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Recommended Citation
Daniel L. Brenner, Ownership and Content Regulation in Merging and Emerging Media, 45 DePaul L. Rev. 1009 (1996)
Available at: https://via.library.depaul.edu/law-review/vol45/iss4/5

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OWNERSHIP AND CONTENT REGULATION IN MERGING AND EMERGING MEDIA

Daniel L. Brenner*

I. INTRODUCTION

The goal of diversity in our communications system remains constant. We want a system that relies on a multiplicity of voices and views, an environment where listeners have an ability to listen and speakers have an ability to speak, and, importantly, messages that should be heard are heard. At the same time, we want to keep government out of the process of generating this communication as much as possible. The First Amendment prohibits Congress from abridging the freedom of speech and the press.1 The "print model," which describes the minimal regulatory approaches taken toward newspapers, should be the touchstone.2 Finally, while this is a distant concern, we remain fearful, at the edges, that individuals not obtain such power in the media marketplace that dissenting views are shut out or that only the views of owners are heard.3

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1. U.S. CONST. amend. I. The First Amendment provides in relevant part: “Congress shall make no law... abridging the freedom of speech, or of the press.” Id.


3. See Alexandra Marks, Mergers May Give Viewers Less Choice, CHRISTIAN SCI. MONITOR, July 11, 1996, at 1, 13 (reporting that the rapid consolidation of cable firms has created a few mega-companies, which "makes it increasingly difficult, if not impossible for independent programmers to gain access to cable systems and has raised alarms over who controls what Americans see on TV"); see also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379 (1969) (“[T]he objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidates, endorsed their opponents, or carried a personal attack upon them.”).
We are living through unprecedented consolidation and growth in media. The end result should be an ever-widening array of choice. Do we have it? How is diversity faring? And what can regulation contribute? In the past, questions of content regulation or ownership to promote diversity were carefully analyzed in the context of particular cases. Worldwide media growth suggests that we should ask if fundamental shifts in how to think about their regulation are warranted.

Consider the last year of media mergers and acquisitions. Disney acquired Capital Cities/ABC, Inc. for $19 billion. Seagram acquired MCA, Inc. for $5.7 billion. Westinghouse acquired CBS for $5.4 billion. Time Warner acquired Turner Broadcasting for $7.5 billion. News Corp, Rupert Murdoch's enterprise, has received investment capital from MCI of $2 billion. AT&T invested in GM-Hughes' DBS system, DirecTV. Microsoft and MCI have formed a joint Internet development venture. Microsoft has announced alliances with NBC and Black Entertainment Television to offer content on the Internet.

4. See, e.g., Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374 (analyzing FCC regulations allowing cable operators to impose content restrictions on leased access and public access channels); Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2469 (1994) (finding must-carry provisions content neutral); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 579 (1990), questioned in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (deferring to Congress’s fact-finding and to the FCC’s expertise in determining that a nexus existed between minority ownership and the inclusion of minority views in programming); FCC v. League of Women Voters, 468 U.S. 364 (1984) (finding a fiduciary obligation imposed on broadcasters by the Communications Act); Red Lion, 395 U.S. at 390 (deriving the authority to regulate broadcasters from the uniqueness of the electromagnetic spectrum); In re Applications of Waters Broadcasting Corp., 91 F.C.C.2d 1260, 1264 (1982) ("[T]here is a critical under-representation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversity of ownership which are at the heart of the Communications Act and the First Amendment.").


10. Jeff Cole, AT&T to Buy 2.5% of GM's DirecTv, Inc., WALL ST. J., Jan 23, 1996, at A2. AT&T invested $137.5 million dollars for a 2.5% stake in DirecTV. Id. The deal also gives AT&T an option to acquire up to 30% of DirecTV. Id.


Sprint formed and then backed away from a consortium venture with Comcast, TCI and Cox Communications in the personal communications systems (PCS) marketplace. NYNEX and Bell Atlantic announced a merger as did SBC Communications and Pacific Telesis Group. Viacom acquired Paramount. Time Warner and Chris Craft/Paramount have developed new television networks. In addition, the new powerhouses of radio are not the old networks, but groups like Evergreen and CBS/Infinity.

The old electronic marketplace of fifteen years ago, dominated by the three television networks and their affiliated stations, is a substantial but not dominant portion of the electronic landscape. Programmers and distributors view the market as worldwide, not domestic. As one producer put it, a film's not been sold 'til it's been sold to Albania. Multinational telecommunications companies are the norm, not the exception. Step off a plane in Europe, and the first companies that will greet you are MCI, Sprint and AT&T.

For the past two years, more personal computers than television sets were sold in the United States. For several years, home video revenues have exceeded theatrical revenues for movie releases. Before long, the video cassette may go the way of the long playing album, replaced by digital video CDs. Add to this the Internet. Ac-

13. John J. Keller & Mark Robichaux, Sprint’s Cable-TV Alliance Alters Local-Phone and Wireless Plans, WALL ST. J., Feb. 22, 1996, at A3. The alliance, called the Sprint Telecommunications Venture (STV), was formed in late 1994 and originally planned to sell a package of communication services combining local, long-distance and wireless services. Id. But recently, the partnership restructured its business plan to concentrate on building a PCS network and changed its name to Sprint Spectrum to reflect this new focus. Id.; Sprint Spectrum Billing Contract, WALL ST. J., July 10, 1996, at C22.


20. Arnold, supra note 18, at D5.
According to latest estimates, one in ten adults uses the Internet,\(^{21}\) and nearly forty percent of households have personal computers—making them all potential Internet customers.\(^{22}\) Faster modems, in particular via cable (one thousand times faster than the telephone line) will make Internet use even more desirable.\(^{23}\) Full motion video will be as accessible on the Internet as words and data are today. How should we regulate these merging and emerging media?

Four types of media regulation have been used in trying to foster diversity in communications. Each expresses a different level of awareness of the role, and limits, of regulation: (1) behavioral, (2) structural, (3) what I call “antitrust-plus,”\(^{24}\) and (4) traditional antitrust regulation. The task for public policy is deciding which regulation method works best to maximize content diversity yet does not offend the First Amendment. My analysis concludes that behavioral and structural regulation has contributed some, but not much, to conclusively enhancing diversity. My additional thesis is this: the market often does a better job of improving diversity for reasons that the government cannot predict or mandate. This result substantially lessens the reliability of antitrust-plus analysis. Finally, government should pinpoint where market failures relating to speech occur and address those shortcomings, rather than invoke an amorphous diversity goal to justify regulation.

II. TYPES OF MEDIA REGULATION

We can start with the history of media regulation at the Federal Communications Commission (FCC or Commission). This is a good

\(^{21}\) Although no one can accurately measure Internet use, most surveys estimate the number of U.S. adults on the Internet at between 8% and 12%. G. Christian Hill & Molly Baker, In the Dark: Companies Have Absolutely No Idea How Many Potential Customers They Have On-Line, WALL ST. J., June 17, 1996, at R26; see, e.g., Joann Muller & Ronald Rosenberg, Small Business Survey: Executives See Rise in Profits, Hiring, BOSTON GLOBE, June 30, 1996, at 74 (reporting results from a survey conducted by Forrester Research, Inc. estimating nearly 8% of adults use the World Wide Web); Don Sheron, Home Computer Usage Growing—Age, Income, Education Leading Indicators for Ownership, SAN ANTONIO EXPRESS-NEWS, July 28, 1996 (citing separate surveys by Decision Analyst and the Roper Poll finding 12% of adult Americans access the Internet). Some market research firms predict that by the year 2000, 20% of adults will be online. Muller & Rosenberg, supra, at 74. Yet, in view of the popularity and exponential growth the Internet has already witnessed in such a relatively brief period, this number appears conservative.

\(^{22}\) G. Christian Hill, Tally at Homes with PCs Increased 16% Last Year, WALL ST. J., May 21, 1996, at B10.

\(^{23}\) Harry A. Jessell, High-Speed Modems a Top Priority, BROADCASTING & CABLE, Dec. 4, 1995, at 82.

\(^{24}\) The term “antitrust plus” or “plus factors” refers to other evidence besides behavior traditionally considered anticompetitive.
place to begin because the FCC and the Communications Act of 1934\(^{25}\) best reflect the first two categories of regulation: behavioral and structural.

\[A. \text{ Behavioral Regulation}\]

Behavioral regulation—controlling what's communicated—is the first resort of those dissatisfied with the performance of the media. Since its creation, the FCC has been charged with regulating radio, and then television, in the "public convenience, interest, or necessity."\(^{26}\) To provide meaning to these words, the Commission has from time-to-time reached out to regulate broadcasting content. Formal efforts to define the public "interest" include the 1946 Blue Book\(^{27}\) and the 1960 Program Policy Statement,\(^{28}\) which obligated a broadcaster to develop a diversity-rich programming environment—if the broadcaster expected to have its license easily renewed.\(^{29}\)

The Commission issued and rescinded percentage guidelines for news and public affairs programming.\(^{30}\) It adopted,\(^{31}\) enforced,\(^{32}\) and then repealed\(^{33}\) the Fairness Doctrine, which required coverage of

\[\begin{align*}
27. \text{See \textit{Federal Communications Comm'n, Public Service Responsibility of Broadcast Licensees} (1946), \textit{reprinted in Documents of American Broadcasting} 148-63 (Frank J. Kahn ed., 4th ed. 1984) (outlining the Commission's programming policy recognizing the need for broadcasters to air programs of community interest).} \\
29. \text{Id. at 2314-15 (identifying "the major elements usually necessary to meet the public interest, needs and desires of the community . . . as developed by the industry, and recognized by the Commission").} \\
31. \text{\textit{In re Editorializing by Broadcast Licensees}, 13 F.C.C. 1246 (1949) [hereinafter Editorializing by Broadcast Licensees].} \\
32. \text{See \textit{Red Lion Broadcasting Co. v. FCC}, 395 U.S. 367, 369, 375-86 (1969) (upholding the constituionality of the Fairness Doctrine and the Commission's right-of-reply rules issued in 1967). To establish a fairness violation, a complainant must show that the broadcaster presented only one viewpoint on a "controversial issue of public importance" and "failed to afford a reasonable opportunity for the presentation of contrasting viewpoints." \textit{In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act}, 48 F.C.C.2d 1, 10 (1974).} \\
33. \text{\textit{In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees}, 102 F.C.C.2d 145, 147 (1985).} \\
\end{align*}\]
controversial issues and afforded reasonable opportunities for contrasting viewpoints on those issues. It engaged in enforcement against offensive programming, from the 1930s, when it condemned words like "damn" as profane, to last year's case against shock jock Howard Stern. The behavioral model continues to operate, exemplified by efforts to regulate speech on the Internet or requirements that TV broadcasters not classify programs like The Jetsons as educational.

Regulating editorial behavior as a means of enforcing the goal of speech diversity almost always runs counter to the "print model." Print was the technology extant at the time of the founding fathers. As Judge David Bazelon wrote seventeen years ago, the print model's "hands off policy" has proven more durable and more congenial to our national political values than the 'different' First Amendment standards" of a behavioral model. As he concluded, "government intervention is as likely to suppress diversity as to promote it."

It's hard to quarrel with what motivates many behavioral restrictions. The argument against the Fairness Doctrine was never that it was a bad idea. As a private policy, it's a good idea; coverage of controversial issues is what journalism is all about, and offering con-

34. The Fairness Doctrine required that "licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community." Editorializing by Broadcast Licensees, supra note 31, at 1257-58.


36. See In re Sagittarius Broadcasting Corp., 10 F.C.C.R. 12245 (1995) (entering into a $1,715,000 settlement agreement with Infinity Broadcasting Corp. arising from enforcement proceedings involving the Howard Stern Show).


38. See In re Policies and Rules Concerning Children's Television Programming, 10 F.C.C.R. 6308 (1995). According to a study of broadcast license renewal applications filed in 1992, many stations asserted that programs such as G.I. Joe, Teenage Mutant Ninja Turtles, and The Jetsons were specifically designed to meet children's educational needs. Id. at 6317 n.32. The Commission was not persuaded, however, concluding that such programs were "of dubious educational value to children." Id. at 6317.


40. Id.

contrasting viewpoints is what unbiased reporting aims to do. In addition, preventing people from hearing speech that shocks or deeply offends, particularly over a medium where the speaker did not pay for its spectrum but obtained it by promising to serve the public interest, is hardly an offensive idea.

The goals of behavioral regulation aren't the problem; its enforcement is. Behavioral regulation necessarily involves the government in evaluating the content of programming. The government must prescribe how to balance controversial issues, such as what indecency is, or why certain programming—children's education, news, or public affairs—must be carried, when other outlets may already carry similar programming or, alternatively, are not regulated at all.42

B. Structural Regulation

Structural regulation offers ostensible relief from these shortcomings. Structural regulation addresses the pattern of ownership; diversity is defined not by what is said, but by who says it.43 Over the years, Congress and the FCC have limited who may own outlets and how many they may own. For example, while there is no ban on foreign ownership of newspapers or cable systems, a foreign entity may not control a radio or television outlet.44 Limits have been set on the number of stations or percentage of homes one company may control nationally,45 as well as the total number of homes that one entity may serve by cable.46 In individual markets, certain cross-ownership rela-

42. As Judge Bazelon has remarked, "[t]he result is nothing short of placing a government editor in the programming booth." Bazelon, supra note 39, at 206.
43. For further discussion of structural regulation, see Daniel L. Brenner et al., Cable Television and Other Nonbroadcast Video § 6.01[1] (1996).
44. 47 U.S.C. § 310(b) (1994).
46. A portion of Section 11(c) of the 1992 Cable Act directed the FCC to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers" a cable operator is authorized to reach through cable systems it owns or in which it has an attributable interest. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, sec. 11(c), § 613(f)(1)(A), 106 Stat. 1460, 1486-87 (1992). The 1992 Cable Act's horizontal ownership limits were struck down as unconstitutional in Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 10 (D.D.C. 1993). In finding the horizontal limits incompatible with the First Amendment, the Daniels court stated that "[a]ny governmentally ordained quota on the number of subscribers a cable operator may reach leaves the grantor with absolutely no intra-medium means of speaking to the remainder of its potential audience." Id. An appeal of the Daniels court's decision striking down the horizontal ownership limitation provision is currently before the United States Court of Appeals for the District of Columbia. See Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 979 (D.C. Cir. 1996) (per curiam) (consolidating Time Warner's challenge to the constitutionality of the Cable Act's horizontal ownership limitation provision
tionships have been prohibited from time-to-time, including newspaper-broadcast and television-cable.\textsuperscript{47} Finally, there are intramarket limits on the number of radio or TV stations one may own.\textsuperscript{48}

Structural regulation takes nonownership forms too. For instance, cable television was structurally limited early on in its development when the FCC restricted the number of distant TV signals that could be imported from other markets.\textsuperscript{49} Broadcast network development was hampered by the decision to intermix VHF and UHF band stations in the same market instead of making all markets UHF.\textsuperscript{50} This decision eliminated the possibility of more than three same-band national networks.\textsuperscript{51} It was only with cable television, which placed VHF and UHF stations on an equal footing as far as reception was concerned, did intermixed networks like Fox, WB and UPN become financially viable.\textsuperscript{52}

Structural regulations can also directly undermine diversity. Take the "must-carry" statute, which requires cable systems to carry all local TV stations requesting carriage.\textsuperscript{53} Such provisions were not based on the particular content of local television stations, but were adopted to insure that local broadcasting would survive.\textsuperscript{54} In practice, however, these rules stymie diversity. Local stations that have virtually no over-the-air viewership, let alone a cable audience, are permitted to invoke must-carry rights against cable operators and force their way

with its challenge to regulations promulgated by the FCC implementing this statutory provision in Time Warner Entertainment Co. v. FCC, No. 94-1035 (D.C. Cir.).


\textsuperscript{48} 47 C.F.R. § 73.3555 (a)-(d) (1995). The Telecommunications Act of 1996 resets these caps to a higher limit. 47 U.S.C.A. § 202(b), (c)(1)(B), (d).

\textsuperscript{49} See In re Amendment of Part 74, Subpart K of the Commission's Rule and Regulations Relative to Community Antenna Television Systems, 36 F.C.C.2d 143, 170-85 (1972) (describing signal carriage rules), on recons. 36 F.C.C.2d. 326 (1972). The signal carriage rules limited the number of television station signals outside of a cable system's area that the system was permitted to transmit to its subscribers. See id. at app. A (amending 47 C.F.R. §§ 76.59, 76.61, 76.63, and 76.151-76.161). This number varied depending on the size of the television market in which the cable system was located and the number of over-the-air signals in that market. \textit{Id}. For an excellent account of the FCC's initial efforts to regulate cable television, see DON LE DUC, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL (1973).

\textsuperscript{50} Bazelon, supra note 39, at 205. For a description and analysis of the Commission's policies toward television see ROGER NOLL ET AL., ECONOMIC ASPECTS OF TELEVISION REGULATION, 97-128 (1973).

\textsuperscript{51} Bazelon, supra note 39, at 205.

\textsuperscript{52} See Thomas W. Hazlett, \textit{Station Brakes: The Government's Campaign Against Cable Television}, REASON, Feb. 1995, at 40, 46 ("The arrival of Fox was directly linked to the enhancement of VHF stations over cable. . . .").


\textsuperscript{54} Turner Broadcasting Co. v. FCC, 114 S. Ct. 2445, 2454-55 (1994).
onto systems.\textsuperscript{55} Meanwhile, new program services delivered by satellite that could occupy those channel positions are excluded.

Similarly, restrictions on station ownership in markets may paradoxically contribute to less diversity, not more. As Peter Steiner\textsuperscript{56} and others have shown, if there is a single owner of multiple radio stations within a market, that owner may be more likely to program minority taste formats than if the radio stations are separately owned.\textsuperscript{57} For example, suppose eighty percent of a market prefers contemporary hits, ten percent prefers classical, and ten percent prefers all talk and you have four stations in the market with four separate owners. All of the owners will be competing for the contemporary format. None of the four would likely serve the classical or talk formats because in a four-way split each gets twenty percent of that larger contemporary hit market. Theoretically, at least, a single owner of all four stations would maximize audience by carrying three different formats, since one hundred percent of the audience would be reached.

Scale economies, not format diversity, led the FCC on its own in the 1980s to permit greater control by single owners in the market.\textsuperscript{58} This was accomplished first by increasing the number of stations one entity could control in a market and then by encouraging agreements by

\textsuperscript{55} See id. at 2453-54 (discussing the must-carry provisions).

\textsuperscript{56} See Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q.J. Econ. 194, 212-17 (1952) (demonstrating that monopoly ownership produces greater diversity in the radio programming context).

\textsuperscript{57} Id.; see also Daniel L. Brenner, Government Regulation of Radio Program Format Changes, 127 U. Pa. L. Rev. 56, 63-69 (1978) (questioning assumptions underpinning Steiner's economic model and concluding that it cannot be determined whether a radio industry structure based on a pure competition model or one based on a monopoly model provides greater program diversity or maximizes listener utility).

\textsuperscript{58} See, e.g., In re Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, 22 (1984) [hereinafter Multiple Ownership Rules] (describing potential efficiency gains from repealing the national ownership caps for radio and television); In re Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, 4 F.C.C.R. 1723 (1989) (relaxing the radio duopoly rule).

Common ownership of radio stations often leads to greater efficiencies. In relaxing the local radio ownership rules, the FCC enumerated economies of scale hampered by then-existing restrictions as follows:

By artificially denying stations efficiencies that could be realized through consolidation of facilities, managerial and clerical staffs, sales, bookkeeping, promotion, production, news and other aspects of station operation, the local ownership restrictions increase the costs of doing business at a time when cost-savings may well be critical to survive.

which one station managed two stations within the same market.\textsuperscript{59} The Telecommunications Act of 1996 frees local radio ownership even more.\textsuperscript{60} Of course, not every form of structural regulation is bad public policy. Yet, time has shown, that what seem like inviolate structural rules become less so in hindsight. For instance, in radio, as the national ownership cap rose from seven to twelve to no limit,\textsuperscript{61} assumptions that the initial rules were intrinsically wise and provided some durable bulwark for diversity crumbled. What we can say is that ownership caps provide a predictable means of testing concentration in the marketplace, offering certainty for government and business. But, these caps probably fall well below what the antitrust laws might permit.

C. “Antitrust-Plus” Regulation

This brings us to the third form of diversity regulation, what I call “antitrust-plus.” The “plus” comes from inclusion of factors beyond pure economic analysis to analyze mergers and acquisitions. Antitrust-plus analysis can be observed in some antitrust cases.\textsuperscript{62} But since the 1970s, there’s been a marked shift away from analysis that includes political considerations.\textsuperscript{63} The Federal Trade Commission Chairman Robert Pitofsky has articulated the difference this way:

\begin{itemize}
\item \textsuperscript{59} See Revision of Radio Rules and Policies, supra note 58, at 2761 (relaxing the local ownership rules and allowing consolidation through joint venture arrangements).
\item \textsuperscript{60} 47 U.S.C.A. § 202(b). The Commission has, in essence, been instructed not only to modify its rules to eliminate limitations on the number of radio stations an entity may own or control on a national level, but also to modify its rules regarding local radio station ownership. \textit{Id.} Therefore, the Commission's modification of its rules regarding ownership, operation, or control in a local market in fact frees local ownership.
\item \textsuperscript{61} In 1953, the FCC formally adopted a Seven Station Rule, which prohibited individuals or entities from owning more than seven AM stations and seven FM radio stations. \textit{Multiple Ownership Rules, supra} note 58, at 22. In 1984, the FCC relaxed the Seven Station Rule, permitting ownership of up to 12 AM stations and 12 FM stations nationwide. \textit{Id.} at 18. In 1992, the FCC further relaxed the national ownership caps, permitting ownership of up to 30 AM stations and 30 FM stations. \textit{Revision of Radio Rules and Policies, supra} note 58, at 2761. The new telecommunications legislation directs the FCC to eliminate the national ownership caps entirely. 47 U.S.C.A. § 202(a).
\item \textsuperscript{62} See, e.g., United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960) (“[A]n unlawful combination is not just as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.”); FTC v. Cement Inst., 333 U.S. 683, 719 (1948) (ruling that one of the key “plus factors” is the sudden adoption of a new system the effect of which is to help stabilize prices in an industry when demand is declining); \textit{In re} General Foods Corp., [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,173 (July 14, 1976) (considering the heterogeneity of the good merely as a “plus factor” justifying intensified scrutiny in some nonquantifiable weighing scheme).
\item \textsuperscript{63} See William E. Kovacic, \textit{The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy}, 36 \textit{Wayne L. Rev.} 1413 (1990) (discussing the shift toward an...
"It has become common for antitrust economists, academics and lawyers to argue that the antitrust laws should be interpreted exclusively to serve economic goals—I believe that is wrong. Concern about concentrated economic power should be given added weight where the merger (or a wave of mergers) concerns companies involved in the communication of ideas.

In those industries, there is more at stake than high prices or low quality to consumers—there is a more fundamental issue of avoiding centralized control over access to the marketplace of ideas."

Under this view, diversity can be hampered by concentration of media. This assumption may call into question a merger or acquisition, even if that proposed activity cannot objectively be found to substantially lessen competition in the relevant advertising or programming markets. This idea is not new, but it is out of favor among many who would rely more on economic efficiency to the exclusion of diversity or political considerations in making an antitrust evaluation, particularly considering scale efficiencies that larger enterprises, media and nonmedia, typically generate.

D. Traditional Antitrust Regulation

Finally, there is standard antitrust analysis, which treats communications no differently than other economic sectors. Under this analysis, government would apply traditional measures of scale efficiencies and concentration to decide whether or not mergers and acquisitions

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efficiency-oriented antitrust policy). Professor Kovacic credits Robert Bork's 1978 book *The Antitrust Paradox: A Policy at War with Itself* with playing a "singular influential role in transforming antitrust doctrine and policy." *Id.* at 1444-45. He writes that "[s]ince 1890, no single scholarly work has exacted greater influence than the *Antitrust Paradox* on the direction of antitrust policy." *Id.* at 1417.


65. *See* Marianne Lavelle, *Telecom Merger Tests New Law Limits*, *Nat'l L.J.*, Apr. 15, 1996, at A16 (reporting that consumer groups hope the SBC-Pacific Telesis merger will provide antitrust regulators like Pitofsky with the opportunity to test the theory that media mergers merit greater scrutiny than mergers in other industries).

produce an undue tendency toward monopolization or substantially lessen competition.67 This is an economic view of antitrust analysis.68 If competitive analysis leads to disapproval that's one thing, diversity should not be an independent factor.

Even under the standard antitrust analysis, there are obvious gradations of scrutiny. The general view of antitrust enforcement during the Reagan years was to relax the merger and acquisition standards for all industries, including media.69 Some observers see stepped-up enforcement under the Clinton Administration.70 The point here, however, is that no special political considerations should apply where the merger involves media as opposed to nonmedia activity. Thus, a stricter antitrust enforcement standard might produce a less concentrated industry with whatever effect on diversity, but enforcement is not driven by diversity as a factor.

These, then, are the means the government employs to regulate diversity: behavioral rules, content-neutral structural rules, antitrust-plus analysis that expressly considers the diversity-enhancing aspects of a proposed merger or acquisition, and antitrust analysis that does not vary because the communications industry is involved.

III. MINORITIES AND THE MEDIA UNDER BEHAVIORAL AND STRUCTURAL REGULATION

The government hasn't tried every conceivable form of behavioral or structural regulation. But, any such efforts to enhance diversity must be weighed against the enormous market forces that govern the commercial electronic system of speech. This is not to say that nothing can or should ever be tried to improve diversity in telecommunica-

67. The competitive effects of mergers and acquisitions of stock or assets are principally governed by § 7 of the Clayton Act, which prohibits mergers and acquisitions "in any line of commerce or in any activity affecting commerce in any section of the country, [where] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1994).
tions. It’s simply to say that such activity must be carefully targeted and is, generally speaking, unlikely to overpower those market forces.

Let’s examine behavioral and structural regulation by way of example. Perhaps there is no more important issue of diversity than the greater inclusion of minority and gender voices in mass communications. Called to account on the race riots of the mid-1960s by the Kerner Commission’s 1968 report, the FCC, Congress, and the media recognized the poor job of including authentic voices from minority communities in news and entertainment programming. The 1950s and 1960s experienced routine exclusion of minorities on local and national television programs. Behind the scenes, generally all-white, all-male newsrooms dominated. Even today, Asians, Latinos, gays, and the physically disabled remain all but invisible in mainstream entertainment programming.

How has government policy operated in this context? From the behavioral side, one detects little specific content regulation aimed at increasing the diversity of speech addressing minority tastes and needs. The FCC requires stations to serve all community elements, but license renewal challenges of radio and television stations that

71. REPORT OF THE U.S. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter KERNER COMMISSION REPORT].

72. See id. at 382-89 (identifying systemic racial exclusion in news and entertainment programming and proposing the establishment of a private, nonprofit entity to carry out the media recommendations of the Commission to address these problems).

73. KERNER COMMISSION REPORT, supra note 71, at 385-86 (noting that blacks are largely neglected on television and recommending they be included in all forms of television programming).

74. In examining the media, the Kerner Commission found:

The journalistic profession has been shockingly backward in seeking out, hiring, training, and promoting Negroes. Fewer than 5 percent of the people employed by the news business in editorial jobs in the United States today are Negroes. Fewer than 1 percent of editors and supervisors are Negroes, and most of them work for Negro-owned organizations.

KERNER COMMISSION REPORT, supra note 71, at 384.

Even today, more than two decades after the Kerner Commission issued warnings to the media to improve minority representation, the number of minorities in newsrooms falls well below their percentage in the total population. George Garneau, Tempers Flare; Minority Journalists Tell National Newspaper Association Officials That More Has to Be Done in Diversifying Newsrooms, EDITOR & PUBLISHER, Dec. 12, 1992, at 14.

cited a failure to meet those needs were generally unsuccessful. In
deed, the leading example of a station losing is license for failure to
meet minority needs was the celebrated 1968 United Church of Christ
case involving WLBT-TV in Jackson, Mississippi. There, the United
States Court of Appeals ordered the FCC to take WLBT's license
away, essentially disgusted with the agency's pro-incumbent posture.

In another instance, one in which the Commission was confronted
with abject racist speech in a political advertisement, the J.B. Stoner
case, the Commission interpreted the equal time laws under section
315 of the Communications Act of 1934 as prohibiting it from censor-
ing the candidate's racist message.

The FCC's method for determining whether a station meets com-

munity needs today—the requirement that an issues list be created
identifying programming that illustrates how the station addresses
community problems—has become mostly a paperwork burden. It
is hard to distinguish between a station that addresses the needs of
urban housing by means of primetime specials involving local commu-
nity groups or mere public service announcements giving the name
and number of housing discrimination agencies. Nor did the Commis-
sion ever say, with good First Amendment reason, what the minimum
requirements were in this regard.

76. See, e.g., In re License Renewal Applications of Certain Broadcast Stations Licensed for
and Serving the State of Mississippi, 59 F.C.C.2d 1335, 1335-36 (1976) (dismissing petition in-
cluding, among other charges, allegations charging 73 broadcast stations with discriminating
against African-Americans in employment).

77. In re Application of Lamar Life Ins. Co. for Renewal of License of Television Station
WLBT and Auxiliary Service, Jackson, Miss., 14 F.C.C.2d 495 (1967).

78. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C.
Cir. 1969). United Church marked the first time a United States court ordered a regulatory
license to be terminated. Fred W. Friendly, The Good Guys, The Bad Guys and The
First Amendment 100-01 (1976). For a detailed account of the WLBT saga see id. at 89-102.

79. In re Complaint by Atlanta NAACP, Atlanta Ga. Concerning Section 315 Political Broad-
cast by J.B. Stoner, 36 F.C.C.2d 635 (1972).

80. Id. at 637. In refusing to prohibit the licensee from broadcasting the political advertise-
ment, the Commission believed that it was constrained by § 315, which states in relevant part
that a "licensee shall have no power of censorship over the material broadcast under the provi-
sions of this section" and § 326 of the Act, which prohibits the Commission from censoring
broadcasts or interfering with the right of free speech by means of radio communication. Id. at
636-37. In addition, the Commission interpreted First Amendment case law as proscribing inter-
ference with the political candidate's right of free speech in this case. Id. at 637.

81. See In re Deregulation of Radio, 104 F.C.C.2d 505, 506 (1986) (requiring that a radio
licensee maintain a list of issue responsive programming to determine whether the station has
fulfilled its programming obligations); Office of Communication of the United Church of Christ
v. FCC, 779 F.2d 702, 704 (D.C. Cir. 1985) (vacating the Commission's order issuing a new
regulation requiring broadcast licensees to maintain a list of at least five to ten community issues
aired by the station during each three-month period as arbitrary and capricious).
These difficulties with a content-oriented approach led the Commission to implement structural initiatives. Equal employment opportunity (EEO) guidelines were established for broadcasting and cable to increase the number of minorities and women employed in these industries.\textsuperscript{82} The EEO guidelines have no doubt been salutary in terms of boosting the opportunities for previously excluded groups. But, it is difficult to say that these employment activities have actually led to greater programming diversity. Most television programming is produced by syndicators or networks, which obtain no government license and whose employment practices are not regulated by the FCC.\textsuperscript{83} For minorities and women conceivably to affect diversity, their ranks should be measured at the content-production level. Instead, the Commission's rules regulate employment opportunities at outlets like cable systems and local radio and television stations, where few programming decisions likely to affect ethnic diversity are made.\textsuperscript{84}

In the 1970s and 1980s, the FCC made other important efforts to increase diversity through structural regulation. For example, to stimulate minority ownership in broadcasting, the Commission instituted its distress sale and tax certificate policies for broadcast properties.\textsuperscript{85} The distress sale policy, which has fallen into some disuse because few stations actually get designated for hearing,\textsuperscript{86} permits a broadcaster facing renewal or revocation of its license to transfer or assign its li-

license to a qualified minority at a distress price.\textsuperscript{87} The licensee can receive up to seventy-five percent of the station’s fair market value (which it could conceivably entirely lose through an adverse finding at the hearing) and a minority broadcaster emerges.\textsuperscript{88}

While there have been some successes, distress sale stations were often struggling operationally and made poor opportunities for new licensees.\textsuperscript{89} Moreover, there was no assurance that the markets served by these stations would be interested in the program diversity that a minority or female broadcaster could offer. This is not to say that minority broadcasters could not and did not succeed in these ventures, or even that the policy presupposes a nexus between the race or gender of a broadcaster and the programming he or she provides. But, in all likelihood the market more influences what is broadcast than ethnicity or gender—in short, as a tool for program diversity, distress sales were limited in their effectiveness.\textsuperscript{90}

Similarly, under the Commission’s tax certificate program, a company selling a broadcast or cable television outlet could receive a deferral of capital gains taxes on the sale if it transferred the property to a qualified minority or female.\textsuperscript{91} This policy has been considerably more effective than the distress sale policy in linking minority and fe-

\textsuperscript{87} In re Reexamination of the Commission’s Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 1 F.C.C.R. 1315, 1316 (1986).

\textsuperscript{88} See Metro Broadcasting, 497 U.S. at 557-58 (stating that under the Commission’s distress sale program the minority buyer must purchase the license before the revocation or renewal hearing begins and the price paid must not exceed 75% of fair market value).

\textsuperscript{89} For many minority buyers, access to capital is a formidable barrier to media ownership because it circumscribes the type of broadcast properties available to them. “[B]ecause capital is in short supply to many minorities, their market may be restricted to AM’s, weak or already-in-trouble FM’s and small-market, usually independent TV stations, the properties the FCC and National Association of Broadcasters have consistently said are in the most trouble.” Patrick J. Sheridan, Study to Show Drop in Minority Ownership, Broadcasting, Sept. 23, 1991, at 50. Limited to faltering broadcast properties, it comes as little surprise that a high number of minority-owned stations have found themselves in financial trouble. Id.; see also Patrick J. Sheridan, Minority Ownership of Radio, TV Drops in 1991, Broadcasting, Dec. 16, 1991, at 47 (citing an NTIA study finding that first-time minority buyers must often settle for already troubled, small-to-medium-size market AM stations).

\textsuperscript{90} Gahr, supra note 83, at 9.

\textsuperscript{91} Statement of Policy on Minority Ownership of Broadcasting Facilities, supra note 85, at 983 n.19; see In re Reexamination of the Commission’s Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, supra note 87, at 1316 (stating that “[t]ax certificates allow the seller to defer capital gains taxation on the proceeds of the sale”); Edmund L. Andrews & Geraldine Fabrikant, The Black Entrepreneur at a Firestorm’s Center, N.Y. Times, Feb. 10, 1995, at D1 (reporting that the FCC’s tax certificate program permits a company selling a broadcasting or cable television property to defer capital gains taxes if it sells to a minority-owned company).
male entrepreneurs with properties they would like to operate. But, even this policy found its limits.

In 1995, Viacom proposed spinning its cable systems off to a qualified minority owner. Under the terms of the deal, most of the financing would have come from an investment firm whose major stockholders included TCI, two large pension funds, and the Bank of America. Further, the investment firm had an option to buy out the minority owner's stake after only three years. Critics of the deal on the House Ways and Means Committee objected, contending that the proposed transaction illustrated precisely why the tax certificate program did little to promote true minority ownership of media companies. Shortly thereafter, Congress concluded that the benefits of ownership diversity measured against the tax revenue lost to deferral no longer justified the policy. As a result, Congress repealed the tax certificate program.

There have been other structural efforts, notably the availability of higher ownership caps where a broadcaster has a substantial minority partner and governmental funding efforts such as minority enterprise small business loans and private financing efforts, such as the broad-

92. See Geoffrey Foisie, Minority Tax Certificates: Heating to Slow Boil, BROADCASTING & CABLE, Sept. 6, 1993, at 59 (noting that the FCC has authorized approximately 300 certificates since the tax certificate program's inception in 1978); Kurt A. Wimmer, The Future of Minority Advocacy Before the FCC: Using Marketplace Rhetoric to Urge Policy Change, 41 FED. COMM. L.J. 133, 145 (1989) ("The tax certificate is a valuable means of producing diversity in the broadcast market because it has demonstrably increased minority ownership of broadcast stations.").


94. Id.

95. Id.

96. Id. The Senate Committee on Finance, in its review of the administration and operation of the program found it to have been subject to "significant abuse." S. REP. No. 16, 104th Cong., 1st Sess. 17 (1995), reprinted in 1995 U.S.C.C.A.N. 89, 98. For instance, the Committee wrote:

[T]he FCC's definition of "control" for purposes of its minority ownership policies provides little guarantee that a minority will effectively manage a broadcast property after the sale of property has been certified. In addition, because the FCC generally requires only one year of minority ownership or control to qualify for a tax certificate, [the program] has frequently resulted in only transitory minority ownership of broadcast properties, i.e., in many cases the granting of the tax certificate has not resulted in achieving the objective of minority ownership or control.


97. Id.; see also Foisie, supra note 92, at 59 (evaluating proposals to revamp the tax certificate program).

98. I.R.C. § 1071 (1994), repealed by Act of Apr. 11, 1995, Pub. L. No. 104-7, § 2, 109 Stat. 93. In my opinion, it was unfair to make this change after the parties had relied on it. But, here, too, it was difficult to demonstrate an increase in diversity of programming that was associated with the policy.
cast industry's BROADCAP fund.99 These efforts may lead to benefits other than a direct change in programming diversity. For instance, there has been an undeniable increase in the number of minority and women leaders in the executive counsels of cable and broadcasting.100 These persons can and do influence company policies and, perhaps, the programming from content suppliers.101 In addition, by breaking through race and gender barriers, these entrepreneurs provide role models for the next generation of leaders. Add to this voluntary programs like cable television’s Kaitz Foundation, which recruits mid-level minority executives.102 Doubtless, a person’s background, outlook and experience will influence a range of business decisions, including those relating to program diversity. It is on this premise that such structural regulations must stake much of their justification.

IV. OWNERSHIP, SIZE, AND DIVERSITY

The behavioral and structural regulation just discussed, tell us little about how antitrust review of a particular merger should proceed. What such regulation does suggest, however, is that generalized assumptions about diversity effects as a basis for disallowing a merger should be examined carefully. Generalized appeals to speech diversity in affirmative behavioral and structural regulation have produced indirect, and at times imperceptible, results. Moreover, size can often be associated with pro-diversity elements that cannot be predicted before a merger takes place, and might not occur if a merger is stifled.

99. The BROADCAP fund was established by the Broadcast Capital Fund, Inc., a venture capital company that has financed many minority broadcasters. FCC Minority Tax Certificates: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 104th Cong., 1st Sess. 148 (1995) (testimony of John E. Oxendine, President and Chief Executive Officer, Broadcast Capital Fund, Inc. & President and Chief Executive Officer, Blackstar Communications, Inc.). As a private initiative formed with the broadcast industry, the BROADCAP fund has helped to promote broadcast ownership by minorities previously barred by a lack of access to capital. Id. at 149.


101. See Carolyn M. Brown & Nadirah Z. Sabir, The Promise of Programming, BLACK ENTERPRISE, Feb. 1996, at 170 (discussing the increase in black-oriented and black-owned programming on cable television); Carolyn M. Brown, Fighting For Air Time, BLACK ENTERPRISE, Dec. 1994, at 92, 94 (noting the increase in the number of blacks who are writing, directing and producing primetime programming).

102. In an effort to help promote minority representation within the broadcasting industry, the Walter Kaitz Foundation was established in 1981 as a training and job referral service. Jane Greenstein, Minorities Still Scant in Cable, ELECTRONIC MEDIA, July 16, 1990, at S4, S16. The foundation’s board is filled with top executives from major cable networks and multiple system operators who “have committed themselves to hiring Kaitz referrals.” Id.
These benefits counteract the assumptions behind the antitrust-plus reservations about merger activity.

Larger companies possess abilities that can produce greater diversity for society. First, they can finance start-up content activity that smaller entities cannot afford. That modus operandi drives the basic economics of the motion picture and sound recording industries; for every ten attempts, a couple will be hits that will finance the eight misses. The larger the company, the more likely that it will be able to commit resources to establishing distinct voices. Consider this example: In Washington, D.C., several smaller, separately owned radio stations have combined to rely on the same company to provide all local news reports, a service that’s an offshoot of traffic reporting. Such combination is legal under the FCC rules. But it is an unfortunate development because this type of partnering means less independent local reporting and a tendency to greater homogeneity, or one-size-fits-all news. In this case, separate ownership does not contribute anything in terms of news diversity.

Second, large companies are often better positioned to combat government censorship and support First Amendment freedoms. The Pentagon Papers case defended by The New York Times and the Watergate investigations conducted by The Washington Post, required deep pockets. Whatever you think of Howard Stern, he is a different voice. A smaller radio company could not have afforded to wage a legal campaign on his behalf or pay the fines he drew without going bankrupt. Small media voices do fight back against government restraints, but many cannot afford to.

Third, large media players see diversity as a way to grow their operations and have been responsible for advances in expanding speech diversity. Let me return again to diversity of voices for minorities and women. Perhaps the most powerful national minority distribution outlet in the United States is Black Entertainment Television

104. Id. at 12.
106. During the Watergate investigation, the Washington Post had encountered fierce attacks from the White House and Nixon supporters. Eamonn P. O'Neill, Sex, Lies and Audio Tape, HERALD (Glasgow), June 20, 1992, at 2.
which recently was celebrated for airing O.J. Simpson's first post-criminal trial interview. BET came into existence because cable television operators decided to vertically integrate and help create the funding for the cable network. Had the assumption persisted that vertical integration was bad for diversity, the mechanism that actually created BET would not have been allowed.

108. BET offers a unique selection of urban contemporary programming that includes music videos, sports, family sitcoms, concerts, specials, talk shows, gospel, news and information. National Cable Television Ass'n, Cable Television Developments 31 (Spring 1996). BET also schedules infomercials overnight. Elizabeth Sanger, Betting on BET/Black Entertainment Television Is Rapidly Increasing Its Visibility and Expanding Its Reach, Newsday, Feb. 25, 1996, (Money & Careers), at 5. BET has 44.2 million subscribers in the United States, Europe and Africa and reaches 98% of the nation's black cable households. National Cable Television Ass'n, supra, at 31; Sanger, supra, at 1, 5.


110. In 1979, when BET's founder, chairman, and chief executive, Robert L. Johnson decided to start a black-oriented cable television network, he sought funding from John Malone, Chief Executive Officer of TCI. Sanger, supra note 108, at 1. TCI financed the venture with a combination of debt and equity. Id. at 5.

In addition to BET, vertical integration has produced Nickelodeon, C-Span and C-Span II, Bravo, Turner Network Television, the Discovery Channel, and Cable News Network. Bruce Fein, Tinkering with Cable When It Isn't Broken, Wash. Times, July 25, 1989, at F3; Marks, supra note 3, at 13.

111. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) ("Economic arrangements between companies standing in a supplier-customer relationship are characterized as 'vertical.'").

112. In Brown, the Court stated that "[t]he primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition,' which 'deprive[s] ... rivals of a fair opportunity to compete.'" (citations omitted). Id. at 323-24. The Court cited trends toward increased concentration and vertical integration and deduced that "[t]he necessary corollary of these trends is the foreclosure of independent manufacturers from markets otherwise open to them," Id. at 332. Finding that the trends toward vertical integration were not accidental but rather "the result of deliberate policies of Brown and other leading shoe manufacturers," the Court remarked that "not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also ... its probable effects upon the economic way of life sought to be preserved by Congress." Id. at 332-33. Based on the trend toward vertical integration in the shoe industry and the fact that the acquisition involved the largest independent shoe retail chain, the Court concluded that the merger "may foreclose competition from a substantial share of the markets for men's, women's, and children's shoes, without producing any countervailing competitive, economic, or social advantages." Id. at 334; cf. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) ("[E]xclusive-dealing arrangements of narrow scope ... may be substantially procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships."); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-56 & nn. 23-25 (1977) (discussing numerous reasons why vertical restrictions promote product promotion and distribution efficiencies).
Consider Lifetime Television, a program service devoted to the needs and interests of women. Lifetime Television is half-owned by Hearst and half-owned by Capital Cities/ABC. Had antitrust laws discouraged this form of horizontal concentration—that is, a broadcast network owning a cable network—the structure of Lifetime might be different. Another example of horizontal integration is Spanish language cable service Galavision, which is owned by Grupo Televisa S.A., Mexico's largest broadcasting company. Traditional antitrust analysis would not have precluded the development of services like BET and Lifetime. But, under a more amorphous antitrust-plus analysis, well, who knows?

V. ARGUMENTS AGAINST MEDIA CONCENTRATION; MARKET FAILURES

Let us now examine the chief arguments against mass media concentration. Professor Ben Bagdikian has written often on this side of the case. He argues that ownership influences which ideas or events are pursued over time by society. The power of the media to treat some subjects briefly and obscurely but others repetitively and in

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113. Lifetime Television is a cable network that presents contemporary, innovative programming. Lifetime Television offers original movies, specials, daytime and primetime series including "Intimate Portraits," parenting and lifestyle information programs and public awareness campaigns. NATIONAL CABLE TELEVISION ASS'N, supra note 108, at 59. Lifetime Television has 64 million subscribers in the United States, Mexico, the Caribbean, Central and South America, Europe, the Middle East, Asia and the Pacific Rim. Id.


115. Hearst Corporation and Capital Cities/ABC Inc. acquired Viacom Inc.'s one-third interest in Lifetime Television for approximately $317.6 million in cash. Kenneth N. Gilpin, Viacom Agrees to Sell Lifetime TV Stake, N.Y. TIMES, Mar. 30, 1994, at D4. After the sale, Hearst and Capital Cities will each own a 50% interest in Lifetime Television. Id.

116. See, e.g., Brown Shoe Co., 370 U.S. at 334 ("An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as 'horizontal.'"); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 734 n.5 (D. Md. 1976) ("A horizontal merger is one between two actual competitors in the same market.").

117. Galavision was created by Grupo Television to bring direct-to-home television (DTH) to Latin America in a partnership with Rupert Murdoch's News Corporation and TCI, Inc. Kathleen M. Berry, On The Beam, INVESTOR'S BUS. DAILY, Feb. 29, 1996, at A5.


119. Id. at 216-18. Bagdikian argues that mainstream news in America favors corporate values that are eventually accepted as objective since "[t]he tilt [of ownership influences] has been so quietly and steadily integrated into the normal process of weighing news." Id. at 218; see also Rance Crain, Objectivity a Media Merger Casualty, ADVERTISING AGE, Apr. 8, 1996, at 17 (expressing concern that "[t]he growing and complex entanglements and alliances of media companies make it next to impossible to discern whether stories and articles are designed to inform or curry favor with a future partner or affiliate.").
depth, or to take initiatives unrelated to external events, is a significant force exerted by the Fourth Estate.\textsuperscript{120}

This assertion is right. But, turning these matters over to a managerial class of editors who make these decisions for larger media enterprises reveals little about the quality of those decisions. It is not clear why those decisions would be better if exercised by smaller capitalized companies. Some of the largest companies may have the most competent, sensitive managers and editors. Some of the smallest may be poor at those decisions. Is the editor of \textit{Tikkun} or \textit{America Spectator} going to be better at these decisions than the executive producer of ABC's \textit{World News Tonight} because of the ownership of the media enterprise? That must be the case if antitrust law is to be used to prevent one type of editorial voice over another.

Consider another concern articulated by Bagdikian: "When an editor makes a news decision based on corporate orders, or knowledge of ownership wishes, the editor seldom states the real reason."\textsuperscript{121} Bagdikian notes that "33 percent of American newspaper editors said they would not feel free to print an item damaging to their parent firm."\textsuperscript{122} Again, the issue is whether large size is a reliable predictor of the offending behavior. Or is it a problem that affects any media outlet, including the theater usher who is told to avoid giving an aisle-side "Go Get Your Money Back" review of the clunker on the screen?

Let us look at one further objection raised against media concentration. Narrow control—whether by government or corporations—is inherently bad. Bagdikian argues that "no small group, certainly no group with as much uniformity of outlook and as concentrated in power as the current media corporations, can be sufficiently open and flexible to reflect the full richness and variety of society's values and needs."\textsuperscript{123}

True. And false. The wealth and glamour of large corporate media influences to which ideas and political leaders they will gravitate. The focus of the Pacifica Radio stations or newspapers published by the homeless may lie beyond the peripheral vision of people earning competitive salaries and the company executives who hire them. So it is true to the extent that companies like to avoid undue controversy or simply miss issues because they can't even see them. But, can one say

\textsuperscript{120} \textsc{Bagdikian, supra} note 118, at 216-18.
\textsuperscript{121} \textsl{Id.} at 217.
\textsuperscript{122} \textit{Id.}; \textit{see also} Marc Gunther, \textit{All in the Family}, \textit{Am. Journalism Rev.}, Oct. 1995, at 36 (examining the impact of media mergers on the independence of news organizations and citing examples of hidden agendas, undue pressure and censorship by the corporate parent).
\textsuperscript{123} \textsc{Bagdikian, supra} note 118, at 223.
this is generally true of larger media, of, say, Time Warner, which owned Interscope and is partnered with Madonna, whose records are, in some minds, pushing the end of the envelope? Or of Viacom, with MTV? Or TCI, which owns a share of the NewsHour with Jim Lehrer? Or News Corporation, with its multiple publishing houses? Moreover, with the rapid embrace of the Internet by these companies—and its interactive content creation—are large companies leading to a narrowing or widening of society's values and needs?

To some extent the commercial market will always emphasize the popular and marginalize other speech, no matter who owns what. However, marginal speech can become mainstream, too. For example, Matt Groening wrote, and still writes, comics for the alternative press. He also created The Simpsons. Allen Ginsburg was condemned as a writer. He now is included in most standard poetry anthologies. Dissatisfaction with the state of diversity in a more concentrated media environment may simply describe the process, if you will, of valuable marginal speech making its slow but sure path toward the commercial end of things. Bruce Springsteen, Sinclair Lewis, Little Richard, Mad Magazine, Impressionism, Wigstock, J.D. Salinger, Coolio, Lenny Bruce—marginal yesterday, mainstreamed today.

To be sure, market failures exist in a concentrated media environment. All that is worth hearing may not succeed commercially. But, government can address this. The solution to these failures is not necessarily intervention in the marketplace or artificial limits on ownership beyond what antitrust would urge. It is instructive to examine three such market failures: content, exclusion from broadcast ownership, and dissemination of nonmainstream ideas.

Take content. About thirty percent of households do not get multichannel video and therefore do not have the rich diet that cable networks like The Learning Channel or Discovery offer. There is a continuing need to carry educational programming across the public

124. But see Marvin Kitman, Octopus Inc. NewsHour, NEWSDAY, Oct. 15, 1995, at 21. In December, 1994, TCI purchased a two-thirds interest in MacNeil/Lehrer Productions, which produces NewsHour. Id. Kitman suggests that TCI's ownership of NewsHour presents the possibility of conflicts of interest and hidden agendas in a leading news program. Id.

125. According to A.C. Nielsen Company, of the 95.8 million television households, 65.9% subscribe to basic cable service. NATIONAL CABLE TELEVISION ASS'N, supra note 108, at 1. There are probably another four to five million subscribers to satellite-delivered multichannel television and about 800,000 multiple multipoint distribution system (MMDS) subscribers. See DANIEL BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 15.08 (1996) (satellite-delivered); see id § 16.01 (MMDS).

126. The Learning Channel offers viewers a way to lean with programs that explore the humanities, arts and sciences, entertainment and much more. NATIONAL CABLE TELEVISION ASS'N, supra note 108, at 58. The Learning Channel is a cable network of Discovery Communi-
broadcasting system. Adequate funding of that service will provide real choice and diversity in those areas where the market can not or will not.\textsuperscript{128}

A second market failure is that individuals today are more or less excluded from ownership in broadcasting, except for the very wealthiest. The value of urban outlets is too great to associate them with individual voices. But this result may not be so bad. Television stations that became the private preserve of strong, opinionated owners pose diversity concerns that are greater than corporate ownership.

Another market failure is that small, nonmainstream voices have difficulty being distributed in a market where power equates to widespread dissemination. It was, of course, never easy to be a small publisher, but today it may be harder to compete against the marketing prowess of best selling magazines, books, records, and video cassettes. Even here, however, small distribution companies are filling niches without government involvement. Lower tape duplication and recording equipment costs permit individuals to manufacture and distribute small pressings of records and copies of video. And specialized "zines,"\textsuperscript{129} an outgrowth of desktop publishing and Xeroxing in the late 1980s, created a flourishing culture of small publishers.\textsuperscript{130}

The Internet may be the greatest equalizer of communications yet devised. Everyone has the chance to have a microphone or a newsstand anywhere in the world. The Web site of a major corporation has no wider distribution than that of a school kid who developed a Web page as a homework assignment. The same number of keystrokes separate the reader from the mightiest and weakest speaker on the Internet. The new powerhouses of the Internet may be those who control how we will find things—search engines like Yahoo!\textsuperscript{131}—not

\textsuperscript{128} The Discovery Channel offers informative entertainment covering nature and the environment, science and technology, history, adventure, and the people who share our world. \textit{Id.} at 42. The Discovery Channel has more than 67 million subscribers worldwide. \textit{Id.}

\textsuperscript{129} But even here, one must note that perhaps the most successful public affairs program ever, ABC-TV's \textit{Nightline}, was the creation of the commercial marketplace, not public television.

\textsuperscript{130} But even here, one must note that perhaps the most successful public affairs program ever, ABC-TV's \textit{Nightline}, was the creation of the commercial marketplace, not public television.

\textsuperscript{131} Underground magazines, or "zines" are "low-budget, personal publications produced as labors of love by just about anyone with something to say and access to a photocopying machine." John Flinn, \textit{Think It, Publish It: The Zine Scene; Maverick Desktop Editors Run Anything From Political Rants to Letters From Mom}, S. F. EXAM., Jan. 23, 1994, at A1.


\textsuperscript{131} Yahoo!, a searchable inventory of more than 30,000 entries, is one of the Internet's most popular destinations. Ellis Booker, \textit{Search Engines Accelerate Internet Browsing}, COMPUTERWORLD, Mar. 20, 1995, at 20. Yahoo was created by a pair of Stanford University electrical engineering students who now operate the resource out of the Mountain View, California
speakers. Deployment of Internet-receive technology such as low-cost computer models that rely on the Internet instead of hard-drive-located programs or public school or library availability of modem-equipped computers will encourage greater diversity more than ownership limits.132

There remains one other “market failure” that lies at the root of the antitrust-plus analysis. It is the fear that excessive concentration of economic power fosters antidemocratic political pressures: freedom corrodes, totalitarianism prospers. This fear animated some of those sponsoring Section Seven of the Clayton Act when it was introduced in 1949,133 just a few years after the very real economic and speech monopoly of the Nazi regime and during the reign of Stalin in the Soviet Union. Even if that threat is distant in the United States today, advocates see value in invoking antitrust to prevent mergers now instead of having the government break up companies later when concentration has led to problems.

In our own country, we certainly have not been free of abuses by press bullies, big and small. Take your pick: the yellow journalists like William Randolph Hearst at the turn of the century (contributing to our entry into the Spanish-American War),134 the nativist radio preacher Father Coughlin in the 1930s,135 the abusive Willie Loeb and his fiefdom of the Manchester Union Leader and the New Hampshire Sunday News in the 1960s,136 the racist, ranting Nellie Babb on radio in Dodge City in the 1980s,137 or, if you will, the radio talk show hosts of the 1990s with their simplistic antigovernment mantra.

The media is not always responsible. But it is difficult to predict that large owners vis-à-vis small ones are more inclined towards an-

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132. See Paul Kapustka, Oracle Demos 'Net Station, COMM. WEEK, Mar. 4, 1996, at 4 (reporting that Oracle demonstrated a low-cost, Internet terminal capable of receiving audio and video feeds from a Web server).
137. Megan Rosenfeld, Dodge City Showdown; Racist, Anti-Semitic Radio Broadcast Alleged, WASH. POST, May 7, 1983, at C1.
tidemocratic values. Large companies own some of the most broad-minded media, and some of the least. Some small media owners are terrific, and some are less so. If anything, large, publicly-held companies, who face the shareholder version of democracy and an array of federal and state regulators, may be less inclined to veer far from the middle. This predisposition towards majoritarian values may support those who say the mass media is too bland. But that uniformity hardly supports more intense antitrust scrutiny in the name of avoiding antidemocratic tendencies. Moreover, media today is probably more diverse in its outlook than in the 1950s or 1960s, well before the so-called merger mania.

VI. Conclusion

As we examine this emerging marketplace, we should avoid broad nostrums correlating size and diversity. Smallness is not necessarily goodness and bigness is not necessarily badness. Behavioral and structural rules may help promote speech diversity but not necessarily, and not necessarily by much. Instead, dissection of market definition and market share will get us closer to the truth in antitrust analysis than assumptions about size and diversity.