is about ten to fifteen percent higher in areas with a weekly newspaper or a radio station specifically targeted to African Americans. In addition, African American voter turnout increases by a dramatic percentage in metropolitan areas that get a first radio station targeted to African Americans.

IV. CALLS FOR LIBERALIZATION TO PROTECT TRADITIONAL MEDIA

With traditional media in flux and the growth of new media, some argue that antitrust should have a limited role in this industry and that the FCC should ease restrictions on media ownership. We discuss, in this section, whether the Obama administration should permit greater consolidation in the media industry. After critiquing the FCC's justification in 2008 to relax media cross-ownership restrictions, we show why the number of media sources in a given community (or nationwide) may be a poor indicator of the marketplace's competitiveness.

A. *Moving Beyond a Laissez-Faire Attitude*

Before the economic crisis, the Bush administration generally had great faith that free market forces correct market failures, and little faith in government institutions promoting competition.[145] Even before our

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[143] *Id.* at 57.

[144] *Id.* at 82.

[145] *See* Stucke, *Better Competition Advocacy*, *supra* note 23, at 1020–25; *see also* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION xii, 113, 134–35, 236 (2009) (criticizing the Bush administration's laissez-faire attitudes). The federal antitrust agencies similarly had a hands-off approach, with a few exceptions, to the media industries. But in his last weeks, the FCC Chair reflected on the nation's economic crisis:

> My philosophy throughout my time at the FCC including the last four years as

economy's unraveling, this view of markets generally—and media markets specifically—was empirically suspect.[146] In understanding these issues, the Obama administration cannot blindly rely on neoclassical economic theory's simplistic assumptions about human behavior or efficient markets.[147] The purpose and benefits of a competitive marketplace of ideas differentiate media markets from other markets.

Ideally, the federal competition agencies in the Obama administration should do or sponsor more empirical work to better understand the competitive dynamics of media industries and how they differ from other industries.[148] More empirical work is necessary—in particular, work that goes beyond advertising markets and includes non-price competition. Currently, the FCC, under the 1996 Act, must justify—empirically—its existing ownership regulations in its biennial review. If the FCC cannot readily supply this empirical evidence, the courts have construed the 1996 Act as requiring the FCC to further deregulate.[149] Given the empirical difficulties in testing the correlation between media consolidation and viewpoint diversity, the current default standard effectively favors further media deregulation. We urge that before any further deregulation is undertaken, the Obama administration should study or sponsor studies of

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

Kevin J. Martin, FCC Chairman, Remarks at The Reg-Markets Center of the American Enterprise Institute, *Balancing Deregulation and Consumer Protection* 2, 9 (Jan. 8, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-287777A1.doc (last visited July 3, 2009).

[146] *See* Stucke, *Better Competition Advocacy*, *supra* note 23, at 1009–12 ("This conception of competition . . . lacks an empirical basis.").

[147] *See* Maurice E. Stucke, *Money, Is That What I Want? Competition Policy & the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1419751 (examining neoclassical economic theory's assumption of self-interest); Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 520–21 (2007) [hereinafter Stucke, *Behavioral Economists*] (discussing the intersection of antitrust and behavioral economics); Maurice E. Stucke, *New Antitrust Realism*, GLOBAL COMPETITION POL'Y (GCP) MAG., Jan. 2009, at 5, *available at* http://ssrn.com/abstract=1323815 ("Contrary to neoclassical economic theory, actual behavior . . . may vary.").

[148] Toward that end, the FTC recently announced several upcoming workshops to address these issues. Press Release, Fed. Trade Comm'n, Extra! Extra! FTC Announces Workshop: 'Can News Media Survive the Internet Age? Competition, Consumer Protection, and First Amendment Perspectives' (May 19, 2009), *available at* http://www.ftc.gov/opa/2009/05/news2009.shtm.

[149] *See* Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study* 8 (Mar. 11, 2008), *available at* http://ssrn.com/abstract=1121229 ("More recently, relying on the 1996 Act, the D.C. Circuit in a series of cases has questioned and demanded evidence for the Commission's invocation of the convergence hypothesis.").

the effects of media consolidation to date.

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

In 2008, the FCC voted to relax media cross-ownership restrictions.[150] Then-FCC Chair Kevin Martin's proposal to loosen the newspaper-broadcast cross-ownership ban in the top twenty cities was more limited than his predecessor's attempt at wholesale transformation of the media ownership rules. Nonetheless, opposition was not long in coming. The U.S. Senate expressed its displeasure through a "resolution of disapproval,"[151] and the new FCC Chair is believed to oppose the weakening of the cross-ownership rules.[152] Among other things, critics argued that Chairman Martin's proposal had a loophole that would allow cross-ownership in smaller markets, not just in the twenty largest markets.[153]

The FCC's rationale for allowing owners of certain newspapers and television stations in the same market to merge is based on efficiencies: the merger will enable the owners to spread their high fixed costs for obtaining news over a greater audience. Thereby, the newspaper-television owner will have greater incentive to produce more news.[154] The FCC's key assumption is that cross-ownership in "the largest markets can preserve the

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[150] The vote was three to two along party lines. *See* 2008 FCC Report, *supra* note 54, at 99, 106, 113 (containing the opinions of each of the five commissioners). The FCC adopted a presumption, in the top twenty Designated Market Areas ("DMAs"), that it is consistent with the public interest for one entity to own a daily newspaper and a radio station or, under the following circumstances, a daily newspaper and a television station, if (1) the television station is not ranked among the top four stations in the DMA and (2) at least eight independent "major media voices" remain in the DMA. In all other instances, the FCC will adopt a presumption that a newspaper/broadcast station combination would not be in the public interest, with two exceptions, and therefore emphasize that the FCC is unlikely to approve such transactions. Taking into account these respective presumptions, in determining whether the grant of a transaction that would result in newspaper/broadcast cross-ownership is in the public interest, the FCC will consider the following: (1) whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast outlet, and if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations. The FCC discussed the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity. *Id.* at 95–96.

[151] John Dunbar, *Senate Votes to Roll Back Media Ownership Rule*, ASSOCIATED PRESS, May 16, 2008.

[152] Editorial, *Media Ownership Rules Safe in FCC Nominee Julius Genachowski's Hands*, SEATTLE TIMES, Jan. 15, 2009, *available at* http://seattletimes.nwsource.com/html/editorialsopinion/2008633309_edita16fccboss.html.

[153] *See, e.g.*, Craig Aaron et al., *Devil in the Details: 10 Facts Kevin Martin Doesn't Want You to Know About His New Media Ownership Rules*, FREE PRESS, Nov. 2007, at 6–7, *available at* http://freepress.net/files/devil_in_the_details.pdf.

[154] 2008 FCC Report, *supra* note 54, at 24–25.

viability of newspapers without threatening diversity by allowing them to spread their operational costs across multiple platforms," and newspapers "can improve or increase the news offered by the broadcaster and the newspaper."[155] The FCC Chair defended relaxing the ownership restrictions to protect newspapers: "The newspaper industry has faced significant challenges recently and I feel we have to do all we can to ensure we continue to have a vibrant industry."[156]

Opponents have questioned whether the FCC should worry about newspapers' financial health since newspapers are generally outside the scope of the agency's expertise. Another question is whether the case has been made that the newspaper industry actually needs or would benefit from this particular type of regulatory relief. It is worth recalling that in 2000, The New York Times Company Chairman Arthur Sulzberger Jr. said, "[f]rom a business perspective, we will not achieve the financial success that can be ours without entering the world of television."[157] Seven years later, The New York Times Company sold its nine TV stations, and left its partnership with Discovery Communications on a joint TV channel.[158] What changed? Apparently, the expected synergies never materialized. Moreover, newspapers—including *The New York Times*—discovered that it was cheaper to shoot digital video of a news event and post it on the newspaper's own website. This low cost video has proven to be popular with both viewers and advertisers.[159]

Besides, less restrictive alternatives exist to a full newspaper-television station merger. Content-sharing arrangements are already in place in many markets, although apparently not in the very largest markets.[160] Newspapers can and do collaborate with local television networks to promote their news content in ways that do not involve a full merger.

Finally, even if a newspaper/television station combination yields some efficiencies, one must ask, "at what price?" The inherent inefficiency of the marketplace of ideas sets it apart from mergers of

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[155] *Id.* at 23–24.

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

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

[158] *Id.*

[159] *Id.* Two other companies also announced they will be splitting their assets. Belo will spin off its newspapers from its local television business. E.W. Scripps will spin off from its newspaper and local television assets and turn its cable networks—including HGTV—into a new company. *Newspapers*, in 2008 PEJ Report, *supra* note 28.

[160] *See* GAO, *supra* note 103, at 2. The GAO's recent survey of several media markets found agreements among stations to share content or agreements that allow one company to produce programming or sell advertising through two outlets. These agreements "were prevalent in a variety of markets but not in the top three markets, suggesting that market size may influence the benefits that companies realize through such agreements." *Id.*

ordinary commodities. In industries with high fixed costs and homogeneous products, a merger may enable firms to achieve economies of scale by rationalizing production lines. The machines run for longer periods, with greater output. Consumers in these industries may not desire product variety, so this loss of diversity is insignificant. But in the marketplace of ideas, a premium is placed on diversity of ideas.[161] Indeed, a concern with cost-savings efficiencies may point in the wrong direction when other values are at stake.[162]

Cost-savings efficiencies may be beneficial when they yield greater output of better quality programming, but cost-savings alone are not dispositive. Many competing independent news sources may confer a greater benefit to society than an efficient monopolist that produces a homogenous news product. 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.

The AAI expressed similar concerns following the computer system failure of the Voter News Service ("VNS") during the 2002 midterm election. VNS was a joint venture among five major TV news organizations (ABC, CBS, NBC, Fox, and CNN), and the Associated Press, and was designed to produce and analyze election exit polling information. Until the 1988 election, the major news organizations did their own exit polling and made their election predictions independently. In 1990, ABC, NBC, CBS, and CNN formed "Voter Research & Surveys," combining their exit polling operations as a cost saving measure. Following the 2000 elections, AAI blamed the networks' erroneous reporting of the presidential election results on the void of competition and urged the government to break up VNS. While disbanding VNS, all six major news organizations still rely on the same data and the same models,

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

[162] As the former FTC Chairman noted, "an occasional loss of efficiency as a result of antitrust enforcement can be tolerated and is to be expected if antitrust is to serve other legitimate values." Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1074 (1979); *see also* BAKER, *supra* note 17, at 43–44.

rather than compete to predict election results the most accurately.[163]

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

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

In relaxing its cross-ownership rules, the FCC noted that the number of television and radio stations on the air since 1975 increased: the number of radio and television stations increased by approximately 76% and 83.5%, respectively.[164] It is a mistake, however, to confuse the number of media outlets with the robustness of competition in the marketplace of ideas.

Ordinarily for commodity goods with a downward sloping demand curve, an increase in output is a good proxy of increased competitiveness. But in the media industry, the increase in outlets delivering news "has generally not meant covering a broader range of stories."[165] Media industries may differ from other industries for several reasons.

First, "the number of independently owned media outlets in a given market," as the Government Accountability Office found, "is not always a good indicator of how many independently produced local news or other programs are available in a market."[166]

Second, an increase in output (more media outlets) could simply mean fewer owners controlling more outlets. As discussed earlier, between March 1996 and March 2007, the number of commercial radio stations *increased* 6.8%, but the number of radio owners *decreased* by 39%.[167] Likewise, the number of full-power television stations significantly increased, while the number of unique television owners decreased. The number of newspapers remained about the same between 2002 and 2005,

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[163] *AAI Calls, Again, for Breakup of Voters News Service*, AM. ANTITRUST INST., Nov. 19, 2002, *available at* http://www.antitrustinstitute.org/Archives/215.ashx; *see also* Kate Pickert, *A Brief History of Exit Polling*, TIME, Nov. 4, 2008, http://www.time.com/time/politics/article/0,8599,1856081,00.html?iid=digg_share.

[164] 2008 FCC Report, *supra* note 54, at 15–16.

[165] *Overview*, in 2007 PEJ Report, *supra* note 31.

[166] GAO, *supra* note 103, at 7. In five markets which the GAO surveyed, the television stations were participating in operating agreements. The five markets were Nashville, Tennessee; Wilkes Barre/Scranton, Pennsylvania; Springfield, Missouri; Myrtle Beach/Florence, South Carolina; and Terre Haute, Indiana. For example, in Wilkes Barre/Scranton, the GAO identified eight television stations. However:

> [O]ne owner of two stations participated in an agreement with a third station and the remaining four television stations participated in two separate agreements—each agreement covering two stations. Thus, while there are eight television stations and seven owners in Wilkes Barre/Scranton, there are [actually only] three loose commercial groupings in the market.

Id.

[167] *See supra* note 97 and accompanying text; WILLIAMS, *supra* note 33, at 1.

but the number of newspaper owners also declined.[168]

Third, media sources are not interchangeable or of equal weight. Some defense counsel in a media merger justify an "all media market," as many local outlets carry some news or advertising. But the empirical evidence shows the continuing importance of the local daily newspaper, followed by the local television station in gathering and investigating news.[169] Thus to observe that forty media outlets exist in one city may say little about the competitiveness of the marketplace of ideas. Typically, many publications cover discrete commodities (such as autos or real estate), are targeted for specific religious or ethnic audiences, or are limited to community events. Given the "relatively unanimous support" that consumers "continue predominantly to get their local news from daily newspapers and broadcast television,"[170] allowing these two dominant news sources to merge can pose greater risk to the marketplace of ideas than allowing a newspaper to acquire other less news-intensive media.[171]

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[168] *See supra* note 105 and accompanying text; Duwadi et al., *supra* note 104, at 11.

[169] *See, e.g.*, 2008 FCC Report, *supra* note 54, at 33 ("Media Ownership Study Number 1 ('Nielsen Survey') indicates, for example that 38.2 percent of all respondents consider broadcast television stations and 30.1 percent consider local newspapers 'the most important source of local news or local current affairs,' whereas only 6.7 percent of all respondents say the same concerning the Internet." (internal citations omitted)).

[170] *Id.*

[171] In 2003, the FCC introduced a "Diversity Index" that sought to give its media ownership framework an empirical footing. The Diversity Index was modeled on the Herfindahl-Hirschman Index ("HHI") used by the federal antitrust agencies in merger cases. Prometheus Radio Project v. FCC, 373 F.3d 372, 388 (3d Cir. 2004). The FCC selected which media to include based on consumers' reported preferences. *Id.* at 403. It then weighted the media based on their popularity (for example, television stations received a greater weight than newspapers). To apply the Diversity Index in a specific market, the FCC counted the number of media outlets in the market. Each outlet of a certain type of media was given an equal weight with every other outlet of the same type. *Id.* Finally, the FCC summed the squares of the weighted ownership shares to calculate the market's Diversity Index score. *Id.* at 404. The Third Circuit rejected the FCC's Diversity Index for a number of reasons, including the equal weighting of outlets. *Id.* at 402–03. As the Third Circuit wrote, "[a] Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America [*The New York Times*] also requires us to abandon both logic and reality." *Id.* at 408. The FCC subsequently recognized that its Diversity Index is an inaccurate tool for measuring diversity, that some aspects of diversity may be difficult to quantify, and thus abandoned its Diversity Index. 2008 FCC Report, *supra* note 54, at 11–12. Professor Eli Noam and DOJ attorney Brian Hill have each suggested alternatives to the Diversity Index designed to remedy the shortcomings the Third Circuit identified. Professor Noam proposes adding a measure of the number of voices in a market to generate a combined number that corrects the concentration index by giving better scores to markets with more distinct voices. Eli Noam, *How to Measure Media Concentration*, FIN. TIMES, Aug. 30, 2004, *available at* http://www.ft.com/cms/s/2/da30bf5e-fa9d-11d8-9a71-00000e2511c8.html. The insight behind this approach is that one is better off with the choice of more radio stations on the dial or another newspaper at the kiosk even if these outlets do not draw large crowds. *Id.* Mr. Hill proposes an entirely new formula that he argues is better able to satisfy the major two assumptions that both the FCC and Third Circuit thought were critical: (1) diversity in a media market should not decrease with ownership concentration; and (2) the contribution to diversity of an individual entity, its diversity importance, should increase with the weighted market shares of that entity's outlets. Brian C. Hill, *Measuring Media Market Diversity: Concentration, Importance, and Pluralism*, 58 FED. COMM. L.J. 169, 170 (2006). In this regard, a recent thoughtful article highlighted the challenges of empirically capturing

Fourth, even if two competing television stations had comparable weight, it is problematic, or as Judge Learned Hand asserted "impossible," to treat different news services as "interchangeable."[172] In *United States v. Associated Press*, newspapers, which were excluded from the dominant AP news service joint venture, could obtain news from other news services. This did not mitigate the competition concerns. Nor was the fact that readers could read the AP news stories in one local newspaper determinative. A newspaper reflects the biases and views of its writers, editors, and owners. One newspaper may downplay and truncate a news wire story; the other newspaper may carry it as a headline. These are not fungible commodities. Thus, the media marketplace is not about consumers switching from one homogeneous product to another. Rather, it should be concerned with the net increase in consumer welfare from having many competing and diverse news sources and editorial voices. As Judge Hand stated about the marketplace of ideas, "it is only by cross-lights from varying directions that full illumination can be secured."[173] Unlike restraints on ordinary commodities (where consumers may turn to less-desirable alternatives but the overall societal impact is insignificant), for restraints in the media, the alternatives may be inherently unsatisfactory and the costs imposed on society may be significant.[174]

Finally, media markets are subject to their own particular economic logic. Decisions by broadcasters about how to cover news, for example, are affected by the number of viewers attracted to "hard" versus "soft" news, the value advertisers place on reaching those viewers, what competitors are doing, and the existence (or lack thereof) of public interest requirements.[175]

V. SOME PROPOSALS FOR THE OBAMA ADMINISTRATION

Given the importance of the marketplace of ideas to our democracy and free-market economy, the importance of traditional media to the marketplace of ideas, and the unique dangers of market failure in this marketplace, it is unwise to continue the current ad hoc policies toward media consolidation. We argue in this section why it is time for the Obama administration to examine the way information flows in the marketplace of ideas, the potential bottlenecks, and mechanisms to promote competition in the marketplace of ideas. We recommend first a

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substantive viewpoint diversity. Daniel E. Ho & Kevin M Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 13–22 (Conference on Empirical Legal Studies Paper, Mar. 11, 2008), *available at* http://search.ssrn.com/sol3/papers.cfm?abstract_id=1121229.

[172] *AP I*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

[173] *Id.*

[174] *See AP II*, 326 U.S. 1, 28 (Frankfurter, J., concurring) (stating that "[a] free press is indispensable to the workings of a democratic society").

[175] HAMILTON, *supra* note 124, at 13–15, 21–22.

coherent media policy, second, an agenda for the agencies to look beyond a merger's impact on advertising rates and more empirical work on media mergers' impact on the marketplace of ideas, and finally ways the government can promote access to the marketplace of ideas.

A. *A Coherent Media Policy*

Congress recently held a range of hearings on media-related topics, including specific media mergers, the "digital future," net neutrality, piracy, the role of private equity, as well as FCC oversight hearings. Ideally, a national media policy would emerge from such hearings, including media specific legislation and new ways to further the other goals of any media policy, such as localism and diversity. It would be useful, for example, for Congress to identify best practices relating to media ownership and ways to promote minority ownership.

While some urge Congress for greater antitrust immunity for the newspaper industry, the history and abuse of the Newspaper Preservation Act caution against further relaxing the federal antitrust laws to permit greater media consolidation. Other countries, including Germany, England, Norway, Sweden, and the Netherlands, have taken steps to limit concentration and promote editorial independence.[176] Some possibilities discussed by Professor Baker and others include requiring more extensive pre-merger review, applying presumptions against media mergers under certain defined circumstances, barring certain types of transactions entirely, explicitly taking editorial independence into account, giving journalists a say or even a veto in merger decisions, imposing some non content-based access requirements on dominant firms, and strengthening antitrust enforcement through more objective criteria (e.g., presumption of illegality based on market share).[177] To assist the newspaper industry, some have proposed changes in federal tax and subsidy policies as an alternative to broader antitrust immunity.[178]

Today's ad hoc piece-meal policy work by each regulatory fiefdom is inadequate. Congress needs to intercede, clearly define the policy goals,

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[176] *See, e.g.*, ORG. FOR ECON. CO-OPERATION & DEV., MEDIA MERGERS 50 (2003), *available at* http://www.oecd.org/dataoecd/15/3/17372985.pdf (discussing Germany's and England's approach to media mergers); *see also* BAKER, *supra* note 17, at 181 (important economic subsidies to media entities in the Netherlands and Norway are conditioned on journalists having complete editorial independence); *id.* at 187 (Sweden provides special newspaper subsidies for secondary papers; papers lose the subsidy if they obtain a certain level of market penetration).

[177] BAKER, *supra* note 17, at 164.

[178] *See, e.g.*, C. Edwin Baker, *A Not-So-Radical Idea For Preserving Journalism's Society-Building Role*, SEATTLE TIMES, Jan. 16, 2009, *available at* http://seattletimes.nwsource.com/html/opinion/2008638058_opinc18baker.html (suggesting a federal tax credit to newspapers to cover up to half the first $100,000 of the salary for each employed newspaper editor or journalist); Nichols & McChesney, *supra* note 2 (proposing annual federal tax credit for all Americans on the first $200 they spend on daily newspapers).

and legislate media-specific competition laws. To accomplish this task, Congress should establish a commission composed of diverse stakeholders to examine further these issues on media ownership, conduct hearings, and make recommendations, which Congress can implement. Notably, in the last great depression of the 1930s, the congressional Temporary National Economic Committee investigated the state of competition in various industries. As the DOJ later reported, this empirical analysis was helpful. The factual data from this effort exposed:

> [T]he urgent need for a vigorous attack on monopoly power and concentration of economic resources and gave added impetus in 1938 and subsequently to the effort to reverse or at least check the trend toward concentration which had prevailed for most of the preceding half century, and to overcome some of the obstacles to effective enforcement of the antitrust laws.[179]

Nor should media policy be left exclusively to one federal agency's domain. Each agency should have a defined role in preserving the marketplace of ideas. The roles should be complementary, and further the overall policy objectives. Today, apart from occasional consultations about a particular transaction or new policy, the federal agencies tend to operate in a vacuum. A telecommunications merger may not necessarily violate the Clayton Act, but fail the FCC's ownership restrictions, or vice versa. In essence, one does not necessarily follow from the other.[180]

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

For some media industries, the federal antitrust agencies examine only the merger's likely impact on advertising rates[181] (and do not revisit the

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[179] U.S. DEP'T OF JUSTICE, A STUDY OF THE DEVELOPMENT OF THE ANTITRUST LAWS AND CURRENT PROBLEMS OF ANTITRUST ENFORCEMENT, SUBMITTED TO THE U.S. SENATE SUBCOMMITTEE ON MONOPOLY 9 (May 23, 1952).

[180] *See, e.g.*, United States v. Radio Corp. of Am., 358 U.S. 334, 350 n.18 (1959) (stating that while the FCC may deny applications under its public interest standard where antitrust violations exist, "'its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall the United States from subsequently . . . challenging those transactions'" (internal citation omitted)).

[181] *See* In the Matter of 2002 Biennial Regulatory Review, 18 F.C.C.R. 13,620, 13,748–49 (2003) [hereinafter 2002 FCC Report] (holding that the only "economic" market in which broadcast stations and newspapers compete is advertising, and thus the only relevant product market is advertising). In the 2002 Biennial Review Order, the FCC defined advertising as the primary economic market in which broadcast stations and newspapers derive their primary sources of revenue. *Id.* The FCC concluded that for purchasers of advertising time, "newspapers, television, and radio are not good substitutes and therefore make up distinct product markets." *Id.* at 13,749. The FCC in liberalizing its media cross-ownership rules in 2008 continued to support the conclusion that the only relevant product market is advertising and found "no reason to deviate from the defined product market." 2008 FCC Report, *supra* note 54, at 2032–33 n.131. The FCC continues to believe that newspaper-broadcast

market post-merger to determine if it predicted correctly).[182] But reduced price competition for advertising and programming is not the only (or even primary) potential anticompetitive effect from a media merger. Indeed, if the focus were solely advertising, one misses an important part of the competitive landscape.

All media compete to varying degrees with other media for advertising dollars. This is of particular importance in the newspaper, television, and radio industries, where the competition extends beyond advertising prices. National newspapers, such as *The New York Times* and *The Wall Street Journal*, compete against other media for national advertisements; daily newspapers compete against Craigslist for classified ads. By June 2006, Google had forty-five percent of advertising revenue for search engines; but when it comes to news, Google is primarily an aggregator with little investment in the traditional newsgathering function.[183] Likewise, Craigslist in some cities is a significant competitor for online classified ads; but Craigslist has no traditional news gathering function.[184] Thus, Google and Craigslist may be formidable competitors to the traditional media for certain advertisers, but are not competitive threats for newsgathering. This increase in *advertising* competition does not translate into competition for better journalism (indeed, the reverse may be true as many major newspapers are downsizing staff, reducing newshole, and

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combinations "cannot adversely affect competition in *any* relevant product market." *Id.* (emphasis added). This is nonsense. In reaching this position, the FCC relied on statements by media companies Gannett and Hearst (who have an interest in the outcome of the FCC's rules) that "very little advertising substitution exists between daily newspapers and broadcast outlets." 2002 FCC Report, *supra*, at 13,749. The FCC ignored Gannett's and Hearst's contrary representations in their SEC filings which emphasized the competition between newspapers and television. *See* GANNETT CO., INC., ANNUAL REPORT (FORM 10-K), at 8 (Feb. 28, 2008), *available at* http://www.secinfo.com/d14D5a.t18Dk.htm ("[N]ewspapers and affiliated Web sites compete with other media for advertising principally on the basis of their performance in helping to sell the advertisers' products or services and their advertising rates. . . . Most of the company's newspapers compete with other newspapers published in nearby cities and towns and with free-distribution and paid-advertising weeklies, as well as other print and non-print media, including magazines, television, direct mail, cable television, radio, outdoor advertising and Internet media."); HEARST ARGYLE TELEVISION INC., ANNUAL REPORT, (FORM 10-K), at 12 (Feb. 28, 2008), *available at* http://www.secinfo.com/dVut2.t1sd.htm (explaining that its "[b]roadcast television stations compete for advertising revenues with other broadcast television stations, as well as with a variety of other media, such as newspapers, radio stations, magazines, outdoor advertising, transit advertising, yellow page directories, direct mail, the Internet and MVPDs serving the same market").

[182] *See* Stucke, *Behavioral Economists, supra* note 147, at 575–79 (describing that antitrust agencies fail to revisit industries post-merger to ensure that they accurately predicted the merger's competitive impact).

[183] 2007 PEJ Report, *supra* note 31. The 100 largest media companies (in terms of 2005 revenues) owned sixteen of the top twenty popular online news sites, as ranked by Nielsen/Net Ratings. *Id.*

[184] Started as a hobby by Craig Newmark in early 1995, Craigslist provides local classifieds and forums for 570 cities worldwide. Craigslist Factsheet, http://www.craigslist.org/about/factsheet.html (last visited June 20, 2009). With more than twenty billion page views and more than fifty million people using Craigslist each month, the Internet site publishes each month more than forty million new classified ads and one million new job listings. *Id.*

eliminating news bureaus). If advertising were the sole focus, the traditional news media in a community could freely merge given Craigslist, Google, and other vehicles for online advertising.

It is important to any media policy to consider media mergers' impact on other policy objectives besides lower advertising rates. Media consolidation may adversely affect, for example, nonprice editorial competition, and non-economic policy considerations, such as localism and diversity. It is well accepted, and a matter of everyday experience, that price is not the sole measure of competition. Companies can, and often do, compete on other dimensions, such as quality, service, and innovation. Newspapers historically invested in editorial content to attract readers, which in turn attracted advertisers.

The next issue is what mechanism should be implemented to promote these values, and what should be antitrust's role? The DOJ historically and recently has challenged anticompetitive restraints in the print media based in part on its impact on the marketplace of ideas, specifically the loss of editorial competition.[185] The DOJ is currently challenging the loss of the editorial competition involving abuses of a newspaper joint operating agreement.[186] In its complaint involving two leading West Virginia newspapers, the United States alleged how local daily newspapers, such as *The Charleston Gazette* and the *Charleston Daily Mail*, provide a unique package of attributes for their readers, which other media cannot substitute.[187] In challenging a market allocation scheme between the nation's two largest alternative newsweekly publishers, the DOJ described the competition between the defendants' alternative newsweeklies:

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[185] *See, e.g.*, Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1155 (W.D. Ark. 1995) (evaluating newspaper merger's impact on both the readership and advertising markets), *aff'd*, 139 F.3d 1180 (8th Cir. 1998); United States v. Citizen Publ'g Co., 280 F. Supp. 978, 985, 993–94 (D. Ariz. 1968) (holding that the quality of a newspaper is interrelated with circulation and advertising revenues and that the "Operating Agreement" entered into between Citizen Publishing Company and Star Publishing Company, which became effective on July 1, 1940, provided for price fixing, profit pooling, and market allocations and were illegal per se under Section 1 of the Sherman Act), *aff'd*, 394 U.S. 131 (1969); United States v. Times Mirror Co., 274 F. Supp. 606, 612 (C.D. Cal. 1967) (finding that antitrust laws apply to newspapers' newsgathering and editorial competition), *aff'd*, 390 U.S. 712 (1968).

[186] Complaint at 1–2, United States v. Daily Gazette Co., 567 F. Supp. 2d 859 (S.D.W. Va. 2008) (Civil Action No. 2:07-0329), *available at* http://www.usdoj.gov/atr/cases/f223400/223469.htm.

[187] *Id.* at 11–12. The DOJ's complaint notes how newspapers provide national, state, and local news in a timely manner and in a convenient, hardcopy format. *Id.* at 11. The news stories featured in such newspapers are more detailed, when compared to the news reported by radio or television, and they cover a wide range of topics of interest to local readers, not just major news highlights. *Id.* Newspapers are portable and allow the reader to read the news, advertisements, and other information at his or her own convenience. Readers also value other features of local daily newspapers, such as calendars of local events, movie and TV listings, classified advertisements, commercial advertisements, legal notices, comics, syndicated columns, and obituaries. *Id.* "Most readers of local daily newspapers in the Charleston area do not consider weekly newspapers, radio news, television news, Internet news, or any other media to be adequate substitutes for the two local daily newspapers serving the Charleston area." *Id.* at 11–12.

Readers and advertisers benefited with better editorial coverage, heavily discounted advertising rates, and higher quality service.[188] The FTC, under Chairman Pitofsky, was sensitive to the marketplace of ideas in the merger between AOL and Time Warner.[189]

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

But the larger issue is whether this is suitable for antitrust inquiry. Some argue that the competition agencies should look beyond a media merger's impact on advertising rates and services and consider its impact on nonprice competition, which includes editorial competition[190] and choice.[191] Others argue that editorial competition involves non-economic concerns better left to other agencies, such as the FCC. Although the federal courts have found that editorial competition among newspapers is cognizable under the federal competition laws,[192] there remains the concern that a particular administration may use editorial competition as a vehicle to punish or support a media company, based on the company's views toward the administration and its policies.[193] Despite these differences, we

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[188] For example, in challenging the defendants' market allocation scheme, the United States discussed the evidence of the intense editorial competition. Competitive Impact Statement at 6–7, United States v. Village Voice Media, LLC, (N.D. Oh. 2003) (Civil Action No. 1:03CV0164), *available at* http://www.usdoj.gov/atr/cases/f200700/200715.htm. The defendants' alternative newsweeklies responded to the other's editorial changes and improvements by introducing new or better features or increasing investigative journalism to recapture the readers' attention to its publication. *Id.* The different, and at times opposing, views and positions of the defendants' competing alternative newsweeklies provided "readers with alternative viewpoints of important local events affecting social, political, esthetic, and moral issues." *Id.* at 7.

[189] *See* Press Release, Fed. Trade Comm'n, FTC Approves AOL/Time Warner Merger with Conditions (Dec. 14, 2000), *available at* http://www.ftc.gov/opa/2000/12/aol.htm (quoting Pitofsy as saying "our concern was that the merger of these two powerful companies would deny to competitors access to this amazing new broadband technology").

[190] *See* Stucke & Grunes, *supra* note 14, at 270–73.

[191] *See, e.g.*, Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 206–207 (2007). For example, if the broadcast networks were to combine their news operations, but each independently set its own advertising rates, the merger might not be challenged if the marketplace of ideas were excluded from the analysis. Even though the evening news would remain free, and the advertising rates would remain competitive, the nonprice competition among the news networks would be eliminated. This is because the loss of this editorial diversity could not be readily replaced.

[192] The more recent decisions are United States v. Daily Gazette Co., 567 F. Supp. 2d 859, 868 (S.D.W. Va. 2008); Reilly v. MediaNews Group, Inc., No. C 06-04332 SI, 2007 WL 1068202, at *3, 6 (N.D. Cal. Apr. 10, 2007) (holding that the alleged loss of editorial competition was sufficient for antitrust injury). *See also* Hawaii v. Gannett Pac. Corp., 99 F. Supp. 2d 1241, 1249–50 (D. Haw. 1999).

[193] President Lyndon B. Johnson, for example, permitted a merger between two Houston banks in exchange for favorable coverage in the Houston Chronicle. *See* MICHAEL R. BESCHLOSS, TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963–1964, at 140–42, 151 (1997) (noting that LBJ said he wanted a letter saying that the paper is "'going to support your administration as long as you're there. Sincerely, your friend, [Chronicle president] John Jones.' . . . I don't see a damn thing wrong with that . . . [B]oth Justice and Treasury will un-cock me right quick if I [approve the merger] . . .

do not advocate that the government agencies make normative judgments about whether *The Wall Street Journal* would be a better newspaper in the hands of the Murdochs, Grahams, or Sulzbergers.

Instead, one mechanism to promote a vibrant marketplace of ideas and avoid these normative judgments may be in revising the structural ownership requirements (such as FCC caps on ownership). In addition, antitrust should have a role if direct evidence of market power exists.[194] Direct evidence of past anticompetitive restraints in that market, or natural experiments in other geographic markets (e.g., evidence of anticompetitive effects where one of the merging parties recently acquired its direct competitor) should establish a prima facie violation under Section 7 of the Clayton Act. Another category of potential concern is the transmission/content arena, when a company that dominates the transmission of information seeks to enter the content side.[195]

[and] I ain't going to do it, George, unless John Jones is willing to say to me that he's my friend."). After receiving the letter, the Administration cleared the bank merger.

President Nixon used the antitrust laws as a sword of Damocles against the media networks. President Nixon in 1971 discussed intimidating the nation's three major television networks by keeping the constant threat of an antitrust suit hanging over them. In a July 2, 1971, taped recorded discussion, aide Charles W. Colson told Nixon that whether filing an antitrust case against ABC, NBC, and CBS "is good or not is perhaps not the major political consideration. But keeping this case in a pending status gives us one hell of a club on an economic issue that means a great deal to those three networks . . . something of a sword of Damocles." Nixon responded, "Our gain is more important than the economic gain. We don't give a goddam about the economic gain. Our game here is solely political. . . . As far as screwing them is concerned, I'm very glad to do it." Walter Pincus & George Lardner Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, WASH. POST, Dec. 1, 1997, at A1.

"If the threat of screwing them is going to help us more with their programming than doing it, then keep the threat," said Nixon. "Don't screw them now. [Otherwise] they'll figure that we're done." *Id.* As for the antitrust actions, the White House kept the DOJ from filing suit until April 1972, when the government accused the networks of restraining trade and monopolizing prime-time entertainment with their own programs. The suits were dismissed without prejudice in 1974. BERNARD M. HOLLANDER, ORAL HISTORY: FIFTY-EIGHT YEARS IN THE ANTITRUST DIVISION: 1949–2007, at 174–79 (June 2008). The Ford administration renewed the complaints and subsequent consent decrees curtailed prime-time productions by the networks. Pincus & Lardner, *supra*.

[194] *See* Stucke & Grunes, *supra* note 14, at 299–300.

[195] This was the situation in the *AT&T* case. *See* United States v. AT&T Co. 552 F. Supp. 131, 223–24 (D.D.C. 1982). And it may arise in a merger between a major cable operator and movie studio (the anticompetitive effects of which prompted in part the 1992 Cable Act). Congress found, in enacting the 1992 Cable Act, that a cable operator has an incentive to favor its affiliated programmers. But a cable operator also has an incentive to offer an attractive package of programs to its subscribers. When these two incentives are in conflict, "the operator may, as a rational profit-maximizer, compromise the consumers' interests." Time Warner Entm't Co. v. United States, 211 F.3d 1313, 1322 (D.C. Cir. 2000). This scenario arose in a consent decree involving Time Warner's acquisition of Turner Broadcasting System. In the Matter of Time Warner Inc., Turner Broad. Sys., Inc. et al., Dkt. No. C-3709 (Feb. 3, 1997), *available at* http://www.ftc.gov/os/1997/02/c3709.do.pdf. The FTC believed that its enforcement action was wholly consistent with the goals of Congress in enacting the 1992 Cable Act in providing greater access to programming and promoting competition in local cable markets. Statement of Chairman Pitofsky and Commissioners Steiger and Varney *in* Time Warner Inc., Turner Broad. Sys. Inc. et al., Dkt. No. C-3709 (Feb. 3, 1997), *available at* http://www.ftc.gov/os/1997/02/c3709other.htm. 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

C. *Promoting Access to the Marketplace of Ideas*

Given traditional media's high fixed costs and significant entry barriers,[196] concentrated media ownership can hinder competition. The Obama administration should affirmatively examine how information flows in the marketplace of ideas, and what remedial steps can remove any bottlenecks.

The Supreme Court of late has displayed great faith in regulation to diminish the likelihood of and remedy anticompetitive harm.[197] It would be a mistake, however, to believe that regulatory dictates alone could replicate a competitive marketplace of ideas. In addition to the risks of imperfect information and regulatory capture, government regulators, unlike private actors (who, at times, bear the costs of their mistakes), may undertake anticompetitive actions because of weaker incentives to avoid mistakes, political myopia, and the lack of direct accountability to the public.[198] As Alfred Kahn stated, the "essential task of public policy in a

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rivals to CNN but for the fact of this acquisition. The FTC believed that Time Warner's acquisition of CNN, as alleged in the complaint, gave it both the ability and incentive to make entry of competing news services more difficult, by denying them access to its extensive distribution system. In the Matter of Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp., Dkt. No. C-3709, Complaint ¶ 38 (Feb. 7, 1997). The FTC observed that courts have upheld against First Amendment challenge regulations specifically designed to address competitive concerns arising from vertically-integrated cable companies' monopoly control over distribution. What is also interesting is that the FTC abstained from determining which rival to CNN must be carried on the cable network:

> In this case, there is even greater reason to avoid a more intrusive role, since programming content would be unavoidably implicated—the selection of one competitor over another inevitably determines to some degree the content of the new entry. In addition, excessive involvement in the selection process could conflict with the goal that the antitrust laws, and antitrust remedies, are intended to protect competition, not competitors.

Statement of Chairman Pitofsky, *supra*. A similar concern arose in the AOL/Time Warner merger, prompting restrictions against AOL Time Warner from discriminating on the basis of corporate affiliation in the transmission of content. *See* Analysis of Proposed Consent Order to Aid Public Comment, http://www.ftc.gov/os/2000/12/aolanalysis.pdf; *see also FTC Backs AOL-Time Warner Merger*, J. RECORD, Dec. 15, 2000 (quoting Chairman Robert Pitofsky) ("Our concern here was with access, that these two powerful companies would create barriers that would injure competitors . . . ."); *AOL Merger Clears Last Big Hurdle*, WASH. POST, Dec. 15, 2000, at A1 (quoting Commissioner Leary) ("I had and I continue to have concerns about these content issues . . . .").

[196] Television, cable, and radio have regulatory barriers and high fixed costs. Newspapers have high fixed "first copy" costs. Publishing the first copy of a newspaper is high, given the reporting and editorial costs, the infrastructure to print newspapers, and costs to solicit advertisers. The marginal cost of producing the second, third, and fourth copies is very low and remains low up to the newspaper's printing capacity. *See* WORLD BANK, *supra* note 83, at 183.

[197] Verizon Commc'n Inc. v. Trinko, 540 U.S. 398, 412 (2004).

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

free enterprise system should be to preserve the framework of a fair field and no favors, letting the results take care of themselves."[199] Similarly, to prevent the formation of monopolies, the United States historically focused on maintaining competitive market structures, rather than regulatory dictates.[200]

Thus, the best remedy for media monopolies is to prevent their formation, through (i) structural mechanisms (such as cross-ownership restrictions and caps on ownership both nationally and in local markets); (ii) removal of bottlenecks and any government-imposed entry barriers; and (iii) active and informed antitrust enforcement to enjoin anticompetitive media mergers. The Obama administration, for example, should be vigilant of any onerous government regulations that reduce the media's independence or distort the provision of information. This means keeping the media independent and free from governmental control or improper influence.[201]

The Obama administration should also examine mechanisms to foster the free flow of information. Under an evolutionary economic perspective, not only is experimentation critical, but also the dissemination of information of that experimentation and feedback thereto.[202] Division of labor has increased specialization of knowledge, whereby individuals know much about a limited area. This specialization of knowledge can increase transaction costs (i.e., ascertaining the measurement and

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

[200] Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 178–79 (2002) (noting that FTC enforcement efforts during the 1990s were directed toward preserving open access to markets). Thus, Section 1 focuses on concerted activity to eliminate competitors, and raise entry barriers. Section 7 prevents mergers that tend to create a monopoly. Attempts to monopolize violate Section 2. *See* Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 546 n.254 (2009). The 1996 Act was deregulatory in its approach, continuing the shift of the telecommunications industry away from a heavily regulated industry (with behavioral restrictions) to the aspired open competition (with structural restrictions). Congress's intent, as expressed by the 1996 Act, is that the antitrust analysis should be primarily conducted by the federal antitrust agencies and not by the FCC. While the FCC's "public interest" standard and ownership control regulations touch upon antitrust issues, Congress wanted the DOJ and the FTC independently and carefully to review media mergers and their impact on competition in the marketplace of ideas. The legislative history of the savings clause to the 1996 Act shows that the FCC regulatory scheme does not preempt antitrust review of media mergers generally, and the marketplace of ideas specifically. Stucke & Grunes, *supra* note 14, at 288–94. However, aside from political and ideological concerns about lax or zealous antitrust enforcement, conventional antitrust policy is not easy to apply in media markets. *See* Howard Shelanski, *Antitrust Law as Mass-Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 373 (2006).

[201] The World Bank noted that "[h]igher levels of perceived media freedom or independence are associated with lower levels of perceived corruption, regardless of differences in a country's level of income." WORLD BANK, *supra* note 83, at 182.

[202] *See* RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 402 (1982); *see also* Moreau, *supra* note 198, at 869. A positive feedback loop for example may emerge from the learning effects from diffused technologies. For example, as end-users experiment and alter a particular technology, the suppliers learn from this diffusion. In the next round, the suppliers, in turn, can offer this greater diffusion of offerings, which various users can further modify.

performance characteristics of goods and services outside one's area of expertise).[203] Moreover, the dispersion of information in society and the attendant search costs can inhibit our understanding of the sources of poor economic performance and thwart dynamic efficiency. This is precisely where the government can play a key role in further "integrating the dispersed knowledge essential to efficient production in a world of specialization."[204] In facilitating "the greatest possible centralization of information, and diffusion of it from the centre,"[205] the government can more cheaply inform market participants. This does not mean having the government evaluate or filter the information's content. Instead, the government can evaluate what additional steps to promote the free flow of information and reduce search costs.[206] These steps may include creating antitrust safe harbors for private individuals to (i) publicly disseminate price, wage, and other information,[207] or (ii) promote novel forms of information dissemination, such as prediction markets, whereby individuals bet on future outcomes.[208] To foster accountability—and lower the media's search costs—the government can also promote its own transparency and remove restraints in accessing such information.[209]

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

[204] *Id.* at 164.

[205] JOHN STUART MILL, ON LIBERTY 123 (2003).

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

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

[208] *See* Kenneth J. Arrow et al., *Statement on Prediction Markets*, AEI-BROOKINGS JOINT CTR. REGULATORY STUDIES 2 (2007), *available at* http://wwm.com/abstract=984584.

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

VI. CONCLUSION

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

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