Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the	)	MB Docket No. 02-277
Commission’s Broadcast Ownership Rules and	)	
Other rules Adopted Pursuant to Section 202 of	)	
Of the Telecommunications Act of 1996	)	
	)	
Cross-Ownership of Broadcast Stations and	)	MM Docket No. 01-235
Newspapers	)	
	)	
Rules and Policies Concerning Multiple	)	MM Docket No.)1-317
Ownership of Radio Broadcast Stations	)	
In Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF
CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION
CENTER FOR DIGITAL DEMOCRACY
MEDIA ACCESS PROJECT

Dr. Mark Cooper
Director of Research
Consumer Federation of America
1424 16th Street, N.W.
Washington, D.C.

Gene Kimmelman
Senior Director of Advocacy and Public Policy
Chris Murray
Legislative Counsel
Consumers Union
1666 Connecticut Ave., NW, #310
Washington, D.C. 20009

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A BOLD ASPIRATION FOR DEMOCRATIC DISCOURSE

The Supreme Court has long held that information is not just another product. While protection of consumer interests requires vigorous antitrust enforcement for any commodity, media markets require more. Because of media's role in promoting civic discourse, the public interest standard for ownership of media has been and continues to be a higher bar than mere antitrust.

Above all, public policy has endeavored to promote diversity of ownership within media based on a compelling public interest standard for preservation of multiple, competing and independent media sources. The bold aspiration set out by the Supreme Court for the First Amendment is to achieve "**the widest possible dissemination of information from diverse and antagonistic sources**." This modern interpretation captures the strong belief of the framers of the Constitution that active and involved citizens are critical to the preservation of democracy.

This important aim of the First Amendment – what should be considered a bold aspiration -- has supported a broad range of policies to promote civic discourse.

- Because the needs of citizens cannot be reduced to needs of consumers, policies to promote vibrant civic discourse take precedence over the pursuit of economic profits and efficiency in the commercial marketplace of mass media.
- Because vibrant democratic discourse demands that citizens be more than passive listeners or viewers, public policy must strive to ensure they have the opportunity to be active speakers as well.
- Because information from one type of media cannot easily substitute for another, numerous independent and diverse institutional media voices are necessary. Institutional diversity that ensures unique perspectives – different types of media, with different cultural and journalistic traditions and different business models – plays a special role in promoting rich civic discourse.
- Because the media have become more powerful and our society has become more diverse and more deeply interconnected with a complex global economy, there is a greater need for media diversity and citizen access to media.

The stakes for citizens, consumers and the nation are huge. The mass media are the primary means through which citizens gather news and information. TV in particular is the primary vehicle for political advertising. At the same time, digital media are at the center of the information economy and the emerging multimedia environment in which consumers and citizens will not only listen and watch, but must also be able to express their opinions and views.

Structural policy, which is content neutral, is ideally suited to promote the complex, qualitative goals the Supreme Court set for the First Amendment. Public policy should strive to create an environment for civic discourse where numerous, independently-owned, institutionally-distinct media outlets are accessible to the public, responsive to local needs and reflective of diverse socio-economic and cultural points of view. Structural limits on media ownership still serve the public interest. Repeal or significant modification of these rules would open the floodgates of mergers and acquisitions that would reduce competition and diversity in the media. As prior experience with the duopoly rule demonstrates, were the Commission to repeal, e.g., the Newspaper/Broadcast cross-ownership rule, we would likely see the following effects:

- Major mass media – TV and newspapers – in every local market would become highly concentrated, with fewer than four owners per market.
- The national total of TV and newspaper owners would likely shrink to as few as 300 distinct owners.
- Most newspapers would be bought up by TV stations and lose their ability to independently criticize the electronic media.

This paper presents a comprehensive conceptual, analytic and empirical basis to justify the preservation of ownership limits. It provides a benchmark against which the future development of the mass media industry can be measured and presents the case against allowing a wave of mergers to take place.

EMPIRICAL EVIDENCE ON MASS MEDIA AND DEMOCRATIC DISCOURSE

A mountain of evidence from academic and trade literature supports this understanding of the mass media and democratic discourse.

While we accept and encourage (and the Constitution protects) the right of editors (therefore owners) to take editorial positions, we would like to have reporting be unbiased. Unfortunately, editorial control slants the news and coverage of issues is selective.

- For instance, an article from the June 2002 American Political Science Review examined newspaper coverage of more than 60 Senatorial campaigns and found that information on news pages is slanted in favor of the candidates endorsed on the newspaper's editorial pages.

- In addition, an analysis of the big three networks coverage of the ownership implications of the 1996 Telecommunications Act demonstrated that the networks failed to adequately inform the public about the Act's provisions which benefited media companies.

- The recent flap over a policy memo from Roger Ailes, head of Fox news, to the Bush Administration, has raised the debate over bias in the leading mass media to greater prominence than ever.

The mass media, particularly television and newspapers are the key sources of news and information. The radio and the Internet play only minor roles. TV and newspapers play an especially important role in influencing people in the election and policy process. They frame issues, set agendas, and hammer home messages through repetition. Political advertisements and news reporting interact in this process.

Decades of empirical analysis document the negative effects of concentration in the media.

- Concentration – fewer independent owners -- has a negative effect on diversity of advertising, programming choices, and presentation of political information. The existence of multiple outlets providing more examples of similar shows does not accomplish the goal of providing greater diversity of points of view.
- Greater concentration reduces public interest and culturally diverse programming, as well as locally oriented programming. As market forces grow, news and public affairs programming is reduced, the quality of programming is compromised, and minority market segments are less well served.

Diversity of ownership is critical to ensuring diversity of sources and viewpoints. Promoting local points of view helps to keep the media accessible, while ensuring that numerous issues that are critical to quality of life – school boards, police, fire, public health – are dealt with in the media. Diversity of institutional forms is critical to promoting healthy antagonism between media outlets.

In this context, consolidation of ownership of news outlets – horizontal mergers (acquisitions involving similar types of media) and vertical integration (consolidation of the entire distribution chain) – poses a significant threat to democratic discourse. Narrowing the range of communications available in the mass media can influence the outcome of individual elections and the electoral process. It can also deeply affect the prospects for democracy by polarizing society and isolating minority points of view.

MASS MEDIA ECONOMICS AND THE TYRANNY OF THE MAJORITY

A competitive market would generally be considered supportive of democratic discourse. Atomistic competition promotes individualistic, impersonal decisions with freedom of opportunity and relatively low resource requirements for entry. Unfortunately, the economic characteristics of the mass media drive it away from competition and toward monopoly. The pursuit of economic efficiency through economies of scale has pushed the media toward oligopoly or monopoly. Catering to majority and popular points of view serves the economic interests of media owners; the prevalence of advertising as a source of revenue drives commercial mass media toward happy “news,” diminishing the watchdog function. The result is a tyranny of the majority, in which minority, unpopular, and noncommercial points of view are squeezed out.

The impact of market failure is felt in three areas – owner influence, loss of local perspective, and erosion of checks and balances and other positive externalities of vigorous civic discourse. To preserve and strengthen civic discourse, public policy must promote diversity of ownership, viewpoints and institutions.

TV AND NEWSPAPERS DOMINATE THE TERRAIN OF MASS MEDIA NEWS AND INFORMATION MARKETS

Television, radio, newspapers, and the Internet serve different purposes for the public. There is little substitutability between the media for viewers or for advertisers. There is not just one news and information market but multiple markets for local and national news, breaking news and in-depth follow-up. For newspapers, the additional role as a fourth estate is critical to checking waste, fraud, and abuse of power by governments and corporations.

In economic terms, media have separate markets with weak substitution effects. They have different content offered by different means and they differ widely in their impact and effect. As a result, there is no effective competition between media types. To date, neither cable TV nor the Internet has changed the role of the major mass media in the gathering and dissemination of news and information.

Prime time TV still dominates the media landscape and TV networks still dominate the news market. Cable TV largely delivers network TV news. Citizens still overwhelmingly rely on TV for their news and information. Newspapers play a unique role of providing in-depth coverage and as the only major mass media devoted primarily to gathering and disseminating news and information rather than entertainment.

There is very little local news and information content on the Internet, and what there is tends to be existing sources (e.g. the local paper) made available in a different way. Recent surveys show that the public spends about fifteen times as much time gathering news and information from TV and newspapers as they do on the Internet.

MEDIA MARKET STRUCTURE IS ALREADY CONCENTRATED

Some claim that dramatic changes from new technologies have rendered obsolete policies which promote diversity. This is not only a premature claim, but it flies in the face of the facts in the most important sense: there has been a dramatic loss of ownership diversity amongst TV and newspaper owners in the last 25 years.

Measures of market concentration are presented that consider both the number of firms competing within a given market and the market share of the largest firms. We examine the period from 1975 to 2000, since many of the structural limits on ownership were adopted in the early 1970s. To put changes in the media in context, it is important to keep in mind that the number of U.S. households served by the media increased by almost 50 percent over this period. The population also became much more diverse. While the number of households that were headed by married white males has increased by 25 percent in the past three decades, households headed by single males have almost tripled, as have households headed by blacks, Hispanics and Asians. In contrast to this expanding, diverse population, we find increasing concentration of media ownership and market concentration.

While there has been an increase in the number of full power TV stations, there has also been a sharp decline in the number of owners.

- In the past 25 years, the number of TV station owners has declined from 540 to 360, while the number of TV newsrooms has been reduced by almost 15 percent.
- The overwhelming majority of local TV markets are tight oligopolies (fewer than six equal sized firms) or duopolies (two, relatively equal-sized, firms that dominate the market).

There has been an increase in the number of cable channels, but almost three-quarters are now owned by only six corporate entities, four of which are major TV networks. While there is more variety in programming, there is not necessarily more diversity. Cable operators produce national programming and a few have moved into regional programming, but there is little local programming or news. Cable operators continue to have a virtual monopoly at the point-of-sale in the multichannel video market (a market share of over 80 percent). Mergers have created regional monopolies as well.

Unlike TV, where there has been an increase in outlets, for daily newspapers we observe a 20 percent decrease in the number and circulation of newspapers.

- The decrease in the number of owners of daily newspapers is even more dramatic, from over 860 in 1975 to fewer than 300 today.
- The majority of local newspaper markets are monopolies; all markets are at least tight oligopolies.
- Combining newspaper and television ownership, the number of independent voices has been cut by more than half since the mid-1970s, from about 1500 to just over 600.

While the first generation of the commercial Internet (dial-up or narrowband Internet) was an open and dynamically competitive market, the hope that the Internet would disperse ownership is being dashed by public policies that allow cable operators to control the offering of Internet services in the high-speed Internet market.

GROWTH OF VERTICALLY INTEGRATED MEDIA CONGLOMERATES HAS UNDERMINED DIVERSITY; CROSS-OWNERSHIP OF NEWSPAPERS UNDERMINES JOURNALISTIC PRINCIPLES

The ability of owners of distribution networks to discriminate against program and content producers has long been recognized in public policy. The Financial Interest and Syndication rules promoted diversity of ownership of prime time programming. Until the end of the 1990s, they kept the ownership quite diverse, with the networks owning fewer that one-fifth of the programs. A decade after the repeal of the rules networks own three-quarters.

Cable systems, which are now the dominant means of distributing video programming, have a long history of discriminatory behavior. A long list anticompetitive practices, including exclusive contract, refusals to deal, tying arrangements, denial of access to facilities, and others have been used to disadvantage competing programming (content discrimination) and undermine competing delivery systems (conduit discrimination).

The video market has devolved into a small, interconnected cabal of a handful of producers. Four entities -- AOL Time Warner, Liberty, ABC/Disney, CBS/Viacom – dominate the most popular programming cable programming as well as prime time network shows. Six entities control approximately two-thirds of all viewers.

Systematic studies of the position taken by cross-owned newspapers on issues that directly affect their economic interests show that they do not report the issues in a balanced fashion. This includes national policy issues, like the Telecommunications Act of 1996, and local issues, such as stadium bond proposals. Cross-owned papers also engage in biased coverage of television or forego analysis of television altogether.

- The dictates of video delivery would alter the nature of the reporting and commitments to investigative journalism.
- The conglomeration in larger enterprises would reduce the journalistic activity to a profit center that is driven by the larger economic goals of the parent.
- Combining the two activities within one entity diminishes the antagonism between print and video media.

RELAXATION OF STRUCTURAL LIMITS WILL SPARK A MERGER WAVE THAT WILL DRAMATICALLY CONCENTRATE LOCAL MEDIA MARKETS

Over the past decade, structural limits on media ownership were relaxed on three different occasions. In each case, a merger wave ensued and the number of owners declined sharply.

There has been a dramatic concentration of television ownership in local markets after the introduction of the duopoly rule in September 1999. Within two years, mergers took place in almost three-quarters of all markets in which they were allowed.

After the passage of the Telecommunications Act of 1996, which relaxed several rules restricting the ownership of radio stations, a frantic period of consolidation took place. In an industry with a total of 10,000 stations, over 9,000 were bought and sold in the five years after the 1996 Act. Of course, some stations were sold more than once.

- The national market went from being atomistically competitive (the equivalent of almost 100 equal-sized firms) to moderately concentrated (the equivalent of 9 equal-sized firms).

- On average, local markets went from the equivalent of five equal-sized firms to three, with the impact greatest in the largest markets that had been the most competitive.

The repeal of the Financial Interest and Syndication rules, which restricted the ownership of prime time programming by the broadcast networks, had an equally devastating impact on diversity of ownership.

- When the rules were in place, prime time programming was produced by the equivalent of 19 equal-sized firms; after they were repealed that number plunged to seven.
- Broadcast networks now completely dominate the ownership of prime time programming, accounting for three-quarters of all shows.

These real world experiences with relaxing or eliminating structural limits on ownership indicate that lifting the newspaper/TV cross-ownership ban or raising the limits on TV ownership would have a devastating impact on media concentration.

- Several hundred mergers would quickly take place, dramatically reducing the number of major independent voices. If the newspaper/broadcast cross-ownership ban were lifted, about 200 newspapers would quickly merge with TV stations. Ultimately, most dailies likely would be combined with TV stations.
- Relaxation of the national cap on broadcast TV station ownership would lead to additional concentration of ownership. The number of independent owners on a nationwide basis would be cut in half.

The immense pressures that have been placed on newspaper journalism in the past several decades as a result of conglomeration, concentration and integration into national chains is directly relevant to the concern about relaxation of structural limits on broadcast media ownership for several reasons.

On the supply-side, the antagonism between TV and newspapers is an important element of promoting civic discourse. At the same time, the operation of newspaper newsrooms produces many stories, especially local, that become an input for TV news. Without the much more intensive and in depth newsgathering of papers, the news product space will be reduced. On the demand side, we observe that newspapers and television are complements. Consumers seek more in-depth follow-up of news headlines that they encounter in broadcast. Public policy should strive to preserve the antagonism and in dependent resources that newspapers bring.

The FCC's regulation of the broadcast media (which is subject to FCC authority, unlike print) has the consequence of preserving the antagonism between both the print and broadcast media, therefore foreclosing an avenue of integration that would be particularly destructive of the journalistic values in our society and destructive of the symbiotic relationship and competitive relationship between newspapers and broadcast—a relationship which disciplines the broadcast media; however, the FCC should also consider the impact of its policies on the print media.

PUBLIC OPINION PERCEIVES THE THREAT OF MEDIA CONCENTRATION

Recent public opinion surveys make it clear that the public does not support the FCC's push toward concentrated media markets and closed communications networks with diminished public interest obligations. The public is troubled by the growing concentration of the media and expresses strong support for public interest obligation for both television and Internet and for open communications networks.

- Respondents indicated that they believe that media companies are becoming too large; that mergers between media companies do not lead to better content and services and result in higher, not lower, prices.
- They think it should be harder, not easier, for media mergers to be approved and are strongly opposed to very large mergers, like the AT&T/Comcast merger.
- The public opposes mergers across media types, such as between broadcast stations and newspapers.
- The public worries about a resulting decrease in diversity of editorials and local news.

The public does not feel that television accurately represents the average consumer and does not trust the information they find in the news. Survey respondents think that shows should reflect the cultural and ethnic make-up of the community.

- Respondents think there should be public affairs programs that discuss local issues. They find it very important that local news and events are reported.
- The public supports a range of public interest obligations and believes that broadcasters will simply maximize profits if not directed to air public interest programming.
- The public also expresses support for public interest obligations extending to the Internet.
- They strongly support open communications networks. Open networks not only ensure the free flow of information, but they keep citizens in the decision-making role.

While public opinion is by no means dispositive in the context of a rulemaking, it should inform the agency's calculus, especially given the FCC's charge to protect the public interest.

CONCLUSION

Legal principles, economic analysis and public opinion do not support the relaxation of structural limits on media ownership and the dramatic increase in concentration that would inevitably follow. The Federal Communications Commission has the ammunition to defend the current rules; the Commission has the data it needs to meet the heightened scrutiny of the courts. It is our hope that the Commission will resist the demands of media giants seeking to expand their control over the primary means of civic discourse.

Contrary to the suggestions of some, the D.C. Circuit Court of Appeals has not compelled the FCC to gut the rules restricting media ownership. It has simply demanded an internally consistent, evidence based approach. We believe that the qualitative evidence as presented is more than adequate to justify the current limits.

However, if such a framework is deemed necessary, we believe economic concepts are useful if carefully embedded in a framework that recognizes the fundamental difference between commerce and discourse, between consumers and citizens. The FCC could apply an HHI-Adjusted voice count and apply a cautious approach that gives special weight to the importance of the abuse of market power in civic discourse.

- The FCC should not allow horizontal mergers in properly defined media markets that are highly concentrated, post-merger. That is, if the merger proposed is in a market that is highly concentrated or would result in a market that is highly concentrated it should not be allowed. The FCC should not allow vertical or conglomerate mergers between major firms (top 6) in which **either** of the television or the newspaper markets involved is highly concentrated.

- The FCC should have a waiver policy on mergers in properly defined media markets that are moderately concentrated (post-merger). The merging parties should be required to show that the merger will promote the public interest. The FCC should require the preservation of functionally separate news and editorial departments in the subsidiaries of the merged entity.

If the FCC adopts this type of economically-based quantitative approach, it must be much more rigorous in its geographic market definition. The existence of three distinct categories of product markets – video, print, and audio – has been amply demonstrated. Defining geographic markets and identifying the specific products to include in each market requires care, but is manageable. It must be based on market realities and empirical facts. Product market shares should be based on users – TV or radio rating and newspaper circulation for owners, not outlets, must be the basis of a market-based standard.

At present, the Internet should not be included as a distinct media type. We have seen that the amount of news and information gathering on the Internet is small and most of it involves visits to the web sites of existing information producers – TV stations and newspapers. Therefore, a proper treatment of the Internet for purposes of news and information market definition that looks at actual usage is not likely to alter the conclusion based on the analysis of the commercial mass media. Under the 1996 Act, the Commission will review this decision on a biennial basis.

PART I: MASS MEDIA AND DEMOCRATIC DISCOURSE

I. INTRODUCTION: NARROWING THE LINES OF COMMUNICATIONS

A. THE CALM BEFORE THE STORM

Over the past year the Federal Appeals Court for the District of Columbia has issued a number of decisions instructing the Federal Communications Commission (FCC) to reexamine several of its rules governing structural limitations on media ownership.[1] The Appeals Court has been careful to point out that it is not challenging the Constitutional or even policy basis on which the rules rest, it is demanding that the FCC give better justifications for its rules. In fact, while the D.C. Appeals Court was stinging in its criticism of the FCC for not doing its homework, it also chided the media companies for ignoring the importance of non-economic considerations in policies to promote civic discourse.

> The networks … argue that the Rule fails even rationality review because "[P]ermitting one entity to own many stations can offer ... more programming preferred by consumers"… but for the Rule "buyers with superior skills [could] purchase stations where they may be able to do a better job" of meeting local needs even as they realize economies of scale.
>
> This paean to the undoubted virtues of a free market in television stations is not, however, responsive to the question whether the Congress could reasonably determine that a more diversified ownership of television stations would likely lead to the presentation of more diverse points of view. By limiting the number of stations each network (or other entity) own, the … Rule ensures that there are more owners than there would otherwise be. An industry with a larger number of owners may well be less efficient than a more concentrated industry. Both consumer satisfaction and potential operating cost savings may be sacrificed as a result of the Rule. But that is not to say the Rule is unreasonable because the Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency – including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy. Simply put, it is not unreasonable – and therefore not unconstitutional – for the Congress to prefer

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[1] *Fox Television Stations, Inc., v. FCC*, 280 F.3d 1027 (hereafter Fox v. FCC); *Sinclair Broadcasting, Inc. v. FCC*, 284 F.3d 148 (D.C. Circ. 2002) (hereafter Sinclair).

> having in the aggregate more voices heard, each in roughly one-third of the nation, even if the number of voices heard in any given market remains the same.[2]

In this case a rule that increases the number of voices in the nation, without increasing the number of voices in a local market, can pass Constitutional muster, if it is properly justified. Rules that are aimed at increasing local voices, as are many being reviewed by the FCC, stand on even firmer grounds. Notwithstanding some concerns about preconceived notions, [3] the court's rulings and the biennial review are the starting point for debate, not the end point. The stakes should not be underestimated. As the *Washington Post* put it under the headline *Narrowing the Lines of Communications?*

> It is only a matter of time before nearly all barriers to cross-ownership in the media industry are lifted … In major metropolitan areas it may be possible, even common, for one giant corporation to own the dominant newspaper, the cable television monopoly, a local broadcast station, several radio stations and even the dominant Internet access provider.[4]

The experience of radio offers an archetype for where media deregulation will ultimately lead, given the fact that in radio public interest obligations and national caps have been eliminated, while local limits have been relaxed. The day after the *Washington Post* raised the red flag on broadcast/cable/newspaper conglomeration, the *Wall Street Journal*

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[2] Fox v. FCC, pp. 12-13.

[3] Judge Sentelle, Concurring and Dissenting in Part," *Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, April 2, 2002. The *Washington Post* echoed this concern, offering the following observation on things to come under the headline *Narrowing the Lines of Communications*, February 24, 2002.

> The decisions will give added support to FCC Chairman Michael K. Powell, who views such restrictions as anachronisms in an era of Internet, broadband and satellite technology … Any excess concentration, Powell argues, can be handled by the Justice Department in its traditional role as enforcer of the antitrust laws.

described the strategy of Clear Channel Communications, which owns about 1200 radio stations, one-tenth of all radio stations in the nation, as "A Giant Radio Chain Perfecting the Art of **Seeming** Local,"

> "In the studio with Evan and Jaron," Mr. Alan began. "How are you guys doing?"
>
> The artists reported that they had just come from skiing at nearby Sun Valley, then praised the local scene … "Yeah, we've got some good people here." Later, he asked Boise fans to e-mail or call the station with questions for the performers.
>
> But even the most ardent fan never got through to the brothers that day. The singers had actually done the interview in San Diego a few weeks earlier. Mr. Alan himself had never been to Boise, though he offers a flurry of local touches on the show he hosts every weekday from 10 a.m. to 3 p. m. on the city's leading pop station.
>
> This may be the future of radio.[5]

The *Washington Post* seems to fears that it could be the future of TV/newspapers/the Internet as well.

B. LEGAL STANDARDS OF REVIEW

While some of the structural limits on media ownership are being reviewed at the direction of the Appeals Court, others are being evaluated as part of a biennial review process mandated by the Telecommunications Act of 1996.[6] In fact, all of the rules ultimately must be reviewed under that standard. The charge is to "determine whether any of such rules are

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[4] "A Giant Radio Chain Perfecting the Art of Seeming Local," *Wall Street Journal,* February 24, 2002.

[5] Anna Wilde Mathews, "A Giant Radio Chain is Perfecting the Art of Seeming Local," *Wall Street Journal,* February 25, 2002, p. A-1.

[6] The ongoing proceedings include *Cross-Ownership of Broadcast Stations and Newspapers,* MM Docket No. 01-235; *Newspaper/Radio Cross Ownership Waiver Policy,* MM No. 98-82; *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* MM Docket No. 01-317.

necessary in the public interest as the result of competition… repeal or modify any regulation it determines to be no longer in the public interest."[7] The public interest still prevails in the 1996 Act. The Act does not embrace competition for competition's sake, nor did it change the definition of the public interest when it comes to media ownership policy. The public interest is the master that competition must serve and the FCC must find that competition is sufficient to promote the public interest before it repeals or modifies these rules.

As the Commission engages in its review of the broadcast ownership rules, we note for the record that under any construction of the biennial standard of review set forth in Section 202(h), the Commission now has more than sufficient empirical evidence to justify keeping the current rules in place.

While these and other comments fully meet the standard enunciated in <u>Fox Television Stations, Inc. v. Federal Communications Commission</u> (D.C. Cir., No. 00-1222, Feb. 19, 2002) (hereafter "<u>Fox</u>"), and provide ample basis for retaining the current ownership regime, we do wish to make plain that <u>Fox</u> erroneously establishes a far more stringent legal test than actually contemplated by Congress in enacting Section 202(h). We will, at the proper time, argue to the Courts of Appeals, sitting en banc if necessary, and to the U.S. Supreme Court, that the <u>Fox</u> case was wrongly decided.

First, <u>Fox</u> improperly treated the 2000 the Biennial Review Report as reviewable agency action. Second, <u>Fox</u> treated Section 202(h) as creating a different review standard than would otherwise be required under the Administrative Procedure Act (APA) for review

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[7] 1996 Acts. 202(h).

of an agency decision not to repeal a rule. Third, the Fox decision ignored the clearly defined framework of the statute in vacating the Commission’s cable-broadcast cross-ownership rule.

The only remedy contemplated by Section 202(h) upon a finding that a regulation no longer serves the public interest is a rulemaking to determine what rule, if any, would be appropriate. The net effect of the Fox decision is to undermine the public's rights under the APA by denying the opportunity to create a record to justify a particular rule in response to a targeted Notice of Proposed Rulemaking.

The D.C. Circuit Court in Fox found that protecting diversity and safeguarding competition can be the proper basis for promulgating and preserving media ownership rules, but insisted that the Commission must present better evidence for those rules if the burden of §202(h) is to be met. We welcome the opportunity to provide a solid factual basis for the FCC's media ownership rules, and believe that the record currently before the Commission rises to meet that challenge.

We agree with the FCC's interpretation of the statute set forth in its *Petition for Rehearing or Rehearing En Banc* in Fox: the D.C. Circuit court has misapplied §202(h), creating a counter-intuitive and nonsensical situation where there is a higher standard to retain an existing rule than to adopt it in the first instance. As the FCC correctly notes, this misguided interpretation would impose a "substantial and continuing burden on the agency that threatens administrative paralysis. This result is not compelled by the language of the statute or by its legislative history." *Id.* at 2.

The National Association of Broadcasters' *Petition for Rehearing or Rehearing En Banc* in Fox makes this point concisely: "In addition to departing from the statutory text and prior judicial decision, the panel's suggestion that a higher standard applies under §202(h) [than under §201(b), establishing the commission's broad rulemaking authority,] makes little sense as a matter of policy. It is illogical to impute to Congress an intent to authorize the

Commission to adopt new rules under one standard but then to require that the rules be repealed or modified two years later if a higher standard—expressed in language *identical* to that of the first standard—is not met."

Furthermore, the Supreme Court, in FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (hereafter "NCCB"), stated that the Commission is authorized to promulgate "such rules and regulations, . . . not inconsistent with law, as may be necessary to carry out the provisions of [the Act]," §303(r), and held that this statutory grant of authority confers on the Commission broad discretion, notwithstanding the word "necessary," to implement its view of the public interest standard "so long as that view is based on consideration of permissible factors and is otherwise reasonable." NCCB at 793.

In effect, the D.C. Circuit in Fox has by judicial fiat written a deconstructive weapon into the statute which Congress never intended. The biennial review provision is a directive to the FCC that it should regularly revisit the rules in place, and based on the comments it receives, if it makes the determination that a rule is no longer serving the public interest, should then commence a rulemaking to determine the proper remedy.

Instead, the D.C. Circuit has construed §202(h) as supplanting the ordinary APA rulemaking provisions, which give the public notice and an opportunity to comment. This has the perverse effect of forcing proponents of a rule to engage in a continual process of justifying every rule on the agency's books, rather than allowing commenters to focus on a particular rule that the agency thinks is suspect.

C. OUTLINE OF THE COMMENTS

These comments presents a comprehensive legal, conceptual, analytic and empirical basis to justify the preservation of the current rules. They provide a benchmark against which the future development of the mass media industry can be measured and presents the case against allowing a wave of mergers to take place. The comments are divided into five parts.

Part I outlines legal and public policy concepts underlying the relationship between mass media and democratic discourse by focusing on the difference between the principles of civic discourse and the economic principles of commercial mass media. Chapter II describes the bold aspiration for First Amendment that supports policies to promote diversity in civic discourse. Chapter III provides an overview of the vast body of empirical evidence on ownership and economic tendencies in the media. It shows that the evidence supports our concerns about the impact of commercial media market failures on civic discourse. It concludes by restating the goals of promoting civic discourse in terms of three aspects of diversity – ownership, viewpoints, and institutions. Chapter IV presents a discussion of the fundamental economic characteristics of mass media. It shows how the economics of the mass media create institutional and economic pressures that thwart vibrant civic discourse. It demonstrates that if pure economics are allowed to determine media market structures, they will not be vigorously competitive, fail to produce the “optimal” output of information products, and leave the information needs of many groups and individuals underserved.

Part II presents a discussion of the different media products and markets. Chapter V presents a discussion of the mass media as producers of news and information as well as a discussion of the commercial product space. This part shows that TV and newspaper, which are by far the dominant sources of news and information, are distinct, major media types that should be treated separately. Because radio has ceased to play a major role in the dissemination of news and information, we do not analyze it in detail. Further, there are clear distinctions between national and local markets. Chapter VI examines the issue of the substitutability between the media through the eyes of the FCC studies. It concludes that substitutability is extremely limited.

Chapter VII describes the media market structure in terms of industrial organization analysis explaining market concentration measures and why they are used. It then applies these concepts to the media at the national level. Chapter VIII applies these concepts to local media markets. This part deals with horizontal market power of media companies as sellers of products to the public.

Part III discusses concerns about vertical integration monopsony power, in which media companies operate as buyers of programming or gatekeepers who dictate access to the media. Chapter IX defines these concerns. Chapter X discusses problems of vertical integration in the video market. Chapter XI examines problems of vertical integration and conglomeration that arise from cross-ownership between newspapers and television stations.

Part V examines the impact of structural limits on media markets. Chapter XII shows that lifting structural limits on ownership in the past has resulted in powerful merger waves that have reduced the number of independent owners. It projects a massive consolidation of the mass media should current rules be relaxed or eliminated. It also discusses the qualitative impact of concentration, conglomeration and integration into national chains of the print media and an indicator of the negative impact such changes can have on journalistic values and civic discourse. Chapter XIII reviews the evidence on public opinion toward such an outcome. It finds that the public is deeply concerned about media concentration and reliance on pure market forces in media and communications markets. Chapter XIV criticizes the extremely narrow, economic view being taken by the FCC and shows that a rigorous economic standard that recognizes the important and unique role of civic discourse leads to the conclusion that the current limits on concentration and cross-ownership should be maintained.

II. THE FORUM FOR DEMOCRATIC DISCOURSE v. THE COMMERCIAL MEDIA MARKET

A. THE MEDIA ARE NOT TOASTERS WITH PICTURES

The narrow economic view that Chairman Powell would like to impose on the public interest standard harks back to Mark Fowler, the first Chairman of the Federal Communications Commission in the Reagan administration. He declared that television, the dominant mass media, "is just another appliance … a toaster with pictures."[8] In fact, the debate about media ownership is not just about economics; if that were the case, we would not have needed the First Amendment to distinguish speech from other goods and services.

The aspiration for the First Amendment was given its modern formulation by Justice Black in 1945 in the seminal case, *Associated Press.*[9] He concluded that 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."**

This bold aspiration demands a much broader view of the public interest. For the framers of the Constitution, diversity was a force to be tapped for the strengthening of democracy.[10]

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[8] Baker, Media, Markets, p. 3; Sunstein, Cass, *Republic.com* (Princeton: Princeton University Press, 2001), cites this quote in the front matter of the book.

[9] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[10] Sunstein, p. 40.

> It is here that the Constitution's framers made a substantial break with conventional republican thought, focusing on the potential uses of diversity for democratic debate. For them, heterogeneity, far from being an obstacle, would be a creative force, improving deliberation and producing better outcomes… Alexander Hamilton invoked this point to defend discussion among diverse

Indeed, the governing Supreme Court decisions make it clear that freedom of information and the press transcend mere economics. As Justice Frankfurter put it, concurring in *Associated Press*,

> A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts and potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.[11]

Since then, the Supreme Court has reaffirmed this view with respect to newspapers[12] and has unflinchingly applied it to all forms of mass media including broadcast TV[13] and cable TV.[14]

To put the matter simply, the needs of citizens cannot be reduced to the needs of consumers. As Sunstein puts it, “we should evaluate new communications technologies, including the Internet, by asking how they affect us as citizens, not mostly, and certainly not only, by asking how they affect us as consumers.”[15]

To be sure, to the extent that competition in the commercial market can help to meet both sets of needs—our needs as consumers *and* citizens—competition should be relied upon, but when the two come into conflict, preserving “the widest possible dissemination from

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> people within a bicameral legislature, urging in what could be taken as a direct respons to Brutus, that “the jarring of parties… will promote deliberation.

[11] Associated Press, 326, U.S. at 17.

[12] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[13] *Red Lion Broadcasting v. FCC*, 395 US 367 (1969).

[14] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638-39 (1994) ("*Turner I*"); *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner III*).

diverse and antagonistic sources" in the forum for democratic discourse should take precedence over the commercial marketplace of the mass media.[16]

What we refer to as the "forum for democratic discourse" is frequently referred to as the "marketplace of ideas." While the basic concept underlying this term – ideas competing for attention and support in an open public arena – is sound, the idea of a marketplace has become so closely associated with purely commercial concerns that we avoid this term. It also fails to capture the fundamental qualitative difference between the nature of action an interaction in the commercial marketplace and the forum for democratic discourse. [17] We want to draw a sharper distinction between democratic discourse and commercial media.

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[15] Sunstein, Republic, p. 106.

[16] Id, p. 122, concludes a chapter entitled Citizens as follows:

> My central claim here has been that the citizens of a democratic polity may legitimately seek a communications market that departs form consumer choices, in favor of a system that promote goals associated with both freedom and democracy. Measures that promote these goals might be favored by a large majority of citizens, even if, in their capacity as consumers, they would choose a different course. Consumers are not citizens and it is a large error to conflate the two. One reason for the disparity is that the process of democratic choice often elicits people's aspirations.

[17] Id., p. 31, elaborates on the forum concept as follows:

> [T]he public forum doctrine promotes three important goals. First, it ensures that speakers can have access to a wide array of people… What is important is that speakers are allowed to press concerns that might otherwise be ignored by their fellow citizens.
>
> ON the speakers' side, the public forum doctrine thus *creates a right of general access to heterogeneous citizens*. On the listeners' side, the public forum creates not exactly a right, but an opportunity, if perhaps an unwelcome one: *shared exposure to diverse speakers with diverse views and complaints…*
>
> Second, the public forum doctrine allows speakers not only to have general access to heterogeneous people, but also to specific people and specific institutions with whom they have a complaint… The public forum ensures that you can make your views heard by legislators, simply by protesting in front of the state legislature itself…

To put the issue another way, the objective of the commercial marketplace is to improve efficiency and produce profit. The objective of the forum for democratic discourse is to promote diversity and antagonism that produces participation, understanding and "truth."[18] In *Associated Press* the Supreme Court also recognized that limitations on private interests to promote freedom of the press were permissible.

> Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[19]

B. DEMOCRATIC DISCOURSE DEMANDS CITIZENS ACTIVE SPEAKERS, NOT JUST PASSIVE LISTENERS OR VIEWERS

This distinction becomes readily apparent when we respond to the advice frequently given by the most ardent advocates of pure economics in response to complaints about the poor quality of the media. 'If you do not like what is on the tube, turn it off,' they say. It may be perfectly acceptable for consumers to be forced to vote with their dollars and turn off commercial entertainment, but it is not acceptable for citizens to be turned off by the poor quality of civic discourse, and then have no comparable alternative to which they can turn. As Justice Brandeis explained in his concurrence in *Whitney v. California*,

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> Third, the public forum doctrine increases the likelihood that people will be exposed to a wide variety of people and views.

[18] Sunstein, p. 45, elaborates on the fundamental difference as follows:

> Consumer sovereignty means that individual consumers are permitted to choose as they wish, subject to the constraints provided by the prices system, and also by their current holdings and requirements…
>
> The idea of political sovereignty stands on different foundations. It does not take individual tastes as fixed or given. It prices democratic self-government, understood as a requirement of "government by discussion," accompanied by reason giving in the public domain.

[19] Associated Press v. United States, 326 U.S. 1, 20 (1945).

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.[20]

Justice Brandeis' admonition against turning citizens into passive couch potatoes needs to be given its full weight in constructing media ownership policy.[21] In particular, citizens must enter the debate not simply as listeners, but also as speakers. One goal is to ensure that they are well informed – receive good and diverse information – but another goal is to have them engage actively as participants in civic discourse.[22] The First Amendment implications of policies should not only be about how much citizens have to listen to, but also about their opportunities to speak.

The general principle that we want First Amendment policy to draw people into civic discourse applies with particular force to minority points of view. In the commercial model, the popular, mainstream, middle of the road ideas will almost certainly find a voice, one that is likely to be very loud, but the unpopular, unique, and minority points of view will not. Profit maximization in increasingly centralized, commercial media conglomerates promotes

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[20] 274 U.S. 357 (1927).

[21] It is interesting to note that Sunstein, (Republic, pp. 46-47) cites this passage in a discussion that notes that

> "with respect to a system of freedom of speech, the conflict between consumer sovereignty and political sovereignty can be found in an unexpected place: the great constitutional dissents of Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis… Note Brandeis's suggestion that the greatest threat to freedom is an "inert people," and his insistence, altogether foreign to Holmes; the public discussion is not only a right but a "political duty"… On Brandeis's self-consciously republican conception of free speech, unrestricted consumer choice is not an appropriate foundation for policy in a context where the very formation of preferences, and the organizing processes of the democratic order, are at stake.

[22] Sunstein, Republic, p. 110, argues that "[T]he right of free speech is itself best seen as part of the project of helping to produce an engaged, self-governing citizenry."

standardized, lowest common denominator products that systematically exclude minority audiences, eschew controversy, and avoid culturally uplifting but less commercially attractive content. The Supreme Court's broad reading of the First Amendment rejects that notion.

Sunstein makes this point forcefully.

> A principle function of a democratic system is to ensure that through representative or participatory processes, new or submerged voices, or novel depictions of where interests lie and what they in fact are, are heard and understood.[23]

Sunstein's formulation is offered in the context of a critical observation. Those who keep watching with various levels of satisfaction do not demonstrate the success of the media market from the point of view of democratic discourse.

> Many people seem to think that freedom consists in respect for consumption choices, whatever their origins and content. Indeed, this thought appears to underlie the enthusiasm for the principle of consumer sovereignty itself. On this view the central goal of a well-functioning system of free expression is to ensure unrestricted choice. A similar conception of freedom underlies many of the celebrations of emerging communications markets…
>
> But freedom imposes certain preconditions, ensuring not just respect for choice and the satisfaction of preferences, whatever they happen to be, but also the free formation of desires and beliefs… Much of the time, people develop tastes for what they are use to seeing and experiencing… And when people are deprived of opportunities, they are likely to adapt and to develop preferences and tastes for what little they have. We are entitled to say that the deprivation of opportunities is a deprivation of freedom – even if people have adapted to it and do not want anything more.
>
> Similar points hold for the world of communications. If people are deprived of access to competing views on public issues, and if as a result they lack a taste for those views, they lack freedom, whatever the nature of their preferences and choices.[24]

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[23] Id., p. 115

[24] Sunstein, p. 108.

Under the Supreme Court's dynamic principle, there is no such thing as "enough" democratic discourse. There need be no embarrassment in raising the bar as technology improves. When it comes to civic discourse, our nation's democratic principles require that public policy respond to evolving market conditions in a manner that vigorously and relentlessly promotes the widest possible dissemination of information from diverse and antagonistic sources and enhances the ability of the public to participate actively in democratic discourse.

For Sunstein, this participatory discourse is the wellspring of change.

> If representatives or citizens are able to participate in a collective discussion of broadcasting or the appropriate nature of the Intern, they can generate a far fuller and richer picture of the central social goals, and of how they might be served, than can be provided through individual decisions are registered in the market. It should hardly be surprising if preferences, values, and perceptions of what matters, to individuals and to societies, are changed as a result of that process.[25]

C. NUMEROUS INDEPENDENT VOICES ARE NECESSARY

An unsophisticated view of media outlets pays no attention to the size of the organizations that produce news and information or their geographic orientation, in the process losing all perspective on citizens' ability to gain access to the media. As corporate scale dwarfs individual resources, citizens are cut off from the means of communication. *Associated Press* certainly expressed a concern about the sheer size of news organizations and the influence that could result.[26] Large numbers of independently owned media outlets play a critical role as a deterrent to negative behavior.

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[25] Sunstein, p. 115.

[26] Maurice E. Stucke and Allen P. Grunes, "Antitrust and the Forum for Democratic Discourse," *Antitrust Law Journal*, 69, 2001,

> The benefits of dispersed media ownership show up in numerous ways.
>
> The Commission's practice of issuing broadcast licenses on a community-by-community basis has the salutary effect of ensuring a local media presence. It also has the ancillary effect of dividing up ownership rights to the mass media. When coupled with the duopoly rules and local and national ownership restrictions, the Commission's rules have the effect of dispersing media power among multiple owners. If Madison was correct in asserting that he best safeguard of liberty is to set faction against faction, the Commission's approach to dividing ownership among multiple constituencies makes a great deal of sense.[27]

> One example is the value that dispersal of ownership may create with respect to what could be described as *potential* content … A society's capacity to maintain its democratic bearings or its ability to resist demagogic manipulation *may* be served by a broad distribution of expressive power, especially media-based power. Such a distribution may be harder for a demagogue to manipulate or control or may be better able to deter political abuses because of being more difficult to control. On this account, the value of a wide distribution of media ownership lies not in any particular media product that this ownership produces on a day-to-day basis (such that the value will be reflected in market sales) but the democratic safeguards that this ownership distribution helps provide.[28]

> Nor did the majority of the justices jump through the typical hoops of defining a relevant market, determining market share and the restraints' impact on price and examining issue of entry or expansion by the other news wire services. Rather the majority was satisfied that AP was sufficiently large to impact the forum for democratic discourse, in that it was "a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of prime consequence."

[27] Krotoszynski, Ronald J., Jr. and A. Richard M. Blaiklock, "Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas, *University of Illinois Law Review*, 2000, p. 867.

[28] Baker, Media, Markets, pp. 297-307; "Giving Up on Democracy: The Legal Regulation of Media Ownership," Attachment C, *Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights and Media Access Project,* (before the Federal Communications Commission, In the Matter of Cross Ownership of Broadcast Station and Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 01-235, 96-197, December 3, 2001).

D. ENTERTAINMENT IS NOT INFORMATION

A narrow economic view of media also fails to fully recognize the distinction between entertainment and information and between variety and diversity.

> It is certainly true that a person two radio stations within the same market will probably select different program formats for each station whereas divided ownership might lead to competition within the same format. Suppose, however, that Disney owned both stations. Would the stations' news bureau report on Disney misdeeds with the same salacious alacrity of a competing local station unaffiliated with Disney? It seems rather unlikely. Just as divided political power fosters accountability – a central tenet of federalism – so too, divided media power fosters accountability.[29]

FCC Chairman Michael Powell has expressed skepticism that there is a viewpoint expressed in most television programming, and accordingly, skepticism as to whether ownership limits serve any public benefit. As the Chairman stated in USA Today, "[t]his is some sort of *Citizen Kane* idea that our thoughts will be directed to particular viewpoints. But the overwhelming amount of programming we watch is entertainment, and I don't know what it means for the owner to have a political bias. When I'm watching *Temptation Island*, do I see little hallmarks of Rupert Murdoch?"[30]

First, the decision of what is entertaining and what values are promoted in society is clearly part of the marketplace of ideas. Underlying "Temptation Island" is the premise that paying people money to put their relationships in jeopardy under a voyeuristic lens constitutes good programming. It is highly unlikely that such a view would come from programming on the Pax network. The entertainment shows that we watch send all sorts of messages about important societal issues—such as race, religion and sexuality—even in a sitcom. Second,

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[29] Krotoszynski and Blaiklock, p. 868.

[30] Davidson, Paul, *"FCC Could Alter Rules Affecting TV, Telephone, Airwaves,"* USA Today, Feb. 6, 2002.

and most importantly, what gets seen and not seen is quite clearly reflected in Rupert Murdoch's values, such as his decision not to include CNN and the BBC on his cable offerings in China, because they have, e.g. offered unflattering portraits of the Chinese government's stand on human rights issues. Murdoch understood that his ability to continue broadcasting in China was at stake, and made a business decision to exclude such programming.[31]

Second, the primary purpose of the ownership rules should be to ensure a diverse, antagonistic marketplace for news and information—not entertainment. To focus on entertainment is not only inappropriate in this proceeding, it is inconsistent with the First Amendment foundation for the cross-ownership ban. The goal is not to regulate entertainment, but rather to set appropriate rules to promote diversity of news and information. If the structural rule necessary to protect robust public debate in the media affects entertainment, so be it. However, there is no need, and indeed should be no desire, to devise a rule designed to affect entertainment.

The most important point is that even if the economic media marketplaces were composed of significant numbers of small firms competing aggressively with one another, an unfettered commercial mass media market might not lead to the vibrant forum for democratic discourse that our Constitution attempts to promote, because diverse sources of information are not the object of commercial competition. It favors entertainment at the expense of information. Owen Fiss articulates this point well:

> [T]he market brings to bear on editorial and programming decisions factors that might have a great deal to do with profitability or allocative efficiency (to

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[31] Frank Ching, "Misreading Hong Kong," *Foreign Affairs*, May, 1997.

> look at matters from a societal point of view) but little to do with the democratic needs of the electorate. For a businessman, the costs of production and the revenue likely to be generated are highly pertinent factors in determining what shows to run and when, or what to feature in a newspaper; a perfectly competitive market will produce shows or publications whose marginal cost equals marginal revenue. Reruns of *I Love Lucy* are profitable and an efficient use of resources. So is MTV. But there is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying the electorate with the information they need to make free and intelligent choices about government policy, the structure of government, or the nature of society. This point was well understood when we freed our educational systems and our universities from the grasp of the market, and it applies with equal force to the media.
>
> None of this is meant to denigrate the market. It is only to recognize its limitations. The issue is not market failure but market reach. The market might be splendid for some purposes but not for others. It might be an effective institution for producing cheap and varied consumer goods and for providing essential services (including entertainment) but not for producing the kind of debate that constantly renews the capacity of a people for self-determination.[32]

E. INSTITUTIONAL DIVERSITY PROMOTES VIBRANT CIVIC DISCOURSE

A simplistic economic approach to media misunderstands the aspirations of the modern interpretation of the First Amendment in another fundamental way. It fails to recognize that information is not just a commodity in which one source, or information from one type of media, can substitute for another. Institutional diversity – different types of media, with different cultural and journalistic traditions and different business models – plays a special role in promoting civic discourse. Unique perspectives provided by different institutions are highly valued as sources of information.

Judge Learned Hand painted a picture of diversity that was properly complex, noting that a newspaper "serves one of the most vital of all general interests: the dissemination of

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[32] Owen Fiss, "Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: Why the State?" *Harvard Law Review* 100, 1987.

news from many different sources, and with as many different facets and colors as possible" because "it is only by cross-lights from varying directions that full illumination can be secured."[33] As a recent law review article put it:

> [I]t is problematic, or as Judge Learned Hand asserted "impossible," to treat different news services as "interchangeable…" A newspaper reflects the biases and views of its writers, editors, and perhaps owners. One newspaper may downplay and truncate a news wire story, while the other newspaper may carry it as a headline. These are non-fungible commodities. Thus, the marketplace is not about consumers switching from one homogenous product to another. Rather, it is the net increase in consumer welfare from having many competing news sources and editorial voices… Unlike restraints on ordinary commodities (where consumers may turn to less-desirable alternatives but the overall societal impact is not significant), for restraints in the media, the alternative may be inherently unsatisfactory and the costs imposed on society may be significant.[34]

A narrow view that all media information is fungible fails to recognize the unique role of newspaper reporting as a fourth estate, checking waste, fraud, and abuse of power by governments and corporations. It ignores the difference between national and local news markets and the tendency of nationally oriented media, which maximize profit by presenting programming attractive to national audiences and national advertisers, to homogenize the local point of view out of existence.

> These courts have recognized that news comes from many sources: newspapers, television, radio, magazines and more recently the Internet. These sources all arguably compete for the public's attention. But these courts have found that both the format and nature of information in local daily newspapers distinguish them from news and entertainment provided by other sources. Daily local newspapers provide a "unique package" of information to their readers. National newspapers lack the local news and advertising. Radio and television are primarily dedicated to entertainment and their news content lacks the breadth and depth of daily newspapers.[35]

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[33] Associated Press, 52 F. Supp. p. 372.
[34] Stucke and Grunes, pp. 282-283.
[35] Stucke and Grunes, p. 273.

We have already made the point that this vision of the First Amendment articulated with respect to newspapers has been extended to the electronic media, particularly television. The importance of television as a unique institution bears emphasizing. Television is special because of its immense power to influence and inform public opinion[36] and the role it plays as the central forum of democratic discourse.[37] The broad language that the Supreme Court used in justifying the imposition of obligation on television, with a direct link back to the admonition of Brandeis bears repeating. As Sunstein put it,

> [T]he Court said "assuring that the public has access to a multiplicity of information sources is governmental purpose of the highest order, for it promotes values central to the First Amendment." The Court also emphasized the "potential for abuse of… private power over a central avenue of communications," and stressed that the Constitution "does not disable the government from taking steps to ensure that private interest not restrict, through physical control of a critical pathway of communications, the free flow of information and ideas.
>
> In so saying, the Court was recalling Justice Brandeis' emphatically republican conception of the First Amendment. Indeed, Justice Breyer, in a separate opinion, made the link with Justice Brandeis explicit: The statute's "policy, in turn, seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve." Here, then is an unambiguous endorsement of the idea that government has the power to

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[36] Krotoszynski and Blaiklock, pp. 832…876.

> The owners of a television or radio station possess a unique ability to influence the direction of public affairs through selective coverage of contemporary events and candidates for public office…
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> As noted earlier, television plays a unique role in contemporary American society. Accordingly, concentration of media ownership that encompass television stations represent a tangible threat to the marketplace of ides than other kinds of concentration of media power. Under this reasoning, it might be acceptable to permit multiple ownership of some media assets within a single marker and not permit multiples or cross-ownership of other media assets.

[37] Sunstein, Republic, p. 35,

> Because of the speed and immediacy of television, broadcasters perform these public forum-type functions even more than general interest intermediaries in the print media.

> regulated communications technologies to promote goals associated with deliberative democracy.[38]

F. THE NEED TO ENRICH CIVIC DISCOURSE TO PRESERVE DEMOCRACY

There is another fundamental way in which the simplistic, strictly economic view which counts only the number of entertainment channels undervalues civic discourse. It fails to consider whether there is a need for more effective means of public debate. If citizen participation in civic discourse is to continue to be or become more effective, a substantial improvement in the means of communications at the disposal of the public—far beyond commercial mass media influences—must be promoted through public policy.

Policy must recognize that this aspiration for civic discourse must be placed in the social, economic and political context in which citizens live. While it is certainly true that there is a great deal more information available to more educated citizens today than twenty-five or fifty years ago, it is also true that they need more information. The population has grown in size and diversity. Mobility, globalization of the economy, communication networks, and social fragmentation place greater demands on the communications network to enable citizens to be informed about increasingly complex issues, to express their opinions more effectively in civic discourse and to remain connected to their communities.

The power of digital communication will be greatly enhanced by improved video images with impact heightened by real-time interactivity and ubiquitous personalization. Dramatic increases in the ability to control and target messages and track media use could result in a greater ability to manipulate and mislead rather than a greater ability to educate and enlist citizens in a more intelligent debate. Individual members of society need new

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[38] Id, p. 184.

communications skills and access to technology to express themselves and evaluate the information presented by more powerful messengers—citizens need a new kind of "media literacy."

The new technologies of commercial mass media are extremely capital intensive and therefore restrict who has access to them. The size of media organizations presents a growing mismatch between those in control and average citizens.[39] A small number of giant corporations interconnected by ownership, joint ventures, and preferential deals now straddles broadcast, cable and the Internet. Access to the means of communications is controlled by a small number of entities in each community and these distribution proprietors determine what information the public receives.

Notwithstanding the growth of new media, the dominant mass media – commercial television – remains extremely scarce in an important sense. The number of channels available is quite small compared to the number of citizens. Sunstein argues that even in cyberspace, where websites and home pages are extremely plentiful, there is scarcity of another key element of the communications process, attention.[40]

At this point in time, the hope that new technologies will strengthen civic discourse is just that—a hope. Claims that dramatic changes have already rendered policies to promote

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[39] Lawrence Sullivan, "Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust," *University of Pennsylvania Law Review*, 1977, p. 125,

> Americans continue to value institutions the scale and workings of which they can comprehend. Many continue to value the decentralization of decision making power and responsibility. Many favor structures in which power in one locus may be checked by power in another.

[40] Sunstein, pp. 185-190.

diversity obsolete are premature. There has been far less fundamental change in the forum for democratic discourse than meets the eye.

G. THE FOCAL POINT OF POLICIES TO PROMOTE DEMOCRATIC DISCOURSE

Those, like the Chairman of the FCC,[41] who denigrate the public interest standard by seeking to reduce it to mere economics complain that it is too imprecise to be implemented, but that misses the point. The aspiration for the First Amendment embodied in contemporary Supreme Court case law provides a properly bold vision. Freedom of the press and vigorous civic discourse are complex, qualitative goals, which are inherently less tangible than a simple concept of profit and loss. That they are less precise does not make them less important.[42]

The fact that the goal is intangible should not prevent us from striving to define it with greater rigor. Indeed, many of the wounds that the FCC has suffered in the D.C. Court of Appeals are self-inflicted. The Commission has failed to articulate a coherent and consistent vision.

> Careful consideration of the Commission's diversity project reveals that a variety of cross-cutting objectives have obscured the most important role that government regulations designed to enhance media diversity can play: thwarting the creation of undue concentration of media power, thereby advancing the project of democratic deliberation.[43]

While we hesitate to limit the broad vision of civic discourse so well articulated by Supreme Court case law, our reading of its rulings leads us to a clear understanding of what

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[41] Michael K. Powell, *The Public Interest Standard: A New Regulator's Search for Enlightenment*, 17th Annual Legal Forum on Communications Law, Las Vegas, April 5, 1998.

[42] Krotoszynski and Blaiklock, p. 860.

> It is not possible to offer up a specific formula to determine how many media outlets are sufficient to safeguard meaningful democratic deliberations. Even so, the consequences associated with the absence of a sufficient number of independently owned media outlets are sufficiently unappealing to justify rules incorporating a healthy margin of safety.

diversity and antagonism are and are not. They involve much more than simple economics or entertainment.

> Public policy should strive to create an environment for civic discourse where numerous, independently-owned, institutionally-distinct media outlets are accessible to the public, responsive to local needs, and reflective of diverse socio-economic and cultural points of view.

That is certainly a mouthful, but it should be. Freedom of the press and vigorous civic discourse are a mouthful. No single policy can accomplish this complex goal, but every policy adopted for the media should strive toward it. Those who would abandon the goal of promoting diversity, in favor of promoting efficiency, are far off the mark.[44]

The difference between simple economics under the antitrust law and civic discourse under the Communications Act is woven into the fabric of the statute. Under the antitrust laws, mergers may be "prohibited if their effect may be to substantially lessen competition or tend to create a monopoly," or "if they constitute a contract, combination… or conspiracy in restraint of trade," or "constitute an unfair method of competition."[45] The standard under the Communications Act is higher, reflecting the special role of communications and mass media in our democracy. The Federal Communications Commission (FCC) is charged to transfer

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[43] Krotoszynski and Blaiklock, p. 814.

[44] Krotoszynski and Blaiklock, pp. 833-834.

> This linkage between media power and political power gives rise to a compelling need to check media power to avoid disruption of the electoral process. Just as unchecked political power presents and unacceptable threat to liberty, so, too, unchecked media power requires structural controls to maintain a viable marketplace of ideas. To the extent that the Commission's diversity policies have as their objective dividing and checking media power, those policies serve a critical function. Critics of the Commission's policies who advocate sole reliance on market forces to protect diversity have simply failed to consider the importance of maintaining structural diversity among the electronic media as a means of enhancing democracy.

[45] U.S. Department of Justice and Federal Trade Commission, 1997. p. 1.

cable, broadcast and telecommunications licenses only upon a “finding by the Commission that the public interest, convenience and necessity will be served.”[46]

In both cases, these standards are prophylactic, asking the authorities to make predictive judgments about the effect of the merger and take actions to prevent negative outcomes (in the case of antitrust) or ensure positive outcomes (in the case of the Communications Act). The double review is grounded in the recognition by Congress that media and communications industries play a special dual role in society. They are critical commercial activities and deeply affect civic discourse.

Those who claim that structural limits should be abandoned because they have failed to produce the optimal outcome to date are also wide of the mark. The question is not whether structural limits have accomplished the goal in its entirety, but whether they move us in the right direction, and whether their elimination moves us in the wrong direction.

> Commission regulations should relate in some logical fashion to the project of avoiding the concentration of too much media power in too few hands. The question in every case should be whether the proposed regulation would promote structural diversity in some tangible fashion, thereby sustaining the project of democratic deliberation.[47]

Indeed, the immediate public policy issue is even more pointed. Would reversal of the structural limits make matters substantially better or worse? We believe the answer is unequivocally that it would make matters much worse.

This paper demonstrates that the structural limits on media ownership still serve the public interest. Structural limits remain the best means for promoting diversity in civic discourse.

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[46] USC, 47, 310 (b)

[47] Krotoszynski and Blaiklock, p. 862.

> Uncontrolled centralization of media power presents a threat to liberty no less acute than the uncontrolled centralization of political power. Concentrated media power. Concentrated media power is utterly unaccountable to the citizenry. Similarly put, those who control the electronic media could, with sufficient concentration of media power, effectively displace citizens as the de facto rulers… A free and independent Fourth Estate is essential to the functioning of our participatory democracy. Even if one concedes that imposing democratic accountability would be both undesirable, the use of content-viewpoint-neutral government regulations to ensure accountability through structural diversity remains a viable solution to the problem…
>
> Structural regulation – limiting the number of stations that a single entity can control, divorcing ownership of print media from ownership of broadcast media within the same community, limiting the number of stations that a single entity can own or control within a community, or licensing stations on a community-by-community basis… are mechanical in operation; the Commission does not engage in content-based inquiries to determine whether a license (or would-be licensee) is in compliance. They are also viewpoint-neutral. The Commission is not picking and choosing among potential speakers in drafting or applying these rules.[48]

Repeal or significant modification of these rules would open the floodgates of mergers and acquisitions that would reduce competition and diversity in the media. It shows that if ownership of the media is what matters, as the Appeals Court indicates, the claim that there has been a vast increase in the diversity of viewpoints of information in the past quarter century is simply wrong. When it comes to television and newspapers, the major media on which citizens predominantly rely for their news and information, there may be a few more outlets, but there are far fewer owners. When it comes to the local information that so deeply affects the quality of life of the average citizen – like school board disputes, bond issues, zoning changes, and road building decisions – it is not even clear that there are more outlets.

The paper shows that because of lax implementation of the public interest principles of the Communications Act, today the average media market has the equivalent of just over six,

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[48] Krotoszynksi and Blaiklock, pp. 872…873-874.

equal-sized independent major media voices – broadcast and cable TV and daily newspaper media – producing news and information.   There are just six hundred owners of such voices nationwide. This is a small number to serve a nation that has grown populous and diverse in a world that has become more complex and interconnected.

More importantly, the relaxation or elimination of the limits on ownership would unleash a powerful merger wave that would dramatically reduce the number of owners and independent media voices.   After the storm of mergers, we expect there to be fewer than four voices per market. Not only would there be fewer voices, but the quantum increase in corporate takeovers would homogenize news and information into national or regional chains that cut back on local news and points of view and undermine journalism's watchdog role. If the structural limits on media ownership are repealed or substantially modified and the major media are allowed to merge into huge conglomerates that span all forms of media production and distribution, the goal of ensuring vibrant civic discourse under the First Amendment will suffer a severe setback.

The narrow view of the public interest taken by Chairman Powell – which concerns itself with the promotion of commercially successful entertainment variety – sells the First Amendment short. The Supreme Court and the founder of the republic had a much bolder aspiration than that. As Sunstein argues, the lifeblood of democracy is the process of participation in the forum of discourse.

> Recall Benjamin Franklin's answer to the large crowd asking the Constitution's authors what hey had 'given" to the American public. "A republic, if you can keep it." Franklin's answer was an expression of hope, but also a challenge, a reminder of a continuing obligation, even a dare…
>
> My most general topic here has been the preconditions for maintaining a republic. We have seen that the essential factor is a well-functioning system of free expression – the "only effective guardian," in James Madison's words, "of

> every other right.” To be sure, such a system depends on restraints on official censorship of controversial ideas and opinions.   But it depends on far more than that. It also depends on some kind of public domain, in which a wide range of speakers has access to a diverse public – and also to particular institutions, and practices, against which they seek to launch objections. Above all, a republic, or at least a heterogeneous one, depends on arenas in which citizens with varying experiences and prospects, and different views about what is good and right, are able to meet with one another and to consult.[49]

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[49] Sunstein, Republic, pp. 201-202.

III. EMPIRICAL EVIDENCE ON THE ROLE OF MASS MEDIA IN DEMOCRATIC DISCOURSE

The legal framework to pursue structural policies to promote diversity in the mass media is quite clear. As pointed out in the introduction, a great furor has developed over the evidentiary basis for the current rules limiting ownership because the Appeals Court felt that the Federal Communications Commission had not done its homework in producing sufficient evidence to support the rules. This chapter demonstrates that the problem is not that the evidence does not exist; the problem is that the FCC did not present it to the court. It shows that the central propositions in the discussion of the need for policies to promote democratic discourse are well supported by a large, highly refined academic and professional research literature. The next chapter pulls the legal and empirical discussions together by presenting an explanation of why reliance on economic market forces will not accomplish the goal of promoting diversity in civic discourse to ensure a vibrant forum for democratic discourse.

The reader should keep in mind the implications of these findings for democratic discourse as the mountain of evidence piles up. The mass media – overwhelmingly television and newspapers – are the key sources of news and information. They play an especially important role in influencing people in the election and policy process. They frame issues, set agendas, and hammer home messages through repetition. Political advertisements and news reporting interact in this process.

While we accept and encourage (indeed the Constitution protects) the right of editors (therefore owners) to take editorial positions, we would like to have reporting be unbiased. Unfortunately, editorial control slants the news and coverage of issues is selective.

In this context, consolidation of ownership of news outlets – horizontal mergers between similar types of media and vertical integration between types – poses a significant threat to democratic discourse. Narrowing the range of communications available in the mass media can influence the outcome of individual elections and the electoral process. It can also deeply affect the prospects for democracy by polarizing society and isolating minority points of view.

A. OWNERSHIP OF THE MASS MEDIA MATTERS A GREAT DEAL

Does ownership matter in reporting the news? An article from the June 2002 *American Political Science Review* offers a clear, affirmative answer for newspapers.[50]

> One of the essential elements of an impartial press in the United States is the "wall of separation" between the editorial pages and the pages devoted to the news. While the political beliefs of newspaper owners and editors are clearly articulated on opinion pages, their views are not supposed to infiltrate the reporting of the news. The analysis presented in this paper raises questions about this claim. We examine newspaper coverage of more than 60 Senatorial campaigns across three election years and find that information on news pages is slanted in favor of the candidates endorsed on the newspaper's editorial pages. We find that the coverage of incumbent Senators is most affected by the newspaper's endorsement. We explore the consequences of "slanted" news coverage by showing that voters evaluate endorsed candidate more favorably than candidates who fail to secure an editorial endorsement. The impact of the endorsement decision on voters' evaluations is most powerful in races receiving a great deal of press attention and among citizens who read their local newspapers on a daily basis. [51]

The answer for television reporting and commentary is similar, even though television stations do not generally endorse candidates as newspapers do. The "biases" of owners are

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[50] Kahn, Kim Fridkin and Patrick J. Kenny, "The Slant of News: How Editorial Endorsements Influence Campaign Coverage and Citizens' Views of Candidates," *American Political Science Review*, 96, 2002, p. 381.

[51] Additional sources cited in support of this proposition include Page, Benjamin I., *Who Deliberates* (Chicago, University of Chicago Press: 1996); Rowse, Edward, *Slanted News: A Case Study of the Nixon and Stevenson Fund Stories* (Boston, Beacon: 1957).

frequently known, as a flap over Rupert Murdoch's news operations at Fox television attests. The close political connection between Roger Ailes and the Republican Party was underscored by his admission that he had sent a public policy memo to the Bush Administration.[52] [53] The response from Fox to these "charges" explained in a 2002 best seller by Bernard Goldberg says mountains about the slanting of TV news and commentary across the board.[54]

> This is how Roger Ailes… explained it in a *New York Times Magazine* piece in June 2001: "There are more conservatives *on* Fox. But we are *not* a conservative network. That disparity says far more about he competition." In other words, if Fox is alleged to have a conservative bias, that's only because there are so few conservative voices on the air at ABC, CBS, NBC, CNN and MSNBC. There certainly *is* a conservative "attitude" at Fox, a conservative sensibility.

The demonstration of owner and editorial bias is not only qualitative or anecdotal. Systematic studies of coverage of local issues found that "objectivity violations in all 20 stories were classified as serving the self-interest of the news organization or its parent corporation."[55] National issues reveal that the interests of the owners influence reporting and editorial position. A study by Snider and Page looked at the decision to allow TV stations to have additional digital spectrum without paying for it, while other parts of the spectrum were

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[52] The story "broke" in the *Washington Post* with the publication of a segment of Bob Woodward's *Bush At War* (2002), p. 207, which Ailes disputed (see Grove, Lloyd, "The Reliable Source," *Washington Post*, November 19, 2002). The incident reinforced the perception of Fox News as "The Most Biased Name in News: Fox Channel's Extraordinary Right-wing Tilt." Ackerman, Seth, *The Most Biased Name in News* (FAIR, August 2002), a bias that is embodied in the "format, guests, expertise, topic and in-house analysts.". *Cable News Wars: Interviews* (PBS, Online Newshour, March 2002), p. 2.

[53] *Cable News Wars: Interviews* (PBS, Online Newshour, March 2002), p. 2.

[54] Goldberg, Bernard, *Bias* (Washington, D.C.: Regnery, 2002), p. 190.

[55] J. McManus, "How Objective is Local Television News?", *Mass Communications Review*, 1991.

being auctioned for other commercial uses.[56] The editorial positions of media corporations that owned newspapers and had significant TV station ownership (at least 20% of revenues from that source) were compared to the editorial stands on the spectrum give-away/auction issue to the stands of newspapers owned by companies having little or no TV station ownership. The findings were striking:

> The results on editorials are very strong and highly significant [statistically]; in fact, among newspapers that editorialized on the subject, every one whose owners got little TV revenue editorialized against the spectrum 'giveaway,' whereas every one with high TV revenues editorialized in favor of giving broadcasters free use of spectrum.[57]

Coverage of the ownership implications of the 1996 Telecommunications Act, or lack thereof, leads to a similar conclusion. An analysis of the networks' coverage was conducted by Alger using the Vanderbilt TV News Archive to assess how the three prime network news shows covered the Telecom Act of 1996 – as a whole, not just the spectrum give-away issue – as it went through the congressional process.[58] The analysis found that the ABC, CBS and NBC network news combined devoted only 19.5 minutes to the Telecom Act during the entire 9 months it was in the process (early May 1995-early February 1996); and most of that was about the v-chip and the "Internet Decency Act" side issues.

Most crucially and tellingly, there was essentially no meaningful coverage of the elimination or reduction of ownership limits and the probable consequences of such actions for more concentrated control of mass media, nor was there meaningful attention given to the

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[56] James H. Snider, and Benjamin I. Page, "Does Media Ownership Affect Media Stands? The Case of the Telecommunications Act of 1996," Paper delivered at the Annual Meeting of the Midwest Political Science Association, April, 1997.

[57] Snider and Page, p. 7-8.

give-away of the extra spectrum for transition to digital, high-definition TV. Thus, the failure of coverage was actually broader than noted in Consumers Union's et al. original submission and of even more profound concern regarding failure to inform the public on a pending policy decision which would greatly benefit the media corporations and which had profound implications for democracy and the public good.[59]

The problem is compounded by the important role of advertisers in commercial mass media as seen in the results of a "survey of 118 news directors around the country, conducted between June and August 2001 [that] represents a significant proportion of the approximately 850 stations that broadcast news" found that "[i]t is 'getting harder every year' to maintain the wall between sales and news".[60] The survey found both pressure from owners to produce profits, which undermines quality, and pressures from sponsors to slant the news.

> To meet profit demands, many news directors report they are having to produce thinner and cheaper product by adding news programs while cutting their budgets….
>
> [M]ore than half, 53 percent, reported that advertisers pressure them to kill negative stories or run positive ones…
>
> News directors also reported their TV consultants (outside companies hired by stations to critique newscasts and improve ratings) issuing blanket edicts about what to cover and what not to cover in order to attract the most advertising dollars.
>
> Together the findings and comments raise questions about the journalistic independence of local television news.

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[58] Alger, Dean, *MEGAMEDIA: How giant Corporations Dominate Mass Media, Distort Competition and Endanger Democracy* (Rowman & Littlefield, 1998), Chapter 6, *The Media and Politics* (Harcourt Brace College, 2nd edition, 1996).

[59] Also see Albert Karr, "Television News Tunes Out Airwaves Auction Battle," *Wall Street Journal*, May 1, 1996, p. B1

[60] Just, Marion, Rosalind Levine and Kathleen Regan, "News for Sale: Half of Stations Report Sponsor Pressure on News Decision," *Columbia Journalism Review-Project for Excellence in Journalism*, November/December 2001, p. 2.

> Breaking down the sponsor suggestions more specifically, 47 percent of news directors this year said sponsors tried to get them to provide favorable coverage.
>
> And 18 percent of news directors – almost one-in five – say sponsors try to prevent hem from veering stories, a problem that is more acute in smaller markets.

The importance of diversity or editorial control across outlets also receives support indirectly through studies of structural balance. The dynamics of the newsroom relationships between editor and reporters produces a tendency to produce stories that are unbalanced.

> While partisan balance may have existed over the course of the entire coverage, individual stories were seldom balanced. In fact, the viewer had only a one in four chance of seeing an approximately balanced story, while 40 percent of the time the viewer was likely to see a story that was structurally imbalanced in every measured way. But this research also indicates that this would vary depending on the station and the day the view was watching.[61]

Goldberg ends his discussion of bias in the TV media, which began with and focused on an op-ed piece about liberal bias in the TV media he had published in the *Wall Street Journal*, with a discussion of bias in the print media in a second op-ed on the editorial pages of the *Wall Street Journal*.[62]

> Consider this: In 1996 after I wrote about liberal bias on this very page, Dan [Rather] was furious and during a phone conversation he indicated that picking the *Wall Street Journal* to air my views was especially appalling given the conservative views of the paper's editorial page. "What do you consider the *New York Times*?" I asked him, since he had written op-eds for that paper. "Middle of the road," he said.
>
> I couldn't believe he was serious. The *Times* is a newspaper that has taken the liberal side of every important social issue of our time, which is fine with me.

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[61] Carter, Sue, Frederick Fico, and Joycelyn A. McCabe, "Partisan and Structural Balance in Local Television Election Coverage," *Journalism and Mass Communications Quarterly,* 79, 2002, p. 50.

[62] Goldberg, p. 222, citing "On Media Bias, Network Stars Are Rather Clueless," *Wall Street Journal,* May 24, 2001.

> But if you see the *New York Times* editorial page as middle of the road, one thing is clear: You don't have a clue.

There are many who would debate the "liberal" bias of the *New York Times,* but it is clear that there is little love lost between the *New York Times* and Mr. Ailes and his supporters. Within a week of the revelation of Mr. Ailes' memo to the White House, the *New York Times* chastised Ailes in an editorial, pointing out that giving advice to the President[63]

> would be fine, were Mr. Ailes still in the business of advising political candidates, but as a top executive of a news organization he should know better than to offer private counsel to Mr. Bush.
>
> Mr. Ailes action seems especially hypocritical for someone who has spent years trumpeting the fairness of Fox and the partisanship of just about everybody in the news business. Fox's promotional slogan is: "We Report, you decide." But the news channel has a Republican tilt and a conservative agenda.

In fact, Paul Krugman (certainly a democrat, if not a liberal) writing in the *New York Times,* repeated Al Gore's complaint that the "liberal media" had gone very conservative.[64]

> This week Al Gore said the obvious. "The media is kind of weird these days on politics," he told The New York Observer, "and there are some major institutional voices that are, truthfully speaking, part and parcel of the Republican Party.
>
> The reaction from most journalists in the "liberal Media" was embarrassed silence. I don't quite understand why, but there are some things that you're not supposed to say, precisely because they are so clearly true.

Michael Kelly, a conservative columnist could not let the Gore/Krugman complaint pass without comment.[65] He cites about a dozen "major surveys on the political beliefs and voting patterns of mainstream print and broadcast journalists" from 1962 to 2001, which show about a three-to-one ratio (46 to 15) of liberals to conservatives. He answers the rhetorical

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[63] "The Fox News Presidential Advisor," November 21, 2002, p. A-36.

[64] Klugman, Paul, "In Media Res," *New York Times,* November 29, 2002, p. A-39.

question, “Does a (still) largely liberal news media (still) exhibit a largely liberal bias?” with a resounding “Sure.”[66] He cites S. Robert Lichter, president of the independent Center for Media and Public Affairs, who observed that

> [J]ournalists tell the truth – but like everyone else, they tell the truth *as they see it*. Even the most conscientious journalists cannot overcome the subjectivity inherent in their profession, which is expressed through such everyday decisions as whether a topic or source trustworthy.

The important and unavoidable lesson is that editorial preferences are deeply embedded in the commercial mass media not only on the editorial pages, but also on the news pages. In a sense, this is the essence of the concept of antagonism in the first place. Rather than claim many outlets owned by a single entity will present a neutral, objective or balanced picture, public policy should recognize that diversity and antagonism of viewpoints comes from diversity of ownership. Indeed, Lichter entered the fray with a letter to the editor pointing out

> In some cases, the coverage of social and political issues clearly coincides with the perspectives of journalists. But such correspondence is not guaranteed, and it cannot be reliably predicted to operate in particular instances.[67]

Even if consolidated ownership presents a variety of entertainment, it invariably creates a risk of slant, bias, or tilt in presenting critical issues at crucial moments in time. While a precise prediction of when bias might operate might not be possible, the tendency is clear, it is much more likely to operate in the owners interest.[68]

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[65] Kelly, Michael, “Left Everlasting,” *Washington Post,* December 11, 2002, p. a-33.

[66] Kelly, Michael, “Left Everlasting (Cont’d),” *Washington Post,* December 18, 2002, p. a-35.

[67] S. Robert Lichter, “Depends on How You Define ‘Bias’,” *Washington Post*, December 18, 2002, A-19.

[68] The FCC’s minimal effort to address the issue of bias (Pritchard, David, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News coverage of*

The evidence to support this conclusion stretches far beyond these recent examples discussed above. The economic interests of media owners influences their advertising, programming choices, and how they provide access to political information.[69] Empirical evidence clearly suggests that concentration – fewer independent owners -- in media markets has a negative effect on diversity.[70]

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the 2000 Presidential Campaign (Federal Communications Commission, September 2002), involved a very small number of observations and no effort to introduce a comparison group. It found that half of the newspapers and television stations that were cross-owned shared a bias. On re-examination, Baker, An Analysis, p. 6, concluded that "seven of the ten combinations had a common slant, and only three had a different slant in their coverage." This is a remarkably high bias and, in our view, only underscores the problem of ownership across the media.

[69] Soloski, John, "Economics and Management: The Real Influence of Newspaper Groups," *Newspaper Research Journal*, 1, 1979;W. L. Bennet, *News, The Politics of Illusion* (New York: Longmans, 1988); J. C. Busterna, "Television Ownership Effects on Programming and Idea Diversity: Baseline Data," *Journal of Media Economics,* 1988; E. S. Edwards and N. Chomsky, *Manufacturing Consent* (New York: Pantheon, 1988); Glasser, Theodore L. David S. Allen and S. Elizabeth Banks, "The Influence of Chain Ownership on News Play: A case Study," *Journalism Quarterly*, 66, 1989; J. Katz, "Memo to Local News Directors," *Columbia Journalism Review*, 1990; J. McManus, "Local News: Not a Pretty Picture," *Columbia Journalism Review*, 1990; Monroe E. Price, "Public Broadcasting and the Crisis of Corporate Governance," *Cardozo Arts & Entertainment*, 17, 1999.

[70] H. J. Levin, "Program Duplication, Diversity, and Effective Viewer Choices: Some Empirical Findings," *American Economic Review*, 1971; S. Lacy, "A Model of Demand for News: Impact of Competition on Newspaper Content," *Journalism Quarterly,* 1989; T. J. Johnson and W. Wanta, "Newspaper Circulation and Message Diversity in an Urban Market," *Mass Communications Review*, 1993; W. R. Davie and J. S. Lee, "Television News Technology: Do More Sources Mean Less Diversity," *Journal of Broadcasting and Electronic Media*, 1993, p. 455; W. Wanta and T. J. Johnson, "Content Changes in the St. Louis Post-Dispatch During Different Market Situations," *Journal of Media Economics*, 1994; D. C. Coulson, "Impact of Ownership on Newspaper Quality," *Journalism Quarterly*, 1994; D. C. Coulson and Anne Hansen, "The Louisville Courier-Journal's News Content After Purchase by Gannet," *Journalism and Mass Communications Quarterly*, 1995; Petros Iosifides, "Diversity versus Concentration in the Deregulated Mass Media," *Journalism and Mass Communications Quarterly*, Spring 1999; Lacy, Stephen and Todd F. Simon, "Competition in the Newspaper Industry," in *The Economics and Regulation of United States Newspapers* (Norwood, NJ: Ablex, 1999)..

B. THE MASS MEDIA ARE CRITICAL TO AGENDA SETTING AND INFLUENCING PUBLIC OPINION

The fact that owners and editors influence coverage is important because the mass media influence the agenda of public policy issues and the public's perception of those issues. Consider a Spring 2002 article from the *Journalism and Mass Communications Quarterly*.[71]

> This study examined the attribute agenda-setting function of the media, which refers to significant correspondence between prominent issue attributes in the media and the agenda of attributes among audiences. An opinion survey on a local issue and a content analysis of a local newspaper revealed that, by covering certain issue aspects more prominently, the media increase the salience of those aspects among audience members. We also found an important outcome of attribute agenda setting, attribute-priming effects. Findings indicate that issue attributes salient in the media are functioning as a significant dimension of issue evaluation among audience members. This study concluded that the media, by emphasizing certain attributes of an issue, tell us "how to think about" this issue as well as "what to think about."[72]

Does the agenda setting and influence of perception take place during election campaigns on important issues? An article in the *American Political Science Review* in 2002, finds evidence to support this effect in one of the most enduring issues in America, race.[73]

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[71] Kim, Sei-Hill, Dietram A. Scheufele and James Shanahan, "Think About It This Way: Attribute Agenda Setting Function of the Press and the Public's Evaluation of a Local Issue," *Journalism and Mass Communications Quarterly,* 79, 2002, p. 7.

[72] In support of the proposition that media plays a key role in informing the citizenry about local issues, the authors cite, Chaffee, Steven and Stacy Frank, "How Americans Get Their Political Information: Print versus Broadcast News," *The Annals of the American Academy of Political and Social Science*, 546, 1996; Jack M. McLeod, Dietram A. Scheufele, and Patricia Moy, "Community, Communications, and Participation: The Role of Mass Media and Interpersonal Discussion in Local Political Participation," *Political Communication,* 16, 1999. In support of the more specific agenda setting functions the authors cite Dietram A. Scheufele, "Agenda-setting, Priming and Framing Revisited: Another Look at Cognitive Effects of Political Communications," *Mass Communications & Society,* 3 (2000) and Maxwell Macomb's and Donald L. Shaw, "The Agenda-Setting Function of Mass Media," *Public Opinion quarterly,* 36, 1972.

[73] Valentino, Nicholas A., Vincent L. Hutchings and Ismail K, White, " Cues that Matter: How Political Ads Prime Racial Issues During Campaigns," *American Political Science Review,* 96, 2002, p. 75.

> Recent evidence shows that elites can capitalize on preexisting linkages between issues and social groups to alter the criteria citizens use to make political decisions.[74] In particular, studies have shown that subtle race cues in campaign communications may activate racial attitudes, thereby altering the foundations of mass political decision making…[75] Results show that a wide range of race cues can prime racial attitudes and that cognitive accessibility mediates the effect.

While race may be a particularly prominent case of influence over attitudes and agenda-setting, the media plays a powerful role across a broad range of issues.[76]

> Historically, the press has played two crucial roles during elections. First, it has been a conduit of information between citizens and candidates. Indeed, most of what citizens know about candidates comes from the news media….[77]

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[74] The references cited in support of this proposition include Edsall, Thomas B. and Mary D. and Edsall, *Chain Reaction: The Impact of Race, Rights and Taxes on American Politics* (Norton, New York: 1991); Jamieson, Kathleen Hall, *Dirty Politics: Deception, Distraction and Democracy,* (Oxford University Press, New York: 1992); Gillens, Martin, "Race Coding and White Opposition to Welfare," *American Political Science Review,* 90, 1996; Mendelberg, Tali, "Executing Hortons: Racial Crime in the 1988 Presidential Campaign," *Public Opinion Quarterly,* 61, 1997, *The Race Card: campaign Strategy, Implicit Messages and the Norms of Equality* (Princeton University Press, Princeton: 2001); Valentino, Nicholas A. "Crime News and the Priming of Racial Attitudes During the Evaluation of the President," *Public Opinion Quarterly,* 63, 1999.

[75] The references cited in support of this proposition include Mendelberg, 2001; Coltrane, Scott and Melinda Messineo, "The Perpetuation of Subtle Prejudice: Race and Gender Imagery in the 1990's Television Advertising," *Sex Roles,* 42, 1990; Entman, Robert M., and Andrew Rojecki, *The Black Image in the White Mind: Media and Race in America* (Chicago: University of Chicago Press, 2000); Gray, Herman, *Watching Race Television and the Struggle for Blackness* (Chicago: University of Chicago Press, 1995); Dixon, Travis, L. and Daniel Linz, "Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News," *Communications Research,*50, 2000, ; Gilliam, Franklin D., Jr., and Shanto Iyengar, "Prime Suspects: The Influence of Local Television News on the Viewing Public," *American Journal of Political Science,* 44, 2000; Peffley, Mark, Todd Shields and Bruce Williams, "The Intersection of Race and Television," *Political Communications,* 13, 1996.

[76] Kim, Shefuele and Shanahan, p. 381.

[77] The sources cited in support of this proposition include, Graber, Doris, *Mass Media and American Politics* (Washington, D.C.: Congressional Quarterly, 1997); Paletz, David L., *The Media in American Politics: Contents and Consequences* (New York: Longman, 1999); Just, Marion, R., Ann N. Crigler, Dean F. Alger, Timothy E. Cook, Montague Kern, and Darrell M. West, *Crosstalk: Citizens, Candidates and the Media in a Presidential Campaign*

> Second, the press structures the discourse of political campaigns by emphasizing certain topics over others.[78]

The special role of television in providing information is well recognized and research attention now focuses on how campaigns affect and are affected by public opinion.[79]

> [V]oters do learn about candidates and their position on issues (policy) from candidate advertising. Research from three presidential campaigns demonstrates that citizens obtain more information from television spots than from the news.[80]
>
> Television has become society's primary source of information, and local television news is more likely to be used by viewers than national news broadcasts. Therefore, how such election news is relayed on local television is increasingly important in our political system.[81]
>
> The impact of television is pervasive throughout all elections.[82]
>
> Presidential elections are unquestionably the main event in American politics…[83] Candidates and campaign consultants believe that television

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(Chicago: University of Chicago Press, 1996); Kahn, Kim F. and Patrick J. Kenney, *The Spectacle of U.S. Senate Campaign* (Chicago: University of Chicago Press, 1999).

[78] The sources cited in support of this proposition include Iyengar and Kinder, *News That Matters* (Chicago, University of Illinois Press, 1987); McCombs, Maxwell E. and Donald Shaw, "The Agenda-setting Function of the Mass Media," *Public Opinion Quarterly*, 36,1972.

[79] Hansen, Glenn, J. and William Benoit, "Presidential Television Advertising and Public Policy Priorities, 1952 –2002," *Communications Studies*, 53, 2002, p. 285.

[80] The studies cited in support of this proposition include Patterson, T. E., and McClure, R. D., *The Unseeing Eye: The Myth of Television Power in National Politics* (New York: Putnam books, 1976); Kern, M., *30 Second Politics: Political Advertising in the Eighties* (New York: Praeger, 1988); Brians, C.L. and M. P. Wattenberg, "Campaigns Issue Knowledge and Salience: Comparing Reception for TV Commercials, TV News, and Newspapers, *American Journal of Political* Science, 40, 1996.

[81] Cater, Fico and McCabe, p. 42.

[82] Brazeal , LeAnn M, and William L. Benoit, "A Functional Analysis of congressional Television Spots," *Communications Quarterly,* 49, 2001, pp. 346-437.

[83] In support of this proposition the authors cite Zhao, X and G. L. Bleske, "Measurement Effects in Comparing Voter Learning From Television News and Campaign Advertisements," *Journalism and Mass Communications Quarterly*, 72, 1995; Zhao, X and S. H. Chaffee, "Campaign Advertisements Versus Television News as Sources of Political Issue Information," *Public Opinion Quarterly,* 59, 1995; Patterson and McClure, Kern, and Brians and Wattneberg.

> advertising is pivotal to winning a state-level campaign…[84] Research confirms; that television spots influence election outcomes at all levels.[85]

The importance of visual images in *priming* the audience has been affirmed, while the understanding of the mechanisms through which the effect operates grows, as a 2002 article in *Journalism* made clear.[86]

> Claims by political and news elites about the influence of visual images are far more common than actual evidence of such effects. This research attempt to gain insight into the 'power' of visual images, specifically those that accompany lexical-verbal messages in the press… Findings suggest that visual news images (a) influence people's information processing in ways that can be understood only by taking into account individual's predispositions and values, and (b) at the same time appear to have a particular ability to 'trigger' considerations that spread through one's mental framework to other evaluations.[87]

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[84] In support of this statement the authors cite campaign spending numbers on the order of a quarter of a billion dollars per election see Jenkins, K., "Learning to Love those Expensive Campaigns," *U.S. News and World Report*, 122, 1007; Sinclair, J. "Reforming Television's Role in American Political Campaigns: Rationale for the Elimination of Paid Political Advertisements," *Communications and the Law,* 17, 1995.

[85] In support of this statement the authors cite Joslyn, R., "the Impact of Campaign Spot Advertising Ads, *Journalism Quarterly,* 7, 1981; Mulder, R., "The Effects of Televised Political Ads in the 1995 Chicago Mayoral Election," *Journalism Quarterly,* 56, 1979; and Pfau, M., and H. C. Kenski, *Attack Politics* (New York: Praeger, 1990).

[86] Domke, David, David Perlmutter and Meg Spratt, "The Primes of Our Times? An Examination of the 'Power' of Visual Images," *Journalism,* 3, 2002, p. 131.

[87] The authors present a detailed social psychological and even neurological discussion of the reasons why and ways in which visual images have a greater impact, but the politically oriented research that they cite as consistent with their findings include Krosnick, J. A. and D. R. Kinder, "altering the Foundation of Support for the President Through Priming," *American Political Science Review,* 84,1990; Pan, Z. and G. M. Kosicki, "Priming and Media Impact on the Evaluation the President's Performance," *Communications Research,* 24, 1997 and Just, M. R., A. N. Crigler and W. R. Neuman, "Cognitive and Affective Dimensions of Political Conceptualization," in A. N. Crigler (ed.) *The Psychology of Political Communications* (Ann Arbor: University of Michigan Press, 1996); Iyengar and kinder.

The impact of television is not only in news coverage, but also, and perhaps even more importantly, in advertising and the interaction between advertising and news, as a 2002 article in *American Politics Research* concluded.[88]

> [T]he author examines whether network news coverage of a campaign advertisement issue can reinforce the ad's basic message for the public and alter individual candidate assessments… Results show that general campaign coverage of race and crime issues… influenced individual ideological perceptions… this influence was limited to certain individuals within the population, namely, media coverage affects individuals with moderate levels of political awareness who have weaker initial predispositions. Combined, these results demonstrate that media can exert both significantly and substantively significant influence on the public.[89]

Certainly the huge amounts spent on TV advertising by candidates attests to its importance.[90] The audience that is most susceptible to advertising and news coverage by this account is precisely the audience on which general elections focus – the undecided middle – thereby justifying the spending.[91] Whereas candidates must focus on the committed, active

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[88] Gwiasda, Gregory, W., "Network News Coverage of Campaign Advertisements: Media's Ability to Reinforce Campaign Messages," *American Politics Research, 29, 2001, p. 461.*

[89] Sources cited in support of the subtle interaction between advertising and coverage of advertising include: Kaid, L. L., et al., "Television News and Presidential Campaigns: The Legitimation of Televised Political Advertising," *Social Science Quarterly,* 74, 1993; Ansolaehere, S and S. Iyengar, "Riding the Waive and Claiming Ownership Over Issues: The Joint Effect of Advertising and News Coverage in Campaigns," *Public Opinion Quarterly,* 58, 1995, Lemert, et al., *News Verdicts, the Debates, and Presidential Campaigns* (New York: Praeger, 1991).

[90] Gwiasda, p. 461; Hansen and Benoit, pp. 284.

[91] While Zaller, J. R., *The Nature and Origins of Mass Opinion* (New York: Cambridge University Press, 1992) is cited as the origin of the hypothesis on effect, the author does not that Joslyn, M. and S. Cecolli, "Attentiveness to Television News and Opinion change in the fall of 1992 Election Campaign," *Political Behavior,* 18, 1996, find that the most attentive are most influenced.

party base in primaries, they must shift their attention to the less aware, less committed middle of the political spectrum to get elected.[92]

C. DIVERSITY IS CRITICAL TO SUPPORTING DEMOCRATIC DISCOURSE

As the importance of mass media, particularly TV advertising and news coverage, is affirmed, one may wonder whether diversity is still important to democracy. Does diversity promote democracy by exposing citizens to a broader range of views, as emphasized by Sunstein? Does the mass media play a critical role in promoting this cross-cutting exposure? Recent articles in the *American Political Science Review* give affirmative answers to these questions.[93]

> Exposure to conflicting political viewpoints is widely assumed to benefit the citizens of a democratic polity… Drawing on national survey data that tap characteristics of people's political discussion networks, I examine the impact of heterogeneous networks of political discussion on individuals' awareness of legitimate rationales for oppositional viewpoints, on their awareness of rationales for their owner viewpoints, and on levels of political tolerance… [and] utilizing a laboratory experiment manipulating exposure to dissonant and consonant political views, I further substantiate the causal role of cross-cutting exposure in fostering political tolerance. [94]

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[92] Benoit, William L. and Glenn Hansen, "Issue Adaptation of Presidential Television Spots and Debates to Primary and General Audiences," *Communications Research Reports,* 19, 2002.

[93] Mutz, Diana, C., "Cross-cutting Social Networks: Testing Democratic Theory in Practice," American *Political Science Review*, 96, 2002. p. 111.

[94] Id., identifies rich traditions in political philosophy and social psychology as general support for this view and offers a long tradition of empirical research bearing directly on the relationship, including Stouffer, Samuel, *Communism, Conformity, and Civil Liberties* (New York: Doubelday, 1955); Nunn, Clyde Z., Harry J. Crockett and J. Allen Williams, *Tolerance for Nonconformity* (San Francisco: Josey-Bass, 1978); Sullivan, John L., James Pierson, and George E. Marcus, (Chicago: University of Chicago Press, 1982); Marcus, et al., *With Malice Toward Some: How People Make Civil Liberties Judgments* (New York: Cambridge University Press,1995); Altemeyer, Bob, *The Authoritarian Specter* (Cambridge, MA: Harvard University Press, 1997); Gibson, James L., *Social Networks, Civil Society, and the Prospects for Consolidating Russia's Democratic Transition* (St. Louis: Department of Political Science, Washington University,1999).

> Furthermore, counter-stereotypic cues – especially those implying blacks are deserving of government resources – dampen racial priming suggesting that the meaning drawn from the visual/narrative pairing in an advertisement, and not simply the presence of black images, triggers the effect.[95]

Recent evidence supports the more complex concept of democratic discourse, since mere exposure to information is reinforced by interpersonal communication.[96]

> The key role commonly attributed to interpersonal discussion in democratic societies, of course, stems from its direct impact on various forms of participatory behavior. More important, however, this study shows that interpersonal discussion plays a role in the reception and processing of political news when it comes to translating mass-mediated messages into meaningful individual action. Consequently, people who are frequent hard news users are significantly more likely to engage in various forms of political action if they talk these issues through with others than are frequent news users who talk to others less often.[97]

D. TENSION BETWEEN COMMERCIALISM AND CIVIC DISCOURSE IS CLEAR

The pressures on commercial mass media to produce as much news as possible with the fewest number of reporters and keep it "happy" to supports the interests of advertisers or sensational news that attracts eyeballs is well documented.[98] It is well documented that the dictates of mass audiences create a largest market share/lowest common denominator ethic that undercuts the ability to deliver diverse, locally-oriented,[99] and public interest

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[95] Valentino, Hutchings and White, p. 75.

[96] Scheufele, Dietram A., "Examining Differential Gains from Mass Media and Their Implications for Participatory Behavior," *Communications Research,* 29, 2002; Geiger, Weny, Jon Bruning and Jake Harwood, "Talk About TV: Television Viewer's Interpersonal Communications About Programming," *Communications Reports,* 14 2001.

[97] The author underscores the significance of this process by reminding the reader (p. 57) that de Toqueville offered the "notion that political talk is the soul of democracy."

[98] Beam, Randal, A., "What it Means to Be a Market-Oriented Newspaper," *Newspaper Research Journal,* 16, 1995, "Size of Corporate Parent Drives Market Orientation," *Newspaper Research Journal,* 23, 2002; Vane, Sharyn, "Taking Care of Business," *American Journalism Review,* March 2002; Just, Levine and Regan.

[99] Karen L. Slattery, Ernest A. Hakanen and Mark Doremus, "The Expression of Localism: Local TV News Coverage in the New Video Marketplace," *Journal of*

programming.[100] Simply put, the existence of multiple outlets providing more examples of similar shows does not accomplish the goal of providing greater diversity of points of view.[101]

Broadcasting and Electronic Media, 40, 1996; Raymond L. Carroll and C.A. Tuggle, "The World Outside: Local TV News Treatment of Imported News," *Journalism and Mass Communications Quarterly*, Spring 1997; Charles Fairchild, "Deterritorializing Radio: Deregulation and the Continuing Triumph of the Corporatist Perspective in the USA," *Media, Culture & Society*, 1999, 21; Layton, Charles and Jennifer Dorroh, "Sad State," *American Journalism Review,* June 2002.

[100] Ben Bagdikian, *The Media Monopoly* (Boston: Beacon Press, 2000), pp. 182...188; P. Clarke and E. Fredin, "Newspapers, Television, and Political Reasoning," *Public Opinion Quarterly*, 1978; M. Pfau, "A Channel Approach to Television Influence," *Journal of Broadcasting and Electronic Media*, 1990; D. T. Cundy, "Political Commercials and Candidate Image," in L. L Kai, et al., (ed.) New Perspectives in Political Advertising G. J. O'Keefe, "Political Malaise and Reliance on the Media," *Journalism Quarterly*, 1980; S. Becker and H. C. Choi, "Media Use, Issue/Image Discrimination," *Communications Research*, 1987; J. P. Robinson and D. K. Davis, "Television News and the Informed Public: An Information Process Approach," *Journal of Communication*, 1990; Paul S. Voakes, Jack Kapfer, David Kurpius and David Shano-yeon Chern, "Diversity in the News: A Conceptual and Methodological Framework," *Journalism and Mass Communications Quarterly,* Autumn 1996.; Bishop, Ronal and Ernest A. Hakanen, "In the Public Interest? The State of local Television Programming Fifteen Years After Deregulation," *Journal of Communications Inquiry*, 26, 2002.

[101] Evidence that increasing variety does not increase diversity can be found in A. S. Dejong and B. J. Bates, "Channel Diversity in Cable Television," *Journal of Broadcasting and Electronic Media*, 1991; A. E. Grant, "The Promise Fulfilled? An Empirical Analysis of Program Diversity on Television," *The Journal of Media Economics*, 1994; Heikki Hellman and Martii Soramaki, "Competition and Content in the U.S. Video Market," *Journal of Media Economics*, 7, 1994; C. A. Lin, "Diversity of Network Prime-Time Program Formats During the 1980s," *Journal of Media Economics*, 8, 1995; Robert Kubey, Mark Shifflet, Niranjala Weerakkody, and Stephen Ukeiley, "Demographic Diversity on Cable: Have the New Cable Channels Made a Difference in the Representation of Gender, Race, and Age?," *Journal of Broadcasting and Electronic Media*, 39, 1995. For other nations see Simon Deakin and Stephen Pratten, "Reinventing the Market? Competition and Regulatory Change in Broadcasting," *Journal of Law and Society,* 26, 1999; Hairong Li and Janice L. Bukovac, "Cognitive Impact of Banner Ad Characteristics: an Experimental Study," *Journalism & Mass Communication Quarterly,* 76, 1999; Richard W. Kilborn, "Shaping the Real," *European Journal of Communication,* 13, 1998; Jay G. Blumer and Carolyn Martin Spicer, "Prospects for Creativity in the New Television Marketplace: Evidence form Program-Makers," *Journal of Communications*, 40, 1990, p. 78.

For Fox, which appears to be following a strategy that emphasizes duopolies,[102] the implications are obvious –

> News staff at both WWOR-TV and KCOP (TV) were told that there are no plans for changes, consolidations or cancellations at present, although some economies of scale seem obvious. "We don't have to have two news crews at one event," says a Fox executive.[103]
>
> Fourteen months later,
>
> "[a]ll departments at the station have been consolidated, all under prior KTTV station leadership… The station's newscast was switched in June from an hour at 10 p.m. to a half-hour at 11, to avoid direct competition with KTTV and allow KCOP an hour syndicated-sitcom block at 10.[104]

There is also clear evidence that greater concentration will reduce public interest and culturally diverse programming,[105] as well as locally-oriented programming.[106] News and

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[102] McConnell, Bill and Susanne Ault, "Fox TV's Strategy: Two by Tow, Duopolies are Key to the Company's Goal of Becoming a Major Local Presence," *Broadcasting and Cable,* July 30, 2001.

[103] Trigoboff, Dan, "Chri-Craft, Fox Moves In: The Duopoly Marriage in Three Markets Comes with Some Consolidation," *Broadcasting and Cable,* August 6, 2001

[104] Trigoboff, Dan, "Rios Heads KCOP News," *Broadcasting and Cable,* October 14, 2002.

[105] V. A. Stone, "Deregulation Felt Mainly in Large-Market Radio and Independent TV," *Communicator*, April 1987, p. 12; P. Aufderheide, "After the Fairness Doctrine: Controversial Broadcast Programming and the Public Interest," *Journal of Communication*, 1990, pp. 50-51; M. L. McKean and V. A. Stone, "Why Stations Don't Do News," *Communicator*, 1991, pp. 23-24; V. A. Stone, "New Staffs Change Little in Radio, Take Cuts in Major Markets TV, *RNDA*, 1988; K. L. Slattery and E. A. Kakanen, "Sensationalism Versus Public Affairs Content of Local TV News: Pennsylvania Revisited," *Journal of Broadcasting and Electronic Media*, 1994; J. M. Bernstein and S. Lacy, "Contextual Coverage of Government by Local Television News," *Journalism Quarterly*, 1992; R. L. Carrol, "Market Size and TV News Values," *Journalism Quarterly*, 1989; D. K. Scott and R. H. Gopbetz, "Hard News/Soft News Content of the National Broadcast Networks: 1972-1987," *Journalism Quarterly*, 1992; V. E. Ferrall, "The Impact of Television Deregulation," *Journal of Communications*, 1992; pp. 21... 28... 30.

[106] Kathryn Olson, "Exploiting the Tension between the New Media's "Objective" and Adversarial Roles: The Role Imbalance Attach and its Use of the Implied Audience," *Communications Quarterly* 42:1, 1994, pp. 40-41; A. G. Stavitsky, "The Changing

public affairs programming is particularly vulnerable to these economic pressures.[107] As market forces grow, this programming is reduced.[108] The quality of the programming is also compromised.[109]

Commercialization can easily overwhelm public interest and diverse content.[110] The radio industry, which has been subject to the most unfettered process of "rationalization," demonstrates how local content can be homogenized off the air.[111] The growing impact of

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Conception of Localism in U.S. Public Radio," *Journal of Broadcasting and Electronic Media*, 1994.

[107] J. H. McManus, "What Kind of a Commodity is News?", *Communications Research*, 1992; Olson.

[108] Bagdakian, pp. 220-221; D. L. Paletz and R. M. Entmen, *Media, Power, Politics*, (New York: Free Press, 1981). N. Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business* (New York: Penguin Press, 1985); S. Lacy, "The Financial Commitment Approaches to News Media Competition," *Journal of Media Economics*, 1992.

[109] B. R. Litman, "The Television Networks, Competition and Program Diversity," *Journal of Broadcasting*, 1979; B. R. Litman and J. Bridges, "An Economic Analysis of Daily Newspaper Performance," *Newspaper Research Journal*, 1986; J. C. Buterna, "Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data," *Journal of Media Economics*, 1988; J. Kwitny, "The High Cost of High Profits," *Washington Journalism Review*, 1990; A. Powers, "Competition, Conduct, and Ratings in Local Television News: Applying the Industrial Organization Model," *Journal of Media Economics*, 1993.

[110] Rifkin, The Age of Access, pp. 7-9.

[111] Fairchild, pp. 557-559,

> News programming, especially local news, which has always been the most expensive kind of programming to produce, has been rationalized almost out of existence, with a significant amount of centralization and heavy reliance on national wire services and increased use of 'information management' services of public relations companies…
>
> In Washington DC, for example, consolidation has led to one news production team providing identical news to 10 stations from a central location, personalizing each station's news break with their call letters… Staff can choose which pieces of news they will include in their own newscasts, but have no control over news content and given the economic realities created and fostered by deregulation, few may actually have the means to make these choices…
>
> It is a fairly straightforward concept: a computer system allows the station to download programming minutes or even days in advance… All possible functions of a radio station, defined in advance, are covered by one of 99 preset computer

homogenization in the TV industry, stimulated by the lifting of national ownership limits and restrictions on vertical integration into programming, is also unmistakable.[112] Insertion of local programming is restricted or eliminated. Stories of local importance are driven out of the high visibility hours or off the air. Pooled news services reduce the ability of local stations to present local stories and eventually erode the capability to produce them.

E. COMMERCIAL MASS MEDIA UNDERSERVE MINORITY COMMUNITIES AND UNPOPULAR POINTS OF VIEW

The failure of commercial mass media to meet the needs of citizens is nowhere more evident that in minority communities. Waldfogel has presented strong evidence across a number of media types that there is a form of a tyranny of the majority in media markets.[113] Where minority groups have strongly differing tastes and there are large fixed costs for media, there a disproportionate tendency to serve the majority and neglect the minority.

> A growing body of evidence shows that, when preferences differ across audience groups, the satisfaction of local media consumers depends on the size

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> command. 'Any station joining the network 'can expect to cut operating costs by 30 to 50 percent.' The advantage of the network,' writes one business reporter, 'is that the station need not worry about selecting the music, the programming staple of most stations on the network. 'Pelmorax uses programming consultant to tailor the music and Decima Research to ensure that its formats reach the right demographics.

[112] Network Affiliated Stations Alliance, "Petition for Inquiry into Network Practices." (Federal Communications Commission, March 8, 2001).

[113] Joel Waldfogel, *Who Benefits Whom in Local Television Markets?*, November 2001 (hereafter Waldfogel, Television). Other papers in the series of studies of "preference externalities" were made a part of the record in conjunction with Joel Waldfogel's appearance at the FCC Roundtable, including, *Preference Externalities: An Empirical Study of Who Benefits Whom in Differentiated Product Markets*, 2000 (hereafter Waldfogel, Radio); with Peter Siegelman, *Race and Radio: Preference Externalities, Minority Ownership and the Provision of Programming to Minorities*, 2001 (hereafter Siegelman and Waldfogel); with Felix Oberholzer-Gee, *Electoral Acceleration: The Effect of Minority Population on Minority Voter Turnout* (2001); with Lisa George, *Who Benefits Whom in Daily Newspaper Markets?* (2000); as well as the statement *Comments on Consolidation and Localism* (2001); with Felix Oberholzer-Gee, *Tiebout Acceleration: Political Participation in Heterogeneous Jurisdictions* (2001) (hereafter Participation).

> of their groups' local population. This relationship has been documented in prior research for local radio and daily newspaper markets. The present study documents that this relationship holds, particularly for blacks, in local television markets as well. In particular, we document:
>
> 1) that television programming preferences differ sharply between blacks and non-blacks, and between Hispanics and non-Hispanics;
>
> 2) the quantity of group-targeted programming is larger in markets with more minorities (proportionately more for blacks, absolutely and proportionately more of Hispanics);
>
> 3) minority viewing of network affiliates increases in their quantity of minority-targeted programming; and
>
> 4) minority viewing (and, one can infer, viewer welfare) depends on the distribution of one's neighbor's tastes.
>
> These results have both practical and theoretical interest. First, the theoretical… as in other local broadcasting contexts, the dichotomy between market and collective choice allocations suggested by Friedman does not hold. Second, the practical: despite the large number of national cable channels widely available in the 66 large markets examined in this study, local television exerts an effect on local viewers' welfare. Policymakers might bear this in mind as they consider rules that advantage national broadcast programming at the expense of local programming.[114]

These finding have been reinforced by recent findings of other scholars, as a 2002 article in *Journal of Broadcasting and Electronic Media* makes clear.[115]

> The analyses presented here represent the next step forward in determining the extent to which advertiser valuations of minority audiences affect the viability of minority-owned and minority-targeted media outlets. The results conform to those of previous studies, which found that minority audiences are more difficult to monetize than non-minority audiences…[116]

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[114] Waldfoge, Television, pp. 19-20.

[115] Napoli, Philip, "Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences," *Journal of Broadcasting and Electronic Media*, 46, 2002, pp. 180-181.

[116] The author notes agreement with Ofori, K. A., *When Being No. 1 is not Enough: The Impact of Advertising Practices on Minority-Owned and Minority-Targeted Broadcast Stations* (Civil Rights Forum on Communications Policy, 1999); Webster, J. G. and P. F.

> Minority-targeted media content suffers from not only the potentially lower valuations of minority audiences but also from the fact that, by definition, it appeals to a small audience. Smaller audiences mean small revenues, particularly when the audience is not highly valued by advertisers…[117]
>
> Moreover, lower levels of audience size and value both exert downward pressures on the production budgets of minority content, which further undermines the ability of such content to compete and remain viable… The differential in production budgets may be enough for some minority audience members to find the majority content more appealing than the content targeted at their particular interest and concerns. Such defections further undermine the viability of minority-targeted content… The end result is lower levels of availability of minority-targeted content.

A long tradition of more qualitative research also supports the conclusion that minority market segments are less well served.[118] Greater concentration results in less diversity of ownership, and diversity of ownership – across geographic, ethnic and gender lines – is correlated with diversity of programming.[119]

Phalen, *The Mass Audience: Rediscovering the Dominant Model* (New Jersey: Erlbaum, 1997); Baker, Advertising.

[117] The author cites, Owen, Bruce and Steven Wildman, *Video Economics* (Cambridge, MA: Harvard University Press, 1992); Waldfogel, Preference Externalities, 2000.

[118] Hamilton, J. T., *Channeling Violence: the Economic Market for Violent Television Programming* (Princeton: Princeton University Press, 1998); Wildman, Steven, “One-way Flows and the Economics of Audience Making,” in J. Entema and D.C. Whitney (eds.), *Audiencemaking: How the Media create the audience* (thousand Oaks CA: Sage Publications, 1994); Wildman, Steve and T. Karamanis, “The Economics of Minority Programming,” in A. Garner (ed.) *Investing in Diversity: Advancing Opportunities for Minorities in Media* (Washington, D.C.: Aspen Institute, 1998); and Owen and Wildman.

[119] M. Fife, The Impact of Minority Ownership on Broadcast Program Content: A Case Study of WGPR-TV's Local News Content (Washington: National Association of Broadcasters, 1979); M. Fife, The Impact of Minority Ownership on Broadcast Program Content: A Multi-Market Study (Washington: National Association of Broadcasters, 1986); Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? (Washington: Library of Congress, 1988); T. A. Hart, Jr., "The Case for Minority Broadcast Ownership," *Gannet Center Journal*, 1988; K. A. Wimmer, "Deregulation and the Future of Pluralism in the Mass Media: The Prospects for Positive Policy Reform," *Mass Communications Review*, 1988; T. G. Gauger, "The Constitutionality of the FCC's Use of Race and Sex in Granting Broadcast Licenses," *Northwestern Law Review*, 1989; H. Klieman, "Content Diversity and the FCC's Minority and Gender Licensing

Policies that promote ownership and participation of underrepresented points of view are a counterbalance to this tendency. To put the matter simply, minority owners are more likely to present minority points of view[120] just as females are more likely to present a female point of view,[121] in the speakers, formats and content they put forward.

Policies," *Journal of Broadcasting and Electronic Media*, 1991; L. A. Collins-Jarvis, "Gender Representation in an Electronic City Hall: Female Adoption of Santa Monica's PEN System," *Journal of Broadcasting and Electronic Media*, 1993; Stephen Lacy, Mary Alice Shaver, and Charles St. Cyr, "The Effects of Public Ownership and Newspaper Competition on the Financial Performance of Newspaper Corporation: A Replication and Extension," *Journalism and Mass Communications Quarterly*, Summer 1996.

[120] Empirical studies demonstrating the link between minority presence in the media and minority-oriented programming include M. Fife, *The Impact of Minority Ownership on Broadcast Program Content: A Case Study of WGPR-TV's Local News Content* (Washington: National Association of Broadcasters, 1979); M. Fife, *The Impact of Minority Ownership on Broadcast Program Content: A Multi-Market Study* (Washington: National Association of Broadcasters, 1986); Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (Washington: Library of Congress, 1988); T. A. Hart, Jr., "The Case for Minority Broadcast Ownership," Gannet Center Journal, 1988; K. A. Wimmer, "Deregulation and the Future of Pluralism in the Mass Media: The Prospects for Positive Policy Reform," *Mass Communications Review*, 1988; Akousa Barthewell Evans, "Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry," *Yale Law and Policy Review*, 8, 1990; Jeff Dubin and Matthew L. Spitzer, "Testing Minority Preferences in Broadcasting," *Southern California Law Review*, 68, 1995; Christine Bachen, Allen Hammond, Laurie Mason, and Stephanie Craft, *Diversity of Programming in the Broadcast Spectrum: Is there a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?* (Santa Clara University, December 1999); Laurie Mason, Christine M. Bachen and Stephanie L. Craft, "Support for FCC Minority Ownership Policy: How Broadcast Station Owner Race or Ethnicity Affects News and Public Affairs Programming Diversity," *Comm. Law Policy*, 6, 2001.

[121] A similar line of empirical research dealing with gender exists. See Stephen Lacy, Mary Alice Shaver and Charles St. Cyr, "The Effects of Public Ownership and Newspaper Competition on the Financial Performance of Newspaper Corporation: A Replication and Extension," *Journalism and Mass Communications Quarterly*, Summer 1996; T. G. Gauger, "The Constitutionality of the FCC's Use of Race and Sex in Granting Broadcast Licenses," Northwestern Law Review, 1989; H. Klieman, "Content Diversity and the FCC's Minority and Gender Licensing Policies," *Journal of Broadcasting and Electronic Media*, 1991; L. A. Collins-Jarvis, "Gender Representation in an Electronic City Hall: Female Adoption of Santa Monica's PEN System," *Journal of Broadcasting and Electronic Media*, 1993; Martha M. Lauzen and David Dozier, "Making a Difference in Prime Time: Women on Screen and

F. NEW COMMUNICATIONS TECHNOLOGIES DO NOT PROVIDE A SIMPLE SOLUTION TO THE PROBLEM OF CIVIC DISCOURSE

Given that the principles of democratic discourse remain in place, as do the problems created by the mass media for civic discourse, a recent article appropriately asks, "Can the Internet Rescue Democracy?"[122] The answer is not entirely encouraging,

> The fact that the Internet can work as a commons hardly guarantees that American democracy will flourish. It is not clear that even a vibrant commons could serve the functions of political mobilization and socialization that ordinary people need before they can influence public policy. Nor will the Internet *necessarily* operate as a commons; in fact, the odds favor an increasingly privatized and commercialized cyberspace. Nevertheless, one of the most promising strategies for democratic renewal today is to try to keep the Internet a publicly accessible space in which citizens create and share free public goods.[123]

Beyond the problem of creating (or preserving) a sphere of public goods in cyberspace,[124] the same author had identified some traditional problems that are migrating to the Internet including "five main grounds for concern: inequality, weakened social bonds, diminished public deliberation, rampant consumerism, and the impact of eroding privacy on

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Behind the Scenes in 1995-1996 Television Season, *Journal of Broadcasting and Electronic Media*, Winter 1999; Patrick B. O'Sullivan, "The Nexus Between Broadcast Licensing Gender Preferences and Programming Diversity: What Does the Social Scientific Evidence Say?" *(Department of Communication, Santa Barbara, CA*,. 2000).

[122] Levine, Peter, "Can the Internet Rescue Democracy? Toward and On-line Commons," in Ronald Hayuk and Kevin Mattson (eds.), *Democracy's Moment: Reforming the American Political System for the 21st Century* (Lanham, ME: Rowman and Littlefield, 2002).

[123] Id.

[124] Concerns about establishing a public sphere, or commons, as the key to a significant enrichment of democratic discourse are echoed by other, see Blumler, Jay, G., and Michael Gurevitch, "The New Media and Our Political Communication Discontents: Democratizing Cyberspace," *Information, Communications and Society,* 4:2001; O'Loughlin, Ben, "The Political Implications of Digital Innovations: Trade-Offs of Democracy and Liberty in the Developed World," *Information, Communications and Society,* 4, 2001; Agre, Philip E., "Real-Time Politics: The Internet and the Political Process," *Information Society,* 18, 2002.

freedom of association."[125] While the empirical evidence on such a new technology is sparse, it does not suggest a democratic revolution. For example, online forums have not achieved a breakthrough in democratic deliberation,[126] and online newspapers look like the physical world counterparts from which they are a spin off,[127] but it is still early and the possibility for new forms of communications emerging cannot be discounted.[128]

The extremely powerful commercial thrust of the new media does not negate the central concern of media public policy, diversity, but rather reinforces this concern.[129] New technologies do not alter underlying economic relationships because the mass-market audience orientation of the business takes precedence and there is no reason to assume that the emergence of a different medium, like the Internet, will change behaviors of dominant firms.[130] Indeed, because the new media markets have moved quickly to vertical integration

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[125] Levine, Peter, "The Internet and Civil Society: Dangers and Opportunities," *Information Impacts Magazine,* May 2001, p. 1.

[126] Dahlberg, Lincoln, "The Internet and Democratic Discourse," *Information, Communications and Society,* 4, 2001

[127] Chyi, Hsiang, Iris, Dominic L. Lasora, "An Exploratory Study on the Market Relation Between Online and Print Newspapers," *The Journal of Media Economics*, 15, 2002;

[128] Foot, Kirsten A. and Steven M. Schneider, "Online Action in Campaign 2000: An Exploratory Analysis of the U.S. Political Web Sphere," *Journal of Broadcasting and Electronic Media,* 46, 2002.

[129] Firestone and Schement, p. 45; Guido H. Stempell III, and Thomas Hargrove, "Mass Media Audiences in a Changing Media Environment," *Journalism and Mass Communications Quarterly*, Autumn 1996; Albert C. Gunther, "The Persuasive Press Inference: Effects of Mass Media on Perceived Public Opinion," *Communications Research*, October 1998; American Civil Liberties Union v. Janet Reno, 929 F. Supp. 824 (E. D. Pa. 1996), 117 S. Ct. 2329 (1997); Petros Iosifides, "Diversity versus Concentration in the Deregulated Mass Media Domain," *Journalism & Mass Communication Quarterly,* 76, 1999.

[130] K. C. Loudon, "Promise versus Performances of Cable," in W. H. Dutton, et al., (ed.) *Wired Cities: Shaping the Future of Communications* (Boston: K. G. Hall, 1987). D. Le Duc, *Beyond Broadcasting* (New York: Longman, 1987); T. Streeter, "The Cable Fable Revisited; Discourse, Policy, and the Making of Cable Television," *Critical Studies in Mass Communications*, 1987; B. Winston, "Rejecting the Jehovah's Witness Gambit," *Intermedia,*

by dominant incumbents from the old media, the problems of raising capital and acquiring licenses that have afflicted the old media persist.[131]

Companies introducing technologies can identify the likely early adopters and innovators and orient their product distribution to maximize the penetration within that market segment.[132] There is a very strong base of support for the importance of income and education in the adoptions of high technology innovations like computers and telecommunications equipment.[133] The strong predictors of inclination to early adoption point

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1990; N. M. Sine, et al., "Current Issues in Cable Television: A Re-balancing to Protect the Consumer," *Cardozo Arts & Entertainment Law Journal*, 1990; R. H. Wicks and M. Kern, "Factors Influencing Decisions by Local Television News Directors to Develop New Reporting Strategies During the 1992 Political Campaign," *Communications Research*, 1995; Motta Massimo and Michele Polo, "Concentration and Public Policies in the Broadcasting Industry," Richard Lubunski, "The First Amendment at the Crossroads: Free Expression and New Media Technology," *Communications Law and Policy,* Spring 1997; Sylvia M. Chan-Olmsted and Jung Suk Park, "From On-Air to Online World: Examining the Content and Structures of Broadcast TV Stations' Web Sites," *Journalism & Mass Communication Quarterly*, 77, 2000.

[131] Ofori, asserts a bias in advertising rates. William D. Bradford, "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes," (School of Business Administration, Univ. of Washington, December 5, 2000), asserts a bias in capital markets.

[132] Jayati Sakar, "Technological Diffusion: Alternative Theories and Historical Evidence," *Journal of Economic Surveys*, 12:2, 1998; Evan Martinez, Yolanda Polo and Carlos Flavian, "The Acceptance and Diffusion of New Consumer Durables: Differences Between First and Last Adopters," *Journal of Consumer Marketing*, 15:4, 1998.

[133] Carol B. Meeks and Anne L. Sweaney, "Consumer's Willingness to Innovate: Ownership of Microwaves, Computers and Entertainment Products," *Journal of Consumer Studies and Home Economics*, 16, 1992; Scott Savage, Gary Madden and Michael Simpson, "Broadband Delivery of Educational Services: A Study of Subscription Intentions in Australian Provincial Centers," *Journal of Media Economics*, 10:1, 1997; David J. Atkin, Leo W. Jeffres and Kimberly A. Neuendorf, "Understanding Internet Adoption as Telecommunications Behavior," *Journal of Broadcasting and Electronic Media*, 42:4, 1998; Kimberly A. Neuendorf, David Atkin and Leo W. Jeffres, "Understanding Adopters of Audio Information Innovations," *Journal of Broadcasting and Electronic Media*, 42:4, 1998; Carolyn, A. Lin, "Exploring Personal Computer Adoption Dynamics," *Journal of Broadcasting and Electronic Media*, 42:4, 1998.

directly to market segmentation strategies.[134] In other words, companies introducing technologies can identify the likely adopters and orient their product distribution to maximize the penetration within that market segment. The competitive energies of the industry are focused on the "premier" segment, with innovative offerings and consumer-friendly pricing, while the remainder of the population is ignored or suffers price increases.

Future commercialization will enhance exclusion of certain groups. The drive to sell more subscriptions and reach a broader, yet highly targeted audience with advertising that caters to their individual tastes will be intense, resulting in a commercialization on a grander scale.[135] The resulting e-commerce will be an electronic "direct mail on steroids" pumped up by the ability of viewers to click through digitally inserted advertising for purchases.[136] High-powered advertising will be targeted at demographically compatible viewers identified by detailed information created by the two-way network on viewing patterns and past purchases,[137] leading to growing concerns that certain groups are not likely to have fair access to the opportunities of cyberspace.[138] The new services may be expensive to deliver because of the cost of appliances, production equipment necessary to produce programming that takes advantage of the new appliance, and also because of the infrastructure necessary to deliver

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[134] Fareena Sultan, "Consumer Preferences for Forthcoming Innovations: The Case of High Definition Television," *Journal of Consumer Marketing*, 16, 1999, p. 37.

[135] Morgan Stanley Dean Whitter Reynolds, *Digital Decade* (New York, 1999).

[136] Bob Van Orden, "Top Five Interactive Digital-TV Applications," *Multichannel News*, June 21, 1999, p. 143; Kearney, Chapter 4.

[137] Bill Menezes, "Replay, TiVo Get Cash for Consumer Push," *Multichannel News*, April 5, 1999, p. 48.

[138] Cooper, "Inequality in Digital Society," *Cardozo Journal On Media and the Arts*, 73, 2002.

interactive services.[139] The cost of services, and the targeting of marketing points to a commercial model in which high-value, high-income consumers are the ones marketers seek to serve. Dramatic increases in the price of these advanced services highlight the traditional concerns about commercial interests targeting attractive markets.[140]

Whether it is evolution or revolution,[141] it has not fundamentally altered the political process yet. This was aptly stated in recent article entitled **"**Revolution, What Revolution? The Internet and U.S. Elections, 1992-2000,"[142]

> This chapter serves to confirm the overall pattern of reinforcement rather than mobilization: net political activists were already among the most motivated, informed, and interested in the electorate. In this sense, during recent political campaigns the net has been essentially preaching to the choir. The net still provided a valuable service in widening the range of information that was easily available during the campaign. However, the web has more often been used to access traditional news rather than as a radical new source of unmediated information and communications between citizens and their elected leaders. Whether the Internet has the capacity to reach beyond this group, and beyond these news sources, as access gradually ripple out to broader groups in the electorate remains an open question.

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[139] The cost of early HDTV equipment has been exorbitant with current prices in the range of $2,000 to $4,000. "Profile with Bob Wright: The Agony Before the Ecstasy of Digital TV," *Digital Television*, April 1999, p. 40; Kim Maxwell, *Residential Broadband: An Insider's Guide to the Battle for the Last Mile* (New York: John Wiley, 1999), pp. 9-10.

[140] Ploskina, Brian and Dana Coffield, "Regional Bells Ringing Up Higher DSL Rates," *Interactive Week,* February 18, 2001; Braunstein, Yale, *Market Power and Price Increases in the DSL Market* (July 2001). "Cable Industry Comment," *Banc of America Securities,* May 7, 2001; Ames, Sam, "Study: Broadband Fees Climbed in 2001," *Yahoo News,* January 18, 2002; Spangler, Todd, "Crossing the Broadband Divide," *PC Magazine*, February 12, 2002; Office of Technology Policy, *Understanding Broadband Demand* (Washington, D.C.: U.S. Department of Commerce, September 23, 2002), p. 14.

[141] Margolis, M. and D. Resnick, *Politics as Usual: The Cyberspace Revolution* (Thousand Oaks, CA: Sage, 2000).

[142] Pippa Norris, "Revolution, What Revolution? The Internet and U.S. Elections, 1992-2000," in Ellaine Ciulla Kamarch and Joseph S. Nye Jr. (eds.), *governance.com* (Washington, D.C.: Brookings, 2002), pp. 75-76.

G. CONCLUSION

This huge body of evidence from the academic and professional literature, some of it very recent, provides the context within which the current structural limits on media ownership should be evaluated. The tenets of a public policy that promotes “the widest possible dissemination of information from diverse and antagonistic sources” through structural policy that limits concentration of ownership are extremely well-grounded in this literature.

IV. MASS MEDIA MARKET FAILURES UNDERMINE THE QUALITY OF CIVIC DISCOURSE

The legal discussion set out the public policy issues by emphasizing the ways in which civic discourse transcends mere economics. The empirical discussion establishes the enduring relevance and importance of the basic tenets of a bold aspiration for the First Amendment. A simple marketplace of ideas is not enough. This chapter takes the argument one step farther. This section demonstrates why the economic characteristics of mass media production result in "market failure." Even if a marketplace of ideas were all we wanted, the commercial mass media would not produce it. In other words, the problem is not that 'good' economics makes for 'bad' civic discourse. In fact, vigorous, atomistic competition is generally considered supportive of democratic discourse. The problem is that the structural tendencies of media markets make for 'bad' economics, which reinforces the tendency of failure in the forum for democratic discourse.

A. COMPETITION, DEMOCRATIC PROCESSES AND THE SHORTCOMINGS OF MASS MEDIA MARKETS

1. The Link Between Competition and Democracy

It is important to stress that vigorously competitive markets are not antithetical to democratic processes. Indeed, economists stress that there are political reasons to prefer atomistically competitive markets. Scherer and Ross, among the most prominent analysts of industrial organization, note that analysis should begin with the political implications of economic institutions. Specifically, they ask "Why is a competitive market system held in such high esteem by statesmen and economists alike? Why is competition the ideal in a market economy, and what is wrong with monopoly?" They provide a series of answers, starting from the decentralized, objective processes that typify atomistically competitive markets and check the power of large entities.

> We begin with the political arguments, not merely because they are sufficiently transparent to be treated briefly, but also because when all is said and done, they, and not the economists' abstruse models, have tipped the balance of social consensus toward competition. One of the most important arguments is that the atomistic structure of buyers and sellers required for competition decentralizes and disperses power. The resource allocation and income distribution problem is solved through the almost mechanical interaction of supply and demand forces on the market, and not through the conscious exercise of power held in private hands (for example, under monopoly) or government hands (that is, under state enterprise or government regulation). Limiting the power of both government bodies and private individuals to make decisions that shape people's lives and fortunes was a fundamental goal of the men who wrote the U.S. Constitution.[143]

Other economic characteristics of atomistically competitive markets that converge with democratic principles are the autonomy and freedom of entry that such markets imply.

> A closely related benefit is the fact that competitive market processes solve the economic problem *impersonally,* and not through the personal control of entrepreneurs and bureaucrats…
>
> [Another] political merit of a competitive market is its freedom of opportunity. When the no-barriers-to-entry condition of perfect competition is satisfied, individuals are free to choose whatever trade or profession they prefer, limited only by their own talent and skill and by their ability to raise the (presumably modest) amount of capital required.[144]

Thus, atomistic competition promotes individualistic, impersonal decisions with freedom of opportunity and relatively low resource requirements for entry. These are ideal for populist forms of democracy.[145] Lessig points out that at the time of the framing of the Constitution the press had a very atomistic character.

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[143] Scherer and Ross, p. 18.

[144] Scherer and Ross, p. 18.

[145] Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), pp. 166-167,

> The “press” in 1791 was not the *New York Times* or the *Wall Street Journal.* It did not comprise large organization of private interests, with millions of readers associated with each organization. Rather, the press then was much like the Internet today. The cost of a printing press was low, the readership was slight, and anyone (within reason) could become a publisher – and in fact an extraordinary number did.[146]

The problem in contemporary mass media markets is that they have moved quite far from the competitive form of organization. In fact, the pursuit of efficiency through

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> Relative anonymity, decentralized distribution, multiple points of access, no necessary tie to geography, no simple system to identify content, tools of encryption – all these features and consequences of the Internet protocol make it difficult to control speech in cyberspace. The architecture of cyberspace is the real protector of speech there; it is the real “First Amendment in cyberspace,” and this First Amendment is no local ordinance…
>
> The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding. This model has implications far beyond e-mail and web pages.

[146] Lessig, Code, p. 183. Although Lessig extols the virtues of the Internet, noting that “When the Constitution speaks of the rights of the “press,” the architecture it has in mind is the architecture of the Internet,” he is also profoundly pessimistic about the prospects for maintaining that architecture in the face of commercialization,

> Now we are changing that architecture. We are enabling commerce in a way we did not before; we are contemplating the regulation of encryption; we are facilitating identity and content control. We are remaking the values of the Net, and the question is: Can we commit ourselves to neutrality in this reconstruction of the architecture of the Net?
>
> I do not think that we can. Or should. Or will. We can no more stand neutral on the question of whether the Net should enable centralized control of speech than Americans could stand neutral on the question of slavery in 1861. We should understand that we are part of a worldwide political battle; that we have views about what rights should be guaranteed to all humans, regardless of their nationality; and we should be ready to press these views in this new political space opened up by the Net (p. 200).
>
> The decision then is not about choosing between efficiency and something else, but about which values should be efficiently pursued. To preserve the values we want, we must act against what cyberspace otherwise will become.

economies of scale and network effects has pushed many contemporary industries toward oligopoly or monopoly. This is a source of concern and requires constant vigilance in all commercial markets. Efficiency that results from large economies of scale also leads toward small numbers of competitors and can degenerate into inefficient abuse of monopoly power.[147] In media markets, where the impact reverberates so powerfully in the forum for democratic discourse, these tendencies must be prevented from distorting civic discourse.

At the same time, while the Internet has opened possibilities for new avenues of civic discourse, it has not yet even begun to dislodge the commercial mass media from their overwhelmingly dominant role. There is also a strong trend of commercialization and centralization of control over the Internet that may restrict its ultimate impact on civic discourse.

2. The Tyranny of the Majority: An Economic Theory of Discrimination In Concentrated Media Markets

In this section we identify the characteristics of media products that push them away from vigorous competition toward monopolistic or oligopolistic structures with severely negative implications for civic discourse. We start by integrating the large body of works of a legal scholars (primarily C. Edwin Baker)[148] and a business school economist (Joel Waldfogel) who articulate these issues extremely well.

> The invisible hand, in other words, will produce a different world, and we should choose whether this world is one we want (p. 209).

[147] Mark Cooper, "Antitrust as Consumer Protection: Lessons from the Microsoft Case," *Hastings Law Journal*, 52, 2001.

[148] Baker, Media, Markets, pp. 297-307; "Giving Up on Democracy: The Legal Regulation of Media Ownership," Attachment C, *Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights and Media Access Project*, (before the Federal Communications

It has long been recognized that the technologies and cost structure of commercial mass media production in the 20th century are not conducive to vigorous, atomistic competition. Print and broadcast media have unique economic characteristics.[149] To the extent that economics is a consideration, economic competition in commercial mass media markets cannot assure diversity and antagonism.[150]

The conceptual underpinnings of the argument are well-known to media market analysts.[151] On the supply-side, media markets exhibit high first copy costs or high fixed costs.[152] On the demand-side, media market products are in some important respects nonsubstitutable or exhibit strong group-specific preferences.[153]

Commission, In the Matter of Cross Ownership of Broadcast Station and Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 01-235, 96-197; December 3, 2001).

[149] Steven T. Berry and Joel Waldfogel, "Public Radio in the United States: Does it Correct Market Failure or Cannibalize Commercial Stations?," *Journal of Public Economics,* 71, 1999, point out free entry may not accomplish the economic goals set out for it either. There is evidence of the anticompetitive behaviors expected to be associated with reductions in competition, such as price increases and excess profits. M. O. Wirth, "The Effects of Market Structure on Television News Pricing," *Journal of Broadcasting*, 1984; J. Simon, W. J. Primeaux and E. Rice, "The Price Effects of Monopoly Ownership in Newspapers," *Antitrust Bulletin*, 1986; R. Rubinovitz, *Market Power and Price Increases for Basic Cable Service Since Deregulation*, (Economic Analysis Regulatory Group, Department of Justice, August 6, 1991); B. J. Bates, "Station Trafficking in Radio: The Impact of Deregulation," *Journal of Broadcasting and Electronic Media*, 1993.

[150] W.B. Ray, "FCC: The Ups and Downs of Radio-TV Regulation (Iowa: Iowa State University Press, 1990); Wat W. Hopkins, "The Supreme Court Defines the Forum for Democratic Discourse," *Journalism and Mass Communications Quarterly,* Spring 1996; C.M. Firestone and J. M. Schement, *Toward an Information Bill of Rights and Responsibilities* (Washington: Aspen Institute, 1995); Duncan H. Brown," The Academy's Response to the Call for a Marketplace Approach to Broadcast Regulation," 11 *Critical Studies in Mass Communications,* 257, 1994; Benkler, Free As The Air,*New York University Law Review,* 74, 1999.

[151] Baker, Democracy, p. 42.

[152] Waldfogel, Television, p. 1.

[153] Baker, Democracy, p. 43.

The "welfare" effect of these characteristics is to cause the market to fail to meet the information needs of some groups in society. This results because groups express strong preferences for specific types of programming or content. Programming that is targeted at whites is not highly substitutable for programming that is targeted at blacks, from the point of view of blacks. If fixed costs and group preferences are strong, producers must decide at whom to target their content. Given the profit maximizing incentive to recover the high costs from the larger audience, they target the majority and the minority is less well served.

The tendency to underserve minority points of view springs in large part from the role of advertising.[154] Advertising as a determinant of demand introduces a substantial disconnection between what consumers want and what the market produces. First, to a significant extent, because advertisers account for such a large share of the revenue of the mass media, the market produces what advertisers want as much as, if not more than, what consumers want. Second, because advertising in particular, and the media in general, revolves around influencing people's choices, there is a sense in which the industry creates its own demand.[155] The tendency to avoid controversy and seek a lowest common denominator is augmented by the presence of advertisers, expressing their preferences in the market.[156]

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[154] Waldfogel, Television, p. 1.

[155] Sunstein, Republic, discusses the implications for democracy, pp. 108-109.

[156] Baker, Democracy; *Advertising and a Democratic Press* (Princeton: Princeton University Press, 1994). Krotoszy and Blaiklock, p. 831,

> The larger the audience the station generates, the higher the station's potential advertising revenues. Broadcaster, therefore, attempt to find and air programming that will appeal to the largest possible audience. In doing so, broadcasters necessarily air programming that is likely to appeal to most people within the potential audience – that is they air programming that appeals to the majority culture's viewpoint.

As articulated and empirically demonstrated by Waldfogel, this might be termed an economic theory of discrimination “because it gives a non-discriminatory reason why markets will deliver fewer products – and, one might infer, lower utility – to ‘preference minorities,' small groups of individuals with atypical preferences.”[157] Discrimination results not from biases or psychological factors, but from impersonal economic processes.

> A consumer with atypical tastes will face less product variety than one with common tastes…. The market delivers fewer products – and less associated satisfaction – to these groups simply because they are small. This phenomenon can arise even if radio firms are national and entirely non-discriminatory.
>
> The fundamental conditions needed to produce compartmentalized preference externalities are large fixed costs and preferences that differ sharply across groups of consumers. These conditions are likely to hold, to greater or lesser extents, in a variety of media markets – newspapers, magazines, television, and movies.[158]

This poses a fundamental challenge to the validity of the assumption that markets allocate resources efficiently.

> Friedman has eloquently argued that markets avoid the tyrannies of the majority endemic to allocation through collective choice. Mounting evidence that minority consumer welfare depends on local minority population in local media markets indicates that, for this industry at least, the difference between market and collective choice allocation is a matter of degree, not kind. It is important to understand the relationship between market demographic composition and the targeting of programming content because related research documents a relationship between the presence of black-targeted media and the tendency for blacks to vote.[159]
>
> [If] another firm introduces an imperfect substitute for her favorite product, she can be made worse off. Suppose that some fellow consumers of her favorite product prefer the new product, but she does not. Suppose further that enough of her fellow customers are diverted from her favorite product to the new product so that her favorite product no longer attracts enough to cover its costs.

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[157] Waldfogel, Radio, p. 27.
[158] Waldfogel, Radio, pp. 27-30.
[159] Waldfogel, Local Television, p. 3.

> Her favorite product is withdrawn. This negative preference externality mechanism operates like a tyranny of the majority in markets.[160]

The second implication that flows from this market failure affects civic discourse. The tyranny of the majority in media markets is linked to the tyranny of the majority in politics because the media are the means of political communications.

> We present evidence that electoral competition leads candidates to propose policies that are supported by proportionately larger groups and that members of these groups are more likely to turn out if they find the proposed policies more appealing. In addition, we show that candidates find it easier to direct campaign efforts at larger groups because many existing media outlets cater to this audience…
>
> Channels of communication that are used to disseminate political information rarely exist for the sole purpose of informing potential voters. The number of channels that candidates have at their disposal reflects the cost structure of printing newspapers, establishing radio stations, and founding political groups. To the extent that these activities carry fixed costs, channels that cater to small groups are less likely to exist. The welfare implications – if one views the decision to vote as the decision to "consume" an election -- are analogous to those of differentiated markets with fixed costs.[161]

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[160] Waldfogel, Radio, p. 3. Baker, Democracy, p. 80, identifies a similar process at the macro level,

> I have described how monopolistic competition among media goods can result in the success of products whose competitive success causes the failure of other media products that would produce more "consumer surplus" than the goods that prevail. The introduction of the new "synergistic" products is likely to cause a slight downward shift in the demand for other media products, causing some of them to fail even though producing them costs much less than their value to potential customers, thereby being capable of producing considerable but now lost consumer surplus…Another way to see this is that sometimes the hope of synergies purportedly justifying media mergers reflects the possibility of a greater ability to engage in more effective price discrimination or a greater likelihood of creating "blockbuster" or best selling products. These hoped for synergies, however, translate into public interest worries that the synergies lead to competitively caused damage to consumer welfare by eliminating more values alternatives

[161] Oberholzer-Gee and Waldfogel, Participation, pp. 36-37.

B. THE DISCOURSE IMPLICATIONS OF MEDIA MARKET FAILURE

This section provides the basis for the public policy concern about concentration of media ownership at the local and national levels as well as the integration of ownership between production and distribution as well as across media types within local markets. The impact of market failure is felt in three areas – owner influence, loss of local perspective, and erosion of checks and balances, as well as erosion of other positive externalities of vigorous civic discourse. The next section provides a brief review of the empirical literature that demonstrates these issues are well grounded in empirical research.

1. Ownership

Baker elaborates on the political implications of the monopolistic media market. The first point is that it results in market power, traditionally measured as monopoly profits.[162] For media markets however, economic profits can be used (dissipated) in another important way. They can use their market power to influence content or policy directly.

The weak competition that results from the first copy/nonsubstitutability characteristics allows owners to earn monopoly profits and to use monopoly rents to pursue

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[162] Baker, Democracy,

> Monopolistic competition theory applies to media goods. They… characteristically manifest the “public good” attribute of having declining average costs over the relevant range of their supply curves due to a significant portion of the product’s cost being its “first copy cost,” with additional copies having a low to zero cost. There are a number of important attributes of monopolistic competition that are relevant for policy analysis and that distinguish it from the standard model of so-called pure competition, the standard model that underwrites the belief that a properly working market leads inexorably to the best result (given the market’s givens of existing market expressed preferences and the existing distribution of wealth). The first feature to note here is that in monopolistic competition often products prevail that do not have close, certainly not identical, substitutes. Second, this non-

their personal agendas. The claim that ownership of the media does not matter to the selection and presentation of content is not plausible.[163] Whatever their political preferences are, media owners are in a uniquely powerful position to influence civic discourse. They can use both the economic resources made available by their market power (as can monopolists in any industry) and the unique role of the media to pursue those preferences.

> Nevertheless, within this type of competition, products' uniqueness or monopoly status often permits considerable margin for variation while still remaining profitable. The "potential" profit of the profit maximizing strategy can be realized and taken out as profit – which is what the corporate newspaper chains are accused of doing. However, the market itself does not require the profit maximizing response as it does in models of pure competition. Rather, the potential profit can instead be spent on indulging (or "subsidizing") the owners' choices about content or price.[164]

One set of behaviors that is particularly problematic for Baker involves undemocratic uses of media market power in pursuit of the private interests of owners through

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> substitutability of the prevailing monopolistic product will allow reaping of potentially significant monopoly profits.

[163] Krostoszynksi and Blaiklock, pp. 832…833.

> The owners of a television or radio station possess a unique ability to influence the direction of public affairs through selective coverage of contemporary events and candidates for public office….
>
> To be sure, concentrations of political power present a more direct kind of threat to democracy than do concentrations of media power. That said, it is possible to use media power as a means of channeling, if not controlling the flow of political power. The owners of a television or radio station has a unique opportunity to influence the outcomes of electoral contests – both by reporting on candidates favorably and unfavorably and through benign (or malign) neglect. Media exposure is like oxygen to candidates for political office, particularly at the federal level. If a television station pretends that a candidate does not exist, her chances of election are considerably reduced.

[164] Baker, Democracy, p. 43. Krotoszynski and Blaiklock, p. 875, put it as follows:

> There is simply no reason to believe that someone like Ted Turner or Rupert Murdock will consistently seek to maximize economic returns rather than use media power to influence political events in ways he deems desirable.

manipulation, cooptation and censorious behaviors.[165] This can undermine the watchdog role of the press or distort coverage of events, when it suits their interests. The chilling effect need not be conscious or overt. Powerful media owners tend to be very visible figures in their political and policy preferences. Employees and institutions instinctively toe the line and self-censor out of an instinct for self-preservation, which dampens antagonism in the media.[166]

Even though this is not Waldfogel's central concern, when he looks at the question of ownership he finds support for the view that ownership matters beyond "simple" economics. Waldfogel found, in his study of radio markets that "black owners enter in situations that white owners avoid."[167] He went on to consider possible explanations for this behavior and offered a hypothesis that relied on owner preferences,

> A second possibility is that black owners enter for "ideological" reasons, which means they are willing to forego some profits in order to provide a particular sort of programming. This hypothesis would rationalize the observation that black-owned and targeted stations have fewer listeners, on average, that [sic] their white-owned counterparts (in markets with both white and black-owned, black-targeted stations). Black owners' willingness to accept smaller returns could explain why greater black ownership increases black-targeted programming: additional black owners are willing to enter low-profitability market niches (programming to small black audiences) that whites would not enter.[168]

Perhaps Waldfogel puts the word "ideology" in quotes to blunt its negative connotation. Baker presents the policy implications in terms that are familiar and relevant to the arena of diversity policy in civic discourse.

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[165] Baker, Democracy, p. 73.

[166] Krotoszynski and Blaiklock, p. 867,

> Employees are unlikely to criticize their employers, and this truism holds true for the fourth Estate.

[167] Siegelman and Waldfogel, p. 23.

[168] Siegelman and Waldfogel, p. 25.

> Choice, not merely market forces, influences quality. Choice explains the variation both within and between ownership categories. Moreover, quality may provide some efficiencies and management qualities that sometimes increase the enterprise's potential for profits or quality. However, the incentives for executives (editors and publishers) in chain firms as well as the added pressures of public ownership are likely to be directed toward focusing on increasing profits. Possibly due to price of membership or involvement within a community that leads to dedication or desires to form status in that community, local ownership might be sociologically predicted to lead to greater commitment to and greater choice to serve values other than the bottom line.[169]

Baker argues that the experience of civic discourse for minorities and the public at large are deeply affected by ownership. Large, monopolistic structures make it more difficult for opinion leaders within minority or niche communities to gain experience in the industry. It will be more difficult for the public to gain access to the media or to be exposed to a broad range of viewpoints through the media.

> [A] *complex democracy* may benefit society as a whole – that is, is something that many people should be (and are, through collective, political decisions about structures) willing to pay to have or otherwise choose if the choice is available. And a complex democracy may require media entities that not only provide particular content but that are experienced as being owned, or at least controlled, by different groups or by people who identify as and are identified by others as being members of or having allegiances to particular groups. If so, the ownership pattern called for by this democratic theory would have significant positive externalities, but an antitrust analysis would remain blind to the costs of any merger that undermines this distribution.[170]

2. View Points

Baker formulates the need to have policies that promote viewpoint diversity to the tendency of the commercial media to underserve the less powerful in society.

> Thus, from the perspective of providing people what they want, media markets are subject to the following criticisms. The provide much too much "bad" quality content – bad meaning content that has negative externalities. Media

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[169] Baker, Democracy, p. 47.
[170] Baker, Democracy, pp. 67-68.

> markets also may produce a wasteful abundance of content responding to mainstream taste. Otherwise, the main problem is underproduction. Markets predictably provide inadequate amounts and inadequate diversity of media content. Especially inadequate is their production of “quality “ content – quality meaning content that has positive externalities. Production of civically, educationally, and maybe culturally significant content preferred by the poor is predictably inadequate. Smaller groups will often be served inadequately, either in relation to democracy’s commitment to equally value their preferences or due to the consequences of monopolistic competition.[171]

In order for the media to meet the needs of these groups, it must inform and mobilize them.

> [P]luralist democracy hopes to generate fair bargains as a result of groups' pressing their interests. In this process, the media should perform several tasks. First, the press should provide individuals and organized groups with information that indicates when their interests are at stake. Second, the media should help mobilize people to participate and promote their divergent interests… Third, for pluralist democracy to work, information about popular demands must flow properly - that is, given the practical gap between citizens and policymakers, the press should make policymakers aware of the content and strength of people's demands.[172]

That these needs have traditionally been centered in localism is understandable. The primary referent for identity and community has traditionally been and remains significantly local. The link between localism and deconcentration of the media seems obvious and changes in electronic media distribution technologies have not significantly altered this fundamental relationship.[173]

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[171] Baker, Media Markets, pp. 96-97.

[172] Baker, Democracy, p. 16.

[173] Krotoszynski and Blaiklock, pp. 866,

> The Commission historically has placed a high value on local control of broadcasting on the theory that local control would result in the provision of programming that better meets the needs of the community of license…
> A quick perusal of cable programming practices demonstrates the veracity of the proposition. With the exception of PEG channels and leased-access channels, cable programming presents very little programming responsive to the needs, wants, and desires of local communities. If you want the prized hog

Waldfogel finds important localism effects operating in the media that support this view. He finds that the preference externality operates in non-prime time programming because it is subject to greater local control and therefore can be more responsive to local market conditions.

> The local data indicate, to a greater extent than the national prime time or cable data, both the distance between black and white preferences and the fact that local programming, far more than national programming, caters to those preferences.[174]

While the economics of television gives rise to strong concerns about localism,[175] Waldfogel sees indications of similar localism effects in newspaper markets as well, supporting the conclusion that "content origin matters."[176] He describes localism's effect on behavior in the preliminary findings of a study of the entry of a national newspaper into local markets as follows.

> competition at the state fair covered live, you need a local media presence. Elections for city, county and even state officers might go uncovered if left to the networks or national cable news channels. Although alternative sources of information exist, including the Internet and local newspapers, most Americans continue to rely upon local and network television for their news programming. With respect to local news, local broadcasters are effectively the only game in town.

[174] Waldfogel, Local Television, p. 13.

[175] Krotoszynski and Blaiklock, pp. 866,

> Given economies of scale, it might be inefficient to cover the hog competition at the state fair. Perhaps Jerry Springer or Montel Williams would generate higher ratings or cost less to broadcast. From a purely economic point of view, covering a debate between candidates for local office might be a complete disaster. Many local television and radio stations nevertheless provide such coverage on a voluntary basis. Perhaps local commercial television broadcasters do not provide such coverage solely out of the goodness of their hearts or a keen sense of civic responsibility. Nevertheless, the fact remains that a national television channel generally would not cover the lieutenant governor's race in South Dakota absent the most extraordinary and unlikely of circumstances.

[176] Waldfogel, Localism, p. 9.

> How does national news media affect local news sources and local political participation?
>
> Preliminary results: increased circulation of national daily affects:
>
> Local paper circulation – reduced targeted audience readership
>
> Local paper positioning – toward local content
>
> Local political participation – reduces voting, less so in presidential years[177]

Concentration of national and local markets into national chains reinforces the tendencies of media owners to ignore local needs.[178]

3. The Watchdog Functions, Externalities and Institutional Diversity

We have already noted that concentration of ownership may undermine the watchdog function of the media by allowing owners to influence it. Baker sees a second threat to the important watchdog function that arises as a negative externality of concentration. Put another way, he finds that concentration undermines one of the positive externalities of media products.

Positive externalities are benefits that flow from actions that cannot be captured by producers and consumers because they are not internalized in market transactions. Since the full gains from trade cannot be captured, the market tends to produce too little, from the

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[177] Waldfogel, Localism, p. 9.

[178] Krotoszynski and Blaiklock, pp. 871…875-876,

> The Commission's efforts to preserve localism as a feature of the broadcast media will be effectively thwarted if large, corporate entities are permitted to amass large station holdings and use central programming techniques to achieve economies of scale and scope…
> Common ownership of media outlets is not conducive to competition in news and other local content programming. Consolidated news department, like consolidated marketing departments, are a common feature of multiple station

societal point of view. The public at large benefits from the watchdog function beyond the value that individual media firms can capture in their market transactions (advertising revenue and viewer payments). Baker uses investigative journalism as an example.

> One item both news entities "sell" is exposes on the content of investigative journalism. Not just the readers or listeners but all members of the community benefit from whatever reform or better government or improved corporate behavior that occurs due to these stories. This journalism can create huge positive externalities. The paper's limited number of purchasers cannot be expected to pay the full value of this benefit - they have no reason to pay for the value received by non-readers. Even more (economically) troubling, a major benefit of the existence of news organizations that engage in relatively effective investigative journalism is that this journalism deters wrong doing by governmental or corporate actors - but deterred behavior produces no story for the journalism to report and hence for the media entity to sell. The paper has no opportunity to internalize these benefits of its journalism - an economic explanation for there being less of this type of journalism than a straight welfare economics analysis justifies.[179]

Left unrestrained, the marketplace will produce fewer watchdog activities conducted by less rigorous institutions. Abuses are less likely to be uncovered and more likely to occur because the deterrent of the threat of exposure will be diminished. Baker chooses an example that fits directly in the current ownership proceedings.[180]

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groups. Divided control of media outlets within a community creates a healthy competition among news and programming sources.

[179] Baker, Democracy, p. 64.

[180] Baker, Democracy, p. 64.

Consider the merger of two entities that supply local news within one community – possibly the newspaper and radio station... Presumably the merged entity would still have an incentive to engage in at least a profit-maximizing amount of investigative journalism. But how much is that? The amount spent in the pre-merger situation may have reflected merely an amount that the media entity's audience wanted and would pay for (either directly or indirectly through being "sold" to advertisers). Alternatively, the pre-merger profit maximizing level for each independent entity may have reflected a competitive need to compare adequately to a product offered by its competitor. In this second scenario, competition may have induced increased but still inefficiently small expenditures on investigative journalism.

The positive externalities that Baker identifies with respect to the watchdog and experiential functions are part of a larger category of externalities associated with information products, particularly civic discourse content. Information products are seen as possessing attributes of public goods to a significant degree. Sunstein makes this broader point in regard to television.

> Even if broadcasters did provide each viewer with what he or she wanted, a significant problem would remain, and from the economic point of view, this is probably the most serious of all. Information is a public good, and once one person knows something (about for example, product hazards, asthma, official misconduct, poverty, welfare reform, or abuse of power), the benefits of that knowledge will probably accrue to others.[181]

Note that two of the central issues noted by Sunstein are positive externalities in the political arena on which Baker's analysis is centrally focused – official misconduct and abuse of power. These are but two of many externalities of information production.[182]

> Given the first scenario, if the provision of investigative journalism and exposes was satisfying an audience demand, there would be little necessity for the two media entities to supply different sets of exposes to the two audiences. Presumably the merged enterprise could share the results of its investigative journalism, now supplying to each entity's respective audience (customers) only the amount previously supplied by the larger of two investigative units… What is from the perspective of the merged entity a profitable "synergy" is from the perspective of the community an inefficient loss of positive externalities.

[181] Sunstein, Cass, "Television and the Public Interest," *California Law Review,* 8, 2002, p. 517.

[182] As the works of Benkler and others have shown, the public good quality of information production goes well beyond the realm of the media and civic discourse and is especially critical to a period that is called an information age. See Yochai Benkler, "Intellectual Property and the Organization of Information Production," *International Journal of Law and Economics*, forthcoming; "Coase's Penguin, or Linux and the Nature of the Firm," *Conference on the Public Domain"* Duke University Law School (November 9-11, 2001); "The Battle Over the Institutional Ecosystem in the Digital Environment," *Communications of the ACM*, 44:2, 2001; "From Consumers to Users: Shifting the Deeper Structure of Regulation Toward Sustainable Commons and User Access," *Federal Communications Law Journal*, 56, 2000. Lawrence Lessig's analysis of the impact of communications structures on innovation is

The central fact that all of these discussions share is that market forces provide neither adequate incentives to produce the high quality media product, nor adequate incentives to distribute sufficient amounts of diverse content necessary to meet consumer and citizen needs. Sunstein states the general proposition as follows.

> Individual choices by individual viewers are highly likely to produce too little public interest programming in light of the fact that the benefits of viewing such programming are not fully "internalized" by individual viewers. Thus, individually rational decisions may inflict costs on others at the same time that they fail to confer benefits on others. In this respect, the problem "is not that people choose unwisely as individuals, but that the collective consequences of their choices often turn out to be very different from what they desire or anticipate."[183]

For most analysts of the role of the media in our democracy, institutions play a critical role in mediating between individuals and the political process. Some draw the link between the institution and the investigative role.

> Democratic governance requires a free press not just in the sense of a diversity of expression. It requires the *institution* of a free press. It requires media with the financial wherewithal and political independence to engage in sustained investigative journalism, to expose the errors and excesses of government and other powerful political and economic actors…
>
> Our best hope for democratic governance in this world is far messier than the ideal republic of yeomen. It requires mediating institutions and associations, private and public concentrations of wealth and power, and varied mechanisms

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another body of work that focuses on the nexus between choices about economic/institutional structures, public goods, and political action (see *Code* and *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001)). The narrow focus here on media and civic discourse reflects the nature of this proceeding and in no way is intended to belittle the broader public goods concerns.

[183] Sunstein, Television, p. 517, citing Robert H. Frank and Phillip J. Cook, *The Winner Take All Society* (1999), p. 191, as well as Pierre Bourdieu, *On Television* (New York: The New Press, 1998), and C. Edwin Baker, "Giving the Audience What it Wants," *Ohio State Law Journal* 58, 1997.

> to maintain multiple balances of power within government, within civil society, and between government and civil society.[184]

Baker finds one base for structural policy in the need to promote institutions have different structures[185] and are driven by different institutional imperatives.

> Finally, the market does not measure preferences for nor produce sufficient amounts of noncommodified media products. Thus, it is likely (but not certain) that self-conscious people would favor rules or subsidies that tilt production toward more diverse noncommodified media…
>
> Thus, media policy should favor structural rules that allocate or encourage the allocation of decision-making control over content creation to people with commitments to quality rather than merely to the bottom line (e.g., the content creators themselves or decentralized control by people involved in the media enterprise). This goal, for example, supports a drastic revitalization of antitrust enforcement in the media area, with the policy being guided by First Amendment concerns that go beyond traditional market analyses. It also supports the following: the long-standing FCC policy of favoring license grants for applicants whose principals live in the community or, even better, whose principals are themselves involved in management; tax policies that favor family ownership rather than sale to conglomerate interests; labor laws that favor a stronger editorial voice for media workers; business organization laws that favor media ownership by workers or non-profit organizations; and access rules or provision of communications facilities (e.g., public-access channels) that provide greater opportunities to communicate for individuals and noncommercial entities….
>
> [O]ur system of free press expression must include a plurality of speaker types, including commercial mass media, government subsidized noncommercial media, independent publishers, political and nonprofit associations, universities and individuals. To some extent, each of these speaker types offsets, complements, and checks rest.[186]

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[184] Netanal, Neil, *Is the Commercial Mass Media Necessary, or Even Desirable, for Liberal Democracy*, TPRC Conference on Information, Communications, and Internet Policy, October 2001, pp. 20-24.

[185] Shah, Rajiv, J. Jay P. Kesan, *The Role of Institutions in the Design of Communications Technologies*, TPRC Conference on Information, Communications, and Internet Policy, October 2001.

[186] Baker, Media Markets, p. 120.

One of the central benefits of promoting deconcentrated and diverse media markets is to provide a self-checking function on the media. The media needs to be accountable to the public, but that function cannot, as a general matter, be provided by government action in our political system. It can best be provided by the media itself, as long as there is vigorous antagonism between sources of news and information.[187] The ongoing trend of conglomeration and cross-media ownership in the industry and the potential for a substantial increase in these developments raises a qualitatively new type of problem. The potential for institutional conflicts of interest arises.

> The flurry of debate over media consolidation masks an equally, if not more disturbing trend: the conflict of interest inherent in diversified cross-ownership of newsgathering institutions by multinational concerns. A media market in which *The Washington Post* and *Newsweek* join in "strategic alliances" with NBC, Microsoft Corp. helps underwrite the salaries of reporters for MSNBC, and America Online helps capitalize CNN expands the potential for conflict of interest far beyond the individual to the institutional level. Indeed, the cross-ownership and content sharing that typifies American mass media today raises legitimate questions about whether journalists working on such far-flung conglomerates can avoid conflicts of interest on the institutional level, and about what such conflicts do to the notion of an independent press…

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[187] Krotoszynski and Blaiklock, pp. 867-868,

> Accordingly as fewer and fewer entities control more and more broadcast outlets, the incentive to expose disinformation or to correct for under coverage of a particular story decreases. If Ted Turner enjoyed a media monopoly, would CNN and *Time* have fallen upon their swords so quickly in the aftermath of the Operation Tailwind story scandal? It seems highly unlikely. The pervasive, negative attention brought to bear on CNN's and *Time's* conduct in reporting this story forced Time Warner to take aggressive corrective action….
>
> The project of outlet diversity bears a clear relationship to the project of maintaining a viable, participatory democracy. To the extent that the ownership rules and policies divide and subdivide media ownership, it does the public a service. Moreover, this service independent of antitrust concerns regarding price fixing or undue market power. The commission's pursuit of diversity in the context of media regulation relates to fostering accountability to the public.

> Institutional conflict of interest extends the conflict inherent in a commercial press… beyond the immediate concerns of the journalist or even the news organization for which he or she works.[188]

C. EMPIRICAL CONCEPTS OF DIVERSITY IN CIVIC DISCOURSE

The FCC has used a variety of concepts of diversity over the years. The concept of diversity and antagonism in civic discourse is complex. Opponents of policies to promote the goals of enriching civic discourse complain that the imprecision of the outcome makes it difficult, if not impossible, to measure success. We believe this reflects the fact that the goal of having an informed citizenry is inherently qualitative and complex. Most social and psychological relationships have numerous highly intertwined causes; there is no reason that knowledge and participation in public policy should be otherwise.

The difficulty of defining outcomes in civic discourse is compounded by another important factor. Public policy cannot and should not try to make people listen and learn. The First Amendment properly leans heavily against dictating the content that is made available. Therefore, we cannot direct people as to what they say or restrict their options as to what they can listen to. As noted in the introduction, ensuring media structures that make voices more accessible is an indirect approach to promoting the goal of minimizing government intervention into content. As Baker puts it, "[S]tructural interventions" refer to rules that allocate (or create) authority or opportunities.[189]

We define the richness of civic discourse in empirical terms to include ownership diversity, viewpoint diversity, and institutional diversity.

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[188] Davis, Charles and Stephanie Craft, “New Media Synergy: Emergence of Institutional Conflict of Interest,” *Journal of Mass Media Ethics*, 15m 2000, pp. 222-223.

[189] Baker, Media Markets, p. 120.

Independent ownership of outlets is critical because outlets that are commonly owned are less likely to provide diverse points of view. Owners have a tendency to impose their preferences and biases on the media they control.[190] They may not do so all the time or on all issues, but at critical moments, when their interests are at stake, they are more likely to do so. Antagonism in viewpoints is fostered by independence of ownership.

The number of independently owned outlets is critical to civic discourse for a variety of reasons. Positive externalities flow from having a larger number of outlets. To the extent that media outlets are numerous they are also more accessible. In addition, independent ownership of outlets should be promoted because ownership influences media organizations' structure and content.[191] Simply put, ownership dictates viewpoint.

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[190] Baker, Democracy, p. 75, describes the loss of valuable content as the result of mergers as follows:

> The idea is, for example, that the merged entertainment company can benefit by presenting the same highly promoted fictional character in new mediums – in a theatre released movie, a television show, a book, a magazine excerpt, a musical CD based on the movie sound track, and especially in the case of children oriented media, as material representations or as characters in computer games. By clever placements, the enterprise can cross promote its various products – the broadcast news division or the magazine can do stories about the release of the enterprise's outstanding new movie or television show, or do in depth reports about the program's star characters, or about the Oscar or Academy award competitions, or other related matters of "great public concern." Or the combined local broadcast station and newspaper can share reporters, thereby reducing the outlays necessary to report on local affairs, or can at least require its reporting staffs to cooperate, thereby reducing the cost of each entity doing the reporting from scratch.
>
> Profitable, however, does not mean in the public interest. Often these "synergies" or efficiency "gains" occur by creating market-dominating media goods that, although profitable for the firm, may provide less value to the public than would the media goods they drive out of existence. In other cases, these synergies result from eliminating alternative pre-merger productive activities that provided significant positive externalities.

[191] Baker, Democracy, p. 85,

To the extent that independently owned outlets are numerous, they are more likely to be local, but that is not uniformly so. A large number of nationally owned, independent outlets would not automatically ensure that local points of view will be reflected in the media. The Internet appears to be creating greater availability of national and international information, but not local information.

Institutional diversity reflects the special expertise and culture of certain media, such as the newspaper tradition of in-depth investigative journalism. Institutional diversity is grounded in both the watchdog and experience externalities.[192] The quality of investigative reporting and the accessibility of different types of institutions to leaders and the public are promoted by institutional diversity. Institutional diversity is often reflected in ownership and viewpoint diversity; institutional diversity involves different structures of media presentation (different business models, journalistic culture and tradition) and these institutions often involve different independent owner and viewpoints across media. To promote institutional diversity, like other forms of diversity, the institutions must be independently owned, yet even in independently owned conglomerates, the journalistic ethic will be overwhelmed.

To perform these, different societal subgroups need their own media. Admittedly, these subgroups (or their members) may not *necessarily* need to own or control their own independent media. Avenues of regular and effective media access might suffice. Still, much greater confidence that the media will serve the democratic needs of these groups would be justified if ownership or control was so distributed.

[192] Baker, Democracy, p. 87,

This plurality of media structures may provide security in that neither corruption that comes from government nor corruption that comes from the market is likely to be equally powerful within or equally damaging to all the organizational forms. For this reason, such a plurality of organizational structures will likely advance the media's checking function. Moreover, this diversity of media structures is likely to enable the media to better perform its multiple democratic assignments.

These three aspects of diversity in civic discourse sharpen our conclusion that variety does not constitute diversity. As we demonstrate, the empirical evidence indicates that gains in variety do not compensate for losses in diversity. The media's tendency to underserve minority and atypical groups in addition to the ownership influence over institutional configurations and content demonstrate why the claim that concentration in media market enhances diversity is wrong, or at best irrelevant. The presumed ability of larger firms to provide a little more variety by covering a new "beat" or offering a hybrid format[193] pales in comparison to the much larger loss of diversity and antagonism when media voices merge.

D. CONCLUSION

In Part I we have outlined the legal, analytical and empirical basis for policies that promote the bold aspiration for the First Amendment that has been a cornerstone of democratic discourse in the U.S. for over two centuries. The remainder of the analysis draws a map of the contemporary commercial mass media, demonstrating that relaxation of structural policies is not in the public interest, as defined by the bold aspiration for the First Amendment.

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[193] Steven Berry and Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting* (National Bureau of Economic Research, 1999); Lisa George, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets* (unpublished manuscript, University of Michigan, 2001). The Stevens and Waldfogel analysis shows that radio market suffered a much larger loss of owners than they gained in formats and the gain in formats were hybrids (close to existing formats). There was no increase in listening. Similarly, the loss of owners exceeds the gain in variety in the newspaper markets with a very small increase in circulation. The variety gains in the newspaper study appear to have been limited to the largest, least concentrated markets.

PART II: THE MASS MEDIA MARKET STRUCTURE

V. MAPPING THE TERRAIN OF MASS MEDIA MARKETS

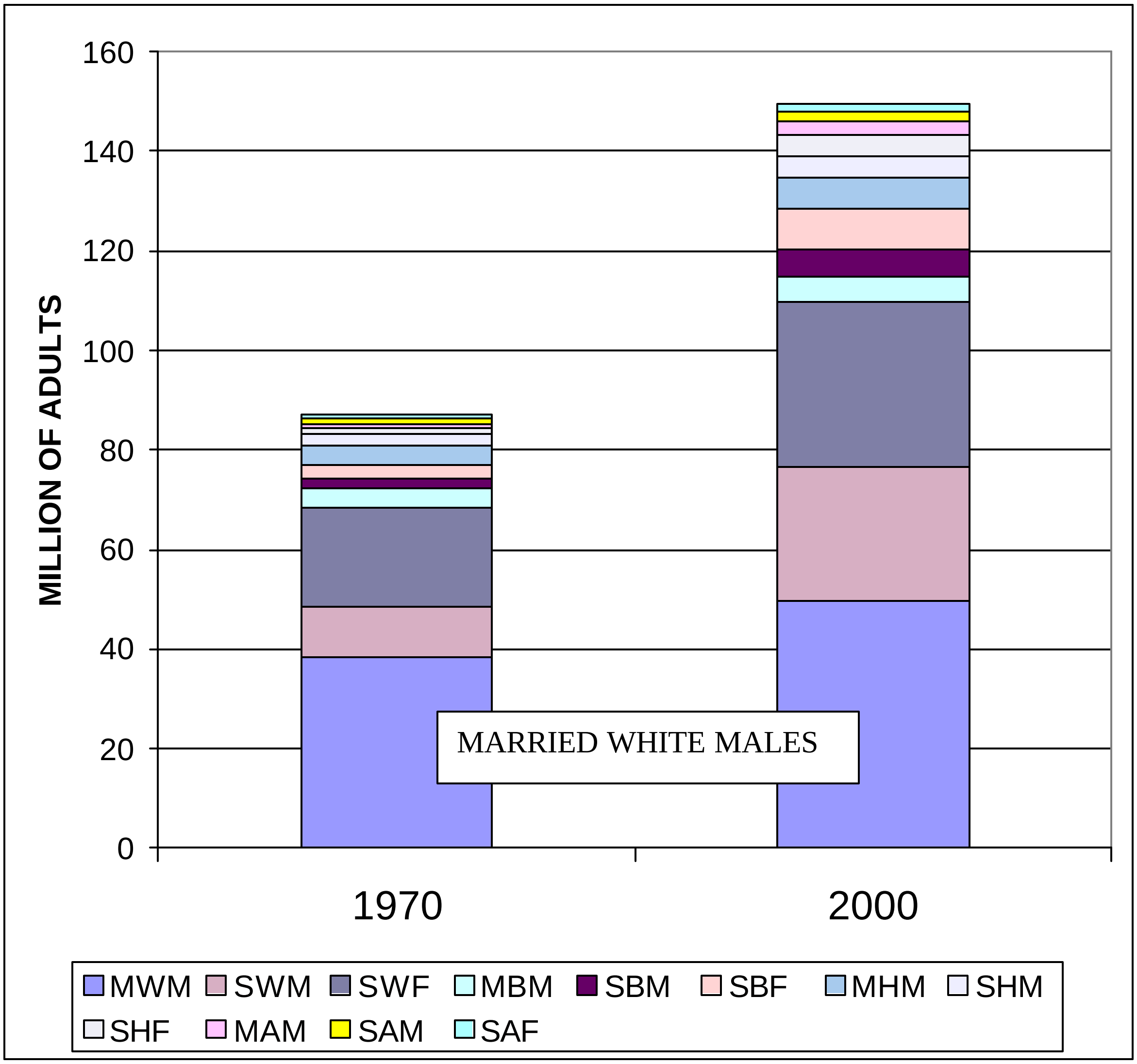
A. AN INCREASINGLY DIVERSE POPULATION IN AN INCREASING INTERCONNECTED WORLD

Before we examine the ownership and use of the mass media, we should first briefly consider the population that it serves. As noted in the introduction, it is difficult to know when there are enough firms to ensure a vigorously competitive market, even when only commercial commodities are at issue. When ideas and truth are being weighed in the forum for democratic discourse, the problem becomes even more complex. Nevertheless, the broad parameters of change in American society over the past three decades are so profound that we can safely conclude that a much more diverse set of media is needed to disseminate information. We focus on the past three decades because many of the rules governing the structure of media ownership were adopted in the early 1970s.

For the purposes of this analysis, we start from the household as the consumption unit. TV markets are defined in terms of households. The bulwark of newspaper distribution is home delivery.

The number of households has increased by 67 percent in the past two decades. This is twice as fast as the increase in the population (see Exhibit V-1). This reflects a dramatic change in the constitution of households units. The number of married families has declined, while single parent households have increased sharply. At the same time, there has been a dramatic change in the racial and ethnic make-up of the population. The share of Hispanics and Asian/Pacific Islanders has doubled. Combining these two trends produces a stunning increase in the diversity of the population.

EXHIBIT V-1: THE TYPICAL HOUSEHOLD HAS CHANGED DRAMATICALLY



Sources: U.S. Bureau of the Census, *Statistical Abstract of the United States: 2001* (U.S. Department of Commerce, 2001), Table 50. *Statistical Abstract of the United States: 1986*, p. 35. Hispanic and Asian household make-up is held constant between 1970 and 1980.

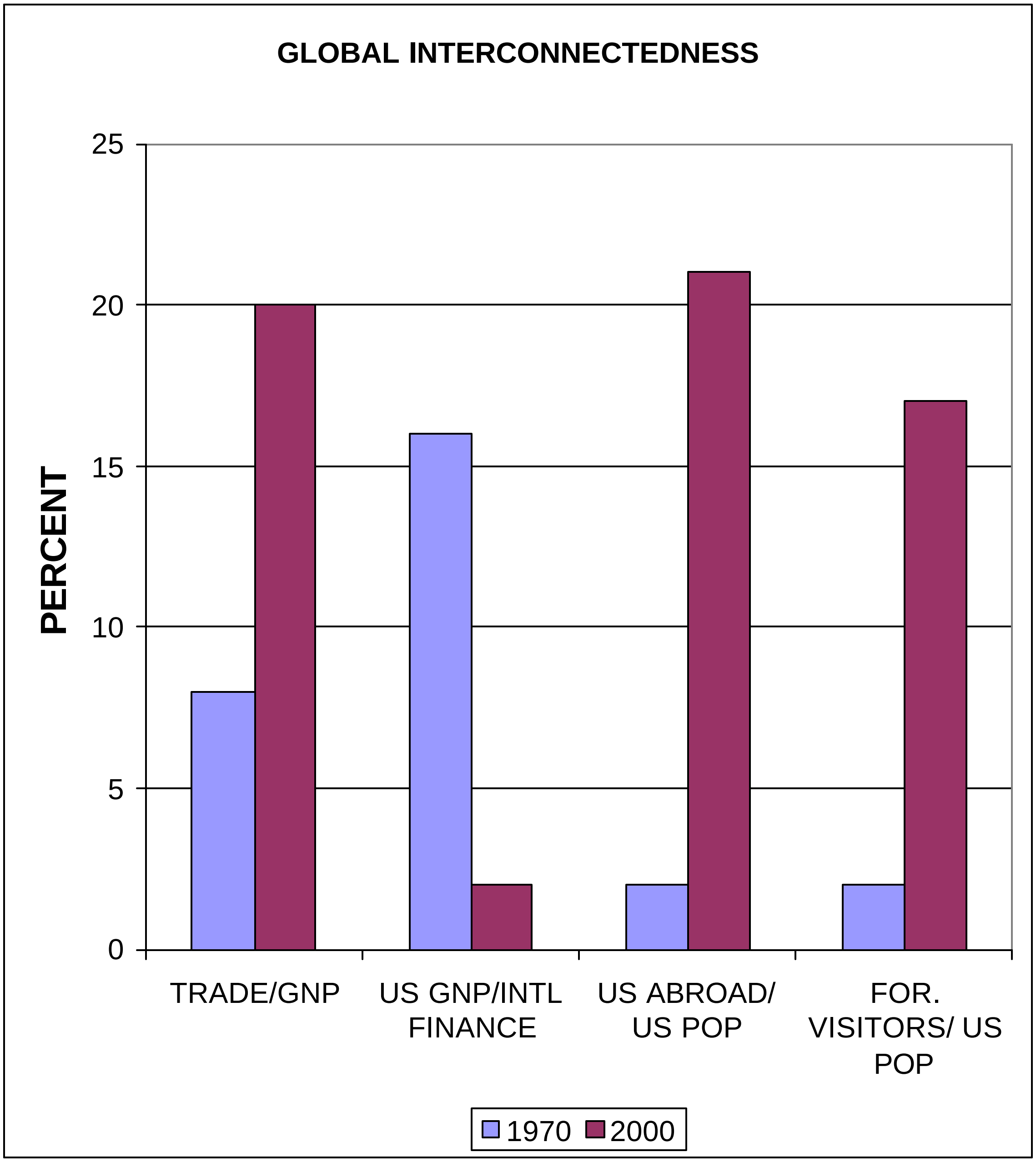
While the population has become increasingly diverse, it has been drawn more tightly into a more complex world (see Exhibit V-2). In 1970, exports and imports equaled about eight percent of gross national product. In 2000, the figure was twenty percent. Global financial markets, in which the U.S. is the leading actor, have grown dramatically. In 1970, the goods and services produced by the U. S. economy equaled about fifteen percent of global financial transactions. By 2000, they equaled only two percent.

The most dramatic changes can be seen in the movement of people. In 1970, the number of American who traveled abroad equaled two percent of the population. By 2000, that number had grown tenfold to equal twenty percent of the population. Similarly, foreigners traveling to the U.S. equaled two percent of the population in 1970. By 2000 it had increased to a number equal to sixteen percent of the population. Foreign born, non-citizens resident in the U.S. equaled five percent of the population in 1970. Today they equal ten percent and their racial and ethnic make-up has changed dramatically. In 1970 they were predominantly Europeans. Today they are predominantly Hispanics and Asians.

B. CIVIC DISCOURSE

The first step in evaluating the status of the mass media and the impact that a radical change in the rules of media ownership is likely to have is to understand how media are used. We find very clear evidence that different types of media serve different markets. This is particularly important for the two dominant media for news and information, print and broadcast TV. While the advocates of convergence equate all media, the reality is that these are distinct products oriented toward different geographic markets in both the commercial.

EXHIBIT V-2: THE U.S. HAS BECOME DEEPLY EMBEDDED IN THE WORLD ECONOMY



Source: U.S. Bureau of the Census, *Statistical Abstract of the United States: 2001* (U.S. Department of Commerce, 2001), Table 1, 647, 1258, 1259, 1297; Statistical *Abstract of the United States: 1986,* p. 406, 407.

marketplace and the forum for democratic discourse.[194] The dramatic change[195] and increase in intermedia competition[196] that the advocates of eliminating restrictions on ownership hypothesize simply does not exist, either as a matter of simple economics or as a matter of diversity in civic discourse.

People use different media in different ways to meet different needs. They spend vastly different amounts of time in different media environments, consume services under different circumstances and pay for them in different ways. In economic terms, these are separate markets with weak substitution effects. They have different content offered by different means and they differ widely in their impact and effect. The various media are based on different business models and address different advertising markets. As a result, competition between the media is muted in the marketplace and the specialization of each is worth preserving because of the unique functions provided in the forum for democratic discourse.

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[194] Allan Brown, "Public Service Broadcasting in Four Countries: Overview," *The Journal of Media Economics*, 9, 1996; Patricia Moy and Dietram A. Scheufele, "Media Effects on Political and Social Trust," *Journalism and Mass Communications Quarterly*, 77, 2000, pp. 746…751,

> The general trend of effects is one in which reliance on television news leads to lower levels of trust in government, while newspaper reading results in higher levels of trust…
>
> While the mass media have been blamed for diminishing levels of trust among the citizenry, we have shown that it is crucial to distinguish not only between types of media, but also between types of trust. Our analysis shows that use of different types of media has different effects on political and social trust.

[195] *In the Matter of Cross Ownership of Broadcast Stations and Newspaper; Newspaper/Radio Cross-Ownership Waiver Policy* (MM Docket Nos. 01-235, 96-197) (hereafter, Newspaper Notice), p. 5.

[196] Newspaper Notice, pp. 6-9.

Once it is recognized that these are distinct products servicing different markets, the growing concentration within each of the media market segments becomes a source of concern. Each of the market segments is becoming dominated by a small number of large, vertically integrated corporations that pursue profit maximization at the expense of professionalism in journalism and public interest programming. Economies of scale create barriers to entry, particularly in the provision of network facilities. Inadequate rules of fair access have allowed vertically integrated companies to leverage their control over facilities into content markets.

As a result, potentially vigorous competition in content markets has been dampened by much weaker competition in distribution markets. These markets are adjacent to each other, and do not compete. To be sure, there is some competition or rivalry across media, but newspapers' classified advertising cash cow in no way resembles the high-priced pharmaceutical and auto advertising splashed across national television network primetime programming. These are separate markets that are not yet, and may not ever be, substitutes for one another.

The two dominant political media – daily newspapers and television – appear to play very different roles. TV, which is, by far, the dominant political advertising vehicle, has a special influence on political discourse, through its influence on political attitudes and behaviors, and its prominent place in election campaigns.

Television does not perform the same function as newspapers and radio. TV has come to dominate mass media in political discourse,[197] by influencing attitudes and behaviors,[198] especially in election campaigns. Television and radio have long been recognized as occupying different product spaces[199] although radio's role may be changing.[200] Generally, radio is seen as having less of an impact than television.[201] However, the difference between TV and radio may be in citizens' exposure to political advertising on TV, while radio talk

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[197] Alan B. Albarran and John W. Dimmick, "An Assessment of Utility and Competitive Superiority in the Video Entertainment Industries," *Journal of Media Economics*, 6, 1993; W. Lance Bennett and Regina G. Lawrence, "News Icons and the Mainstreaming of Social Change," *Journal of Communication*, 45, 1995; Douglas M. McLeod, "Communicating Deviance: The Effects of Television News Coverage of Social Protests," *Journal of Broadcasting & Electronic Media*, 39, 1995; John B. Dimmick, "The Theory of the Niche and Spending on Mass Media: The Case of the Video Revolution," *Journal of Media Economics*, 10, 1997; *Glenn G.* Sparks, Marianne Pellechia, and Chris Irvine, "Does Television News About UFOs Affect Viewers' UFO Beliefs?: An Experimental Investigation," *Communication Quarterly*, 46, 1998; Juliette H. Walma Van Der Molen, Tom H. A. Van Der Voort, "The Impact of Television, Print, and Audio on Children's Recall of the News," *Human Communication Research*, 26, 2001.

[198] Karin Gwinn Wilkins, "The Role of Media in Public Disengagement from Political Life," *Journal of Broadcasting & Electronic Media*, 44, 2000.

[199] Pere Clarke and Eric Fredin, "Newspapers, Television and Political Reasoning," *Public Opinion Quarterly*, Summer 1978; John P. Robinson and Mark R. Levy, "New Media Use and the Informed Public: A 1990s Update," *Journal of Communications*, Spring 1996.

[200] The role of radio talk shows is the new development. Thomas J. Johnson, Mahmoud A. M. Braima, and Jayanthi Sothirajah, "Doing the Traditional Media Sidestep: Comparing Effects of the Internet and Other Nontraditional Media with Traditional Media in the 1996 Presidential Campaign," *Journalism & Mass Communication Quarterly*, 76, 1999, find that nontraditional media do not have an impact on a variety of measures of knowledge and perceptions about the 1996 presidential campaign and to the extent they do, it was specifically radio talk shows, influencing views of Clinton negatively (see also Patricia Moy, Michael Pfau, and LeeAnn Kahlor, "Media Use and Public Confidence in Democratic Institutions," *Journal of Broadcasting & Electronic Media*, 43, 1999).

[201] D. Berkowitz and D. Pritchard, "Political Knowledge and Communication Resources," *Journalism Quarterly*, 66, 1989; S. H. Chaffee, X. Zhao and G. Leshner, "Political Knowledge and the Campaign Media of 1992," *Communications Research*, 21, 1994; D. Drew and D. Weaver, "Voter Learning in the 1988 Presidential Election: Did the Media Matter?" *Journalism Quarterly*, 68, 1991.

shows have a different impact.[202] Broadcast does not compete effectively with newspapers in the news function.[203]

The ascendance of television as a source of news is clear in transformation of usage patterns. Responses to question that asked where people get "most" of their news shows the ascendance of TV. By the late 1980s, radio had lost its role (see Exhibit V-3). Newspapers suffered a decline in the 1990s, but still are far ahead of radio and the Internet. TV is still the dominant source for "most" news. When asked more recently about the regular sources of news (as opposed to the place where the respondent gets most news), TV and newspapers still dominate, although the Internet has grown (see Exhibit V-4).

TV in general, and network TV in particular, has become the premier vehicle for political advertising. The differential impact of television advertising is clear.

> Clearly, television is a unique communications medium unlike any other, including print, radio, and traditional public address. Unlike most other media, television incorporates a significant nonverbal component, which not only serve to suppress the importance of content but also requires little deliberative message processing…

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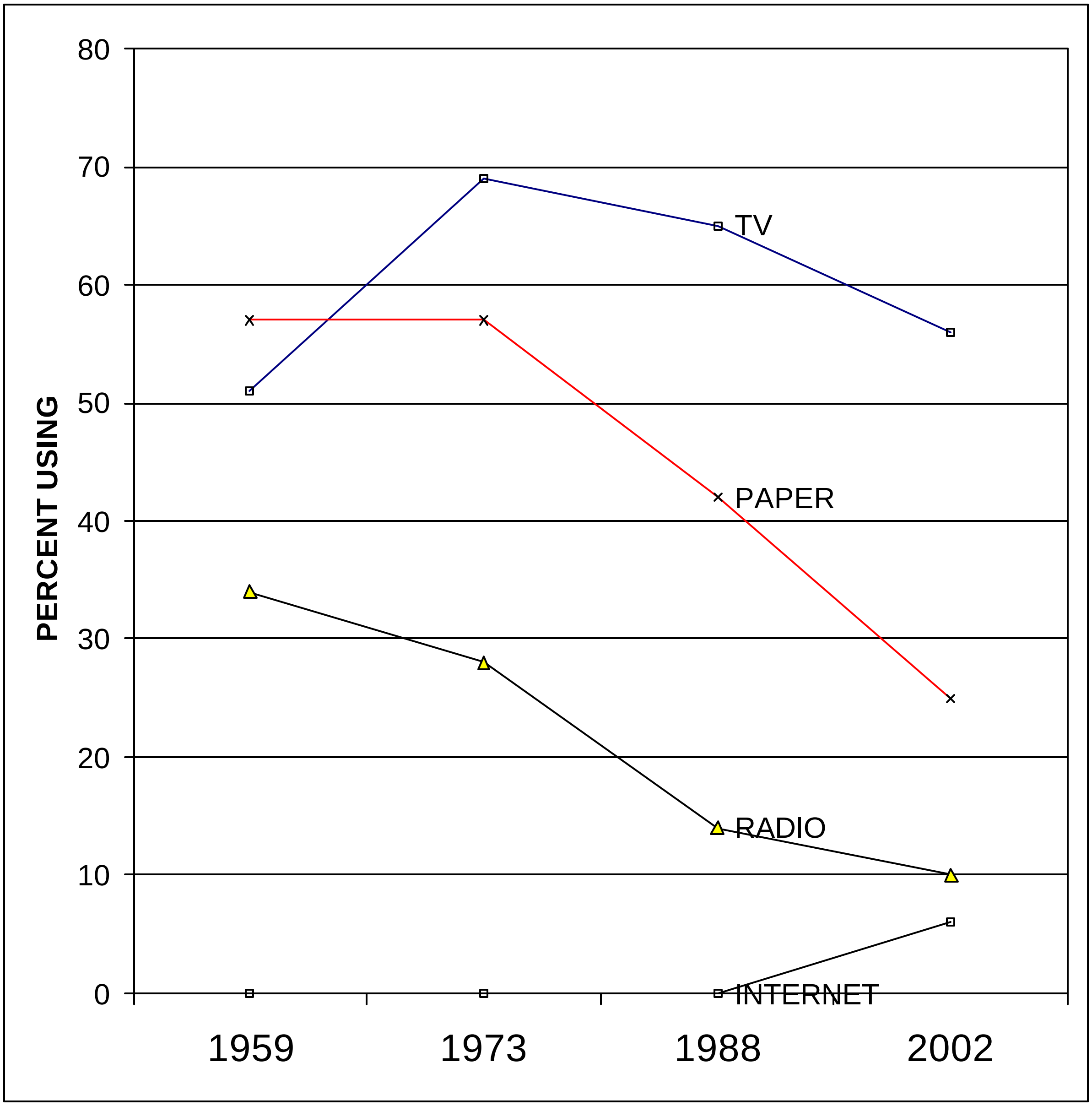
[202] Johnson, Braima and Sothirajah, 2000, juxtapose the earlier finding of a lack of influence for radio with more recent findings that radio talk shows have an impact. See also, Johnson, Braima and Sothirajah, 1999, and K. Stamm, M Johnson and B. Martin, "Differences Among Newspapers, Television and Radio in their Contribution to Knowledge of the Contract with America," *Journalism and Mass Communications Quarterly*, 74, 1997.

[203] Carl Sessions Stepp, *"Whatever Happened to Competition," American Journalism Review*, June 2001.

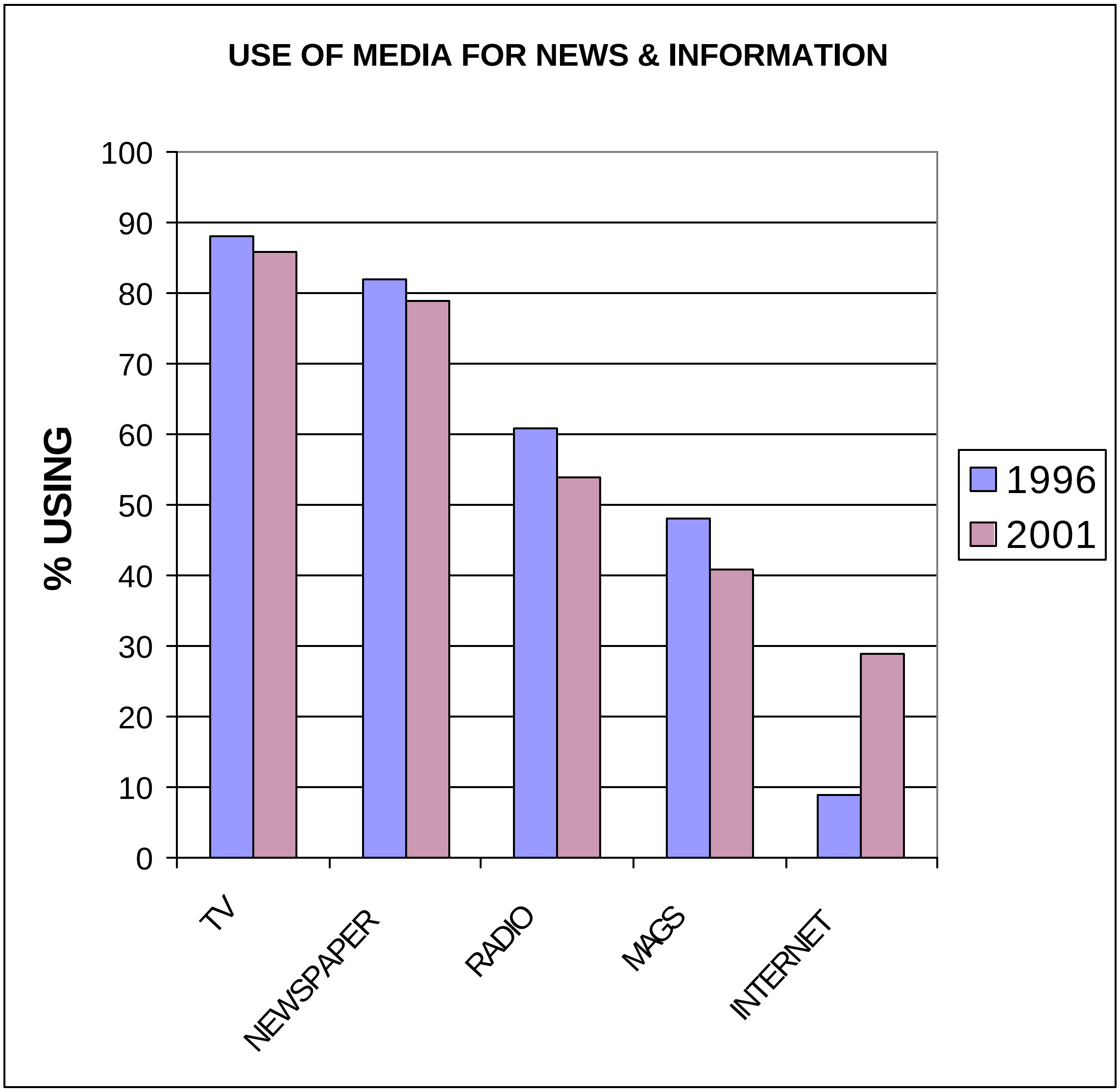
> Wasn't it television and radio that were going to kill newspapers? "I don't really consider them competition in that old-school way," stresses Florida Sun-Sentinel editor Earl Maucker. "They reach a different kind of audience with a different kind of news…"
>
> Publisher Gremillion, a former TV executive himself, seconds the point, "I don't believe people are watching TV as a substitute for reading the newspaper…"
>
> …Many newspapers are increasingly writing off local TV news as a serious threat, treating local stations instead as potential partners who can help spread the newspapers' brand name to new and bigger audiences.

EXHIBIT V-3: TV AND NEWSPAPERS ARE THE PREDOMINANT SOURCE OF NEWS AND INFORMATION: GET MOST NEWS



Source: Roper, *America's Watching: 30th Anniversary 1959-1989*; Nielsen, *Consumer Survey on Media Usage* (Federal Communications Commission, Media Ownership Working Group, September 2002).

EXHIBIT V-4: THE INTERNET HAS GROWN AS A SOURCE OF NEWS AND INFORMATION, BUT HAS NOT DISPLACED THE MAJOR MEDIA



Source: Roper Reports.

A number of empirical studies have concluded that reliance on information from television leads to less understanding of policy issues than newspapers. Studies also indicate that when people use television for political news, they emerge less informed than those of equal education and political interest who avoid the medium.[204]

Of paramount importance for civic discourse policy is the central role that the networks play in the dissemination of news. Television has been the primary source of news for over a decade. On average, each night between 20 and 25 million households tune in to the early evening flagship news shows on the three major networks. In contrast, the four major cable news networks capture about 3 million viewers over the course of their entire early evening/prime time news offering.

While broadcast TV has experienced a decline in news viewing, the primary cause is a shift from watching news over-the-air to watching the same outlets through-the-wire. Claims that Americans are turning away from TV to the Internet for news is not supported by the evidence.[205]

A Pew Research Center study makes this point (See Exhibit V-5). Between 1993 and 1999, when Internet use became widespread, viewing of network news and network news magazines declined. However, so has viewing of the major non-network (cable) shows like CNN and C-Span. Where did the viewers go? They went to the cable-based offerings of the

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[204] Jon R. Sinclair, “Reforming Television’s Role in American Political Campaigns: Rationale for the Elimination of Paid Political Advertisements,” *Communications and the Law*, March 1995.

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[205] *National Cable Horizontal Ownership Limits, Further Notice of Proposed Rulemaking,* CS Docket No.s 98-82, et al., Federal Communications Commission (hereafter, Notice), p. 8.

EXHIBIT V-5: WATCHING TV NEWS PROGRAMS

(Percent of Respondents)

	1993		1999	
	Sometimes or Regularly	Regularly	Sometimes or Regularly	Regularly
NATIONAL				
Network News	81	58	58	30
Network Magazine News	89	52	75	31
CNN	69	35	55	21
C-Span	36	11	21	4
FOX CABLE	na		45	17
CNBC	na		42	13
MSNBC	na		38	11
LOCAL				
Broadcast	83	77	80	56
Cable	na		51	29

Pew Research Center, “Internet Sapping Broadcast News Audience,” June 11, 2000.

network stations. In other words, while viewing may be shifting from over-the-air to through-the-wire, according to this data, it is actually becoming more concentrated in the major networks.

Newspapers provide a distinct role through broad, deep coverage and investigative reporting. They provide a different type of information service with different impact. They also provide a different news function than video or radio, with much longer and in-depth treatment of issues. In this they have adapted to a role that is distinct from television.[206] The news business itself reflects the partitioning in its awards… Pulitzer prizes have been added for criticism, features, and explanatory writing, because those are the aspects of news left for print excellence in television's wake… For while television editorializing can be intelligent and eloquent, and even promote political change, the star treatment accorded to television news personalities removes them from the civic discourse.[207] Newspapers devote greater attention to local news and provide a distinct role through broad, deep coverage and investigative reporting.[208] One area of great significance is local news reporting. Print journalists often assert an allegiance to their almost century-old creed:

> I believe in the profession of journalism. I believe that the public journal is a public trust; that all connected with it are, to the full measure of their

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[206] Michael Cornfield, "What is Historic About Television?", *Journal of Communications*, 21, 1994, pp. 110-111.

[207] Michael Cornfield, "What is Historic About Television?", Journal *of Communications*, 21, 1994, pp. 110-111.

[208] David C. Coulson, and Stephen Lacy, "Newspapers and Joint Operating Agreements," in *E. David Sloan and Emily Erickson Hoff, (eds.) Contemporary Media Issues (Northport: Vision Press, 1998) Stephen* Lacy, David C. Coulson, and Charles St. Cyr, "The Impact of Beat Competition on City Hall Coverage," *Journalism & Mass Communication Quarterly*, 76, 1999 .

> responsibility, trustees for the public; that acceptance of lesser service than the public service is a betrayal of this trust.[209]

The uniqueness of newspapers also stems from the fact that this is their primary function. All of the other mass media combine news and entertainment. Newspapers are predominantly a source of news and information and much less a source of entertainment (see Exhibit V-6). Of all the media, newspapers are uniquely focused on providing information. In contrast, TV, radio and the Internet combine entertainment and information.

It is important to note that viewership of local broadcast news has not dropped off, in spite of the growth of local cable news. Although this would appear to suggest some increase in institutional diversity of sources, the growth reflects a significant shift of viewing from over-the-air to through-the-wire. Local cable news, to the extent it exists, is a spin-off of existing broadcast offerings. There is virtually no local news originating on cable. Even the FCC admits that the Internet is not a source of local news.

The growth of news-oriented websites likewise might not be considered particularly significant, because many do not focus on local news and information, and those that do are often operated by existing local media, such as broadcast stations and newspapers.[210]

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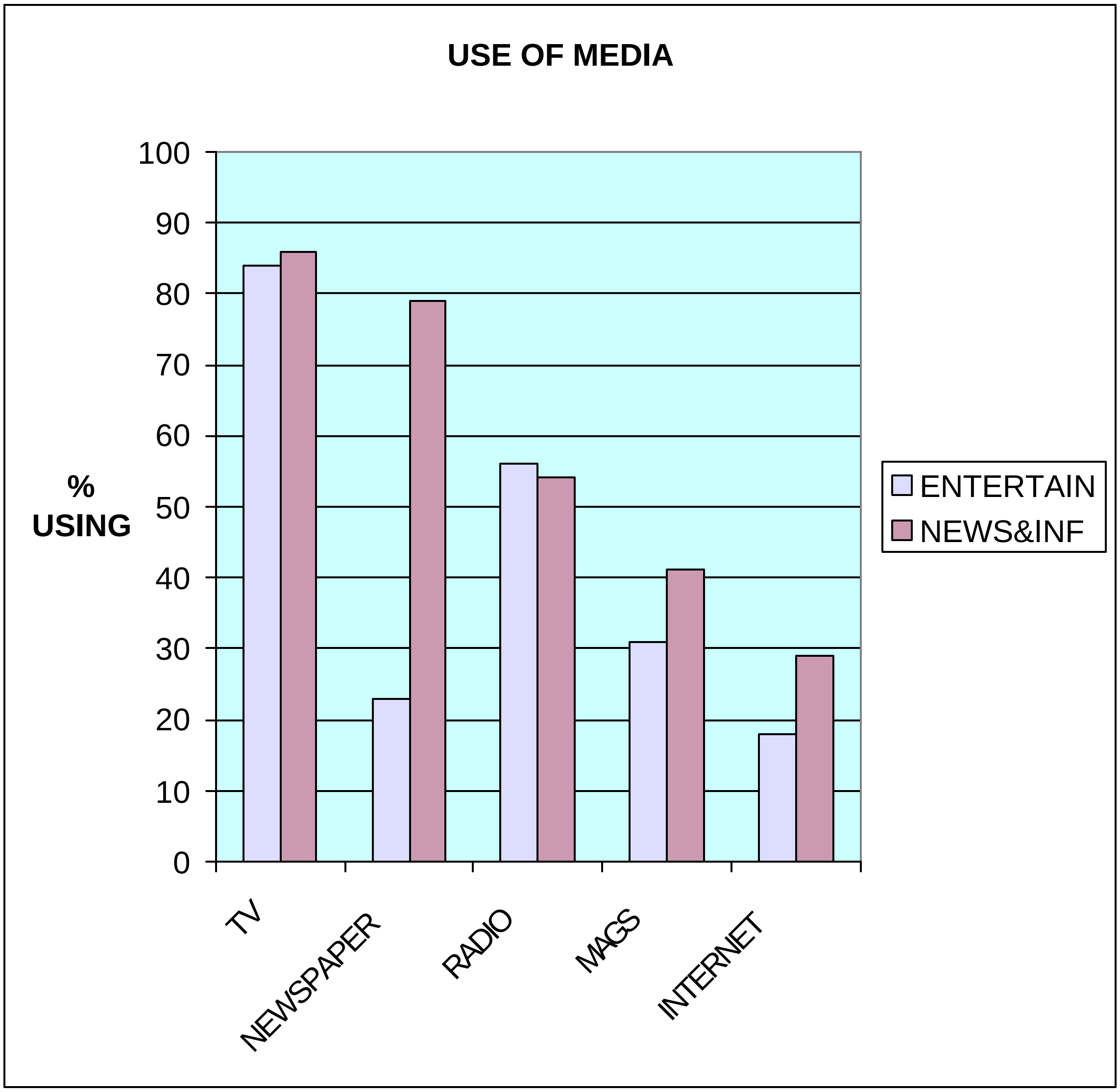
[209] Thomas Kunkel, and Gene Roberts, "The Age of Corporate Newspapering; Leaving Readers Behind," *American Journalism Review,* 2001 citing Walter Williams, *The Journalist's Creed* (1914).

[210] Notice, p. 9.

EXHIBIT V-6: NEWSPAPERS ARE UNIQUELY ORIENTED TOWARD NEWS GATHERING AND INFORMATION, NOT ENTERTAINMENT



Source: Roper Reports, 01-2, 2001, p. 159.

The use of online media has not substantially changed individual news sources. Exhibit V-7, constructed from Pew research, makes this clear. Of the three media, TV has lost the least viewership for regular attention. The emergence of use of online media to access news may have reduced radio and TV viewing somewhat, but not a great deal.

A recent study from the UCLA Center for Communications Policy reinforces this point.[211] Respondents report spending about four minutes per day gathering news online. They report about twenty-five minutes per day reading the newspaper. The Pew study shows the respondents spent over half an hour a day watching TV news and fifteen minutes a day listening to radio news. In other words, traditional media account for twenty times as much news gathering time as the Internet.

The survey, conducted in mid-2000, asked respondents whether they had ever heard of specific online news sources and whether the sources are believable. Respondents were much more familiar with the web sites of existing broadcast and newspaper firms and found them much more believable (as Exhibit V-8 shows). Many fewer respondents had never heard of the TV and major newspaper related sites.

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[211] *Surveying the Digital Future,* November 2001.

EXHIBIT V-7: SOURCES OF NEWS IN THE 1990S

(Percent of Respondents)

SOURCES OF NEWS

	1990/91	1998/99
REGULARLY		
TV News	80	75
Newspaper	71	63
Radio	56	46
YESTERDAY		
TV News	68	62
Newspaper	56	47
Radio	44	44
On-Line		21

Pew Research Center, “Internet Sapping Broadcast News Audience,” June 11, 2000.

EXHIBIT V-8: FAMILIARITY WITH ONLINE NEWS SOURCES

(Percent of Respondents)

	BELIEVE	NEVER HEARD OF
SLATE	2	68
SALON	3	65
ABOUT	10	55
ZDNET	12	56
GO	14	49
CNET	21	41
LYCOS	24	38
AOL	39	22
NETSCAPE	39	20
FOX	41	16
NYT	41	16
USATODAY	51	12
MSNBC	54	11
YAHOO	54	8
ABC	56	11
CBS	58	11
CNN	61	10

Pew Research Center, “Internet Sapping Broadcast News Audience,” June 11, 2000.

Post-September 11 surveys reaffirm this pattern (see Exhibit V-9).[212] TV is the primary source for breaking news – what is known in advertising as the announcement function. Radio plays a small role here. TV's dominant role persists in the follow-up function. Radio drops off in the follow-up, but newspapers take on a larger role. The Internet is there, but does not play a large role. We observe similar changes on a year-to-year basis. We would expect more interest in news and that is what we find in Exhibit V-9, which shows the net additions to newsgathering – subtracting people who said they are seeking more news minus people who said they are seeking less. Newspapers and TV show the largest increase, with the Internet surpassing radio slightly.

Perhaps the most decisive blow to the claim of an Internet revolution can be seen in the responses to questions about where people turned for their main sources of campaign news in presidential elections (see Exhibit V-10). TV still overwhelmingly dominates, followed by newspapers, radio and then the Internet. The number of respondents who cite TV and newspapers is over 13 times that of the Internet. This parallels the finding that respondents spend about 15 times as much time gathering news and information on TV and in the newspapers as they do on the Internet.

It should also be recalled that the online sites generally visited replicate offline sources. This is true with respect to the poll from which data on sources of news about the most recent presidential election were gathered (see Exhibit V-11). By far the most popular websites for political news were the sites of the major sources of TV news – CNN and the

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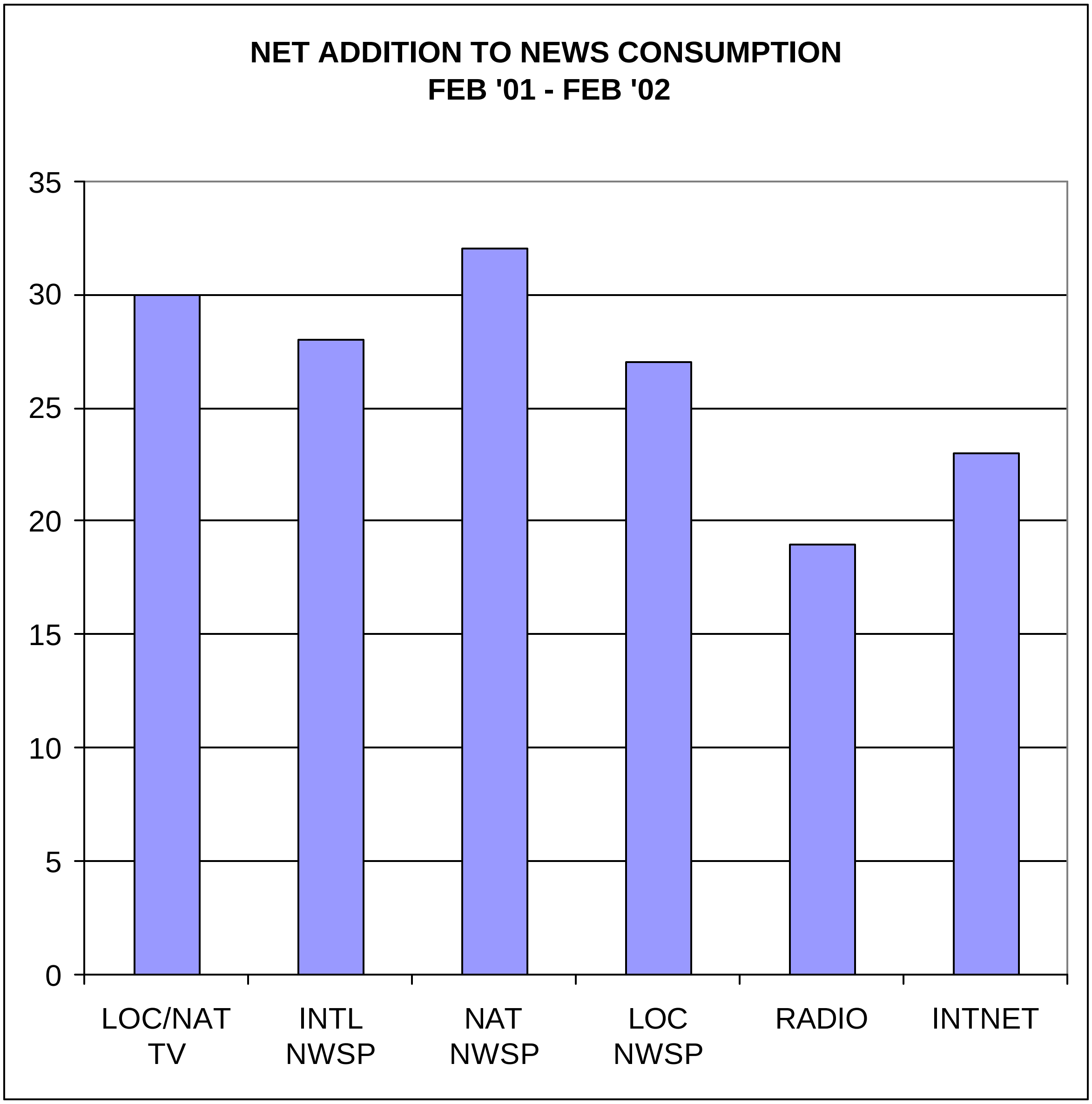
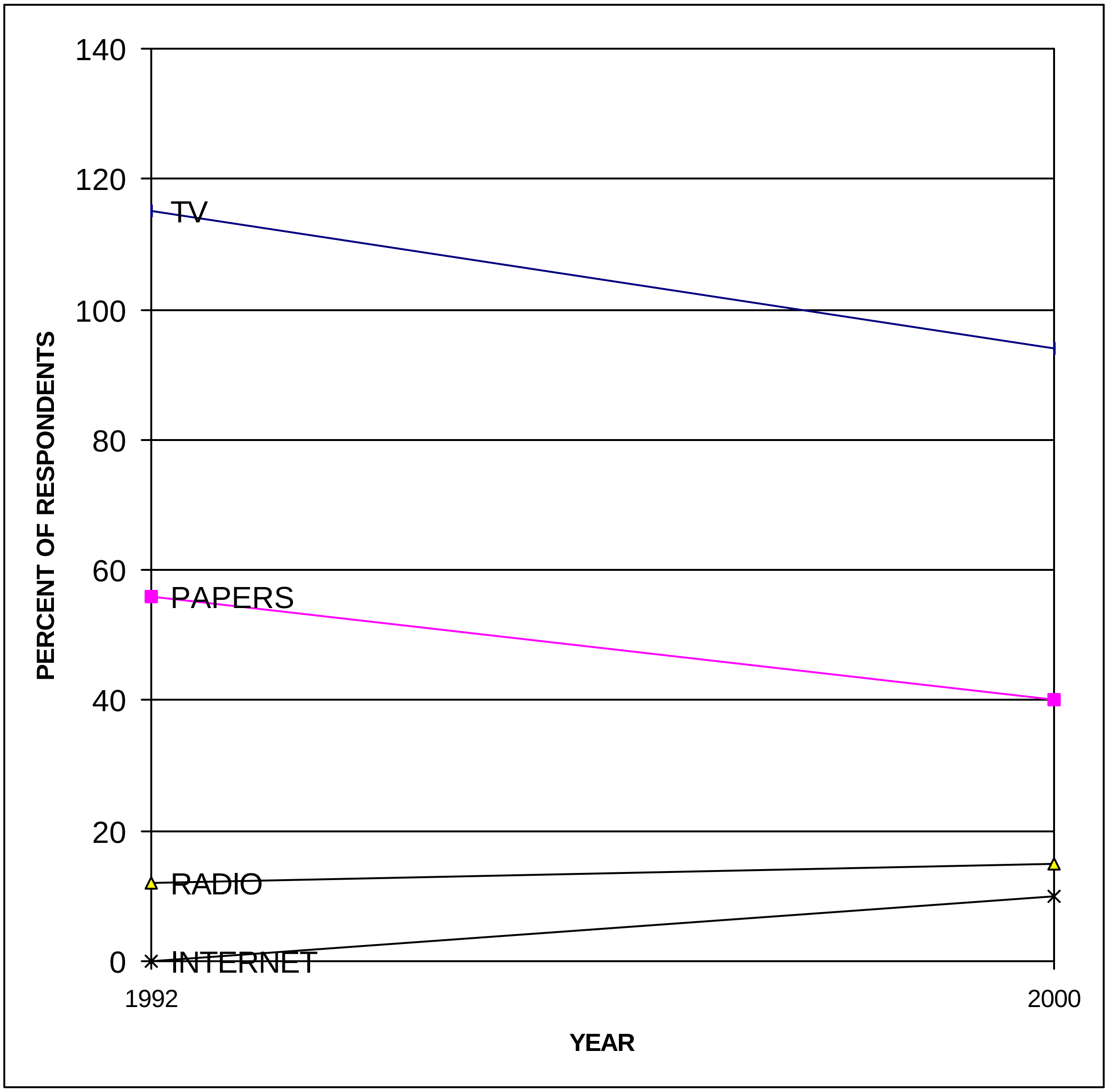
[212] Roper Reports, *Consuming More News and Believing It Less*, February 28, 2002.

EXHIBIT V-9: RECENT CHANGES REINFORCE TV AND NEWSPAPER DOMINANCE OF THE MEDIA, WITH THE INTERNET GROWING, WHILE RADIO LAGS BEHIND



Source: Roper Reports, *Consuming More News and Believing It Less*, February 28, 2002.

EXHIBIT V-10: MAIN SOURCE OF CAMPAIGN NEWS



Source: Pippa Norris, "Revolution, What Revolution? The Internet and U.S. Elections, 1992-2000," in Ellaine Ciulla Kamarch and Joseph S. Nye Jr. (eds.), *governance.com* (Washington, D.C.: Brookings, 2002).

EXHIBIT V-11: MOST POPULAR WEBSITES FOR POLITICAL NEWS 2000

WEBSITE	
CNN. COM	59
MSNBC.COM	52
NETWORK TELEVISION (CBS, NBC, ABC)	45
NATIONAL NEWSPAPER WEBSITE	33
LOCAL COMMUNITY WEBSITE	29
HOUSE, SENATE, WHITE HOUSE WEBSITE	16
C-SPAN	15
PBS ONLINE	10
ONLINE MAGAZINE (e.g. *Salon, Slate*)	7

Source: Pippa Norris, "Revolution, What Revolution? The Internet and U.S. Elections, 1992-2000," in Ellaine Ciulla Kamarch and Joseph S. Nye Jr. (eds.), *governance.com* (Washington, D.C.: Brookings, 2002).

three major networks. The article from which these observations are drawn is aptly titled "Revolution, What Revolution? The Internet and U.S. Elections, 1992-2000."[213] The Internet may be creating a revolution in economic organization and interpersonal communications, but it has not yet significantly altered the terrain of the mass media and their influence on civic discourse.

C. THE COMMERCIAL MASS MEDIA PRODUCT SPACE

Although the central concern with media ownership as it affects civic discourse must focus on news and information, the commercial context in which the production of news and information are embedded cannot be ignored. As suggested earlier, those commercial influences impinge on the ability and commitment to gather and disseminate news and information. This review of the commercial mass media product space shows that the fundamental characteristics of the media market that led us to conclude that there is a serious market failure from the point of view of civic discourse are still operative. Mass media revenues are still dominated by advertising. TV dominates the national advertising market. Newspapers and radio still dominate the local advertising market. Substitutability between media remains low.

1. Television

TV still dominates the media landscape (see Exhibit V-12). The average American household watches about 1500 hours per person per year, which has been unchanged for over a decade. This is about 50 percent more than radio listening, ten times the amount of time spent reading a newspaper, and 15 times the amount of time spent on the Internet. TV networks still dominate the most valuable viewing time – prime time – and capture the

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[213] Norris, 2002.

EXHIBIT V-12: MEDIA MARKET DATA

UTILIZATION	1985	1995	2000p
PERCENT OF HOUSEHOLDS WITH			
Broadcast	85	93	98
Cable/Satellite	43	63	84
Radio	99	99	99
Newspaper	63	60	56
Internet	0	0	45
UTILIZATION (% of Adults Reporting Use)			
Broadcast	92	93	94
Cable/Satellite	48	60	71
Radio	85	86	84
Newspaper	85	84	79
Internet	0	0	45
HOURS PER ADULT (per year)			
Broadcast	1320	1082	873
Cable	210	537	622
Radio	1200	1082	980
Newspaper	185	170	152
Internet	0	2	93
ADULT POP. (Million)	175	191	196
DISPOSABLE INCOME			
Nominal	3263	5423	7363
Real, 1996$	4348	5539	6719

Source: U.S. Census Bureau, *Statistical Abstract of the United States: 2000* (U.S. Department of Commerce, 2000), Tables 17, 722, 909, 910, 911, 931, 932, 937, *Statistical Abstract 2001*, Tables 1125, 1126 and various equivalent tables in earlier editions.

lion's share of national advertising dollars. While there has been an increase in non-primetime cable TV viewing, the big three networks are still "primetime programming juggernauts."[214] The addition of four new broadcast networks that provide little news and public interest programming has not altered the fact that the big three networks still account for the overwhelming majority of high impact news and information shows – 80 or 90 percent.

Network broadcast TV is predominantly national, accounting for 60 percent of national advertising revenues; newspapers are local, accounting for 60 percent of local advertising revenues (see Exhibit V-13). There has been little change in advertising market shares. In 1985, slightly less than one-third of all advertising dollars spent on these media was spent on broadcast. In 2000, broadcast accounted for a little more than one-third of all advertising dollars. In 1985, just over one-half of all advertising dollars was spent on newspapers; in 2000, newspapers accounted for just under one-half. In 1985, radio accounted for one-seventh of advertising; the same was true in 2000.

Network advertising revenue growth has far outstripped population growth or any change in viewing habits. Advertising revenue has grown about 117 percent as compared to adult population/audience, which has grown by about 14 percent, and the total market (measured by total household income), which has grown by about 65 percent. Based on these entertainment/information media, broadcast's share of the total advertising pie has increased from 31 percent to 36 percent since 1985.

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[214] This is how CEO Sumner Redstone is reported to have referred to Viacom/CBS, *Communications Daily*, December 5, 2000 cited in Network Affiliated Stations Alliance, *Petition for Inquiry Into Network Practices*, March 8, 2001 (hereafter NASA, Petition).

EXHIBIT V-13: ADVERTISING DATA

ADVERTISING (Billion $, nominal)

	1985	1993	1998	2000p
Broadcast	14.6	28	39	44
Cable	0.7	4	8	12
Radio	6.5	9	15	20
Newspaper	25.2	32	44	49
Internet	0	0	1	3
Total	47	73	108	128

DISTRIBUTION OF NATIONAL AND LOCAL ADVERTISING BY MEDIA TYPES

	DISTRIBUTION **WITHIN** MEDIA TYPES PERCENT OF MEDIA ADVERTISING			% OF TOTAL REVENUE FROM NATIONAL ADVERTISING	DISTRIBUTION OF ADVERTISING **ACROSS** MEDIA TYPES			
					LOCAL		NATIONAL	
	LOCAL	NTL	TOT		$	%	$	%
NEWSPAPERS	86	14	100	6	42	57	7	14
RADIO	75	25	100	23	15	20	5	10
CABLE	25	75	100	25	3	4	9	18
BROADCAST	32	68	100	68	14	19	30	59
TOTAL	59	41	100		74	100	51	100

Source: U.S. Census Bureau, *Statistical Abstract of the United States: 2001* (U.S. Department of Commerce, 2000), Tables 1125, 1126, 1271.

TV networks are in a different class than the other media in terms of advertising dollars. Broadcast remains in a different category than cable. Cable TV has only captured a limited amount of prime time viewing, but has captured significant numbers of viewers during non-primetime hours. This is the primary reason that cable's average advertising rates remain low in comparison to broadcast.[215]

TV ratings and audience market shares show that the networks dominate prime time. The top 20 or so TV shows are all prime time network programs.[216] They fill about three quarters of the weekly prime time viewing hours (8 pm to 11 pm). The top 20 shows capture between 150 and 225 million household hours of viewing per week. Almost all of these shows are original network programs. A small number of households, 10 to 20 million, might be viewing a network movie. Cable's top products are quite different. Of the top twenty cable network shows, about half are in prime time. They capture 20 to 40 million household hours. About half are rerun movies, not original programming.

Combining news and all of primetime, which is the networks' bread and butter, the big three networks capture about half a billion household hours of weekly viewing, including of course the dominant news shows. The top three cable networks capture about one-fifth of that and provide virtually no news or public affairs programming.

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[215] David Waterman and Michael Zhaoxu Yan, "Cable Advertising and the Future of Basic Cable Networking," *Journal of Electronic Media and Broadcasting,* Fall 1999; Survey evidence indicates that advertisers think cable and broadcast are "substitutes" for each other, but the market shares do not (see Leonard N. Reid and Karen Whitehill King, "A Demand-Side View of Media Substitutability in National Advertising: A Study of Advertiser Opinions about Traditional Media Options," *Journalism & Mass Communication Quarterly,* 77, 2000.

[216] The following discussion is based on Nielson ratings from Spring 2001.

Network TV is primarily a nationally-oriented medium. TV networks dominate the national video product space with original prime time programming. Nevertheless, local advertising revenues and local stations play an important role in the TV market. The tension within the traditional broadcast industry has been fueled by the conflict of economic interests between local stations and national networks. This tension bears directly on the provision of local content, one of the most prominent aspects of policy in electronic media.[217]

2. Newspapers and Radio

Newspapers serve local markets. They capture a very different type of advertising dollar than TV. National advertising accounts for a modest share of radio and newspaper revenues. Newspapers dominate the local advertising market with classified ads comprising the majority of newspapers' revenues.[218] Radio, newspapers, and magazines are substitutes from an advertiser's perspective. There is some evidence that cable and newspapers are cross elastic, which reflects the fact that they are both local. Radio and newspapers occupy the non-video local product space.[219] The stability of their market shares indicates that they are not likely to be greatly eroded by new media in the near term.[220]

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[217] NASA, Petition.

[218] Reid and King.

[219] John Busterna, "The Cross Elasticity of Demand for National Newspaper Advertising," *Journalism Quarterly*, 64, 1987; Mary Alice Sentman, "When the Newspaper Closes," *Journalism Quarterly*, 63, 1986.

[220] Glen J. Nowak, Glen T. Cameron, and Dean M. Krugman, "How Local Advertisers Choose and Use Advertising Media," *Journal of Advertising Research,* Nov/Dec 1993, find that targeting is the critical factor for local advertising. When interactive video media develop an effective targeting approach, an issue that is receiving significant attention, it could infringe more on the local revenue stream of radio and newspapers. The failure of the Internet to develop that local focus may account for the slow growth of advertising revenue garnered by that medium.

Newspapers and local TV stations have a complex relationship in the advertising market. Newspapers dominate classified advertising. Local TV stations dominate advertising for local political campaigns. For certain types of products they have a complementary relationship, with newspapers providing much more detailed product promotion (particularly price). The differences between the media types (newspaper and TV) in newsgathering and analysis discussed generally in the previous section apply to the local market.[221] Thus, in the important area of civic discourse they do not compete and in a significant part of their commercial activities they do not compete.

Radio has fallen into a special niche – it serves as background for people as they engage in other activities such as working or driving.[222] This specific function of the radio may derive from the different demands it places on the listener.[223] In this niche, radio is not a primary source of news. Radio is the least often cited of the sources of information among the three traditional media.[224]

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[221] Andrew J. Schwartzman and Andrew Blau, *What's Local About Local Broadcasting* (Media Access Project and the Benton Foundation, 1998), found virtually no local public affairs programming and what little there was aired at times that it was not likely to attract much of an audience.

[222] Thomas J. Johnson, Mahmoud A. M. Braima, Jayanthi Sothirajah, "Measure for Measure: The Relationship Between Different Broadcast Types, Formats, Measures and Political Behaviors and Cognitions," *Journal of Broadcasting & Electronic Media,* 44, 2000, p. 45; see also Chaffee and Frank.

[223] Stempell, Hargrove and Bernt, pp. 77, point out that the different demand may enable radio to continue its role even as the new media expand.

> Information seekers can listen to the radio while they are using the Internet. Obviously, they are not going to be paying full attention to both, but one involves seeing and the other involves listening, so both can be used at the same time.

[224] The Pew Research Center reports that fewer than half of all respondents to a mid-2000 survey listened to the radio for news regularly compared to two-thirds who read a newspaper and three-quarters who watched TV.

3. Multichannel Video

Cable systems operators are the local distribution system for cable, franchised at the local level, although federal preemption has scaled back the role of local franchising authorities. Lately there has been a strong trend to regionalizing the local cable companies so that contiguous areas are joined under one company.[225] Cable provides local distribution of video content, primarily capturing non-prime time viewing. While total hours watching TV have been almost constant over the past fifteen years, cable's share has grown from 14 percent to almost 50 percent.

The large national cable networks built up over the past couple of decades have been created by buying up small Multiple System Operators (MSOs). There has also been a strong trend toward vertical integration into programming, primarily by purchasing libraries of programs and sports entertainment. Cable has become a local distribution mechanism for national programming.

In contrast to network TV, which is funded entirely by advertising, cable is funded primarily by subscription revenues, although national advertising revenues have been growing. Local advertising still plays a small role in cable and cable plays a small role in the local advertising market. Newspapers take in 13 times as much local advertising revenue and radio four times as much as cable.

Satellite occupies a much narrower product space than cable. It is a high-cost, niche distribution system. Given its cost characteristics, it does not compete with basic cable. Given that satellite still lacks robust local programming and original prime time programming, it is not yet a substitute for network TV or cable. During the decade of the 1990s, satellite filled out its niche. It now has about 18 million subscribers, compared to cable's almost 70 million. The large channel capacity of Direct Broadcast Satellite (DBS) and high front-end costs dictate the packaging of large numbers of high priced channels and/or long-term contracts. As a result, DBS is a small competitive fringe that is not capable of disciplining cable TV pricing.[226] DBS still costs more than basic cable does, not including the front-end system costs, which undermines its ability to compete on price.[227] Cable makes much more money by increasing prices for basic cable than by trying to compete in the DBS niche.

4. The Internet

In 1985, the Internet was just beginning its commercial phase, accounting for virtually no viewing time or advertising revenue. Fifteen years later, it accounts for only four percent of total viewer time and less than two percent of advertising dollars.

The Internet revolution has provided a wonderful new functionality that allows people to conduct commercial transactions and daily activities in a more efficient manner, but has not yet significantly altered the dynamics of mass media. It provides little if any local content. It

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[225] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*. CS Docket No. 00-132, January 2001 (hereafter, FCC, Seventh Annual Report).

[226] Alicia Mundy, "The Price of Freedom," *MediaWeek*, March 29, 1999, p. 32.

[227] Federal Communications Commission, *Pricing Analysis,* February 2001, did find a weak subscriber effect. Even though satellite is not cross elastic on price, larger satellite subscribership does have a small effect in taking subscribers away from cable. There is also evidence that satellite is much more effective where cable quality is weak. Neither of these observations is inconsistent with our argument that satellite is not sufficiently competitive to discipline cable pricing.

appears to occupy a new media space.[228] It provides a national, non-video product.[229] It does not provide independent voices or balance the immense power of traditional mass media to influence public opinion, particularly when public policy has allowed existing media owners to increasingly control the communications infrastructure underlying the Internet and to direct the flow of information on the Internet.

The Internet is starting to look a lot more like cable than broadcast in its revenue model. For example, AOL's bundling is like cable's bundling, adding more and more features that glue in different segments of the market. AOL makes much more in subscription revenue than the entire Internet generates in advertising revenue.[230] This is somewhat greater than the proportion of subscription to advertising on cable.[231]

In this subscription model people pop on and off to meet their short, narrowcast needs, but are not glued to the tube and do not generate a great deal of advertising (or, for the

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[228] Stempell, Hargrove and Bernt, p. 75 present the results of a unique longitudinal study that allowed for careful elaboration of research findings. They emphatically reject the notion that the Internet is stealing attention from other media.

> Our finding seem consistent with the speculation from many quarters that the Internet has taken people away form other media. However, [it] tells a different story. Almost exactly half of our sample indicated they are using the Internet at least once a week, so we compared use of other media by those who use the Internet and those who do not. Users and non-users of the Internet both used network TV news to about the same extent. Those who use the Internet were slightly less likely to use local TV news, but the difference was not statistically significant. Those who use the Internet were more likely than those who don't use it to be regular newspaper readers and regular radio news listeners. So the Internet is not stealing readers from newspapers or listeners from radio.

[229] It can be argued that before the advent of TV, radio occupied this product space (see Tankel and Williams).

[230] A low estimate of AOL subscription revenues is $8 billion. Internet Advertising revenue is estimated in the range of $1-2 billion.

moment, ancillary revenues). It is a personal productivity device particularly well-suited to information intensive users.[232] For the vast majority, it is a shopping mall at the fingertips of subscribers, enhancing daily activities. Internet traffic is made up of a few hours of online time per week, spread over a dozen sessions with a minute or so at any given page. The leading advertisers on the Internet are a completely different group than one sees on television.[233]

Given the current state of affairs in which the same few companies own monopoly delivery wires and cable TV stations and dominate high speed Internet, the prospects that the Internet will be a liberating, democratizing medium seem to be fading. Moreover, given the current state of the dot.bomb revolution, relying on the Internet to discipline powerful media giants is wishful thinking at best.

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[231] Wall Street analysts praised the merger on these grounds, see Consumers Union, et al., *In the Matter of Application of America Online Inc. and Time Warner, Inc., for Transfer of Control,* Federal Communications Commission, Docket No. CS-00-30, April 26, 2000.

[232] Stempel, Hargrove and Bernt, p. 78,

> Clearly an information seeking device helps explain the greater newspaper use by Internet users, and this information-seeking behavior may run two ways. Internet users may turn to their newspapers or newspaper readers may go to the Internet for more information on a given topic. Either is possible sequentially as a supplemental information-seeking behavior. What is at least not practical is going from either the Internet or the newspaper to TV news to seek additional information on a given topic. TV news is not organized in a way that makes this practical or even possible in many cases.

[233] This discussion is based on Nielson ratings for May and June 2001.

VI. MASS MEDIA NEWS SOURCES: COMPLEMENTS OR SUBSTITUTES

The evidence reviewed in the previous chapters indicates that there is little substitutability between the media in a news product space that is dominated by television and newspapers. During the course of the review of the media ownership rules, the Federal Communications Commission has invested an immense amount of energy into proving that there is substitutability between the media. This claim is critical to the entire deregulation argument, since it would allow the agency to claim that media markets broadly defined are not concentrated and that owners of media lack influence, since citizens can simply switch sources.

The FCC's effort to define media markets in this way has failed. Its own data show that there is, at best, only very little substitutability between the media, either for viewers as a source of information gathering[234] or advertisers as a source of information dissemination. [235] Both of the major studies of consumer substitution indicate that the mass media are more likely to be complements than substitutes. We observe this at the level of aggregate market data, with consumer usage data, and with consumer opinions about media usage.

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[234] Waldfogel, Joel, *Consumer Substitution Among Media* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002); Neilsen Media Research, *Consumer Survey on Media Usage* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002).

[235] The advertising studies lend little support to the claim of substitutability (see Brown Keith and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002); C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002).

The problem that the FCC analysis runs into is that in order for two products to be substitutes, we would expect to find that they are negatively correlated. The more a consumer uses one type of media, the less they would use other types. In fact, the FCC data shows the opposite. The more people use one type of medium, the more they use the others.

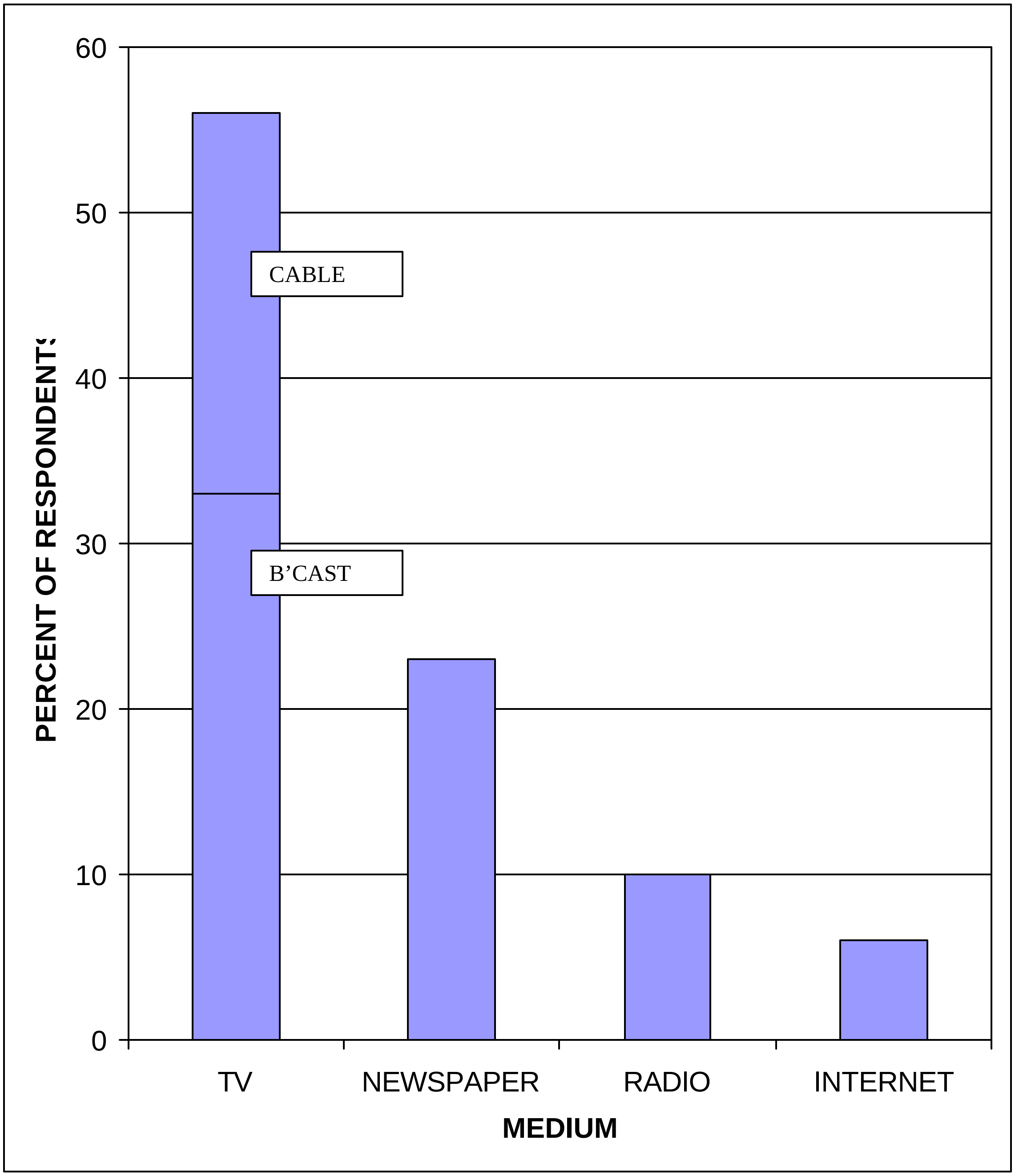
As noted in the FCC analysis, this correlation could be "spurious" at some level. For example, when looking at market level data, the fact that larger markets attract or support more TV stations and newspapers is a function of the market size. It tells us nothing about individual consumer behavior. Even at the level of individuals, we could explain the positive correlation as a "media junkie" phenomenon. Some people just consume more media than others and they consume all types of media more. The fact that many consumers substitute media types is masked by a subset of consumers who are media junkies.

The complementarity explanation is also possible. Because the different media types serve different functions, individuals who consume one media type are stimulated to consume the others. For example, hearing a headline on the drive home from work, the consumer is more likely to turn on the news, watch multiple news channels, or peruse the newspaper the next morning to get more details.

A. NEILSEN SURVEY EVIDENCE

The responses to a survey conducted by the Nielsen company commissioned by the FCC affirms the basic observations on the nature of the use of the media for news and information that were offered in the previous chapter. First, it confirms the overwhelming dominance of TV and newspapers as source of information (see Exhibit VI-1). TV and newspapers are the most frequent source of news

EXHIBIT VI-1: NEILSEN SURVEY RESPONDENTS SOURCES OF MOST NEWS



Source: Source: Nielsen, *Consumer Survey on Media Usage* (Federal Communications Commission, Media Ownership Working Group, September 2002).

and information. They are even more dominant when the most often used sources are identified. Here again, they are cited 13 times more often than the Internet.

Looking at "any use" of each media type, TV is again dominant, followed by newspapers, particularly as a first mention (see Exhibit VI-2). Looking at expected changes in media use, TV clearly dominates the other sources. Many more respondents say they expect to watch more TV news, than the other sources.

The Commission then asked a series of questions that presented respondents with hypothetical situations -- "Using a scale of 1 to 5, with 1 meaning no more likely and 5 meaning much more likely, if (Broadcast TV…) were no longer available, how much more likely would you be to use (cable or satellite news channels…) for local or national news and current affairs?" Asking people to hypothesize situations that are extremely unlikely and not within their experience is dicey. Moreover, in this survey, 83 percent of the respondents have cable or satellite, so they do not use over-the-air reception and whether they fully appreciated that the networks, which they watch so regularly, would not be available ever again, is doubtful. Be that as it may, the results of this hypothetical exercise shows that broadcast TV is the dominant medium, followed by cable TV, newspapers, radio and the Internet (see Exhibit VI-3).

EXHIBIT VI-2: SOURCES OF NEWS: 2002

(Percent of Respondents)

MEDIUM	LOCAL		NATIONAL			
	NO PROMPT	PROMPT	NO PROMPT	PROMPT	MOST OFTEN USED	GROWTH
TV	85	92	83	91	56	27
NEWSPAPER	63	77	50	82	23	6
RADIO	35	66	30	54	10	7
INTERNET	19	34	21	29	6	9

Source: Nielsen, *Consumer Survey on Media Usage* (Federal Communications Commission, Media Ownership Working Group, September 2002).

EXHIBIT VI-3: DEPRIVATION ANALYSIS

If this medium were no longer available ⤵ I would be much more likely to use ⇒	Broadcast TV	Cable	News-TV	Radio paper	Internet
Broadcast TV	na	38	33	31	14
Cable TV	44	na	35	31	19
Newspaper	44	32	na	22	16
Radio	34	24	24	na	12
Internet	34	37	17	12	na

Source: Nielsen, *Consumer Survey on Media Usage* (Federal Communications Commission, Media Ownership Working Group, September 2002).

B. THE ECONOMETRIC STUDY OF SUBSTITUTION

1. Ambivalent Evidence on the Existence of Substitutability

The most detailed substitution analysis commissioned by the FCC involved usage data for markets and individuals. It focused on “the question of whether the changes in the availability or use of some media have brought about changes in the availability or consumers’ use of other media, or whether different media serve as substitutes for one another for information consumers.”[236] It goes on to claim that “this study examines the extent of substitutability across media.”[237]

The study appears to be at best schizophrenic about substitution. On the one hand, it claims a pervasive pattern of substitution,

> Standing back, there is clearest evidence of substitution between Internet and broadcast TV, both overall and for news; between daily and weekly newspapers; and between daily newspapers and broadcast TV. There is also evidence of substitution between cable and daily newspapers, both overall and for news consumption; between radio and broadcast TV for news consumption; and between the Internet and daily newspapers for news consumption.[238]

It gives the impression that there is a great deal of substitution when it states that the study “cannot completely answer the question of substitution is sufficiently effective that all media should be considered substitutes for news and information purposes.”[239] Cautioning us that the substitution is not complete, gives the impression that there is a lot of it. That is not the case at all.

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[236] Waldfogel, Consumer Substitution, p. 3.
[237] Waldfogel, Consumer Substitution, p. 3.
[238] Waldfogel, Consumer Substitution, p. 3.
[239] Waldfogel, Consumer Substitution, p. 3.

In the conclusion there is more caution. The author states that, at best, in the statistical sense, “there at least some degree of substitution.”[240] At least some is a far cry from complete. The author goes on to introduce a concept of “behavioral neutrality” as a measure of complete substitution stating that “with complete substitution, the civic behavior affected by media consumption will also be unaffected by changes in availability of use of any particular medium.”[241] The study cites a variety of evidence that shows that “behavioral neutrality fails.”[242] In fact, the study never did address the question of the extent of substitution in a statistical sense. If there is any substitution, it is minuscule.

2. Statistical Evidence On The Existence Of Substitution Is Weak

Even the evidence on the mere existence of substitution is questionable. In order to arrive at the conclusion that there is substitution the study adopted a very lax statistical standard – a statistical confidence interval of 10%. He describes this as “liberal”

> If one adopts a more liberal cutoff (a negative coefficient with a t-statistic exceeding 1 in absolute value), the relationships suggesting substitution are: Using the liberal cutoff of 1 (in absolute value) for t-statistics, one can see suggestive evidence of substitution in the following relationships:

The irony of a conservative Commission adopting a liberal statistical standard to justify getting rid of the ownership rules is palpable. In fact, rather than being called a “liberal” standard it might be more appropriate to call it an irresponsible standard for substantive and statistical reasons.

Substantively, as we have argued, because these policies involve civic discourse under the Communications Act, the Commission should adopt a conservative, or cautious approach.

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[240] Waldfogel, Consumer Substitution, p. 40.
[241] Waldfogel, Consumer Substitution, p. 40.
[242] Waldfogel, Consumer Substitution, p. 40.

Instead of stretching the limits of scientific practice in a direction that biases the analysis toward concluding that there is substitutability when there is none, a responsible, cautious, conservative approach would have moved in the opposite direction. It would have chosen a more rigorous statistical standard. Instead of accepting findings at the 10% confidence level, it should insist on the 1% level. In fact, the latter (1% confidence interval) is infinitely more frequent in scientific analysis than the former (10% confidence interval).

There is a second, statistical reason a more rigorous standard should have been chosen. The study applies this lax standard to multiple tests of each possible relationship between the various media. When one of the many tests turns out to show substitutability, it is declared to support the finding. The more times one tests a relationship, the less compelling is any single finding of statistical significance. For example, if one chooses a 10 percent confidence interval and does ten tests, they the expectation is that one would be significant by chance. Given the multiple tests, the cautious thing to do would have been to choose a rigorous standard.

Exhibit VI-4 shows Waldfogel's summary table. On the 184 relationships tested, about 40, or 22 percent showed statistically significant substitutability on at least one of the tests by the lax standard. Exhibit VI-5 shows the percentage of tests that were found to be statistically significant. Virtually all of the vast majority of tests did not find statistically significant substitutability, <u>even</u> by the lax standard. On average, two-thirds of the tests found no statistically significant relationship by the lax standard. In the aggregate, approximately 7 percent of the statistical tests found a significant relationship by the lax standard.

Exhibit VI-6 applies a more rigorous statistical standard. Virtually all of the

EXHIBIT VI-4: THE LAX STANDARD OF VIEW OF MEDIA SUBSTITUTION

	TV all use	TV all outlets	TV news use	Radio all use	Radio all outlets	Radio news use	Radio news outlets	Dailies use	Dailies outlets	Weeklies use	Weeklies outlets	Internet use	Internet news use	Cable use	Cable news use
TV all use				E		D						E H	D	E	
TV all Outlets															
TV news use						G		G J					F G I J		G
Radio all use	E														
Radio all outlets	C							C		C				A **C**	
Radio news use								J					C		
Radio news outlets			G									A	A		
Dailies use													J	A **D**	G J
Dailies outlets											A B			A C	
Weeklies use														D	
Weeklies outlets				C					A B						
Internet use	E H						A								
Internet news use			F G H I			D	A	J							
Cable use	E				A			A **D**	A	D					
Cable news use			G					G J							

EXHIBIT VI-5: THE LAX STANDARD VIEW OF MEDIA SUBSTITUTION IN THE CONTEXT OF MULTIPLE STATISTICAL TESTS

(Percentage Of Tests Claimed Significant; Blank =0)

	TV all use	TV all outlets	TV news use	Radio all use	Radio all outlets	Radio news use	Radio news outlets	Dailies use	Dailies outlets	Weeklies use	Weeklies outlets	Internet use	Internet news use	Cable use	Cable news use
TV all use	▨	▨	▨	20		14						28	14	20	
TV all Outlets	▨	▨	▨												
TV news use	▨	▨	▨			14		22					56		25
Radio all use	20			▨	▨	▨	▨								
Radio all outlets	20			▨	▨	▨	▨	50		50				40	
Radio news use				▨	▨	▨	▨	14					14		
Radio news outlets			25	▨	▨	▨	▨					14	14		
Dailies use								▨	▨				14	40	40
Dailies outlets								▨	▨		100			40	
Weeklies use										▨	▨			20	
Weeklies outlets				20					100	▨	▨				
Internet use	40						25					▨	▨		
Internet news use			100			20	25	11				▨	▨		
Cable use	20				50			22	50	33				▨	
Cable news use			25					22							

EXHIBIT VI-6: A RIGOROUS STANDARD VIEW OF MEDIA SUBSTITUTION IN THE CONTEXT OF MULTIPLE STATISTICAL TESTS

(Percentage Of Tests Claimed Significant; Blank =0)

	TV all use	TV all outlets	TV news use	Radio all use	Radio all outlets	Radio news use	Radio news outlets	Dailies use	Dailies outlets	Weeklies use	Weeklies outlets	Internet use	Internet news use	Cable use	Cable news use
TV all use				20								28		20	
TV all Outlets															
TV news use						14		22					56		25
Radio all use	20														
Radio all outlets															
Radio news use								14							
Radio news outlets			25												
Dailies use													14		40
Dailies outlets															
Weeklies use															
Weeklies outlets															
Internet use	40														
Internet news use			100			20		11							
Cable use	20				5					3					
Cable news use			25					22							

relationship reported based on the macro data fail to pass this standard. Only 19 of the 184 possible relationships are statistically significant by the rigorous standard. Barely one-quarter of the tests of these relationships is significant by the rigorous standard. In other words, about 3 percent of the tested relationships are significant at the level of the rigorous standard. This is hardly testimony to the existence of substitutability.

3. The Small Extent of Substitutability

Although the study never analyzes the magnitude of the substitutability there are two indications that it is very small. First, cross media substitution explains virtually none of the variation in media usage. The demographic control variables that are utilized in the analysis, explain 12.44 percent of the variance in the number of TV news half hours watched. Adding in the use of the four other media for news and information gathering, increases the explained variance to 12.65 percent. In other words, media substitution accounts for less than one-quarter of one percent of the variance in TV media use. Moreover, part of that variance is explained by complementarities (positive relationships) not substitution. In no case did the media variables account for more than 2 percent of the variance in the target media use.[243]

With little variance explained, we would not expect to find large effects. In economic terms, the cross elastiticies of demand are minuscule. For example, in the Internet-TV relationship, for which the study finds the strongest evidence of substitution, we find an elasticity of .02. In other words, if the Internet usage were to double (increase by 100 percent) TV usage would decline by just 2 percent. To say that this is not a complete explanation is a gross understatement. It is virtually no explanation at all. In fact, as a critique of the FCC studies recently pointed out, the complementarity explanation is more consistent with the data.[244]

C. IN SEARCH OF SUBSTITUTION AND COMPLEMENTARITY IN THE SURVEY DATA

The Neilsen data was used to explore the issue of complementarity in a number of ways. Exhibit VI-7 shows the total hours of use for each of the major media for respondents categorized by the media that was the source of most of their news and information.

One sixteenth of the respondents cited the Internet as their primary sources of news. They are the most intensive users of media, with a very large number of hours devoted to the Internet, compared to the remainder of the population. They are light users of TV.

Radio was cited by one-tenth of the respondents. While their usage of media was about average overall, they were very heavy users of radio and light users of TV.

Newspapers were cited by just under one-quarter of the respondents as their primary source of news. Their total media usage was below average. They had low TV usage but did not have a great deal more newspaper usage than the other groups. Those who cited TV (either broadcast or cable) as their primary source of news had slightly above average overall use, primarily because they used TV more.

All of the groups who did not cite the Internet as the primary source of news had roughly the same amount of Internet use – between 7 and 8 hours per week. Similarly, there is relatively little variation across the groups in terms of newspaper usage.

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[243] Since the study is proprietary, we report only the summary result. The results of the statistical runs are stored in confidential computers at the Federal Communications Commission and available upon request.

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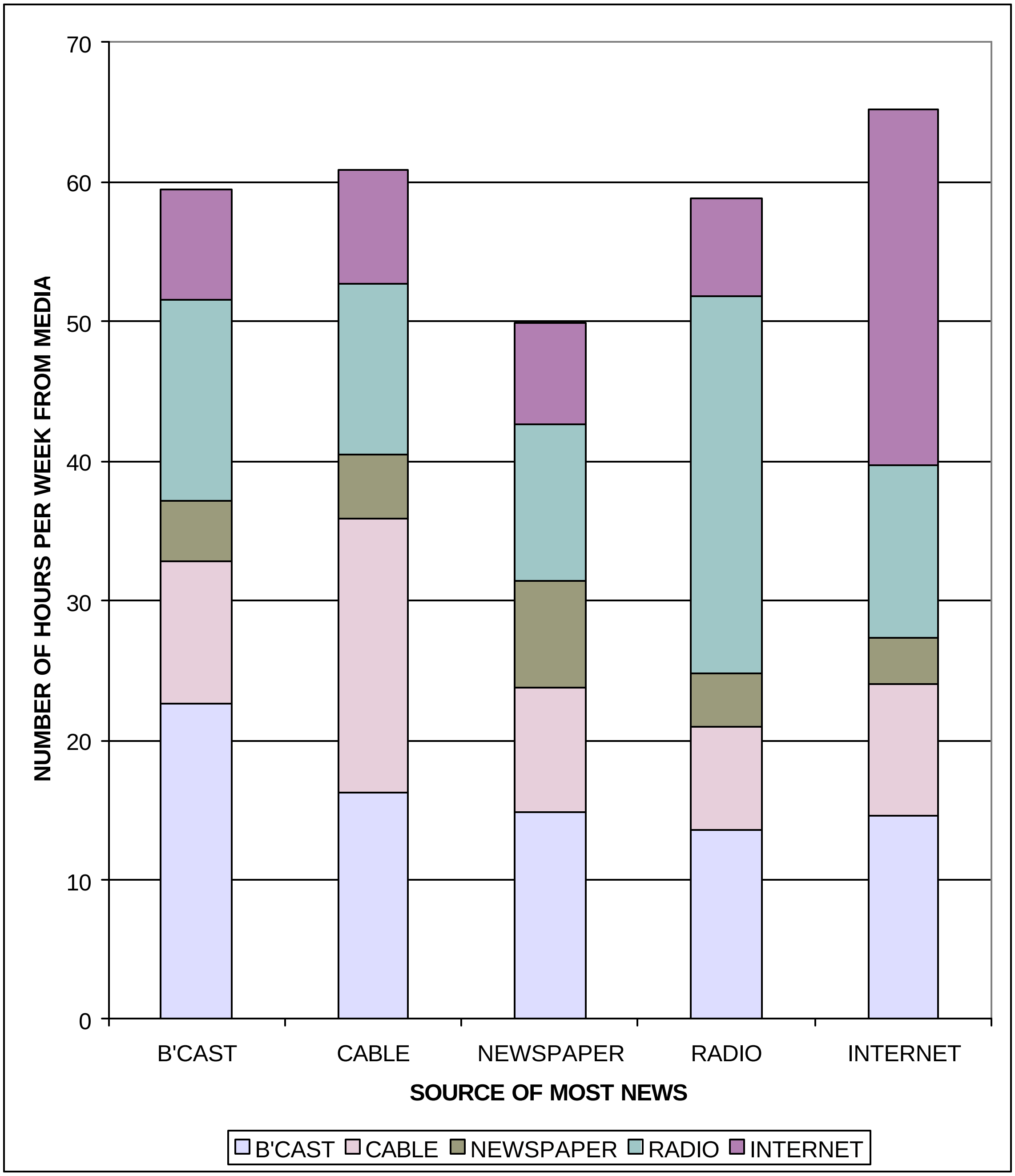
[244] Baker, Dean, *Democracy Unhinged: More Media Concentration Means Less Public Discourse, A Critique of the FCC Studies on Media Ownership* (Washington, D.C.: Department of Professional Employees, AFL-CIO, December 2002).

EXHIBIT VI-7: MEDIA USAGE BY TYPE OF MEDIA USED MOST OFTEN FOR NEWS



To examine the pattern of substitutability/complementarity with the Neilsen data we followed the logic of the hypothetical question with self –reported usage data. That is, the suggestion in the hypothetical is that people who use specific media might change under some circumstances. They are presented the extreme possibility of not having access to their most often used source of news. If this were indicating that there is substitutability, it would be reinforcing to find that those individuals now substitute between the media.

To follow up on this, we ran correlations and regression, as identified in the substitutability in the following subgroups of the population. Simple bivariate correlations and multiple regressions controlling for age and gender were estimated for the following groups of respondents:

All Respondents

Internet Users
Non-Internet Users

TV (broadcast or cable) for most news
Not TV for most news

Broadcast for most news
Cable for most news
Newspaper for most news
Radio for most news
Internet for most news

Not one of the correlations or regression coefficients indicated substitutability. Every correlation and regression indicated complementarity and many were statistically significant.

Another possible approach to the complementarity/substitutability issue is to look at various groups according to their level of usage. Media junkies might use the media as complements; low volume users might use them as substitutes. To examine this possibility, the relationship between the use of various media was examined in two subgroups (see

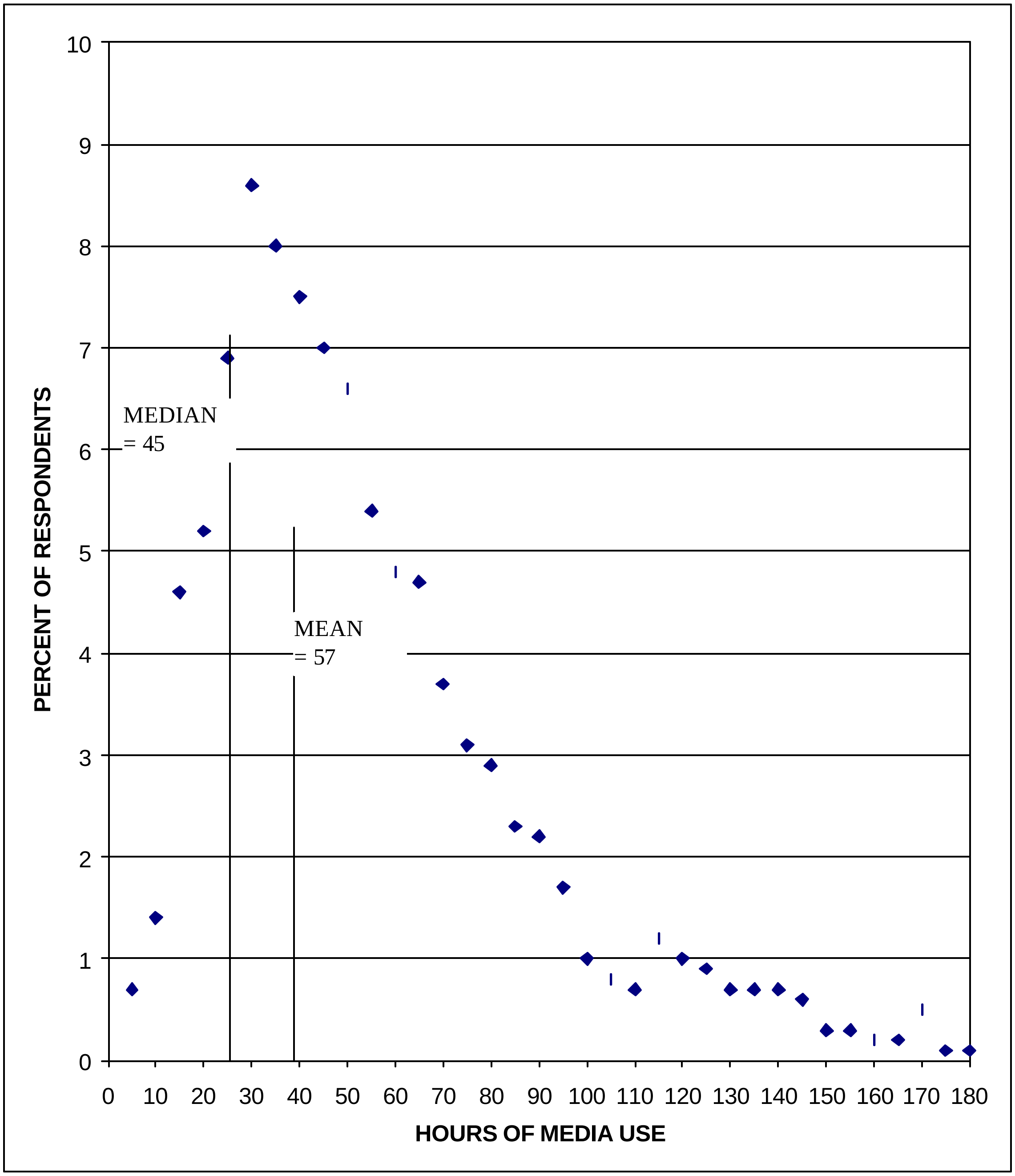
Exhibit VI-8). Because the distribution is slightly skewed (the mean is almost one-third higher than the media), we divided the population as follows.

- low use respondents, defined as the 50 percent of respondents whose total use of the media fell below the median, and
- high use respondents, defined as approximately one-third of the respondents whose use fell above the average.
- The median use is 45 hours per week; the average use is just under 57 hours per week.

This approach shows a hint of substitution, as Exhibit VI-9 shows, the complementarities between the media are a lot stronger and larger for the more intensive media users than the substitutions effects are among the less intensive.

One final observation on substitution should be made. In order to make sense of the statistical results, the substitution analysis assumes that cable and Internet are non-local media. To the extent that public policy has been primarily concerned about localism and media distribution markets are local, this raises problems for the broad definition of markets. This argument also suggests that we would not expect to find substitution between the cable news sources and the local broadcast sources. This argument is supported by the Neilsen data (see Exhibit VI-10). Local broadcast exhibits no significant negative correlation with cable news broadcast. In fact, it exhibits no significant correlation with any other broadcast sources of news. Once again, we observe positive correlations, suggesting complementarity, with one exception, cable local and CBS, but the size of the coefficient is quite small. The largest coefficients are observed for the national news networks and as a separate group the cable news networks and all are positive. Three of the correlations across broadcast and cable are positive, though small, with the largest being between MSNBC and NBC.

EXHIBIT VI- 8: DISTRIBUTION OF TOTAL MEDIA USAGE



Source: Neilsen Survey Data.

EXHIBIT VI-9: COMPLEMENTARITY/SUBSTITUTABILITY IN HIGH AND LOW USAGE GROUPS

(Coefficients shown are significant at the .01 level or higher)

	Broadcast	Cable	Newspaper	Radio	Internet
LOW USE RESPONDENTS (Below the Median)					
Broadcast	-	-.12		-.12	-.10
Cable	-.18	-		-.13	
Newspaper			-		
Radio	-.18	-.13		-	
Internet	-.18				-
Adjust R^2					
All variables	.074	.051	.059	.057	.092
Demographics only	.027	.022	na	.025	.074
HIGH USE RESPONDENTS (Above the Mean)					
Broadcast	-	.18		-.12	
Cable	.20	-			
Newspaper	.40	.35	-	.39	.21
Radio	-.10	-		-	-.10
Internet			-	-.13	-
Adjust R^2					
All variables	.091	.070	.087	.038	.088
Demographics only	.019	.001	na	.017	.072

EXHIBIT VI-10: CORRELATIONS AMONG TV SOURCES OF NEWS
(Simple correlations statistically significant at the .01 level).

	BROADCAST				CABLE			
	ABC	CBS	NBC	LOCAL	CLOCAL	MSNBC	CNN	FOX
ABC	-	.37	.33				.06	
CBS		-	.38		-.06			
NBC			-			.09	.06	
LOCAL				-				
CLOCAL					-		.10	
MSNBC						-	.29	.13
CNN							-	.18
FOX								-

D. CONCLUSION

Thus when we examine the empirical evidence on real world behavior, we find that it supports the view of news and information media space in which TV and newspapers dominate, but provide separate and distinct functions with little substitutability. The analysis of the structure of commercial markets and the forum for democratic discourse must start from this reality.

Having produced data that shows very different types and levels of usage, the FCC should analyze media markets in a manner that reflects these patters. It can no longer base policy on the way people **could** use the media. This hypothetical assumption has pervaded FCC policy in a very specific way. When it analyzes markets, for example, it does not ask what stations do people actually listen to? It does not notice that the major networks dominate the airwaves, in terms of eyeballs. Instead, it counts each station equally. A station that has a one percent market share is counted just as heavily as a station with a twenty percent market share. A newspaper with a five percent market share counts just as much as a newspaper with an 80 percent market share. This approach, which ignores the reality of actual media use and the different reach of the media would never pass muster in antitrust analysis and it should not pass muster in civic discourse analysis.

VII. NATIONAL MARKETS

A. EMPIRICAL MEASURES OF MARKET STRUCTURE

One of the central issues in the current debate over rules that restrict the ability of one firm to own newspapers, broadcast TV stations and cable TV systems in the same area is the claim that there has been a dramatic change in the information marketplace. For the purposes of assessing media markets, as is generally the case in the analysis of the industrial organization, we start with an examination of the number and size of firms in the market.

Where a small number of large firms dominates a market, the concern is that they can exercise "market power," by raising prices or lowering quality. This causes inefficiency and a transfer of wealth from consumers to producers. A clear articulation of this problem, which is directly applicable to the debate over media ownership, can be found in the *Merger Guidelines* issued by the Department of Justice.

> Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.*/ In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly coordinating their actions. Circumstances also may permit a single firm, not a monopolist, to exercise market power through unilateral or non-coordinated conduct -- conduct the success of which does not rely on the concurrence of other firms in the market or on coordinated responses by those firms. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.[245]
>
> */ Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation.

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[245] Horizontal Merger Guidelines, at section 0.1.

The difficulty that the qualitative and non-economic importance of the media poses for market structure analysis is compounded by the fact that the identification of when a small number of firms can exercise this power is not a precise science. Nevertheless, when the number of significant firms falls into the single digits there is cause for concern, as the following summary of empirical and theoretical findings in the industrial organization literature suggests.

> Where is the line to be drawn between oligopoly and competition? At what number do we draw the line between few and many? In principle, competition applies when the number of competing firms is infinite; at the same time, the textbooks usually say that a market is competitive if the cross effects between firms are negligible. Up to six firms one has oligopoly, and with fifty firms or more of roughly equal size one has competition; however, for sizes in between it may be difficult to say. The answer is not a matter of principle but rather an empirical matter.[246]

As a practical matter, using the Department of Justice Merger Guidelines and general economic literature, we apply the following categories to describe media markets:

Monopoly – 1 dominant firm

Duopoly – 2, relatively equal-sized, firms that dominate the market

Tight oligopoly – 3 to 5 large firms

Moderately concentrated – 6 to 9 firms

Unconcentrated – 10 or more firms

Atomistic competition – 50 firms

The description of markets suggested above is based on theoretical, empirical and practical experience in media markets (see Exhibit VII-1). In order to assess the potential for the exercise of market power resulting from a merger, the Department of Justice analyzes the

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[246] J. W. Friedman, *Oligopoly Theory* (Cambridge: Cambridge University Press, 1983), pp. 8-9.

EXHIBIT VII-1: DESCRIBING MARKET STRUCTURES FOR PUBLIC POLICY ANALYSIS

DEPARTMENT OF JUSTICE MERGER GUIDELINES	TYPE OF MARKET	EQUIVALENTS IN TERMS OF EQUAL SIZED FIRMS	HHI	4-FIRM SHARE
	Monopoly	1 firm with 65% or more of market	4200<	100
	Duopoly	2	5000<	100
		5	2000	80
↑ HIGHLY CONCENTRATED	Tight Oligopoly		1800 OR MORE	
		6	1667	67
UNCONCENTRATED ↓	Loose Oligopoly	10	1000	40
	Atomistic Competition	50	200	8

Sources: U.S. Department of Justice, *Horizontal Merger Guidelines*, revised April 8, 1997, for a discussion of the HHI thresholds; William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), for a discussion of four firm concentration ratios.

level of concentration as measured by the Herfindahl-Hirschman Index (HHI).[247] This measure takes the market share of each firm, squares it, sums the result, and multiplies by 10,000.[248] A second method that is frequently used by economists to quantify market concentration is to calculate the market share of the largest four firms (four firm concentration ratio or CR4).

Under its Merger Guidelines, the DOJ considers a market with an HHI of 1000 or less to be unconcentrated. Such a market would have the equivalent of ten equal-sized competitors. In such a market, the four firm concentration ratio would be 40 percent. Any market with a concentration above this level is deemed to be a source of concern. The DOJ considers an HHI of 1800 as the point at which a market is highly concentrated. This level falls between five and six equal-sized competitors.

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[247] U.S. Department of Justice, Merger Guidelines, revised, 1997.

[248] Shepherd, p. 389, gives the following formulas for the Herfindahl-Hirschman Index (HHI) and the Concentration Ratio (CR):

$$H = \sum_{i=1}^{n} S_i^{2}$$

$$CR = \sum_{i=1}^{m} S_i$$

m i = 1

where
n = the number of firms
m= the market share of the largest firms (4 for the four firm concentration ratio)
S_i = the share of the ith firm.

Shepherd describes these thresholds in terms of four firm concentration ratios as follows:[249]

> Tight Oligopoly: The leading four firms combined have 60-100 percent of the market; collusion among them is relatively easy.
>
> Loose Oligopoly: The leading four firms combined have 40 percent or less of the market; collusion among them to fix prices is virtually impossible.

Shepherd refers to collusion in his discussion, but it is important to note that it is not the only concern of market power analysis or the Merger Guidelines. The DOJ Guidelines are oriented toward conditions under which a broad range of types of anticompetitive behaviors are sufficiently likely to occur as to require regulatory action. The Merger Guidelines recognize that market power can be exercised with coordinated, or parallel, activities and even unilateral actions in situations where there are small numbers of market players.[250] The area of noncollusive, oligopoly behavior has received a great deal of attention. A variety of models have been developed in which it is demonstrated that small numbers of market participants interacting in the market, especially on a repeated basis, can learn to signal, anticipate, and parallel one another to achieve outcomes that capture a substantial

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[249] Shepherd, p. 4.

[250] Horizontal Merger Guidelines, at section 0.1.

> The rule of thumb reflected in all iterations of the Merger Guidelines is that the more concentrated an industry, the more likely is oligopolistic behavior by that industry.... Still, the inference that higher concentration increases the risks of oligopolistic conduct seems well grounded. As the number of industry participants becomes smaller, the task of coordinating industry behavior becomes easier. For example, a ten-firm industry is more likely to require some sort of coordination to maintain prices at an oligopoly level, whereas the three-firm industry might more easily maintain prices through parallel behavior without express coordination.

share of the potential monopoly profits.[251] This leads us to identify several other specific types of markets where such behavior is more or less likely.

First, the highly concentrated category can be broken down into two types of markets that are a special source of concern. Although the expression ‘monopoly’ technically refers to one firm, antitrust practice refers to monopoly power when the market share of a firm rises to 60 to 70 percent. In both of these cases the CR4 would be 100. The HHI can vary, depending on the size of the second firm in the market. A dominant firm with a market share of 65 percent alongside ten small firms would result in an HHI of about 4,300. As a practical matter, in media markets we observe that monopoly situations where the leading firm has over 65 percent of the market share exhibit HHIs of 5,300 or higher. A ‘duopoly’ refers to a market with only two firms. Two equal sized firms would be a duopoly with an HHI of 5,000. Duopolies generally fall in the 60/40 percent range, exhibiting HHIs between 3000 and 5300.

On the other hand, we should not forget that although ten firms constitute an unconcentrated market by the DOJ Guidelines, that number does not ensure vigorous competition. Generally, a much higher number, perhaps fifty, is associated with vigorous or atomistic competition. With 50 equal size competitors, the HHI would be 200 and the CR4 would be 8.

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[251] John B. Taylor, Economics (Boston: Houghton Mifflin, 19989); W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* (Cambridge: MIT Press., 2000), Chapter 5; Jean Fudenberg and Jean Tirole, “Noncooperative Game Theory for Industrial Organization: An Introduction and Overview,” in Richard Schmalensee and Robert D. Willig, (eds.) *Handbook of Industrial Organization* (New York: North-Holland, 1989).

B. BROADCAST VIDEO

We begin the discussion with national numbers on ownership. These national numbers are relevant for a variety of reasons. They establish the likely pool from which competitors might be drawn and the barriers to competition that new entrants are likely to face. Dramatic increases in concentration and reductions in the number of potential competitors raise significant concerns. The substantial barrier to entry that the growth of large media conglomerates raises is a separate and reinforcing constraint on competition. To the extent we observe increasing concentration of outlets into fewer hands, it also suggests national groups and chains are expanding.

One of the changes to which advocates of abandoning ownership limits point is the increase in the number of full power TV stations (Exhibit VII-2). These stations are the dominant suppliers of broadcast television. They have increased from just under 1,000 in 1975 to almost 1,700 in 2000. These numbers include a substantial increase in the number of noncommercial stations.

This positive picture is tempered by two negative developments. Although the number of broadcast TV outlets has grown, the number of news operations at those stations has not. Indeed, the best evidence suggests that it has declined by about 10 percent.[252]

In other words, there has been a dramatic decline in the number of TV stations that have news operations, almost a 25 percent decline. By Stone's reasoning, with virtually every

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[252] Vernon Stone, *News Operations at U.S. TV Stations*, University of Missouri, School of Journalism, 2002.

"viable commercial" [253] TV station having a newsroom in 1975, there were about 940 such operations. By 2000, Stone estimates that only 850 had them.

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[253] Stone refers to "viable commercial TV stations."

EXHIBIT VII-2: TELEVISION STATIONS, OWNERSHIP AND NEWS OPERATIONS

	1975	2000
TELEVISION		
Outlets		
Full Power	952	1678
Low Power	NA	2396
Owners	543	360
Newsrooms	940	850
Staff/Newsroom		24

Sources: FCC, Notice of Proposed Rulemaking, p. 6; Vernon Stone, *News Operations at U.S. TV Stations.*

The mixed picture we get by looking at news operations (rather than stations) gets much darker when we consider ownership of TV stations. The data shows a sharp decline in the number of owners, despite the growth of the number of stations. There are now one-third fewer broadcast owners than there were twenty-five years ago. Local marketing agreements hide even greater diminution.[254]

C. MULTICHANNEL VIDEO

The analysis of TV stations is important both because these are important distribution mechanisms and also because these TV stations were historically the source of local programming. One of the most prominent claims of those who argue that dramatic changes have taken place is that the growth of the number of networks creates a great deal of diversity. Cable TV systems have become the dominant form of distribution for video programming and they have the capacity to deliver many more channels. These channels need networks.

At one level, the growth of the number of outlets is impressive. Cable TV networks are measured by their subscriber count. This is calculated not as the actual number of households that watch a network but as the number of households that take cable service from systems that carry the program. In other words, if a household can pick up the clicker and tune in to a channel that carries a network, that household is counted as a subscriber. This is equivalent to the simple count of the number of over-the-air households that a broadcast station can reach. If an over-the-air signal can reach a household, the network is available.

Using this as the measure of subscribers, we estimate that the total number of subscribers to the 200 largest cable networks and 1500 local TV stations is approximately six

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[254] "Sinclair Issues a Challenge to FCC, Powell," E*lectronic Media*, October 15, 2001, p. 9.

billion households (see Exhibit VII-3). Since there are approximately 106 million TV households, the average number of networks available is over 50 per household. This sounds like a huge number. However, when we examine the ownership of these networks, we discover that almost three-quarters of them – serving approximately four billion subscribers – are owned by six corporate entities. The four major TV networks, NBC, CBS, ABC, Fox, and the two dominant cable providers, AOL Time Warner and AT&T/Liberty, completely dominate the tuner. Estimates of the writing budgets of these producers are generally consistent with the subscriber counts.

Each of these programmers has a guaranteed right of distribution. Cable operators own their wires. Broadcast networks have a license to spectrum and have "must carry/retransmission" rights on cable networks. Moreover, these entities are thoroughly interconnected through joint ventures.

There is certainly more variety available, but whether there is more diversity is debatable, especially when local programming is considered. The dominant cable operators produce a lot of national programming and a few have moved into regional programming, especially sports, but there is little local programming and news. The three major networks have existed for quite some time and the Fox network was cobbled together from existing stations. Many local stations are no longer producing the programming they were fifteen years ago because of changes in Commission rules.

EXHIBIT VII-3: DOMINANT VIDEO PROGRAM PRODUCERS/DISTRIBUTORS

	SUBSCRIBERS		WRITING BUDGET	
	$ (Million)	%	$ (Million)	%
AOL – TIME WARNER	935	15.6	206	16.8
CBS/VIACOM	910	15.1	145	11.8
ABC/DISNEY	705	11.8	132	10.8
AT&T/LIBERTY	540	9.0	106	8.6
NBC	495	8.3	53	4.4
FOX	400	6.6	130	10.6
Subtotal	3985	66.4	772	63.0
TOTAL	6000	100.0	1225	100.0

SOURCES: Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 00-132, Seventh Report, Tables D-1, D-2, D-3, D-6, D-7; BEA TV markets; WGA Comments.

At the national level, cable has undergone a strong trend of increasing concentration since it was deregulated in 1984 (see Exhibit VII-4). In 1984, the national market had the equivalent of approximately 30 equal-sized competitors. With attribution of the systems in which AT&T owns substantial interests, the market now has the equivalent of only four competitors.

D. NEWSPAPERS

In the twenty-five years since the adoption of the rule restricting cross-ownership of newspapers and broadcast, daily newspaper operations have declined (see Exhibit VII-5). The number of dailies has declined by about 19 percent. Their circulation has declined by about 10 percent.

The shrinkage of outlets in the newspaper market is compounded by the dramatic reduction in the number of owners.[255] We estimate that the number of owners has declined by two-thirds (from 860 to 290). Combining the newspaper and television ownership numbers, as the dominant form of news disseminating media, we find that the number of independent voices has been cut by more than half since the mid-1970s.

Those who argue that the market has changed point to the growth of weekly papers. Although their numbers have declined slightly (3 percent), circulation has increased sharply (by 128 percent). Weeklies cannot be compared directly to dailies from the point of view of providing news and information. To the extent they provide news, it is not timely. Moreover, their focus tends to be quite different than the daily press. The community-oriented weeklies

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[255] *Editor and Publisher International Yearbook*, various years. We have calculated the total number of owners by treating all groups listed in the yearbook as a single owner.

EXHIBIT VII-4: CONCENTRATION OF NATIONAL CABLE EYEBALL MARKET

YEAR		4-FIRM	HHI
1984		28	360
1992		48	930
2001	FCC, without attribution	52	905
	with attribution	56*	1101
	with attribution + Cablevision	60**	1254
	with attribution + Cablevision + TWE	68***	1923
AT&T, with attribution		64	1529
Comcast with attribution + Cablevision		70	1749
with attribution + Cablevision + TWE		77	2676

SOURCES AND NOTES: Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, First Report, CC Docket No. 94-48, Eighth Report, CC Docket No 00132; Applications and Public Interest Statement In *the Matter of Application for Consent to the Transfer of Control of Licenses Compact Corporation and AT&T Corp. Tansferors to AT&T Comcast Corporation*. *All* estimates are rounded to the nearest 10.

*With attribution puts AT&T now claims 18.8 million subscribers having very recently sold off cablevision stock to get its ownership share to 4.98%.

**AT&T claims of technical compliance with the attribution rules, or its ability to remain in compliance, given how close it has chosen to stay to the limit of non-attribution, have yet to be demonstrated. Cablevision is estimated to have 3 million subscribers.

*** AT&T's efforts to divest its TWE holdings have been unsuccessful to date. The attributable TWE subscribers are estimated at 11.35 million.

EXHIBIT VII-5: CHANGING NUMBERS, OWNERS AND CIRCULATION OF NEWSPAPERS

		1975	2000	% Change
Daily	Papers	1756	1422	-19.0
	Editions/week	11292	9954	-11.8
	Circulation (million)	424	381	-10.1
	Owners	863	290	-66.4
Weekly	Papers	7915	7652	-3.3
	Editions/week	7915	7652	-3.3
	Circulation (million)	36	82	127.8
Total	Circulation (million)	460	463	0

Sources: FCC, Notice of Proposed Rulemaking, p.6; U.S. Bureau of the Census, *Statistical Abstract of the United States, 2000*, Table 932; *Annual Almanac, Editor and Publisher*, various issues.

have a “promotional flavor” and are “strong on neighborhood shopping advertisements but relying heavily on press releases for editorial content.”[256] They focus on “life style and consumer issues” and “have not challenged the metropolitan newspaper’s news and editorial coverage of major urban and regional issues.”[257] At a minimum, any comparison must recognize the fact that we need to calculate total weekly circulation. Dailies come out every day, weeklies come out every seven days. By this standard, the total number of weekly plus daily newspaper editions printed per week has declined by about 3 percent and circulation has been constant. Thus, at best, excluding the qualitative difference, no change has occurred.

E. THE INTERNET

The Internet provides a most instructive lesson for market structure analysis, since, in theory, the number of Internet Service Providers is infinite, yet the market has become concentrated (see Exhibit VII-6). TV networks and cable companies frequently argue that the number of outlets is all that matters, rather than the market share of the outlets. However, we believe this is the wrong approach since the distribution of attention is far more concentrated than the number of channels suggests.

For economic analysis, eyeballs are what should be counted, not stations. In other markets the number of competitors is not the central issue, it is their market share that matters. Recently, Microsoft asserted that there were seven different operating systems in the marketplace with over twenty thousand applications available and at least three different computing environments (handhelds, PCs and the Internet), and therefore Microsoft could not

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[256] Phyllis Kaniss, *Making Local News* (Chicago: University of Chicago Press, 1991), p. 154.

[257] Kaniss, p. 159.

EXHIBIT VII-6: MEASURES OF INTERNET CONCENTRATION

Measure	HHI
Subscribers	2500
Viewing Time	1200
Search Engines	1100

Sources: Jupiter Research, *Online Media Consolidation Offers No Argument for Media Deregulation*, 2001; Tair-Rong Sheu and Kathleen Carley, "Monopoly Power on the Web – A Preliminary Investigation of Search Engines," *20th Telecommunications Policy Research Conference*, October 27, 2001.

possibly be a monopoly. Even a conservative appeals court resoundingly rejected that argument.[258] Market structure analysis must be grounded on the actual market shares, not merely the number of participants; the rapidly increasing concentration of the Internet underscored that point. The increasing concentration of the Internet is stunning.

AOL's dominance of subscribership in the U.S. is widely noted (35 million subscribers, putting its market share above 50 percent). Its market share makes it a leading firm in a highly concentrated market.[259] Even more striking is the growth in the concentration of usage.

> Because the number of potential online channels is infinite, some assume that market dominance is an impossibility on the Internet. This is faulty reasoning. Gauging consolidation online simply requires a different measuring stick than it does off-line.
>
> Analysis of Media Metrix data over the past three years shows an incontrovertible trend toward online media consolidation…. Between March 1999 and March 2001, the total number of companies controlling 50 percent of user minutes online decreased by nearly two-thirds, from 11 to four.[260]

Because AOL has such a dominant position (over 30 percent of user time) the HHI is about 1200, well above the moderately concentrated threshold. The four firm concentration ratio also falls in the range where concerns about concentration and the abuse of market power begin.

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[258] Mark N. Cooper, "Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case," *Hasting Law Journal*, April 2001, reviews the evidence.

[259] A leading or dominant firm proviso was included in the 1982 Merger Guidelines but was subsequently dropped. Shepherd talks about firms with a 50 percent or more market share as leading firm and a source of concern.

[260] Jupiter Research, *Online Media Consolidation Offers No Argument for Media Deregulation*, 2001.

Search engines fall in a similar range. The HHI is at about the level of moderately concentrated (1100). The four firm concentration ratio is at the tight oligopoly level, just under 60 percent.

VIII. LOCAL MEDIA MARKETS

Most discussions of TV and newspaper markets use the Designated Marketing Area (DMA) as the geographic market area. This is a very large market area and any analysis based upon it will seriously underestimate the level of actual concentration for a number of reasons.

First, on the TV side, use of the DMA overestimates the availability of broadcast stations for many viewers. To the extent that viewers receive their broadcast signals through multichannel (cable or satellite) distribution, this large market may be appropriate. However, a substantial part of the population receives broadcast signals over the air – about 15 percent. For this group, the DMA is far too large a market definition, since signals do not cover the entire DMA.

Second, many smaller broadcast stations do not enjoy distribution throughout the DMA. While they have a right to request carriage throughout the DMA, it makes little economic sense for them to do so. The local news and advertising from communities that are fifty or a hundred miles away from the dominant central city cannot attract enough attention to make it economically worthwhile, nor should it be expected to. Meeting local needs for information dissemination is an important function that public policy should promote. Basing public policy on the fiction that every TV station is available to every viewer throughout the DMA distorts the reality of the level of concentration in TV markets.

The problem on the newspaper side is even more severe. Newspapers do not have must carry or retransmission rights throughout the DMA. Newspapers are very geographically focused. They are usually identified with a major central city or county where they achieve dominant circulation. When more than one major city or county falls within a DMA the perception of the level of concentration is distorted.

In spite of these factors, which are likely to lead to an underestimation of concentration in these major media markets, we find that in most DMAs in the country, the number of independently owned major media outlets – TV stations and daily newspapers – is extremely small.

A. BROADCAST TV

In spite of the fact that the use of the DMA as the geographic market leads to an underestimation of the level of concentration, we still find that TV markets are highly concentrated (see Exhibit VIII-1). None of the markets is unconcentrated, and only eight percent are moderately concentrated. Over half the markets are tight oligopolies. A quarter of the markets are duopolies.

B. MULTICHANNEL VIDEO

The failure of satellite to discipline cable pricing abuse and the failure of cable to compete with local telephone service are among the greatest disappointments of the 1996 Telecommunications Act and they tell a great deal about the prospects for cross technology competition. Congress had great hopes for this form of competition. In fact, the only facilities-based competitor for local telephone service actually mentioned by the Act's Conference report was cable TV.[261] Similarly, Congress devoted a whole section to telephone

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[261] Pub. L. 104-104, Conference Report, p. 148.

competition for cable through open video systems.[262] Neither of these has proven effective competition. Open video systems are non-existent[263] and the only telephone company that

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[262] Title II, part 5.

[263] FCC, Seventh Annual Report.

EXHIBIT VIII-1: CONCENTRATION IN BROADCAST TELEVISION MARKETS: VIEWER SHARE WITHIN DESIGNATED MARKET AREAS

TYPE OF MARKET	Number of Markets	% of Markets
MONOPOLY	26	12
DUOPOLY	56	27
TIGHT OLIGOPOLY	112	53
MODERATELY CONCENTRATED	16	8
UNCONCENTRATED	0	0
TOTAL	210	100

Source: Calculated by Author.

has pursued entry into the cable business as a plain overbuilder -- Ameritech -- was purchased by another telephone company -- SBC -- that is exiting the cable business.[264]

The failure of competition in multichannel video is evident in local markets. Approximately 95 percent of the homes passed in the country are served by only one cable company.[265] On average, cable operators have an 85 percent market share for multichannel video at the local level.[266] In fact, since satellite is concentrated in rural areas where cable is not available,[267] cable's market share in areas where they are both present is higher. The HHI index at the local level is above 7000, indicating an extremely highly concentrated market for multichannel video service.

C. NEWSPAPERS

Newspaper markets are even more highly concentrated, as summarized in Exhibit VIII-2. We have gathered data on 68 large markets to calculate HHIs and analyze the advertising revenues in markets that are comparable to those with newspaper/broadcast TV cross-ownership (23 markets with an average DMA rank of 54).

These markets are even more concentrated as measured by HHIs. Well over half of the markets are monopolies (57 percent). One-fifth is duopolies and the final one-fifth is tight oligopolies. For the smaller markets we have counts of media voices but not market shares, but we still find very high levels of concentration. By voice count alone, almost 40 percent are monopolies, a percentage that is four times as large as the voice count percentage for

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[264] FCC, Seventh Annual Report.
[265] FCC, Seventh Annual Report.
[266] FCC, Seventh Annual Report.

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[267] Consumers Union Cable and Satellite Survey gives a figure of 40 percent of satellite subscribers who do not have access to cable.

EXHIBIT VIII-2: CONCENTRATION IN NEWSPAPER MARKETS: CIRCULATION OF DAILIES WITHIN 68 LARGE DESIGNATED MARKET AREAS

TYPE OF MARKET	Number of Markets	% of Markets
MONOPOLY	39	57
DUOPOLY	12	18
TIGHT OLIGOPOLY	12	18
MODERATELY CONCENTRATED	0	0
UNCONCENTRATED	0	0
TOTAL	68	100

Source: Calculated by Author.

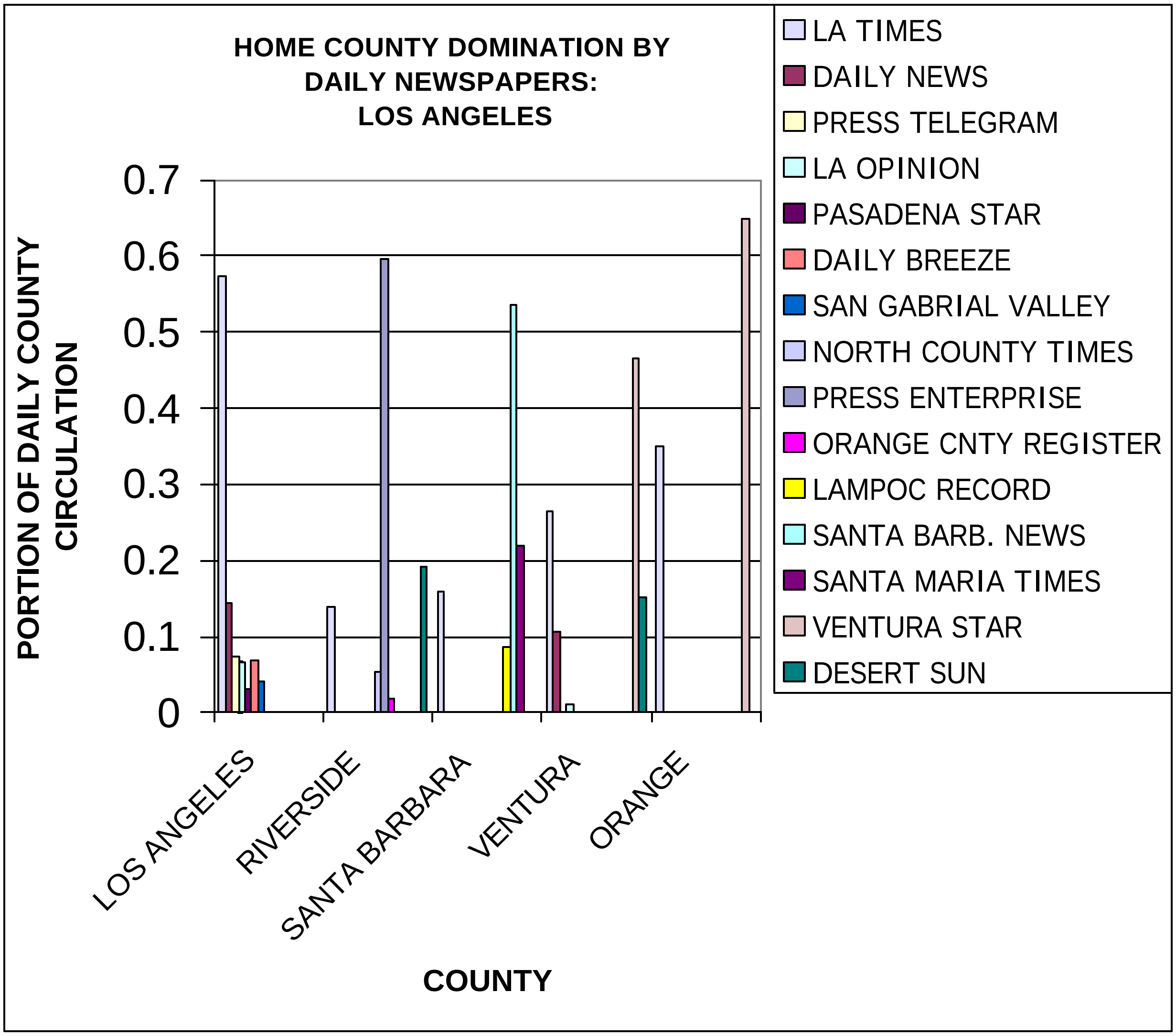
larger markets. By voice count, another 40 percent are duopolies, a percentage that is much larger than the voice count percentage for larger markets.

Thus, we believe that well over two-thirds of newspaper markets are monopolies, with another quarter being duopolies, and the final one-tenth being tight oligopolies.

The above DMA-based analysis substantially underestimates the concentration in newspaper markets. We noted that newspapers tend to be very place-specific, providing local news and advertising. They therefore tend to dominate specific areas. To demonstrate this fact, we have examined the newspaper circulation within counties in a number of large DMAs. These DMAs tend to be well below the national average of concentration. However, when we consider circulation in counties, we find that the markets are much more concentrated. In fact, the weighted HHI is on average almost 2000 points higher at the county level.

Exhibit VIII-3 shows one example, with a detailed analysis for Los Angeles. This is one of the largest DMAs in the country with many newspapers. Our newspaper data covers about 95 percent of the households. Each individual newspaper dominates a specific county. This is not a "failure" of competition in the traditional sense. Rather, it reflects the nature of the local newspaper business, where a geographic focus is required. Neither local news nor local advertising for large DMAs can be covered in one newspaper, so each paper is significantly specialized in a geographic market. When newspaper concentration is measured at the DMA level, Los Angeles is one of the least concentrated DMAs, although still highly concentrated with an HHI of 2400 (the equivalent of 4 equal sized competitors). When calculated at the county level, the weighted average HHI is about 2000 points higher (indicating a duopoly).

EXHIBIT VIII-3: NEWSPAPER MARKETS ARE MORE CONCENTRATED WHEN VIEWED AT THE COUNTY LEVEL THAN AT THE DESIGNATED MARKET AREA LEVEL



Sources: Eileen Davis Hudson and Mark Fitzgerald, "Capturing Audience Requires a Dragnet," *Editor and Publisher*, October 22, 2001, p. 20. Los Angeles is used as an example because it is the third least concentrated (for newspapers) DMA in the country and the five counties identified above account for 95 percent of the households in the DMA. The HHI is 2400 when calculated on a DMA-wide basis but averages 4000 when calculated on a county-by-county basis.

D. THE INTERNET

The discussion of broadcast TV, multichannel video and newspapers involves essentially the ownership of local distribution mechanisms for media output. The equivalent for local Internet is the ownership of communications networks. Viewed in this way, ownership is high concentrated. This has become a major public policy issue for advanced telecommunications services, embodied in the debate about "open access" to cable modem service and "unbundling" of telephone company digital subscriber lines service.

The recent report by the National Research Council proposed an interesting typology of broadband markets from the point of view of competition:

> Type 0 – no terrestrial providers of broadband.
>
> Type 1 – one terrestrial facility-based provider in the area (e.g., cable but not DSL or *vice versa*).
>
> Type 2 – two terrestrial facilities-based providers.
>
> Type 3 – one or more facilities-based providers that install new infrastructure to compete with incumbents.[268]

Their approach to categorizing these markets reminds us that there are liable to be "no-opolies," situations in which no full service broadband facility is available. It also drives home the point that terrestrial wire-based services (today: telephone wireline or cable modem service) are likely to dominate.

The FCC publishes data on the availability of high-speed Internet services from Internet Service Providers[269] by zip codes, which shows the product space is highly

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[268] Bits, p. 21.

[269] Industry Analysis Division, *High-Speed Services for Internet Access: Subscribership as of June 30, 2001* (Common Carrier Bureau, Federal Communications Commission, February 2002), Table 9.

concentrated at best (see Exhibit VIII-4). A recent J.P. Morgan analysis of the availability of facilities reaches a similar conclusion.[270] Both show that about one-fifth of the nation does not have high-speed service. The FCC's ISP data shows that another one-fifth of zip codes are monopolies, slightly less than one-fifth are duopolies and a quarter are tight oligopolies. Only ten percent of zip codes are moderately concentrated and four percent are unconcentrated. J. P. Morgan estimates that in addition to the one-fifth of the country that has no supplier, almost one-half of the country is subject to a facility monopoly. The final one-third has a facility duopoly.

If we look at facilities-based competition even in the narrowband or dial-up Internet, we find a similar lack of competition. About 90 percent of accounts are still based on wireline incumbent service.[271] Only a very small percentage of customers (2-4 percent) have given up wireline service and rely on wireless only. This reflects the fact that for basic local service, wireless is not an attractive alternative. For Internet access, it is not much of an alternative at all at present. Another 1 percent of customers have taken cable telephone service. These are almost entirely in the residential customer class. Another 3 percent receive service for entirely separate wireline facilities. These are largely in the business customer class. Another 2 percent receive service from partially separate facilities (i.e. by using unbundled network elements). To date, facilities-based intermodal competition has taken

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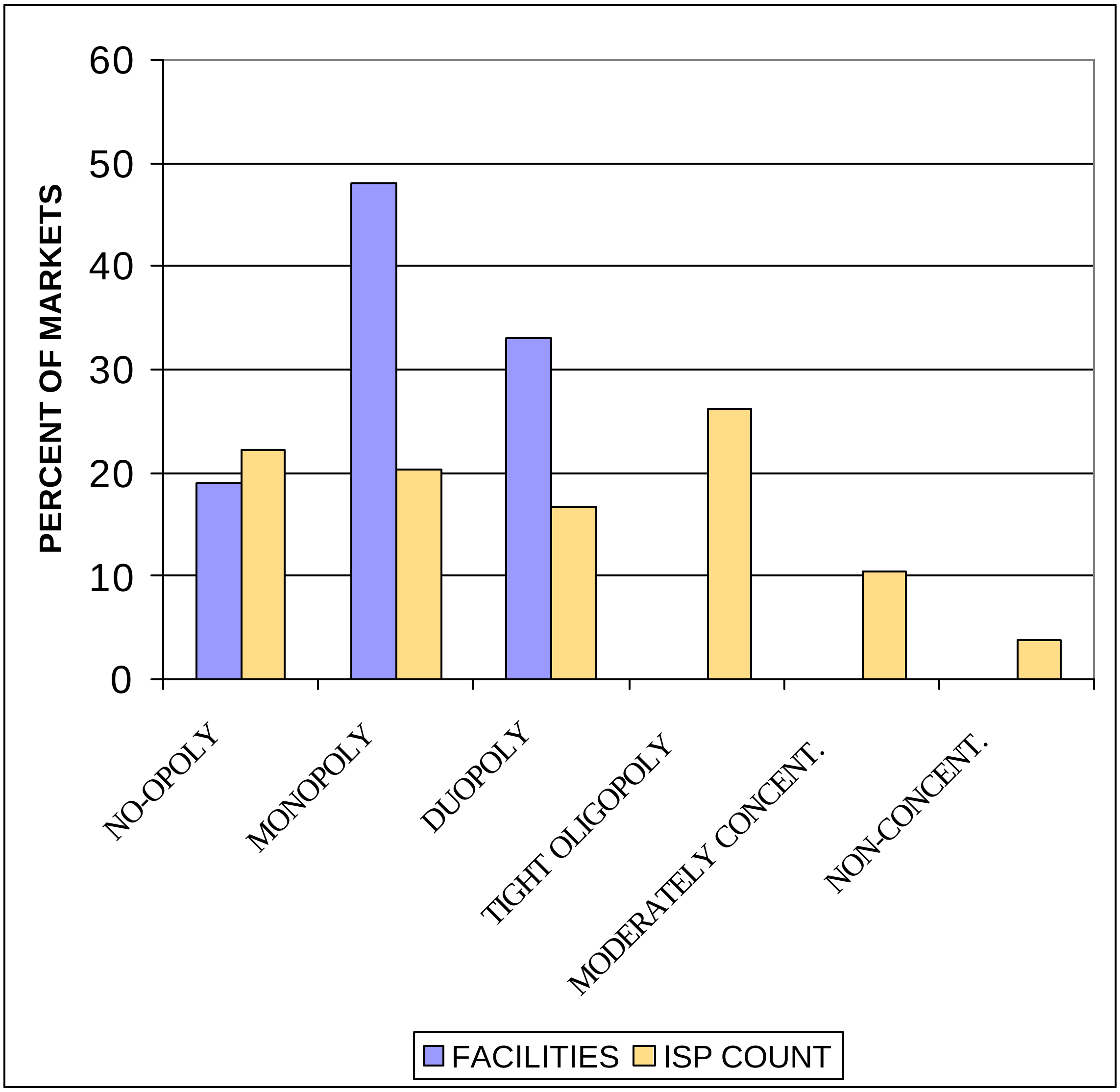
[270] Jason Bazinet, *The Cable Industry* (J.P. Morgan Equity Research, November 2, 2001), Figure 36.

[271] [271] Industry Analysis Division, *Local Telephone Competition, as of December 30, 2001* (Common Carrier Bureau, Federal Communications Commission, August 2002).

EXHIBIT VIII-4: MARKET STRUCTURE OF HIGH-SPEED INTERNET ACCESS SERVICE



Sources: Industry Analysis Division, *High-Speed Services for Internet Access: Subscribership as of June 30, 2001* (Common Carrier Bureau, Federal Communications Commission, February 2002), Table 9; Jason Bazinet, *The Cable Industry* (J.P. Morgan Equity Research, November 2, 2001), Figure 36.

about a 4 percent market share.[272] Facilities-based intramodal competition that is not dependent on unbundled network elements has taken about a 4 percent market share. Intramodal competition based on unbundled network elements has taken an 8 percent market share.

E. LOCAL MEDIA VOICES IN CIVIC DISCOURSE

The analyses in the previous two chapters makes it clear that one cannot simply count the number of outlets available to determine the status of media market structure with respect to civic discourse. The debate over media ownership is about news and information for citizens as listeners and speakers, not about entertainment outlets. A recent article in the *New York Times*[273] made this mistake in the extreme, and it provides a useful means to summarize the error of misdefining the public policy issue.

The article presents graphic representations of the media landscape in three cities that totally distort the reality and thoroughly misrepresents the public policy issue. The graph is labeled, "More News Options" and presents a count of radio stations, TV stations, daily newspapers and the average number of cable TV channels. Virtually none of the cable TV channels is news. In fact, of the handful of cable channels that do news, the TV networks control almost all. Most radio stations do not do news either, and to the extent that they do, it is hourly headlines, totally lacking in reporting. In one of the markets, single entities own more than one TV station. The issue confronting the nation is how its citizens get news and information to formulate their understanding of public policies and whether they have the

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[272] The role of intermodal competition in local telephony raised in the NPRM, paras. 24-28, is small.

[273] Jim Rutenberg, "Fewer Media Owners, More Media Choices," New *York Times,* December 2, 2002, p. C-1.

opportunity to voice their opinions. In other words, we are concerned about civic discourse in which the citizenry are both listeners and speakers. Understanding the public policy issue properly, points to a very different conclusion.

- TV and radio still are by the far the dominant sources of news and information. Americans spend more than ten times as much time gathering news and information from TV and newspapers as they do on the Internet.

- Ownership of the major means of disseminating information – TV and newspapers – is the central issue. Even the FCC counts cable operators only once, since the owner decides what gets on the air.

- When we recognize that citizens are speakers, as well as listeners, we need to look at the availability of media on a per capital (or per household basis) since this affects the chance that an individual will have the opportunity to be heard and influence the opinions of his or her fellow citizens.

Viewed in this way (see Exhibits VIII-5 to VIII-10), we do not find that "media choices have expanded exponentially through technology."[274] At best, counting the number of owners, there has been slow growth in the past forty years, but most of that occurring between 1960 and 1980. Looking at the number of owners per household, there was growth between 1960 and 1980, and then stagnation or decline since 1980.

Looking at the major mass media through which news and information is conveyed to the public, we see the past twenty years a dramatic reduction in the number of owners and a major increase in concentration. Radio has declined as a source of news and information over that period. The Internet certainly has not supplanted newspapers and TV as a source of news and information.

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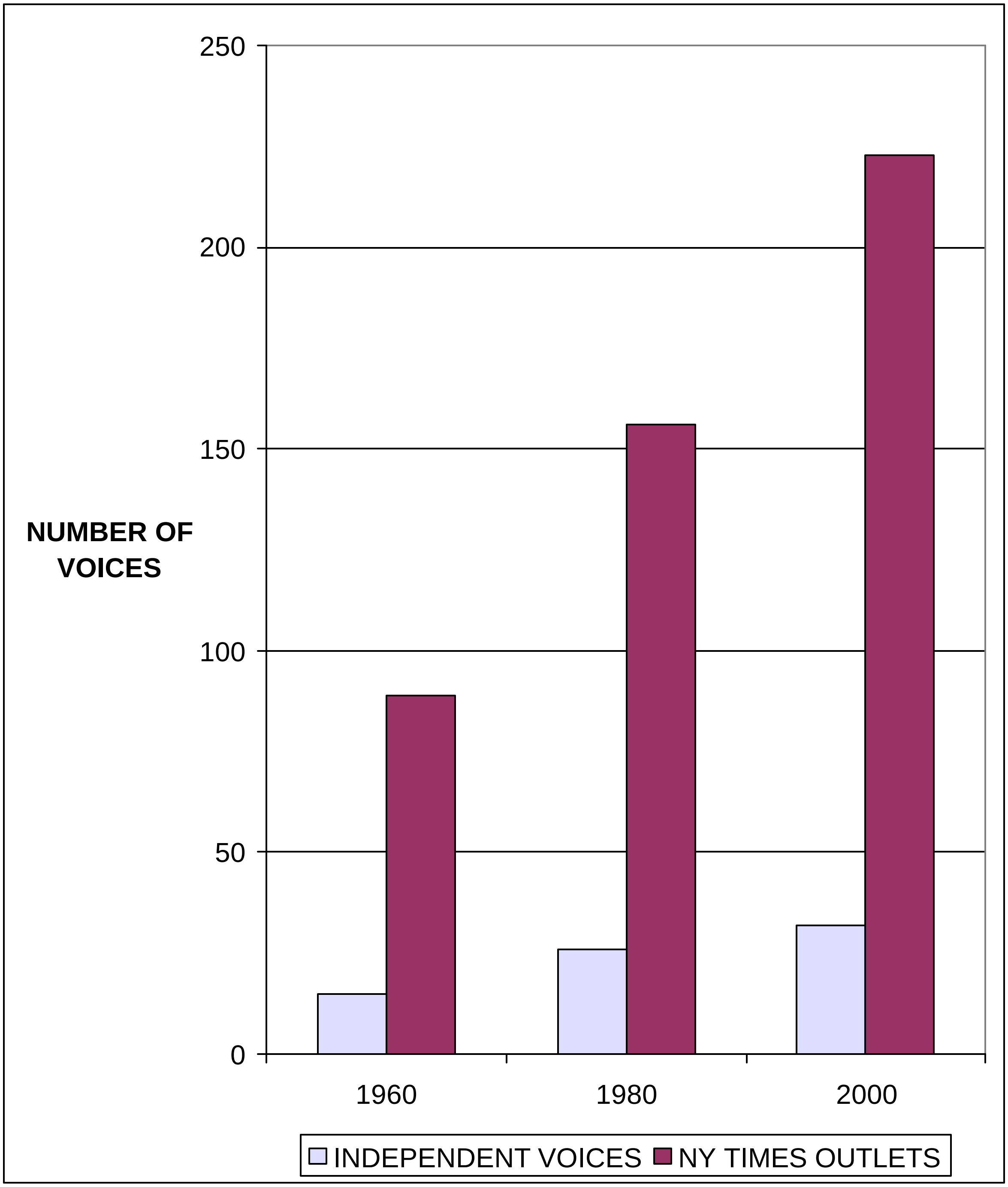
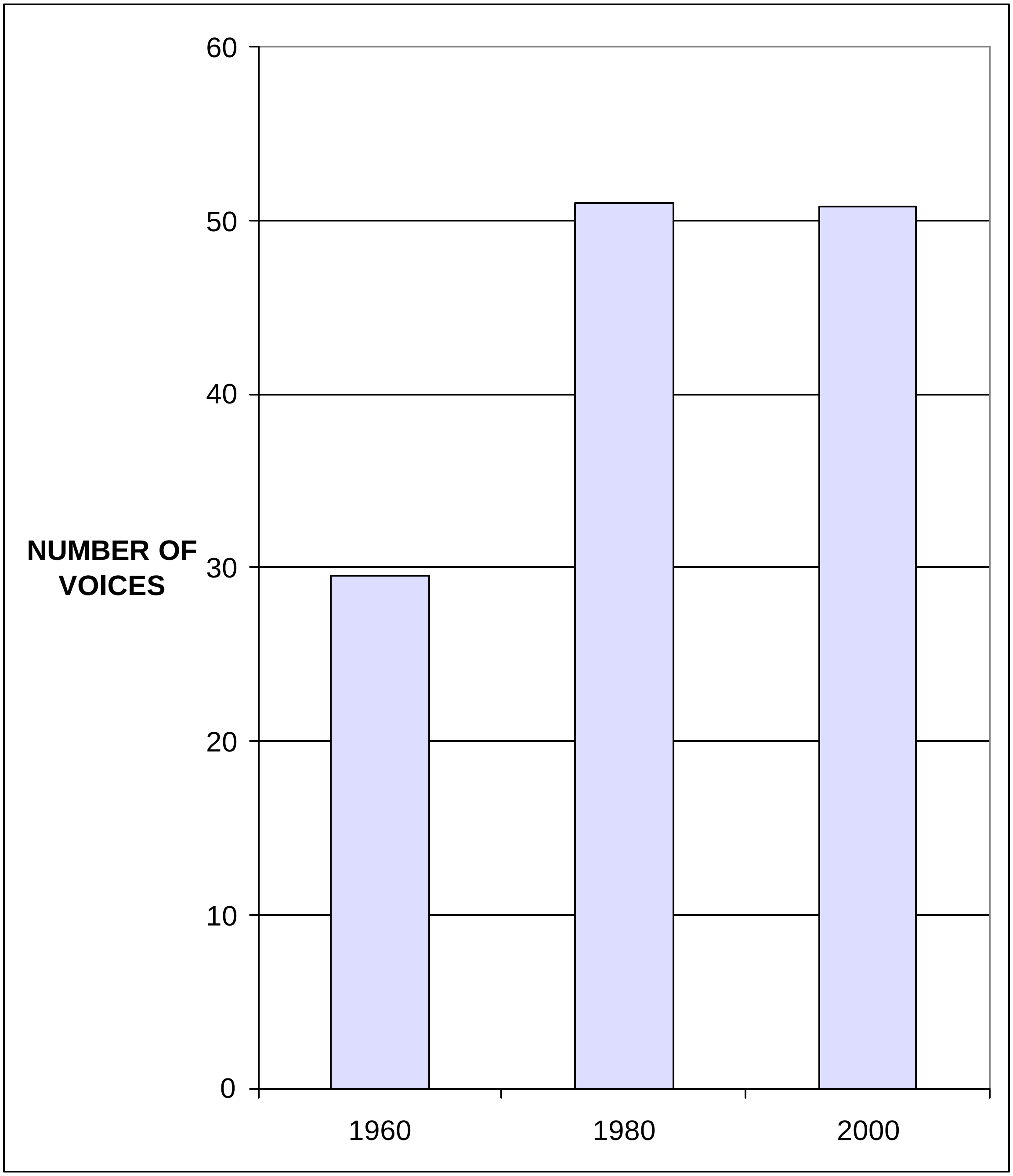
[274] Rutenberg, p. C-1.

EXHIBIT VIII-5: COUNTING MEDIA VOICES: NEW YORK, NY



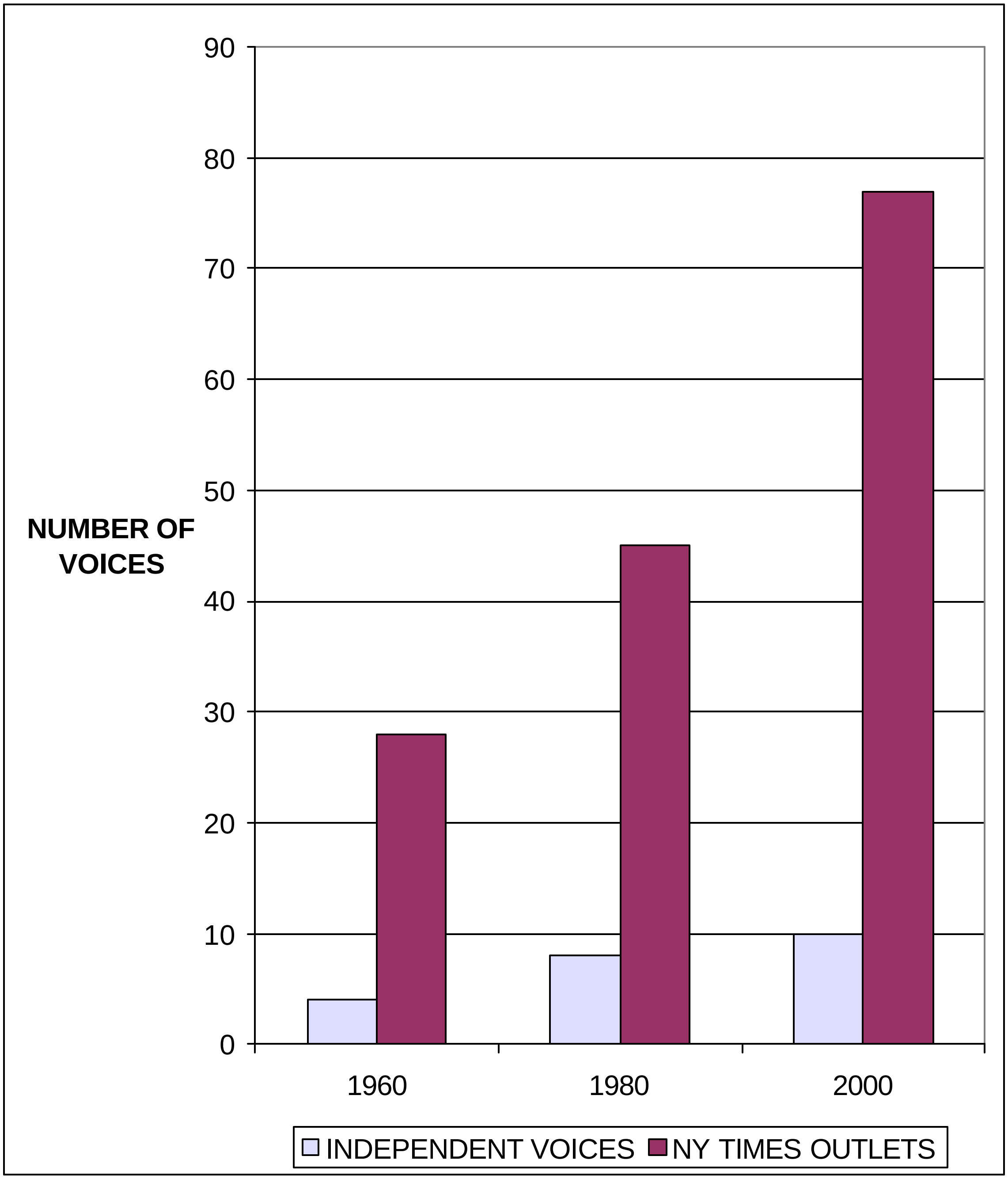
Source: Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Federal Communications Commission, Media Bureau Staff Research Paper, 2002); Jim Rutenberg, "Fewer Media Owners, More Media Choices," *New York Times,* December 2, 2002.

EXHIBIT VIII-6: NEWS VOICES PER 100,000 HOUSEHOLDS: NEW YORK, NY



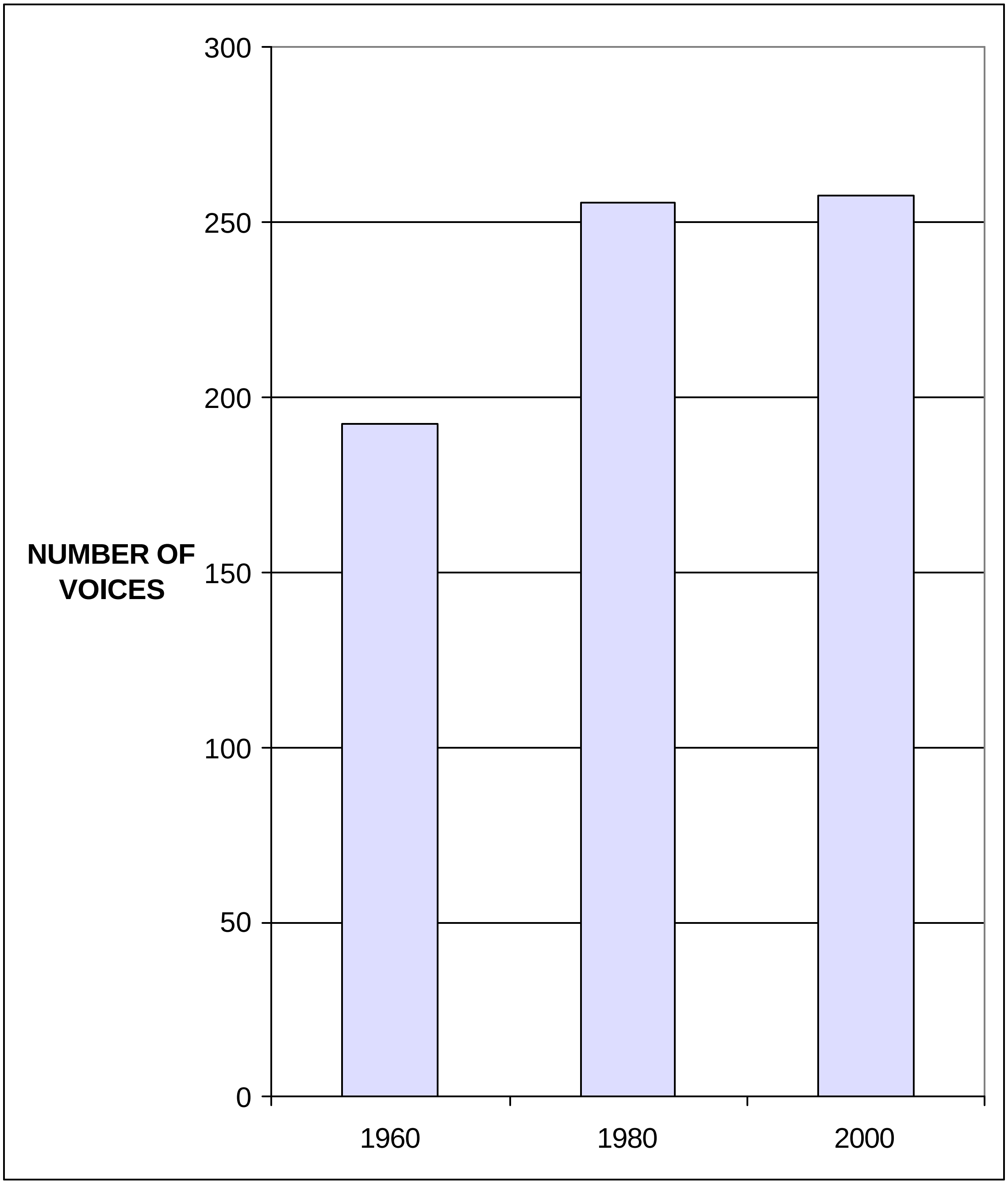
Source: Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Federal Communications Commission, Media Bureau Staff Research Paper, 2002).

EXHIBIT VIII-7: COUNTING NEWS VOICES: BIRMINGHAM, AL



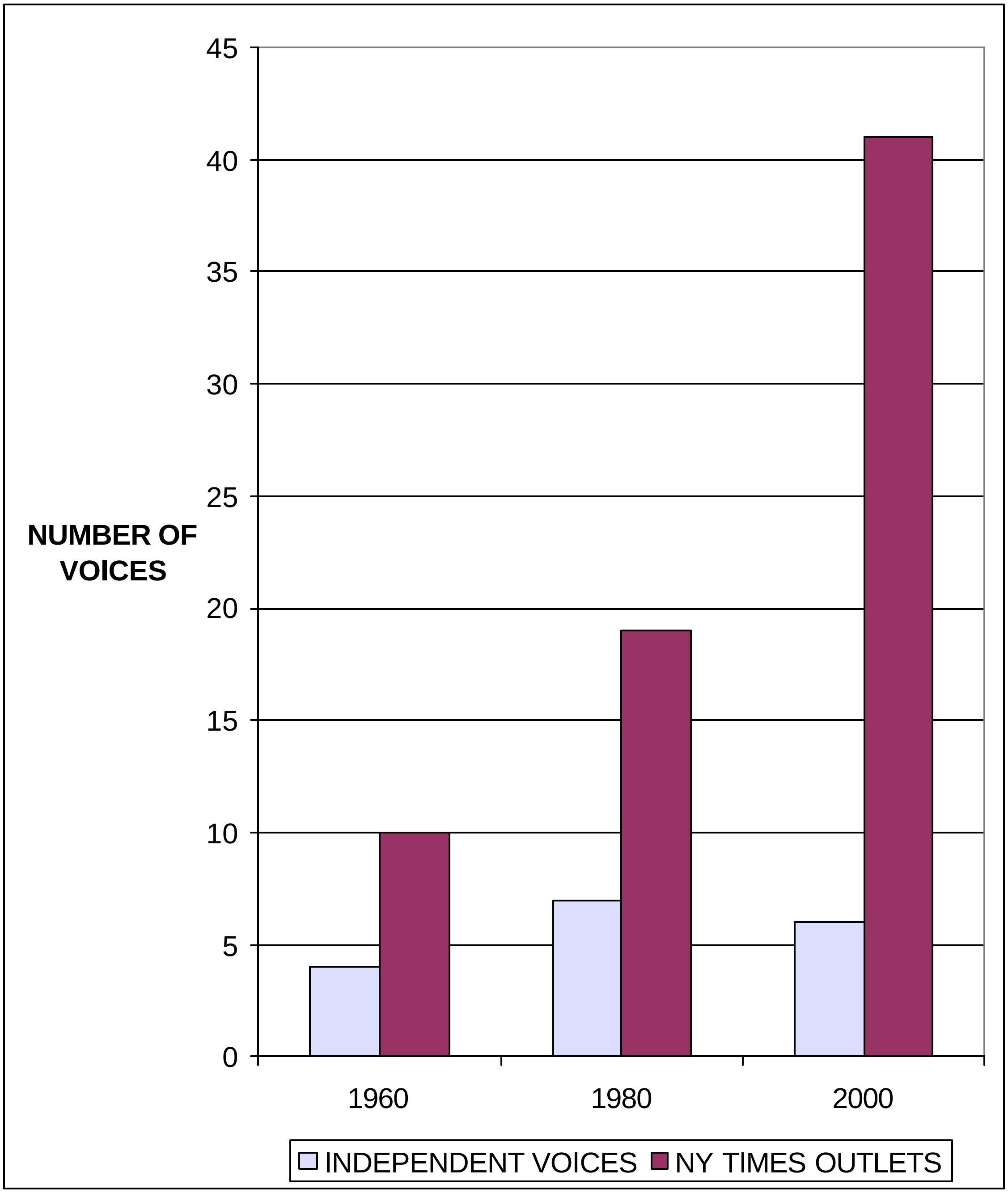
Source: Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Federal Communications Commission, Media Bureau Staff Research Paper, 2002); Jim Rutenberg, "Fewer Media Owners, More Media Choices," *New York Times,* December 2, 2002.

EXHIBIT VIII-8: NEWS VOICES PER 100,000 HOUSEHOLDS: BIRMINGHAM, AL



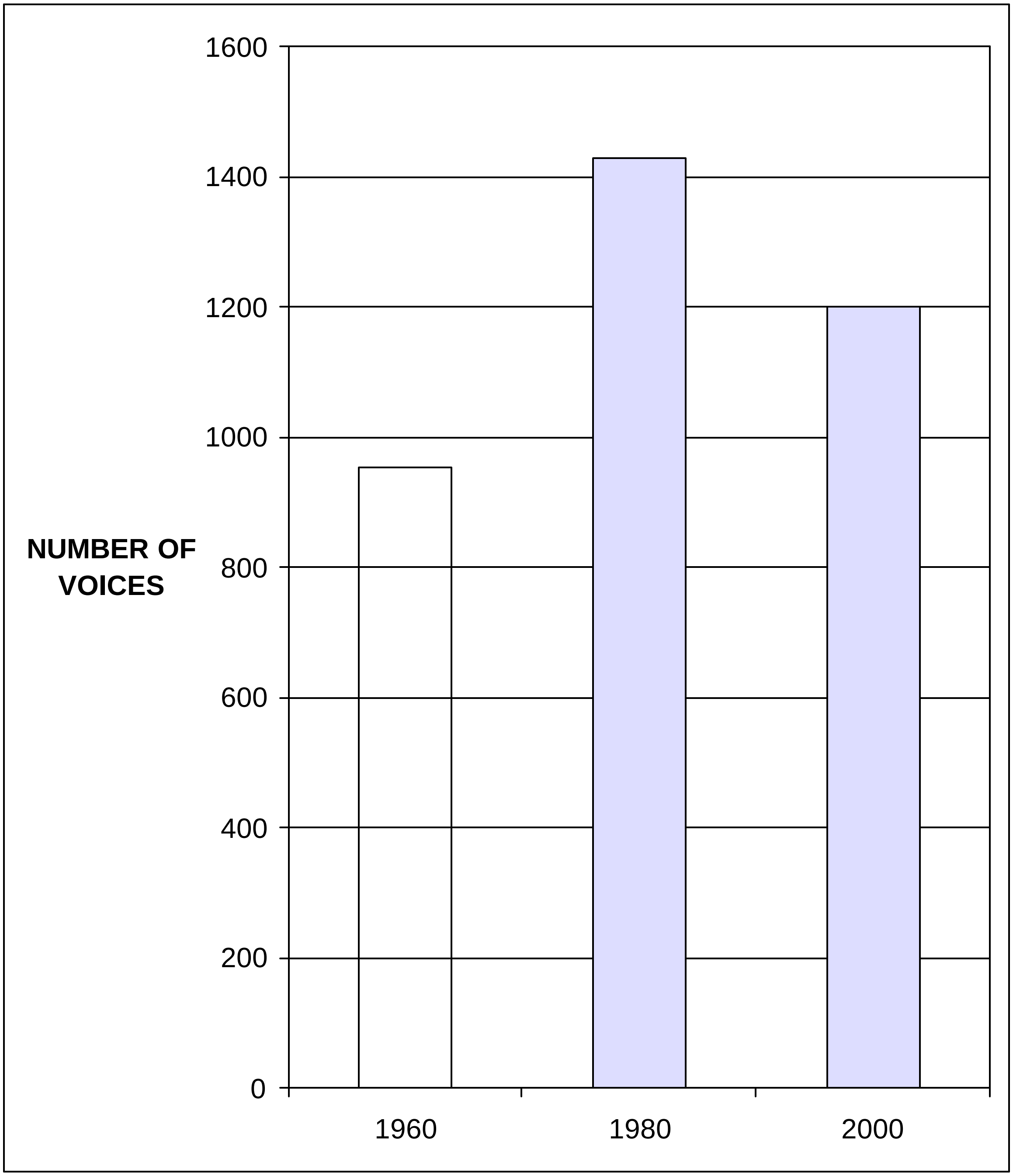
Source: Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Federal Communications Commission, Media Bureau Staff Research Paper, 2002).

EXHIBIT VIII-9: COUNTING NEWS VOICES: ALTOONA, PA



Source: Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Federal Communications Commission, Media Bureau Staff Research Paper, 2002); Jim Rutenberg, "Fewer Media Owners, More Media Choices," *New York Times,* December 2, 2002.

EXHIBIT VIII-10: NEWS VOICES PER 100,000 HOUSEHOLDS: ALTOONA, PA



Source: Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Federal Communications Commission, Media Bureau Staff Research Paper, 2002).

Some might argue that the current structural limits have failed to preserve diversity in ownership. In fact, the consolidation in TV has occurred not because the rules are ineffective, but because they have been repeatedly relaxed over that period at the expense of diversity. The next chapter shows that, without what is left of the structural limits, the major media markets will become much more concentrated and less diverse in ownership.

PART III: THE CHALLENGE OF VERTICAL INTEGRATION IN MEDIA MARKETS

IX. VERTICAL INTEGRATION AND CONGLOMERATION

Part IV primarily dealt with media owners as sellers of products to the public. In economics this is known as horizontal market power. The analysis focused on the ability of a producer to dominate the delivery of a specific product to the public in a specific geographic market. There are other forms of market power with which civic discourse and economic analysis are concerned. We are also worried about media owners as buyers of products in an economic sense or gatekeepers of access to public debate from the point of view of democratic discourse. In this part we analyze the problem of monopsony power, which is the flip side of monopoly power, vertical integration and conglomeration. The analysis defines these issues in this chapter. The next chapter presents qualitative and quantitative evidence of the problem in each of the major media markets – TV and newspapers.

A. THE ECONOMIC THEORIES OF MONOPSONY AND MONOPOLY POWER

Antitrust law and practice recognizes that monopoly and monopsony are flip sides of the same anticompetitive coin.

> The mirror image of monopoly is "monopsony." A monopsonist is a monopoly buyer rather than seller. Although most antitrust litigation of market power offenses has involved monopoly sellers rather than buyers, monopsony can impose social costs on society similar to those caused by monopoly.[275]

> Monopsony is often thought of as the flip side of monopoly. A monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals. A monopolist has power over price exercised by limiting output. A monopsonist also has power over price, but this power is exercised by limiting aggregate purchases. Monopsony injures efficient allocation by reducing the quantity of the input product or service below the efficient level.[276]

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[275] Hovenkamp, Herbert, Federal *Antitrust Policy The Law of Competition and Its Practice,* Hornbook Series (St. Paul: West Group, 1999), pp. 13-14.

[276] Sullivan, Lawrence and Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook,* Hornbook Series (St. Paul: West Group, 2000), pp. 138-139.

Monopsony power has received less attention in antitrust practice for a variety of reasons. Monopoly and monopsony frequently occur together and monopoly is the more inviting antitrust target[277] and its initial effect can be to lower prices paid by the monopsonist, making it extremely important to consider the impact on the suppliers of the input, as well as the public.[278] However, the leading antitrust texts recognize that a careful economic analysis

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[277] Id., pp. 138-139.

> Antitrust law has been slow to develop a coherent set of principles for assessing monopsony power. One reason for this is that many firms possessing monopsony power in the purchase of goods or services also possess monopoly power when the goods or services are resold. For example, the monopsony power that a cable TV franchise possesses in purchasing television programming becomes monopoly power when that programming is distributed to the franchise's cable subscribers. When a monopsonist is also a monopolist, attacking the monopoly conduct may be the politically more popular enforcement option because the monopoly conduct has a direct impact on the price paid by consumers.
>
> Although there is no theoretical basis for assuming that monopsony power is less injurious to consumer welfare than monopoly power, the direct injury that monopsony occasions is to the seller of goods and services, not to the end consumer. To the extent antitrust chooses politically popular enforcement initiatives, it is understandable that it would focus on a monopoly that raises prices to consumers rather than a monopsony that depresses prices to sellers.

[278] Hovenkamp, p. 14.

> By reducing its demand for a product, a monopsonist can force suppliers to sell to it at a lower price than would prevail in a competitive market ... If the price is suppressed they will reduce output to a level that once again equals their marginal costs. In any event, both price and output will fall below the competitive level when the buyer is a monopsonist. Some productive assets will be assigned to products that would have been the supplier's second choice in a competitive market. As a result, monopsony allocates resources inefficiently just as monopoly does.
>
> The important policy implication of monopsony is that it reduces rather than increases output in the monopsonized market. Many federal judges have failed to see this. The consumer welfare principle in antitrust, or the notion that the central goal of antitrust policy should be low prices, has often suggested to courts that monopsony is not all that important an antitrust policy concern.

of the abuse of monopsony power leads to the more traditional and typical anticompetitive effects.[279]

> The monopsonist reduces its buying price by reducing the amount of some input that it purchases. If the input is used in the output in fixed proportions, then the output must be reduced is well. This suggests two things: (1) the monopsony buyer that resells in a competitive market will charge the same price, but its output will be lower than if it were a competitive purchaser; (2) the monopsony buyer (or cartel) that resells in a monopolized (or cartelized) market will actually charge a higher price than if it were a competitive purchaser.[280]

To put the matter in simple terms from the point of view of the current analysis, when the buyer of programming becomes too large, he can dictate the price to content producers and drive them out of the market or cause them to reduce quality. Since the media companies have market power at the point-of-sale, they can force the public to endure the reduction in quality or elimination of diversity.

In fact, not only is monopsony power the object of traditional antitrust practice,[281] but also it has a very long-standing presence in seminal cases.[282] Moreover, antitrust authorities note that the exercise of monopsony power is more likely in specialized products. They specifically include cable TV programming in the list of markets likely to be afflicted with the exercise of monopsony power.

> Monopsony is thought to be more likely when there are buyers of specialized products or services. For example, a sports league may exercise monopsony (or

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[279] Roger D. Blair and Jeffrey L. Harrison, “Antitrust Policy and Monopsony,” *Cornell Law Review* 1991.

[280] Id. p. 15, see also Sullivan and Grimes, p. 139.

[281] John Lauck, “Toward an Agrarian Antitrust: New Direction for Agricultural Law,” *North Dakota Law Review* 499, 1999; John J. Curtin, Daniel L. Goldberg and Daniel S. Savrin, “The EC’s Rejection of the Kesko/Tuko Merger: Leading the Way to the Application of a ‘Gatekeeper’ Analysis of Retailer Market Power Under U.S. Antitrust Law,” 40 *B.C. L. Rev*. 537, 1999.

[282] Id., p. 139.

> oligopsony) power in purchasing the services of professional athletes. An owner of a chain of movie theaters, some of which are the sole theaters in small towns, may have monopsony power in the purchase or lease of movies. Cable TV franchises may exercise monopsony power in purchasing television channels that will be offered to their subscribers.[283]
>
> At the same time, the abuse of monopsony power is more likely when the product is undifferentiated. Where products are relatively undifferentiated and capacity primarily distinguishes firms and shapes the nature of their competition, the merged firm may find it profitable unilaterally to raise price and suppress output. The merger provides the merged firm a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales. Where the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.[284]

B. THE PROBLEM OF VERTICAL INTEGRATION AND CONGLOMERATION

> Antitrust authorities identify three different types of mergers.
>
> A **horizontal** merger is a marriage of rivals. It involves firms doing “the same” thing in “the same” market…
>
> A **vertical** merger involv[es] companies in a supplier-customer relationship…
>
> **Conglomerate** mergers… [are] **product-extension** mergers, in which the products (or activities) of the partners do not compete with each other but have some functional relationship in production or distribution.[285]

When mergers are vertical, there are particular concerns about the level of competition in each of the affected markets and the impact of the merger on competition across stages of

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[283] Sullivan and Grimes, p. 138.

[284] Merger Guidelines, Section 2.22. In some respects, video programming is differentiated, in others it may not be. The development of marquis shows and strong brands suggests differentiation. The development of look-a-likes suggests a lack of differentiation.

[285] Peter Asch, Industrial *Organization and Antitrust Policy* (New York: John Wiley and Sons, 1983), pp. 262-263.

production. The most succinct statement from the general literature that captures the problems with such a merger is from William Shepherd who concludes that:

> Large costs could arise if the two merging firms are both heavily dominant at their levels, and capital barriers are high at one level.[286]
>
> The "ideal" conglomerate merger is by an unexpected entrant acquiring a minor firm. By contrast, if an important potential entrant buys up a dominant firm (or vice versa), competition will be doubly reduced.[287]
>
> The *Guidelines* do recognize three major competitive problems of vertical mergers in concentrated industries. First, forward mergers into retailing may facilitate collusion at the manufacturing stage by making it easier to monitor prices or by eliminating a "disruptive buyer."[288]

We have found monopoly or near monopoly newspaper markets and highly concentrated broadcast markets. We have also found a lack of competition between the core businesses of these two media. Lifting the cross-ownership restriction would lead to vertical integration (integrating back office operations) or conglomeration (two different lines of business merging). Newspaper-broadcast mergers are the antithesis of "ideal."

There is a growing body of theoretical and empirical analysis that has reinvigorated concerns about the anti-competitive impacts of vertical integration, particularly in the cable industry.[289] Concerns arise that not only will the dominant firm in the industry gain the

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[286] Shepherd, p. 292.

[287] Shepherd, p. 304.

[288] Martin K. Perry, "Vertical Integration: Determinants and Effects," in Richard Schmalensee and Robert D. Willig, (eds.) *Handbook of Industrial Organization* (North Holland, Amsterdam: 1989), p. 247.

[289] On the cable industry see Ordover and Braunstein, op. cit. or more general arguments see T. G. Krattenmaker, and S. C. Salop, "Anti-competitive Exclusion: Raising Rivals' Costs to Achieve Power Over Prices," *The Yale Law Journal*, 92:2, 1986; J. Ordover, A. O. Sykes and R.D. Willig, "Non-price Anti-Competitive Behavior by Dominant Firms Toward the Producers of Complementary Products," in F. M. Fisher (ed.), *Antitrust and Regulation* (Cambridge: MIT Press, 1985).

leverage to profitably engage in anti-competitive conduct, but also the dynamic processes in the industry will clearly shift toward cooperation and coordination rather than competition.

Exhibit IX-I summarizes the anticompetitive conduct and negative market performance that can emerge from weakened market structures that result from the particular type of concentration caused by these mergers.

Vertical integration through merger can create barriers to entry. By integrating across stages of production, incumbents may force potential competitors to enter at both stages, making competition much less likely. These barriers take a variety of forms.[290]

A barrier to entry that receives considerable attention in the general literature is the need to raise large sums of capital for entry into vertically integrated industries. Backward integration by a dominant manufacturer may also create a barrier to entry so as to preserve its dominance.[291] Exclusive and preferential deals for the use of facilities and products can be anticompetitive.[292]

The market structural conditions that result from the concentration and integration of the industry make behavioral abuse effective. Cross subsidization becomes possible,[293] although this is by no means the only available instrument of anti-competitive conduct. Vertical integration facilitates price squeezes and enhances price discrimination.[294]

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[290] Perry, p. 247.

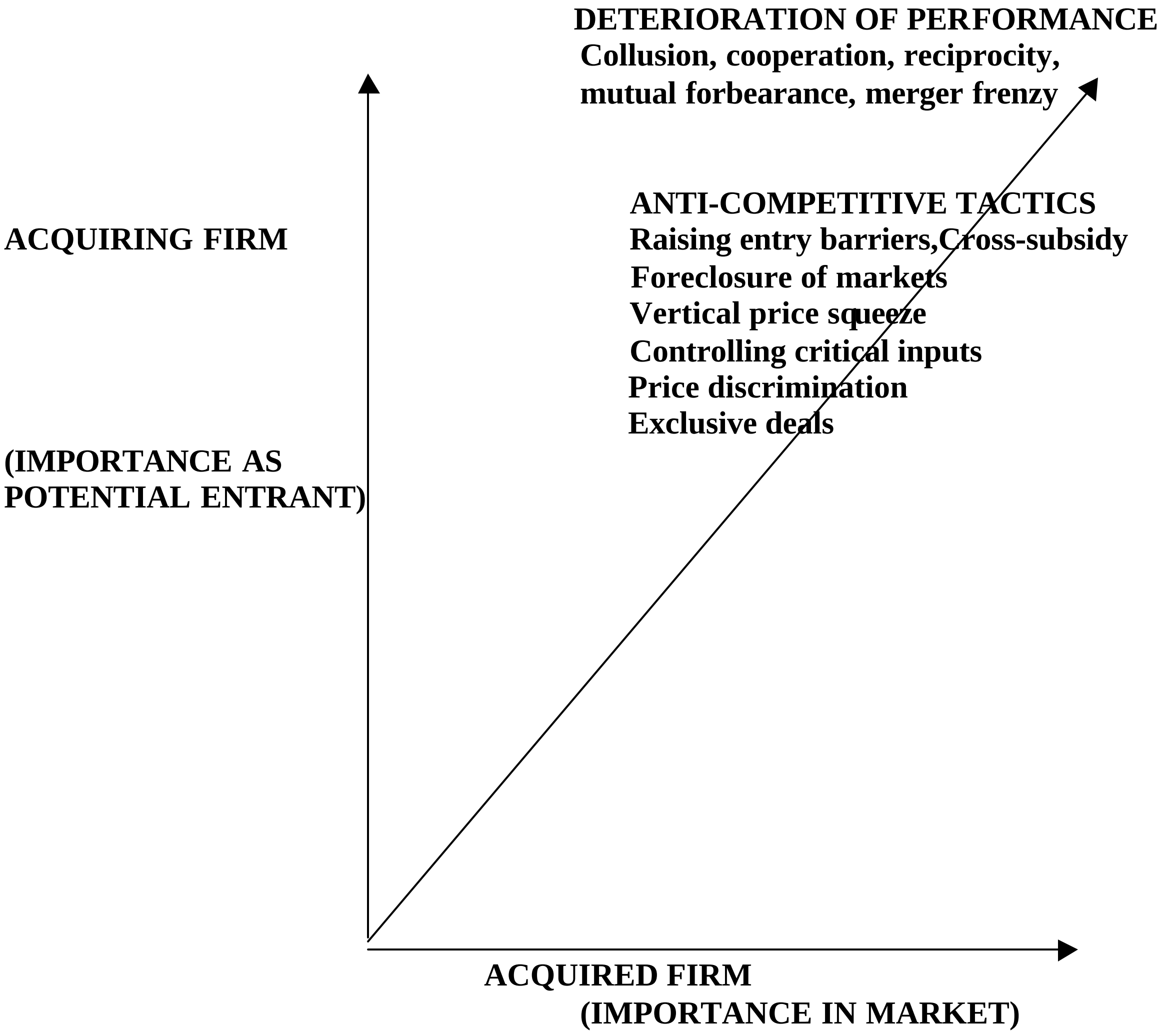
[291] Shepherd, p. 290.

[292] Perry, p. 247.

[293] Peter Asch, and Rosalind Senaca, *Government and the Marketplace* (Chicago: Dryden Press, 1985), p. 248.

[294] Scherer and Ross, p. 524.

EXHIBIT IX-1: THE SPECIAL PROBLEM OF CONGLOMERATES



Source: William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), pp. 289-304.

Not only will the dominant firm in the industry gain the leverage to profitably engage in anti-competitive conduct, but also dynamic processes in the industry will clearly shift toward cooperation and coordination rather than competition. The issue is not simply collusion, although that is a concern.[295] Beyond collusion, a mutual forbearance and reciprocity occurs as spheres of influence are recognized and honored between and among the small number of interrelated entities in the industry.[296] The final behavioral effect is to trigger a rush to integrate and concentrate. Being a small independent at any stage renders the company extremely vulnerable to a variety of attacks.[297]

These are the negative effects of the merger in strict economic terms. There are social and political concerns in the literature as well. Loss of local control is one concern. This would be a particularly strong concern in a media industry.

> There remain the social impacts of absentee ownership upon localities. Though they are less technically proven, they may ultimately be important.
>
> One impact occurs through plant closures decided by distant officials who are unaware or insensitive about local strengths …
>
> Local firms are normally knit into their communities, with the companies' officials contributing and participating in local affairs … When taken over by large firms, the local companies typically stop their local involvement. Indeed, there is often a shift toward pressuring the city for tax reductions and other favors.[298]

A second concern is the accumulation of political power. Again, given the fact that this industry involves the most important means of information discourse, this would be a particular concern.

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[295] Perry, p. 247.
[296] Asch and Senaca, p. 248.
[297] Scherer and Ross, pp. 526-527; Shepherd, p. 290.
[298] Shepherd, p. 304.

> Large size can also yield political power, for two main reasons. First, large firms are a focus of large-scale financial resources, which can be quickly mobilized and deployed effectively. Second, their large employment rolls give them a direct influence over voting patterns.[299]
>
> Supporters of conglomerate size limitations frequently respond to such claims with a "noneconomic" argument … stating that the relevant issue for policy rests *not* in the "actual harms, however defined" that conglomerates create, but rather in "a *fundamental ideological concern* with giant aggregations of privately held assets."[300]
>
> The joining of significant numbers of large corporations may well affect power in a broad context -- visible perhaps in rising aggregate concentration measures -- even though the impacts on specific markets cannot be readily discerned. This result may give rise to social or political rather than economic concerns, but even economists will concede that such worries are real ones.[301]

In moderately or highly concentrated media and communications markets, vertical integration—the combined ownership of content and distribution channels—can skew incentives to undermine journalistic independence. For a news program at a station that is independently owned and operated, the overriding concern should be credible and professional reporting that will bring viewers back. However, when a large media conglomerate gobbles up that same station, it becomes unlikely that the station will cover its parent aggressively when inevitable conflicts of interest arise. In markets with few direct competitors, this bias is more likely to go unnoticed and unchallenged.

Even when it appears that the giants in one media sector are squaring off against the giants in another, each invoking the consumer's interest as its sole motivation in battle, often the consumer is more a hostage than the beneficiary of the warfare. For example, when ABC, backed by its parent, the Walt Disney Company (Disney), squared off against cable monopoly

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[299] Shepherd, p. 298.
[300] Asch and Senaca, p. 249.
[301] Asch, p. 264

Time Warner over carriage terms for Disney's programming, consumers faced the following prospects: either Time Warner would win and consumers would still pay inflated cable rates without receiving Disney programming, or Disney would win, and Time Warner could increase consumers' rates in return for carrying Disney programming. And when cable and Internet giant AOL Time Warner sounds like it wants to challenge the national broadcast networks' dominance in TV news coverage through its popular CNN and Headline News cable channels, analysts believe this really means that AOL Time Warner wants to merge or partner with either ABC News or NBC News.[302]

The fundamental failure of media and communications policies to develop competitive transmission/distribution systems has left consumers at the mercy of powerful content and transmission companies whose most antagonistic, "competitive" behavior consists of fighting with each other over who gets the larger share of monopoly profits from consumers and who often control content delivered to consumers.

C. THE UNIQUE PROBLEM OF DISCRIMINATION IN VERTICALLY INTEGRATED DIGITAL NETWORKS

As digital delivery of media becomes the dominant form of distribution and various communications networks converge on digital technology, concern over vertical integration has focused on the problem of discrimination. As the "increasing number of mergers in high-technology industries has raised both horizontal and vertical antitrust issues ... the interest in and analysis of vertical issues has come to the forefront."[303] Increasingly large owners of communications facilities, merging across communications and media markets have elicited

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[302] Jim Rutenberg, "Mix, Patch, Promote and Lift." *New York Times*, July 15, 2001.

[303] *See* Daniel L. Rubinfeld and Hal. J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, *Berkeley Tech. Law Journal* 16, 2001, p. 632.

vigorous analysis of the abuse of vertical market power (e.g., AT&T/MediaOne, AOL/Time Warner [and Time Warner/Turner before it], SBC Communications Inc. (SBC)/Ameritech, and Bell Atlantic/GTE).[304]

The small number of digital distribution facilities can create a transmission bottleneck that would lead directly to the problem of vertical leverage or market power. "[A] vertically integrated broadband provider such as AT&T will have a strong incentive and opportunity to discriminate against unaffiliated broadband content providers."[305] Facility owners with large market shares do not hesitate to criticize the anticompetitive impacts of other facility owners who gain a large market share.[306] They understand all too well that closed communications facilities means market leverage, which creates the incentive to discriminate against both alternative transmission media, and alternative suppliers.

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[304] *See* Time Warner Inc., 123 F.T.C. 171 (1997). In the Time Warner/Turner/TCI merger analysis, the FTC found that entry into the distribution market was difficult in part because of vertical leverage [hereinafter Time Warner/Turner/TCI].

[305] Jerry A. Hausman, et al., *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers, Yale Journal on Regulation,* 18, 2001, pp. 129, 134.

[306] AT&T Canada Long Distance Services, "Comments of AT&T Canada Long Distance Services Company," before the *Canadian Radio-television and Telecommunications Commission*, Telecom Public Notice CRTC 96-36: Regulation of Certain Telecommunications Service Offered by Broadcast Carriers, February 4, 1997 (hereinafter, AT&T Canada); Comments of America Online, Inc. In The Matter of Transfer of Control of FCC Licenses of MediaOne Group Inc., To AT&T Corp. CS Docket 99-251, (filed Aug. 23, 1999), available at http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (providing, at the federal level, AOL's most explicit analysis of the need for open access) [hereinafter AOL, FCC]

As concern over this leverage has grown, analysts have identified two distinct types of discrimination. Vertically integrated broadband providers may practice content discrimination or conduit discrimination. [307]

Content discrimination has been the focal point of concern in relation to high-speed Internet services. Content discrimination involves an integrated provider "insulating its own affiliated content from competition by blocking or degrading the quality of outside content."[308] It benefits the vertically integrated entity "by enhancing the position of its affiliated content providers in the national market by denying unaffiliated content providers critical operating scale and insulating affiliated content providers from competition."[309]

AT&T identified four forms of anticompetitive leveraging -- bundling, price squeeze, service quality discrimination, and first mover advantage.[310] It describes the classic vertical leveraging tools of price squeezes and quality discrimination as content discrimination. Even after AT&T became this nation's largest cable TV company, it criticized local telephone companies for abusing their monopoly control over telephone wires. AT&T complained about bottleneck facilities, vertical integration, anticompetitive bundling of services, and the distortion of competition when it opposed the entry of SBC into the long distance market in Texas. These are the very same complaints AOL made about AT&T at about the same time.[311]

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[307] *See* Time Warner / Turner / TCI, p. 8.

[308] Hausman, p. 158.

[309] *Id., p*. 159.

[310] AT&T Canada.

[311] AT&T Canada, p. 15, AOL FCC.

In implementing conduit discrimination, the vertically integrated company would refuse to distribute its affiliated content over competing transmission media.[312] In so doing, it seeks to drive consumers to its transmission media and weaken its rival. This is profitable as long as the revenue gained by attracting new subscribers exceeds the revenue lost by not making the content available to the rival. Market size is important here, to ensure adequate profits are earned on the distribution of service over the favored conduit.[313] Although some argue that "the traditional models of discrimination do not depend on the vertically integrated firm obtaining some critical level of downstream market share,"[314] in reality, the size of the

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[312] Hausman, p. 159,

> [A] cable broadband provider will engage in conduit discrimination if the gain from additional access revenues from broadband users offsets the loss in content revenues from narrower distribution. . .
>
> To capture the gains from such discrimination, the vertically integrated cable provider must have a cable footprint in which to distribute its broadband portal service, either through direct ownership or through an arrangement to share the benefits of foreclosure with other cable providers.

[313] Rubinfeld and Singer, p. 667,

> What determines whether conduit discrimination will be profitable? Simply put, if a cable broadband transport provider that controls particular content only has a small fraction of the national cable broadband transport market, then that provider would have little incentive to discriminate against rival broadband transport providers *outside of its cable footprint.* The intuition is straightforward: out-of-franchise conduit discrimination would inflict a loss on the cable provider's content division, while out of region cable providers would the primary beneficiaries of harm done to non-cable competitors.

[314] Hausman, p. 156; "Comments of the American Cable Association," In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001, pp. 13-14 [hereinafter ACA] provides the calculation for cable operators,

> The major MSOs will be the clear winners in these transactions. MSOs granted exclusive distribution rights will have an opportunity to attract DBS subscribers with exclusive programming, resulting in increased subscriber

vertically integrated firm does matter since “a larger downstream market share enhances the vertically integrated firm’s incentive to engage in discrimination.”[315]

> revenues (a minimum of \$40-\$50 per subscriber) and increased system values (at least \$3,500-\$5,000 per subscriber). . . .
>
> Where do ACA members fit into these transactions? Nowhere. ACA members operate locally, not regionally or nationally. In situations involving regional or national exclusive distribution rights, there is little incentive to carve out exceptions for smaller cable systems. For each small system subscriber lost under exclusivity, the vertically integrated program provider will likely lose revenue between \$0.10 and \$0.75 per month, depending on the service. In contrast, for each former DBS subscriber gained through regional or national exclusive program offerings, the MSO with exclusive distribution rights will gain all monthly revenue from that subscriber, plus increased system value. In economic terms, an external cost of this gain will be the cost to small cable companies and consumers of reduced program diversity.

[315] Hausman, p. 156.

X. PROBLEMS OF VERTICAL INTEGRATION AND DISCRIMINATION IN VIDEO MARKETS

A. NETWORK PRIME TIME PROGRAMMING: REPEAL OF THE FIN-SYN RULES

On of the most instructive examples of structural policy that prevented vertical integration from foreclosing access to distribution networks were the rules on financial interest and syndication of programming (Fin-Syn). The intention of the rules was to spread the ownership of programming and prevent the networks from dominating prime time. Judging by what happened after they were repealed, the rules were a potent structural limit. The elimination of these rules resulted in massive consolidation of the media industry.

During the 1980s, when the rules were in effect, prime time, as a market, was not very concentrated (see Exhibit X-1). Judged both by the HHI and the CR-4 the market was unconcentrated. Repeal of the rules resulted in a sharp increase in concentration. The HHI for prime time programming now is well into the moderately concentrated range. The CR-4 indicates a tight oligopoly.

The increase in concentration was accompanied by a dramatic shift toward production by the networks (see Exhibit X-2). The big three networks went from an ownership share of programming of 17 percent in 1989 to 48 percent in 2002 through growth and mergers. Of course, the repeal of the Fin-Sin rules made the mergers “attractive.” “New” networks, all of which had been based in major studios, push the network total to 75 percent. Other major studios now account for a very small share of prime time programming. Larger independents, which accounted for 20 to 30 percent under the Fin-Syn rules, now account for less than 10 percent. Smaller producers accounted for about two-fifths of the prime time

EXHIBIT X-1: CONCENTRATION OF PRIME TIME PROGRAMMING

	HHI	CR4
1970	360	32
1977	571	37
1989	532	35
2002	1356	65

Sources: Mara Epstein, *Program Diversity and the Program Selection Process on Broadcast Network Television* (Federal Communications Commission, Media Ownership Working Group, September 2002); *Prime Time Power and Politics: The Financial Interest and Syndication Rules and Their Impact on the Structure and Practices of the Television Industry* (Ph.D. Dissertation, Department of Culture and Communications, New York University, 2000).

EXHIBIT X-2: PRIME TIME PROGRAMMING OWNERSHIP

	1970	1977	1989	2002
CBS	2	2	8	25
VIACOM	0	0	3	
PARAMOUNT/UPN	6	4	5	
ABC	0	0	6	14
DISNEY	2	3	4	
NBC	2	0	3	9
20TH CENTURY FOX	7	3	4	12
WARNER/WB	0	7	7	15
UNIVERSAL	12	26	19	7
LARGE INDEPENDENTS	18	30	22	6
ALL OTHERS	39	38	20	4

Sources: Mara Epstein, *Program Diversity and the Program Selection Process on Broadcast Network Television* (Federal Communications Commission, Media Ownership Working Group, September 2002); *Prime Time Power and Politics: The Financial Interest and Syndication Rules and Their Impact on the Structure and Practices of the Television Industry* (Ph.D. Dissertation, Department of Culture and Communications, New York University, 2000).

programming in the 1980s. These producers now account for only one-twentieth of prime time shows.

B. THE LONG TRADITION OF ANTICOMPETITIVE CONDUCT IN THE CABLE INDUSTRY

1. General Exclusionary Practices

The increasing importance of video distribution through cable and satellite has been noted. Unfortunately, this shift has not solved the problem of discrimination in airing of programming. Integrated MSOs have a long history of granting preferential access to subscribers for affiliated programmers and denying access to those who are not affiliated. Evidence of these problems is both qualitative and quantitative.[316] The dominant, integrated firms get the best deals. For example, large MSOs often secure “most favored nation” clauses from programmers. Such clauses are supposed to guarantee an MSO as good a price as any other operator pays for programming, sometimes excluding Time Warner and TCI.[317]

Other examples of anticompetitive conduct include efforts to impose or obtain exclusive arrangements, price discrimination, and “dial disadvantage.” Exclusive arrangements prevent competing technologies from obtaining programming, as well as preventing competition from developing within the cable industry.[318] Price discrimination against competitors

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[316] Hoekyun Ahn, and Barry R. Litman, “Vertical Integration and Consumer Welfare in the Cable Industry,” *Journal of Broadcasting and Electronic Media,* 41.

[317] John M. Higgins McAdams, “Hangover from Takeovers,” *Broadcasting & Cable,* April 19, 1999.

[318] HBO, a subsidiary of Time, played a key role in the effort to prevent TVRO operators from obtaining programming (see Chan-Olmsted, op. cit., p. 11), and the effort to sell overbuild insurance (*Competitive Issues in the Cable Television on Industry,* Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 127, 152-174. The current efforts to impose exclusive arrangements have raised numerous complaints from potential competitors (see for example "Statement of William Reddersen on Behalf of Bell South Enterprises (hereafter, Bell

and placing competitive programming at a disadvantageous location on the dial (e.g. very high, near other programs with low ratings), have once again become common practice in the cable industry.[319] These include, for example, exclusive deals with independents that freeze-out overbuilders,[320] refusals to deal for programming due to loopholes in the law requiring non-discriminatory access to programming,[321] tying arrangements,[322] and denial of access to facilities.[323]

Allegations of anti-competitive cable practices are not limited to industry critics. The practices within the industry became so bad that even major players became involved in formal protests. Viacom and its affiliates, a group not interconnected significantly with the top two cabals in the industry, filed an antitrust lawsuit against the largest chain of affiliated

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South)," and "Testimony of Deborah L. Lenart on Behalf of Ameritech (hereafter, Ameritech)," *Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce*, U.S. House of Representatives, July 29, 1997.

[319] *Competitive Issues in the Cable Television Industry*, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988. More recently, for example, The Time Warner-Turner merger as originally proposed included preferential treatment for TCI (see "Separate Statement of Chairman Pitofsky and Commissioners Steiger and Varney,"*In the Matter of Time Warner, File No. 961-0004*. Efforts to exclude non-affiliated programs have also been in evidence, as Viacom's most popular programming (MTV) has been bumped.

[320] Bell South, p. 4, cites examples of suspected exclusive arrangements involving Eye on People, MSNBC, Viacom, and Fox, as does Ameritech, p. 7.

[321] The loophole will be terrestrial transmission to regional clusters, thereby avoiding the requirement to provide non-discriminatory access to satellite delivered programming. Bell South gives examples of Comcast in Philadelphia and Time Warner in Orlando (p. 5). Ameritech cites Cablevision in New York (p. 8). A similar process seems to be developing in Detroit (see Ameritech).

[322] Bell South gives examples including NBC/CNBC, Scripps Howard/Home and Garden (p. 5).

[323] Testimony of Michael J. Mahoney on Behalf of C-TEC Corporation Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives, July 29, 1997.

competitors in its New York territory. Ultimately, it sold its distribution business to its competitors.

The natural tendency of the industry's largest players to discriminate was demonstrated in the Time Warner/Turner/TCI merger proposal. The FTC rejected the Time Warner/Turner/TCI merger proposal and imposed conditions on it. It rejected a preferential deal for TCI's purchase of Time Warner programming and required TCI to reduce its level of ownership in Time Warner to less than 10 percent of nonvoting stock (i.e., a non-attributable, passive level).[324] With respect to the programming market it found:

> Entry into the production of Cable Television Programming Services for sale to MVPDs that would have a significant impact and prevent the anticompetitive effects is difficult. It generally takes more than two years to develop a Cable Television Programming Service to a point where it has a substantial subscriber base and competes directly with the Time Warner Turner "marquee" or "crown jewel" service throughout the United States. Timely entry is made even more difficult and time consuming due to a shortage of available channel capacity.[325]

With respect to programming, the FTC saw a number of grounds for believing competition would be lessened:

> enabling Respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs, directly or indirectly (e.g., by requiring the purchase of unwanted programming). Through its increased negotiating leverage with MVPDs, including through purchase of one or more "marquee" or "crown jewel" channels on purchase of other channels.
>
> enabling Respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs by raising barriers to entry by new competitors or to repositioning by existing competitors, by preventing such rivals from achieving sufficient distribution to realize economies of scale; these effects are likely, because

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[324] Federal Trade Commission, In the Matter of Time Warner Inc., Turner Broadcasting Systems Inc., Telecommunications Inc. and Liberty Media Corporation, Complaint, Docket No., September 1997 (hereafter, Time Warner/Turner/TCI).

[325] Time Warner/Turner/TCI, p. 7.

> (1) Respondent Time Warner has direct financial incentives as the post-acquisition owner of the Turner Cable Television Programming Services not to carry other Cable Television Programming Services that directly compete with Turner Cable Television Programming Services; and
>
> (2) Respondent TCI has diminished incentives and diminished ability to either carry or invest in Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services because the PSA agreements require TCI to carry Turner's CNN, Headline News, TNT and WTBS for 20 years, and because TCI, as a significant shareholder of Time Warner, will have significant financial incentives to protect all of Time Warner's Cable Television Programming.[326]

The FTC also concluded that the Time Warner/Turner/TCI merger could reduce competition in distribution markets by

> denying rival MVPDs and any potential rival MVPDs of Respondent Time Warner competitive prices for Cable Television Programming Services, or charging rivals discriminatorily high prices for Cable Television Programming services.[327]

Little has changed in the vertically-integrated, horizontally-concentrated cable TV industry since the FTC reached those conclusions. Overbuilders have faced vigorous efforts to prevent competition through exclusion from access to programming and regulatory tactics of incumbent cable operators.[328] Comcast has shifted some sports programming to terrestrial delivery, thereby avoiding the open access requirement of the 1992 statute. As cable operators become larger and more clustered, this strategy will become increasingly attractive

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[326] Time Warner/Turner/TCI, p. 8.

[327] Time Warner/Turner/TCI, p. 8.

[328] *RCN Telecom Service of New York, Inc. v. Cablevision Corp., et al,* Docket No. CS01-127; *DIRECTV v. Comcast; EchoStar v. Comcast.* Problems can also occur on an event-by-event basis (see "Comments of Everest Midwest Licensee LLC dba Everest Connections Corporation," *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition,* Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001, p. 4; "Comments of Gemini Networks, Inc.," p. 3.

to them. Specific areas where such programming has been denied are Phoenix, Kansas, Philadelphia and New York. The denial of access to marquis sport programming can have a devastating effect, with satellite providers in markets where foreclosure has occurred achieving a market penetration only one-quarter of the national average.[329]

Integrated MSOs wield immense power against smaller cable companies, exploiting loopholes in the program access rules.[330] For the smaller entities, the current refusals to deal are not limited to sports programming. Other services have been denied, such as video on demand.[331] Second, where the large MSOs do not have direct ownership of video services,

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[329] Joint Comments, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001, p. 14.

[330] "Comments of Braintree Electric Light Department," In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001.

ACA, p. 16, elaborates,

> AT&T/New England Cable News ("NECN"). The Commission is familiar with NECN. In 1994, in response to a petition for exclusivity by Continental Cablevision, the Commission granted a limited waiver of Section 628(c)(2)(D) for NECN. The Order gave NECN an 18-month window to enter into exclusive programming contracts, and the exclusivity terms were to end by June 2001. AT&T is the successor to Continental's attributable interest in NECN.
>
> NECN has recently denied access to its service to at least one ACA member based on an exclusive contract with AT&T. The small system seeking access to NECN competes with AT&T in one market. NECN now claims that it is delivered terrestrially, and it cannot provide access to its programming because of its contract with AT&T.

[331] Everest, p. 6.; "Comments of Qwest Broadband Services, Inc.," In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628

they have obtained exclusive arrangements,[332] thereby denying competitors and potential competitors access to programming.[333] The exclusionary tactics apply not only to head-to-head cable operators and satellite providers, but also to DSL-based providers seeking to put together a package of voice, video, and data products.[334] Third, because the dominant MSOs are so large, they can influence important programmers not to sell to competitors and potential competitors. One of the more prominent examples was summarized in the recent program access proceeding as follows:

> It is well known, for example, that News Corp. abandoned its 1997 joint venture with DBS operator EchoStar Communications Corporation (EchoStar) after incumbent cable operators responded to the transaction by refusing to discuss carriage of Fox cable programming. Unwilling to put the financial viability of Fox's programming at risk, News Corp. took the path of least resistance, left Echostar at the altar and switched its affections to the cable-controlled PrimeStar DBS service.
>
> Time Warner, Inc. and [Fox] appear to have entered a symbiotic truce following [Fox's] new proposed affiliation with cable TV industry-owned Primestar Partners L. P. [Fox] originally proposed a merger with EchoStar Communications Corp. to compete with cable TV operators. But according to industry sources, [Fox] received not-so-subtle signals from cable TV operators

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(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001, p. 4.

[332] ACA, p. 15,

AT&T/DigitalTVLand. AT&T owns Headend in the Sky ("HITS"), a wholesale distributor of digital programming via satellite. HITS services have been instrumental in enabling many smaller systems to expand channel offerings through digital services, and ACA has been a prime supporter of this service. Among the digital services carried by HITS is TVLand, a popular entertainment channel. But of all the channels carried by HITS, ACA members cannot receive digital TVLand from HITS. AT&T apparently has a national exclusive contract for the service.

[333] Everest, p. 6, provides a different example.

[334] "Comments of the Competitive Broadband Coalition," In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628 (c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Federal Communications Commission, CS Dkt. No. 01-290, December 3, 2001, p. 11.

> that its cable TV programming would have trouble finding carriage on their systems if the EchoStar deal went through.
>
> It was also reported that New Corp.'s abandonment of its joint venture with EchoStar was a prerequisite for at least one cable Mao's blessing of Fox's $2 billion acquisition of the Family Channel.[335]

The problem is not limited to small cable operators or new entrant MSOs having difficulty gaining access to programming (conduit discrimination). It extends to programmers having difficulty gaining access to MSO distribution or what we have called content discrimination.

2. Examples of Exclusion that Implicate Civic Discourse

Powerful cable MSOs have been able to prevent, restrict, or restructure programming networks, diminishing competition, diversity, and innovation. This unfortunate trend has occurred in both the national and local cable programming marketplaces. We cite several examples below. If the Commission engages in a serious fact-finding process, it will discover additional examples.

Rupert Murdoch's plans to create the Fox News Channel in 1994, for example, were thwarted by both Time Warner and TCI.[336] In order to eventually receive carriage for Fox News, Murdoch had to loan then TCI "$200 million…and an option to buy 20 percent of the network." Other programmers who did not have an investment in the country's then largest MSO suffered. "To make room (for Fox News), Malone cleared out existing networks like a bowling ball cracking into the tenpin. The arrival of Fox News in Denver pushed Court TV to split the programming day with Spice, a pay-per-view sex network."

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[335] "Joint Comment," p. 8.

Recent comments in the program access proceeding summarize these events aptly:

> It is also well known that Fox News Channel ("FNC") owes its very existence to Telecommunications, Inc. ("TCI," since acquired by AT&T), whose agreement to carry FNC on systems serving 90% of TCI's subscribers was critical to the successful launch of the network. Not coincidentally, Fox made FNC available to incumbent cable operators on an exclusive basis. Like the saga of News Corp./EchoStar, FNC's launch and subsequent exclusivity to the cable MSOs is a case study of how the largest incumbent cable operators control the destiny of new programming services, and why programmers sell to cable's competitors at their own risk.[337]

Even the BBC was stymied by MSOs who had other cable news programming interests.[338] The BBC was prevented by cable MSOs from establishing a cable news channel as far back as 1991. In 1998, the BBC announced it hoped to form agreements with cable operators to carry BBC World, its international news service, within the next two or three years. A CNN spokesman, Steve Haworth, is quoted as saying, "Competition is always good for journalism, but I think that the BBC will find this to be a very tough marketplace for them. Remember, this is a second attempt for them," referring to BBC World's unsuccessful first attempt to gain US cable distribution. BBC World was launched in 1991 but only made its first appearance in the United States in 1997 after it made a deal with 25 public television stations for them to carry daily news bulletins. BBC, as the Commission knows, was only able to secure some digital distribution after it partnered with MSO-linked Discovery Channel, creating the BBC America channel.

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[336] Stephen Keating, *Cut Throat: High Stakes and Killer Moves on the Electronic Frontier* (Boulder, CO: Johnson Books, 1999), pp. 17-18, characterizes the incident as described in this paragraph.

[337] Joint Commenters, p. 8.

[338] Heidi Przybyla, "BBC uses D.C. as Beachhead for American Invasion," *Washington Business Journal*, characterizes the incident as described in this paragraph.

Note that our examples are not from the era before digital distribution created additional opportunities for potential carriage. Powerful MSOs even have the power of life and death over well-established programmers who are resident on the cable system.

For example, in a recent interview, Black Entertainment Television (BET) president and CEO Debra Lee acknowledged that plans to establish BET II, a family and public affairs channel, were scuttled because "the industry just didn't embrace it."[339] According to Lee, BET heard from AT&T and others that the industry wanted to see "another black channel." As Lee told Multichannel News: "We were saying, Well, if that's the case, we'll be glad to do it…. We put together a 24-hour programming schedule and sent it to the major cable operators, and there just wasn't a lot of interest."

Indeed, additional minority channel programming fare is very much endangered. According to Multichannel News, "one year after Viacom's blockbuster purchase of BET, several African American-targeted networks are fighting an uphill battle" for carriage.[340] "Despite continued calls for more programming for African-American viewers, industry observers said Viacom's $3 billion acquisition has given BET and its related analog and digital services greater leverage—thus making it more difficult for upstarts New Urban Entertainment Television (NUE-TV), Major Broadcasting Co. and World Network to register significant distribution gains." The article notes that the ability of Viacom to bundle BET services with their networks like MTV will give BET an advantage over their programming competitors.

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[339] "BET's Lee Searches for Viacom Synergies," *Multichannel News*, December 3, 2001.

[340] "Minority Nets Continue Distribution Push," *Multichannel News*, December 3, 2001.

The arts channel Trio has "lacked the leverage to make cable operators sit up and take notice" since its 1994 launch, despite its digital tier ambitions.[341] Consequently, the network's owners (which included the Canadian Broadcasting Company) decided they had to sell the channel to the well-connected Barry Diller's USA Networks. But the price to secure US MSO carriage appears to have changed the channel's original mission of "films, dramas, and documentaries." Now, under Diller, the early 1970's series "Rowan and Martin's Laugh-In" will "anchor Trio's prime-time line-up along with reruns of the PBS music series Sessions at West 54th."

At the local level, AT&T eliminated a San Francisco cable news channel after the channel's other owners no longer had the protection secured by a retransmission consent agreement.[342] The BayTV News Network was a "local news and information channel" created as a result of "retransmission-consent negotiations between AT&T's predecessor, Tele-Communications Inc., Liberty Media, and then-KRON owner Chronicle Broadcasting." KRON was then the NBC affiliate in San Francisco (KNTV in San Jose became the new NBC affiliate on January 1, 2002). KRON owner Young Broadcasting said they had made "numerous improvements" to BayTV News and had "achieved significant gains in viewership." Yet AT&T, according to Multichannel News, decided to end the channel and give its slot to the Food Network.

In August of 1998, Time Warner Cable announced that it would launch an all-news, 24-hour TV channel in Austin, Texas to be available to 220,000 area subscribers, with the specific intent of focusing on central-Texas news. The A.H. Belo Corporation, a media

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[341] "Barry's New Baby," *Cablevision*, June 11, 2001.

company that currently owns 18 broadcast television stations and four daily newspapers nationwide (including four stations and the *Dallas Morning News* in Texas), had also planned to start a cable news channel during the following year.[343] In January of 1999, Belo launched the Texas Cable News (TXCN), another CNN-style cable news program that was to run in the Dallas-Ft. Worth area on TCI and Marcus cable.[344] Belo intended to invest $15 million in TXCN over the course of 1999, and according to the broadcast division president Ward Huey Jr., they were already negotiating with Time Warner Cable for distribution on their cable systems in Austin, San Antonio, and Houston by the time of the announcement of the launch.

According to a February 26, 1999 article in the *Austin American-Statesman*, Belo then purchased KVUE Channel 24 in Austin from Gannett Company for $55 million and a Sacramento station (KXTV-TV).[345] The executive vice-president of Belo was quoted as saying, “We have always wanted to get into the Austin market just because it not only is a good complement to what we already have, but it now gives us two-thirds of the homes in the state of Texas.” The addition of an Austin channel would allow Belo to use KVUE’s news reports on TXCN. However, the article states flatly that “…most viewers shouldn’t expect to see TXCN in the Austin area any time soon. That’s because the region’s primary cable television provider, Time Warner Cable, is planning its own 24-hour news channel and isn’t expected to carry TXCN.” By May of 1999, Time Warner Cable still did not carry TXCN.

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[342] “AT&T Pulls Plug on BayTV News Network,” *Multichannel News*, July 9, 2001.

[343] R. Michelle Breyer,“CNN-Style Channel Planned for Austin,” Austin *American-Statesman,* August 22, 1998, Business, p. D1.

[344] “New Cable Operation to Tex-ize the news,” *Austin American-Statesman,* January 1, 1999, Metro/State, p. B2.

[345] Kim Tyson, “Belo adds KVUE to Texas TV holdings,” *Austin American-Statesman*, February 26, 1999, News, p. A1, characterizes the incident as described in this paragraph.

Dianne Holloway reported in the *Austin American-Statesman* that, "Belo has been trying for months to break into the Austin television market with its Texas Cable News channel."

Bill Carey, president of Time Warner Cable in Austin, justified the decision to exclude TXCN by saying, "I'm sure [Belo] do what they do very well, but we haven't seen any interest among our customers in state news…. I think of news channels the way I do newspapers, and only local sells. News 8 [TWC's cable news channel] fills a badly needed niche: instantly accessible news and weather with a strong local focus. I don't know of any newspapers or news channels that succeed with statewide or regional news."[346]

In September of 2000, Belo and Time Warner entered into an agreement that would allow the former to air its TXCN on TWC in exchange for splitting the $25 million bill to create two more cable news stations in Houston and San Antonio. In an article on the deal, Heather Cocks noted that Time Warner had "resisted carrying the Dallas media company's 18-month-old Texas Cable News because of a perceived conflict with the News 8 Austin station that Time Warner launched last year."[347] She quotes the senior vice president of Belo as saying, "We've been having conversations with Time Warner since we launched TXCN in January of last year, but it got serious this past spring….To be on cable in Texas, they're obviously a major player."

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[346] Dianne Holloway, "TV's new motto: All the news that's fit to air—and then some," *Austin-American Statesman*, May 29, 2000, Lifestyle, p. E1.

[347] By Heather Cocks, "Time Warner Cable to Carry Belo's Texas News Channel," *Austin American-Statesman,* September 26, 2000, Business, p. D1.

The companies will split resources for the new channels, and the board of representatives for each channel will be comprised of 50 percent Belo and 50 percent Time Warner. The TXCN airs on channel 230 in Houston on Time Warner's digital tiers only.[348]

C. THE VIDEO PROGRAMMING CABAL

The broadcast networks that dominate prime time and the integrated cable operators that dominate non-prime time have become thoroughly integrated into a tight cabal that controls the video dial (see Exhibit X-3). As noted above, a handful of companies dominate the programming side of the multichannel video market. Moreover, each of the dominant programmers has guaranteed access to carriage on cable systems – either by ownership of the wires (cable operators) or by carriage rights conferred by Congress (broadcasters).

- AOL Time Warner (has ownership in cable systems reaching over 12 million subscribers and cable networks with over 550 million subscribers),
- Liberty (owns some cable systems and has rights on AT&T systems and owns cable networks with approximately 880 million subscribers),
- ABC/Disney (has must carry-retransmission rights and ownership in cable networks reaching almost 700 million subscribers),
- CBS/Viacom (has must carry-retransmission rights and ownership in cable networks reaching approximately 625 million subscribers).

These four entities have ownership rights in 20 of the top 25 programming networks based on subscribers and prime time ratings (see Exhibit X-4). They account for over 60

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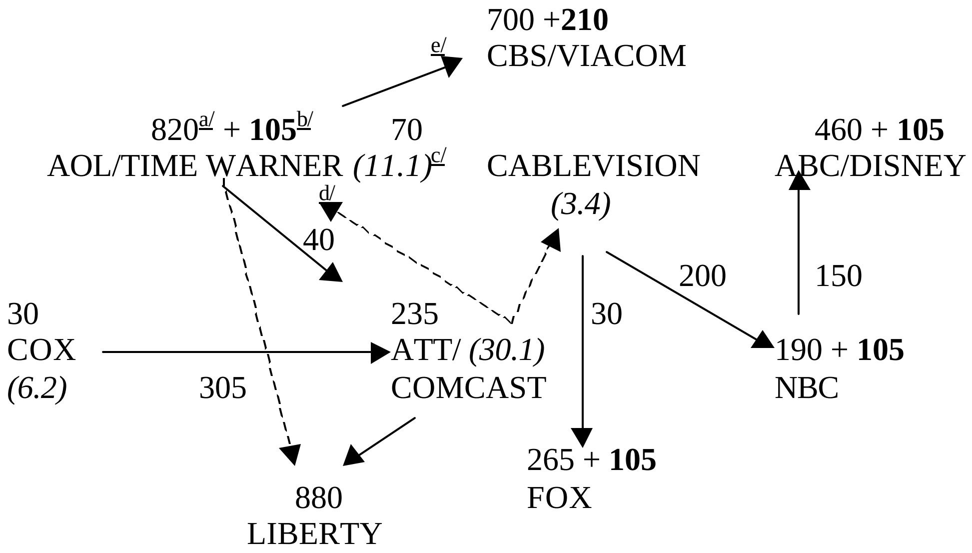
[348] Missy Turner, "Local cameras will roll on 24-hour news channel," *Houston Business Journal,* http://houston.bcentral.com/houston/stories/2001/04/30/story5.html

EXHIBIT X-3: THE VIDEO CABAL: VERTICAL INTEGRATION AND JOINT VENTURES OF DOMINANT VIDEO ENTERPRISES



Sources: Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 00-132, Seventh Report, Table D-1, D-2, D-3, D-6, D-7, BIA Financial, *Television Market Report: 2001* (Chantilly, VA: November 2001). "Comments of the Writers Guild of America," Federal Communications Commission, *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission's Cross-Interest Policy*, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154.

[a/] This is computed as the number of homes in which each cable network is available = millions of subscribers; total is 4.9 billion.

[b/] Broadcast networks are in bold. Each is set at 105 million, which is the total number of TV households in the nation. Total broadcast network "subscribers" is 1.17 billion.

[c/] Cable subscribers are in italics.

[d/] Subscribers in joint ventures are attributed to the larger partner. Arrows point in the direction in which subscribers are attributed to owners. Broken arrows indicate passive ownership.

[e/] Solid arrows indicate active ownership.

EXHIBIT X-4: CONCENTRATION OF MARQUIS PROGRAMMING

NETWORK	1993		2000		OWNERSHIP
	SUBSCRIBERS RANK	PRIME TIME RANK	SUBSCRIBERS RANK	PRIME TIME RANK	
ESPN	1	4	4	12	ABC/DISNEY
CNN	2	12	11		AOLTW
USA	3	1	5	2	LIBERTY
NICK	4	6	10	6	CBS/VIACOM
DISCOVERY	5	10	2	8	LIBERTY
TBS	6	2	1	5	AOLTW
TNT	7	3	3	3	AOLTW
CSPAN	8		12		CABLE CONSORTIUM
MTV	9	13	15	14	CBS/VIACOM
LIFETIME	10	7	9	1	ABC/DISNEY
TNN	11	11	13	10	CBS/VIACOM
FAMILY	12	8	6		FOX/ABC/DISNEY
A&E	13	9	7	7	ABC/DISNEY
WEATHER	14		13		
HEADLINE NEWS	15		17	17	AOLTW
CNBC	16		18		NBC
VH-1	17		20		CBS/VIACOM
QVC	18		16		COMCAST
AMC	19		19		CABLEVISION
BET	20	14		19	CBS/VIACOM
WGN	21			9	LOCAL BCAST
CARTOON		5		4	AOLTW
SCI-FI	1	5		16	LIBERTY
TLC			14	13	LIBERTY
HISTORY				11	ABC/DISNEY
FX				15	FOX

Sources: FCC, *In the Matter of the Status of Competition in the Market for the Delivery of Video Programming*, First and Eighth Reports.

percent of subscribers to cable networks, rendering this market a tight oligopoly. Other entities with ownership or carriage rights account for four of the five remaining most popular networks. The only network in the top 25 without such a connection is the Weather Channel. It certainly provides a great public service, but is hardly a hotbed for development of original programming or civic discourse.   Entities with guaranteed access to distribution over cable account for 80 percent of the top networks and about 80 percent of all subscribers' viewing choices on cable systems.

The dominance of a few entities is not restricted to the most popular shows that were generally established prior to the passage of the 1992 Act. As Exhibit X-5 shows, of the 39 new networks identified by the cable commenters that have been created since 1992, only 6 do not involve ownership by a cable operator or a national TV broadcaster. Sixteen of these networks have ownership by the top four programmers. Eight involve other MSOs and 6 involve other TV broadcasters. These numbers contradict the claim that there has been a dramatic change in the programming environment. As Exhibit X-6 shows, the number of independent networks as a percentage of the total has remained about the same, as has the number of subscribers to independent networks.

EXHIBIT X-5: THE LACK OF INDEPENDENT ENTRY

NETWORK	LAUNCH	OWNER
Cartoon Network	1992	MSO
Sci-Fi Network	1992	MSO
Turner Classic Movies	1994	MSO
Independent Film Channel	1994	MSO
WAM! Kidz Network	1994	MSO
Much Music USA	1994	MSO
Golf Channel	1995	MSO
Outdoor Life	1995	MSO
Great Amer.	1995	MSO
Animal Planet	1996	MSO
CNNFI	1996	MSO
CNNSI	1996	MSO
BET Jazz	1996	MSO
WE: Women’s Entertainment	1997	MSO
Discovery Health Channel	1998	MSO
Tech TV	1998	MSO
Style	1999	MSO
Oxygen	2000	MSO
TV Land	1996	BCAST
Soapnet	2000	BCAST
Nat. Geog	2001	BCAST
ESPN 2	1993	BCAST
FX Network	1994	BCAST
History Channel	1995	BCAST
ESPN Classic	1995	BCAST
Fox News Channel	1996	BCAST
MSNBC	1996	BCAST
Speedvision	1996	BCAST
ESPNews	1996	BCAST
Fox Sports	1996	BCAST
LMN	1998	BCAST
Home & Garden	1994	BCAST
Food	1993	BCAST
Flix	1992	IND
Game Show Network	1994	IND
Bloomberg	1995	IND
Health	1998	IND
Goodlife	1998	IND
Ovation	1998	IND

Sources: McLaughlin, An Economic Analysis of Subscriber Limits, Table 2, Comments of the Writers Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry, Appendix A. FCC, In the Matter of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Report, Tables D-1, D-2, D-3.

EXHIBIT X-6: NUMBER AND CURRENT SUBSCRIBERSHIP OF NETWORKS EXISTING BEFORE AND LAUNCHED SINCE THE 1992 ACT

	PRE-1992 NETWORKS		POST-1992 NETWORKS	
	#	SUBSCRIBERS	#	SUBSCRIBERS
INDEPENDENT	6	20	7	31
BROADCAST-AFFILIATES	14	55	13	72
MSO-AFFILIATED	19	36	18	70

Sources: See Exhibit X-5.

XI. PROBLEMS OF VERTICAL INTEGRATION AND CONGLOMERATION IN PRINT JOURNALISM

A. PRESSURE FROM VERTICAL INTEGRATION AND CONGLOMERATION ON JOURNALISTIC VALUES

The prospect of mergers between TV stations and newspapers raises concerns about both vertical integration and conglomeration.[349] Such a merger is vertical in the sense that the news production output of the newspaper operation would become an input for the TV distribution activity. It is a conglomerate merger in the sense that the new entity would span two separate markets, the print news and the video news market. Both of these changes would have negative effects on the journalistic endeavor of the newspaper.

- The dictates of video delivery would alter the nature of the reporting and commitments to investigative journalism.
- The conglomeration in larger enterprises would reduce the journalistic activity to a profit center that is driven by the larger economic goals of the parent.
- Combining the two activities within one entity diminishes the antagonism between print and video media.

Consider the contrast between journalistic values and the image presented by Tribune Company executives, describing how the Chicago Tribune and Chicago television station WGN, among other media properties, view their business:

> Tribune had a story to tell – and it was just the story Wall Street wanted to hear.
>
> In charts and appendices, they showed a company that owns four newspapers—and 16 TV stations (with shared ownership of two others); four radio stations; three local cable news channels; a lucrative educational book

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[349] Dean Alger contributed substantial analysis to this chapter, see "Reply Comments of Consumers Union, Consumer Federation of America, Media Access Project and Center For Digital Democracy" *In the Matter of Cross-Ownership of Broadcast Stations and Newspaper Newspaper/Radio Cross-Ownership Waiver Policy*, Federal Communications Commission, MM Dockets No. 01-235, 96-197, February 15, 2002.

> division; a producer and syndicator of TV programming, including Geraldo Rivera's daytime talk show; a partnership in the new WB television network; the Chicago Cubs; and new-media investments worth more than $600 million, including a $10 million investment in Baring Communications Equity Fund, with dozens of Asian offices hunting out media investments.
>
> …There was an internal logic and consistent language to their talk: Tribune, said the four men, was a "content company" with a powerful "brand." Among and between its divisions, there was a "synergy."
>
> …It was a well-scripted, well-rehearsed performance, thorough and thoroughly upbeat. And the word "journalism" was never uttered, once.
>
> …Even apart from TV and new media—at the Tribune papers themselves—the editor in chief rarely presides at the daily page one meeting. The editor's gaze is fixed on the future, on new zoned sections, multimedia desks, meetings with the business side, focus group research on extending the brand, or opening new beachheads in affluent suburbs. "I am not the editor of a newspaper," says Howard Tyner, 54, whose official resume identifies him as vice president and editor of the Chicago Tribune. "I am the manager of a content company. That's what I do. I don't do newspapers alone. We gather content."[350]

In highlighting the Tribune Company, we do not mean to suggest that there is anything wrong with the company's behavior. On the contrary, economic "synergies" may certainly help Tribune improve the quality of its media products. And we do not mean to suggest that other factors, like newspaper consolidation and newspaper ties with other corporate entities, do not also challenge print journalist's ability to follow their creed. However, when the two largest sources of news and information – television and newspaper[351] – come under the same ownership roof, there is special cause for concern about business pressures that could undermine the free marketplace of ideas.

Dangers ranging from favorable newspaper reviews of a broadcaster's programming, to positive editorials/opinion articles about business interests of a broadcaster or politicians

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[350] Ken Auletta, "The State of the American Newspaper," *American Journalism Review*, June 1998.

who favor such business interests would be difficult to prevent if cross-ownership is broadly permitted:

> Down in Tampa, Media General has gone so far as to put its newspaper, the Tribune, in the same building with its local television station and online operation, the better to exchange stories and, ostensibly, resources. (It's still unclear what the newspapers get out of the bargain other than garish weather maps sponsored by the local TV meteorologist.) Tampa's has become the most sophisticated model of this kind of thing, and as such is drawing enormous interest from other newspaper companies.
>
> Under the Tampa model, and presumably in most major city rooms of the future, news decisions for all these outlets are made in a coordinated way, sometimes in the same meeting. In effect the same group of minds decides what "news" is, in every conceivable way that people can get their local news. This isn't sinister; it's just not competition.[352]

Except where there is meaningful competition between local newspapers, we believe that lifting the newspaper/broadcast cross-ownership ban would significantly undercut the watchdog role that newspapers play over broadcasters and thereby undermine – particularly in the realm of political speech – Congress' goal of ensuring an open marketplace of ideas.

Industry commenters in FCC proceedings have made an important aspect of the case for us. Their repeated statements that joint ventures are not an effective means for capturing economic efficiencies underscores the important role of antagonism. In other words, they claim that independent entities in joint ventures are too difficult to keep in line.

> Tash sees advantages to partnering, including the ability for both companies to maintain separate and independent voices.
>
> "Anything you do ends up being in partners' interest rather than being forced through common ownership," Tash says. "If it's common ownership, you might add up the pluses and minuses and decide it's a net-plus, even if it's a net-minus for one partner. In this relationship, it has to be a net plus for both.

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[351] Media Studies Center Survey, University of Connecticut, Jan. 18, 1999.

[352] Thomas Kunkel and Gene Roberts, *"The Age of Corporate Newspapering; Leaving Readers Behind," American Journalism Review*, May 2001.

> Tash admits that partnerships with other media companies can be tricky. "You can't rely on orders from a common owner to work through issues that arise."[353]

This issue plays out in an interesting way in the comments of the advocates of combinations. Industry commenters who favor elimination of the rule cite the proliferation of media variety as the changed market conditions that justify a rule change.[354] Having already demonstrated that media such as the Internet are not effective substitutes for newspapers and broadcast television, in this chapter we show that diverse ownership—not media variety—is the essential proxy for antagonism.

Industry commenters contend that "commonly owned media outlets cannot realistically be considered a single 'voice' in evaluating diversity."[355] They urge the Commission to rely on their corporate policies of editorial separation between media entities as the policing mechanism that will ensure diverse information presentation. For example, Gannett tells us that it has a "firm corporate policy of assuring the editorial and journalistic autonomy of the individual newspapers and television stations it holds across the country [that] has been maintained in the context of its common ownership of a newspaper and a television station."[356] However, not only can corporate policies change rapidly, but also many joint owners clearly do not behave this admirably.

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[353] Lisa Rabasca, "Benefits, Costs and Convergence," *Presstime*, p. 3.

[354] See, e.g., Hearst-Argyle, p. 4-5; Gannett, p. 21; NAA, p. v.

[355] Gannett, p. 15. See also Comments of Newspaper Association of America, p. vii (stating that "the Commission has no factual basis for assuming that common ownership necessarily reduces the print and broadcast media to a single, monolithic viewpoint").

[356] Gannett, p. 12.

B. BIASES IN THE COVERAGE OF THE TELECOMMUNICATIONS ACT OF 1996, ANOTHER LOOK AT SELF-INTERESTED COVERAGE

Before we look at specific examples, we remind the reader that systematic evidence on the influence of ownership interests on policy and reporting. Policies that affect ownership, such as the 1996 Telecommunications Act are particularly interesting.

The National Association of Broadcasters, in conjunction with local TV stations, produced and abundantly aired what they called "public service ads" (sometimes aired as editorials) arguing for the give-away of the additional spectrum to the TV station owners. The main theme of the ads/editorials was that there was a threat to "free over-the-air broadcasting as we know it" and that there would be a big "tax on free TV" – which referred to the proposal to auction off the extra spectrum, rather than give it away. The *Charleston Daily Mail* newspaper reported: "In an unprecedented move, four local [TV] stations combined to air messages alerting viewers to HDTV proposals now pending in Congress.... At 6:27 pm and 11:32 pm each station aired" the message simultaneously.[357] With consummate chutzpah, NAB later included the total airtime cost of these ads in their assessment of the local public service TV stations were providing!

From research on newspaper coverage of those ads, political scientists Snider and Page could find "no cases in which *opposing views* on the spectrum give-away" were presented by the TV stations.[358] That there was a newspaper that was owned independently of the TV stations was obviously crucial to having independent reporting on these biased TV presentations – by *all* the stations in the area.

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[357] Snider, and Page, pp.7-8.
[358] Snider and Page, p. 8.

Other indications, including the observations of members of Congress like Sen. McCain and Sen. Dole, suggest the pattern is a general one. For example, on December 23, 1995, The *San Francisco Chronicle*, owned by the same company which owned KRON-TV in San Francisco at the time, prominently editorialized that with the telecom bill, "American consumers will benefit from an astonishing bonanza of dazzling new communications services and, eventually, lower prices..." and admonished Congress to "get it wrapped up." There was no mention in the editorial of the easing of ownership limits or other benefits the TV station owned by the Chronicle Company would receive, and though we did find one earlier *Chronicle* news article that noted some of the doubts raised about the bill, two larger, page one news articles in that period dealt with the bill in approving fashion.

Further loosening of ownership limits through the proposal to end the local cross-ownership rule has been editorialized favorably by papers in companies with TV interests. For example, on July 31, 2001 the *Chicago Tribune*, owned with TV and radio stations WGN, castigated Sen. Hollings for "putting the future on hold" when he asked for more detailed review of the move to end the local newspaper-broadcast cross-ownership rule.

Political scientist Martin Gilens and his colleagues took the list of the 100 largest media corporations and looked at those with newspapers but no TV holdings, those with five or fewer TV stations, and those with nine or more TV stations, to see how they covered the easing of ownership limits in the Telecom Act. They looked at news coverage, rather than editorials. The findings are not as stark, but: "Twenty-two percent of stories in the 'no TV ownership' newspapers mentioned that the loosening of the [ownership] caps would result in fewer media companies owning the nation's TV stations. In contrast, only 2% and 11% of stories from the 'limited TV ownership' and 'substantial TV ownership' papers brought this to their readers' attention."[359]

It is telling that the industry trade magazine *Electronic Media* commented in early 1996 that "media barons have been lucky to keep the Telecommunications Act far from the consciousness of most Americans."[360] In broadcast media, it wasn't merely "luck," it was a refusal to cover this crucial issue, and American democracy was the "unlucky" one.

C. REPEATED FAILURES OF CROSS-OWNED MEDIA TO EXERCISE THEIR WATCHDOG FUNCTION

1. Tampa Florida

For our first example of the fundamental problem that cross ownership poses to the role of the press in providing antagonistic sources of information, we can turn to Tampa, which is frequently offered as the poster-child for media convergence. In Tampa, Florida, Media General, Inc. (Media General) owns both the *Tampa Tribune* newspaper and WFLA-TV. Recently it has taken both operations and housed them under one roof, yet the decision to co-locate led to a loss of editorial and journalistic integrity even before the actual move:

> Others wonder how the cozy, inbred relationship between the newsrooms might affect their coverage of each other. *Tribune* TV writer Walter Belcher offered a chilling example, saying editors forced him to lay off criticism of WFLA for nearly a year prior to the opening of the News Center [which housed the *Tribune* and WFLA news operations in the same space to facilitate their integration], supposedly to avoid ill will between the staffs. "I told them that maybe I should just stop writing about TV altogether," Belcher says with a laugh. "I eventually went back to [covering WFLA] in February, but I still felt like I had to be careful and explain some things more clearly."[361]

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[359] Martin Gilens, and Craig Hertzman, "Corporate Ownership and News Bias: Newspaper Coverage of the 1996 Telecommunications Act," Paper delivered at the Annual Meeting of the American Political Science Association, August, 1997, p. 8.

[360] Snider and Page, 1997, p.14.

[361] Joe Strupp, "Three Point Play," *Editor and Publisher*, August 21, 2000, p. 23.

Unfortunately, such chilling of free speech in a newsroom is no laughing matter – and not the only example in which Belcher's coverage of WFLA came under scrutiny from joint management. Belcher's coverage of WFLA was compromised further when managers at WFLA requested that he not write about speculation that a reporter would be leaving the station to follow her husband, a former WFLA reporter who moved to another station in Alabama. How many other stories were not pursued because of the new camaraderie between the now joined-at-the-hip *Tribune* and WFLA staffs?

The ultimate concern about the loss of antagonism is to undermine the quality of journalism on both the broadcast TV and newspaper sides.

> Eric Deggans, TV critic at the competing St. Petersburg Times, said convergence can be a good thing but cautions that monopolizing a market with leaders in both print and television could affect a company's news product.
>
> "I think news organizations have to be very strong journalistically to avoid conflicts of interest and to avoid the abuse of power that can come by owning so much of the media landscape," Mr. Deggans said. "The concern is that there will be a party line regarding stories. We need to see how they tackle issues like that. I think people in this market have serious concerns about it.

Oddly enough, Media General, in its comments to the Commission, opines that "it is Tampa that to date best illustrates the company's approach to convergence."[362] Given the demonstrable "loss of editorial or journalistic integrity" in Tampa, Media General's showcase example of "the company's approach to convergence" makes a solid case for retaining the newspaper/broadcast cross-ownership rule to prevent the kind of abuses seen in Tampa.

2. Quincy Illinois

Quincy, the smallest media market in the country which has grandfathered newspaper/broadcast cross ownership (held by Quincy Newspapers, Inc., hereafter, "QNI") is cited by industry commenters[363] as another example where convergence has been a shining success; yet, the allegations raised in a lawsuit pending against QNI show the extreme dangers present in a market where a company can gain control over both print and broadcast outlets. QNI is a media holding company that owns at least fifteen media properties, including the Quincy Herald-Whig, a newspaper, two television stations (WGEM-TV and CGEM-TV), and two radio stations (WGEM-AM and WGEM-FM). It is privately held by the Oakley and Lindsay families. The Tri-State Shopper (TSS) is a small advertising publication that was attempting to compete with QNI for advertising sales.

QNI allegedly threatened its customers that if they did any business with TSS, QNY would raise their prices; if customers chose to do business with QNI at the exclusion of the Tri-State Shopper, they would be given free or below cost advertising in QNI publications. Given QNI's control of such a large number of media properties, for a company that had advertising needs beyond the scope of a small weekly shopper, the choice was clear: do business with QNI or don't advertise.

Furthermore, the Quincy Area Convention and Visitors Bureau is housed in the Oakley-Lindsay Civic Center. The Visitors Bureau publishes an annual "Quincy Illinois Visitors Guide," which is a guide to businesses, media, etc., in the Quincy area. This visitors guide is produced with state funding, and about 75,000 copies are distributed every year to tourists that visit Quincy. Curiously, this visitors guide makes no mention of any media properties other than those held by QNI.[364] Apparently, the Quincy Herald-Whig handles the

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[362] Media General, p. 6.
[363] See NAA, p. 28.
[364] See Quincy Illinois Visitors Guide, 2001edition.

advertising for the visitors guide – the lawsuit alleges that only QNI aligned properties were contacted for advertising in the guide. A new business moving into Quincy would be likely to use this visitor's guide to find places where he or she could advertise, but with no mention of non-QNI aligned properties, it would be difficult to find competitors.

Granted, this information surfaced in the context of an antitrust lawsuit—some might argue that this very fact shows that a prophylactic rule is unnecessary to prevent these harms, i.e., it can be addressed properly through antitrust. However, it is only because in this instance that there were clear examples of economic harm that it is addressable through antitrust. Had the predatory behavior been a more subtle leveraging of broadcast and print properties to prevent certain information from becoming public, or an attempt to color coverage to benefit the owner, there would not be such clear economic harm. It is perhaps likely that the information would never have surfaced in the first place. When the stakes are higher than just the market for advertising – when they are raised to the level of important civic debate – we cannot wait for remedies after-the-fact. This is precisely why a prophylactic rule is critical.

3. Dallas Texas

A. H. Belo Corporation (Belo), owner of the *Dallas Morning News* and WFAA-TV argues in its comments that its joint ownership of the *Morning News* and WFAA-TV "has had no noticeable impact on the intense level of diversity and competition in the Dallas/Fort Worth marketplace."[365] That is likely because of Belo's decision that the *Morning News* should stop all TV criticism in order to stay away from any critical reporting about its sister station.

> Then there is a question of how the *Morning News* would cover the station. Because the two share Belo as a parent, the newspaper has often been criticized as being too soft on its sibling. But now that the two were officially partners, the News decided it could no longer cover WFAA objectively. Rather than exclude the one station from its coverage, the *News* halted all TV criticism.[366]

Not only was the *Morning News*'s coverage of WFAA-TV stifled because of the co-ownership, but also an important media critic for the entire market was lost. If joint corporate ownership of a newspaper and television station can lead to coverage being dropped to maintain positive internal relations, what other types of coverage could be jettisoned to protect corporate interests?

4. Milwaukee Wisconsin

Milwaukee has also been described as an example of cross-ownership leading to model behavior. A closer examination reveals anything but model behavior, this time involving a publicly financed sports stadium project. Journal Broadcast Corporation (Journal) operates the Milwaukee *Journal* as well as WTMJ-TV, WTMJ-AM and WKTI-FM in Milwaukee. All are leaders in their service area. In its comments to the Commission the Journal notes that "the radio and television stations have been totally independent from the newspaper in both program and editorial content," and that the outlets have been critical of each other.[367] At a key moment, on an issue of great public import that directly involved the private interests of the company, that appears not to have been the case.

There was a move for public financing of a new stadium for the area's major league baseball team, the Brewers. The Journal Group's AM radio station has the contract for

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[365] Belo, pp. 8-9.

[366] Lucia Moses, "TV or not TV? Few Newspapers are Camera Shy, But Sometimes Two Into One Just Doesn't Go," *Editor and Cable*, August 21, 2000, p. 22.

[367] Journal, p. 2.

broadcasting the Brewers' games. In late 1994, the CEO of the Journal Group, Robert Kahlor, became head of the Milwaukee committee championing public financing for the stadium, and even registered as chief lobbyist. This was a much-debated issue. Indeed, when it came to a vote in the state Senate (in fall 1995) it was decided by one vote. How did the *Journal Sentinel* media cover this big, contentious issue?

"The Journal Company's newspaper, TV-news shows and news-talk radio station all marched in lock-step supporting the public financing position" (Beckman). In the case of the newspaper, that avid support appeared in the paper from the news pages to sports page columnists to the editorials. The other two TV stations, while not such avid boosters, generally reported on the public financing position in positive fashion. Thus, the citizens of Milwaukee, despite the contentious nature of the issue, did not have antagonistic voices in the main media to rely on. The dominant news outlet, the metro paper, had a financial interest in getting the stadium built, which directed its coverage. A veteran local media analyst, who had also been a journalism professor for years (David Beckman), noted, "this case is a classic example of how a media monolith defeats the purposes of free and open debate" in the main media that people rely on and which dominate the public arena and overwhelmingly define the public discourse.

> There's no doubt that conflicts of interest have created some serious lapses in editorial judgment. Milwaukee's Journal Communications, owner of the city's Journal-Sentinel newspaper and WTMJ TV and radio stations faced intense criticism when publisher Robert Kahlor allowed the paper to shed its watchdog role become a cheerleader for a new baseball stadium funded primarily with public money. Not only did Kahlor chair the governor's stadium commission, but also he spent more than $25,000 of Journal company cash lobbying state lawmakers to support public funding.
>
> No coincidence, say local critics, that WTMJ stations also carry Brewers games. "All four Journal media lost almost all objectivity," says Dave

> Beckman, retired professor of mass communications and media columnist for the city's alternative weekly, Shepherd-Express.[368]

5. Columbus Ohio

A similar case involved the Dispatch Company in Columbus, Ohio, which is controlled by the Wolff family, who own the *Columbus Dispatch*, the main metro newspaper, WBNS-TV, and WBNS-AM and FM radio stations. A little over ten years ago it also started a chain of suburban weekly newspapers in the region. With all of those papers, they have 78 percent of all print advertising revenue in the metro region, according to CM Media executives. CM Media, which owns the alternative *Columbus* weekly and a series of suburban weeklies, sued the Dispatch company in the early 1990s on antitrust grounds, saying that the Dispatch was establishing the weeklies and holding down ad costs – predatory pricing – in order to keep down CM Media as a significant challenge to their dominance in Columbus media. The Wolff family's other holdings include a bank, an investment company, and a printing company.

Another case of a sports team and cross-ownership is telling, with different details. The Dispatch's Wolff family is part owners of the Columbus pro hockey team. Besides the usual boosterish coverage of the team connected by ownership to the media outlet that is now too common, there were proposals to build a new hockey stadium. The overt outcome of this was different from in Milwaukee, however. Public financing proposals lost twice in ballot measures. The Wolff family and an insurance company financed the building of the stadium itself. But, since then the city has given land, easements, clean-up, infrastructure and other

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[368] Bill McConnel, "The National Acquirers: Whether Better for News or Fatter Profits, Media Companies want in on TV/Newspaper Cross-ownership," *Broadcasting and Cable*, December 10, 2001.

assistance, subsidized to the tune of "at least $80 million," which the alternative weekly (*The Other Paper*) has documented, in what coverage they could muster. Had a family that owned the TV station gotten such subsidies in a city with an independently-owned newspaper, the investigative juices of the paper's reporters and editors would have been flowing and front page coverage would have been produced from the one local mass medium that has the resources for in-depth investigation. *The Dispatch* has not, however, covered this huge subsidy. Instead, it has been all boosterism of the team and the stadium. Once again, a case of cross-owned newspaper and TV station failed the local democratic process.

Note also that the Dispatch editorialized in favor of the Telecom Act, saying (7/18/95), "The telecommunications bill passed by the senate ... is a worthwhile effort at getting government out of the way and letting the affected companies freely reshape their industries." The benefit to the Dispatch/Wolff family's TV station was not mentioned.

6. Atlanta Georgia

Atlanta, a city kept in check for decades by a tradition of two competing newspapers, the *Journal* and the *Constitution*, suffered from the merger of the two. With Cox owning a TV station, it is now a large market with a very high level of concentration and cross-ownership. The editorial staffs no longer presented two viewpoints, and the number of state government reporters plummeted from twelve to three. It soon became clear that there were not enough government reporters as the news was very one-sided. Bad press led to the paper increasing statehouse-reporting time by six percent, but the consensus is that the coverage has not recovered to its pre-merger quality.[369]

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[369] Roberts, Gene, *Leaving Readers Behind*, 10.

PART IV: STRUCTURAL LIMITS PREVENT CONCENTRATION AND PRESERVE DIVERSITY OF OWNERSHIP

XII. RELAXING OR ELIMINATING STRUCTURAL LIMITS WILL CAUSE A DRAMATIC LOSS OF MAJOR INDEPENDENT LOCAL MEDIA VOICES

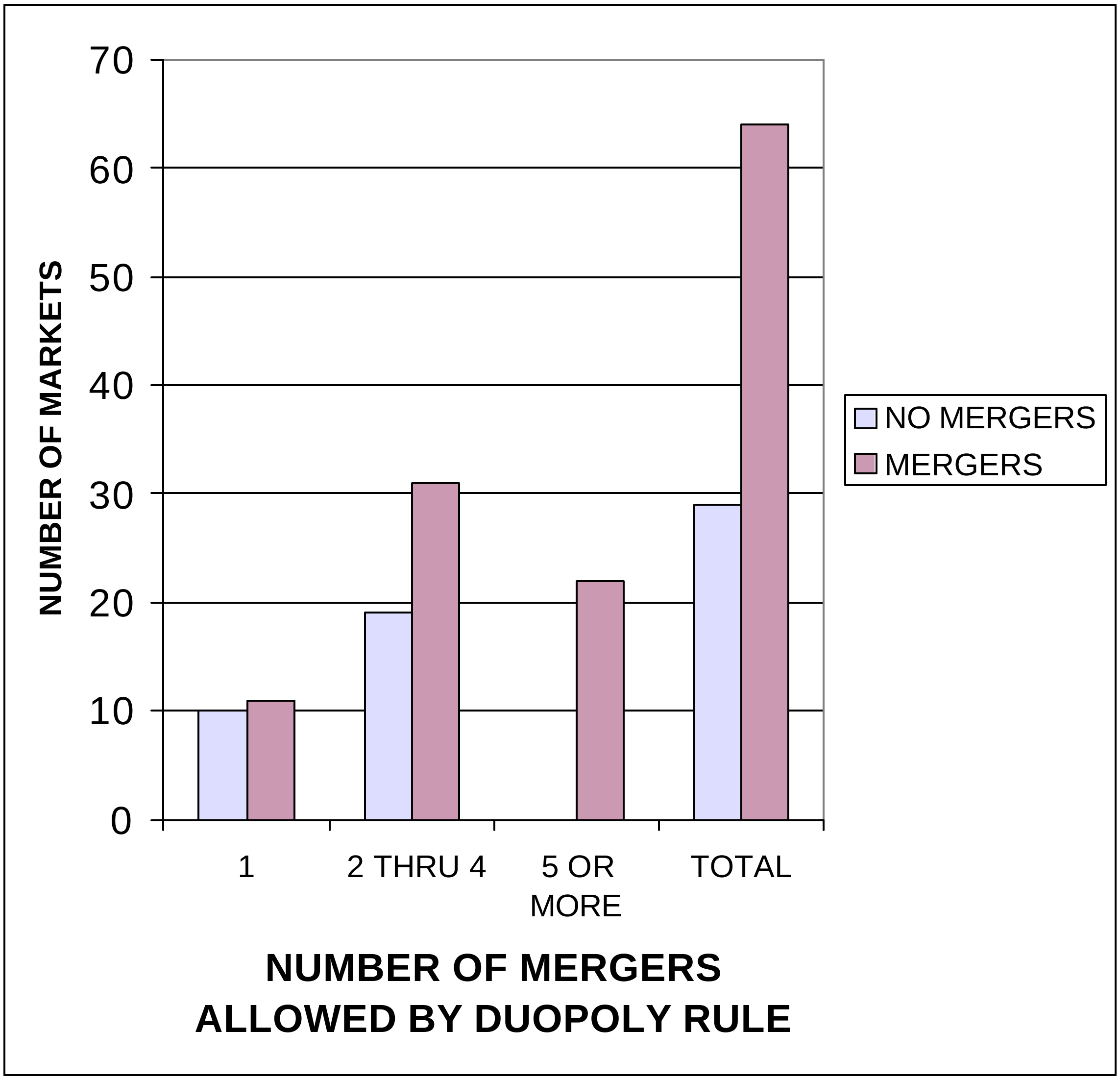
Starting from this initial base of highly concentrated markets, lifting the cross-ownership ban would have a devastating impact on media concentration. Based on changes in other ownership rules, it is reasonable to expect that several hundred mergers would quickly take place, dramatically reducing the number of major independent voices in these markets.

A. PREVIOUS PATTERNS OF MERGER ACTIVITY

1. TV After Relaxation of the Duopoly Rule

To gauge the impact of eliminating the structural limits, we examined the rate at which mergers took place in TV markets after the introduction of the duopoly rule in September 1999. The duopoly rule allows a station owner to own two stations within one market as long as there remain eight independent TV voices after such a merger. We estimate that mergers have become permissible in approximately 70 markets since this rule was enacted. Exhibit XII-1 shows the percentage of markets in which mergers took place. At least one merger took place in about two-thirds of all the markets where they were allowed. (67 out of 98 markets). In lager markets where 5 or more mergers were allowed, at least one merger took place in every market (i.e. there are no markets without a merger). In markets where multiple mergers are permitted, only about 36 percent of all the possible mergers have taken place. In smaller market at least one merger took place in about half the markets where they were allowed

EXHIBIT XII-1: MERGERS SPURRED BY THE DUOPOLY RULE



Source: Calculated from BIA Financial, *Television Market Report: 2000;* See Reply Comments of Consumer Federation of America, et al.; In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking, MM Docket No. 01-235, 96-197, February 15, 2002.

There are at least two other recent instances in which major relaxation or elimination of structural limits on ownership took place – the radio market and the financial and syndication rules for broadcast TV. In both instances we observe a similarly strong trend of consolidation.

2. Radio After the 1996 Act Relaxed Many Restrictions

The consolidation of radio markets in a short period of time after the relaxation of structural limits is striking. The radio industry has become concentrated at every level (see Exhibit XII-2).

Even at the national level, where one might think that the existence of a market fragmented into 285 geographic areas and populated by over 10,000 stations would limit the possibility of concentration, we find that the national market is moderately concentrated when measured by listeners and revenues. In both cases, the HHI exceeds 1000. As noted, this is the equivalent of 10 equal-sized competitors.[370] Just five years earlier, the national HHI was 125, the equivalent of 80 equal-sized competitors. In a very short period, the national market has gone from being atomistically competitive to a loose oligopoly.

A second view of the national market – product types or formats – also reveals a startling level of concentration. All radio formats have become at least loose oligopolies (four firm concentration ratios greater than 40 percent) and the majority have become tight oligopolies (four firm concentration ratios greater than 60 percent).[371] On a listener-weighted

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[370] Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002), p. 10.

[371] Peter DiCola and Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians* (Future of Music Coalition, 2002), pp. 37-39. Nineteen of 30 self reported formats

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are tight oligopolies, while 13 of 19 BIA formats are and 8 of 13 *Radio and Records* categories are.

EXHIBIT XII-2: CONCENTRATION IN RADIO MARKETS

	1995/96	2000	2002
MARKET DEFINITION			
NATIONAL			
REVENUE			
HHI	125	1053	1033
CR4			52
LISTENERS			
HHI			1130
CR4			49
FORMATS			
CR4			63
LOCAL			
REVENUE			
HHI	2103	3084	
STATIONS			
CR4			
BY MARKET SIZE			
TOP 10	61		81
TOP 25	64		83
TOP 50	72		86
51-100	83		94
101-285	86		95

Sources: Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002); Peter DiCola and Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians* (Future of Music Coalition, 2002).

basis, the average format is a tight oligopoly.[372]

However, the radio market is primarily a local market. At that level, the concentration is even greater. The average local market had the equivalent of five equal-sized competitors in 1995 (HHI=2103). By 2000, that had increased by almost 1000 points, to just over 3000, the equivalent of three equal-sized competitors. The relaxation of the rules allowed the larger markets to become much more concentrated, increasing from just at the tight oligopoly level to very tight oligopolies.

Exhibit XII-3 shows this dramatic increase in concentration by assigning markets to the market type categories identified earlier. Even in 1995, most markets were tight oligopolies. However, the merger wave unleashed by the Telecommunications Act of 1996, allowed about half of all markets to become effectively duopolies[373] and almost ten percent of markets to become effective monopolies,[374] while all loose oligopolies were eliminated.[375]

Exhibit XII-4 shows these market categories for the top 50 markets, where the 1996 Act had its biggest impact. One-sixth of the larger radio markets were loose oligopolies in 1996 and five-sixths were tight oligopolies. None were duopolies. By 2002, the loose oligopolies were eliminated and one-quarter of the markets were duopolies.

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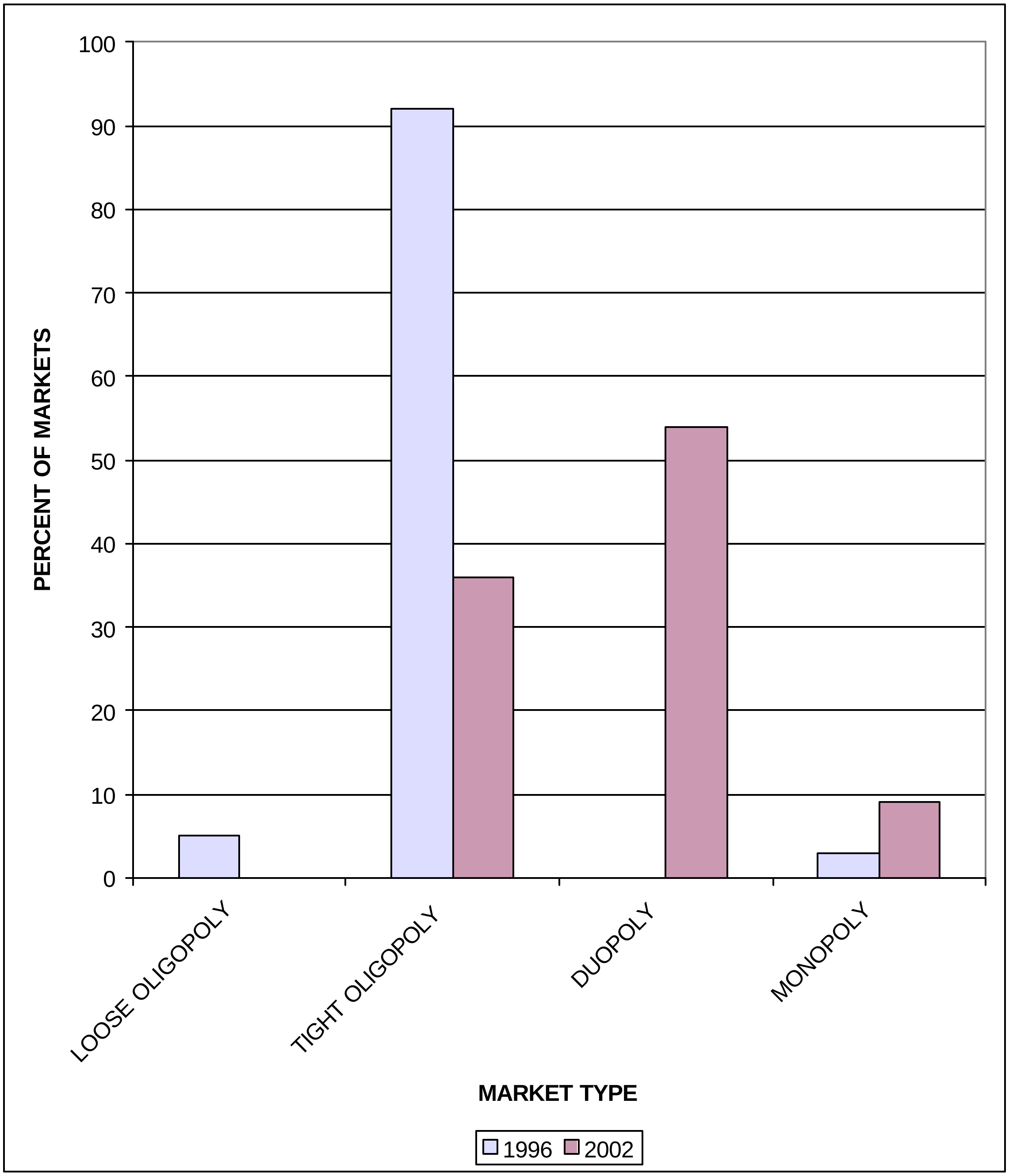
[372] Self-reported CR4 is 64%; BIA CR4 is 61%; R&R CR4 is 65%.

[373] For these purposes, duopolies were defined as markets in which the two largest firms had market shared in excess of 40%/40% or 50%/30%.

[374] For these purposes, monopolies are defined as markets with a dominant firm with a market share of 65% or more.

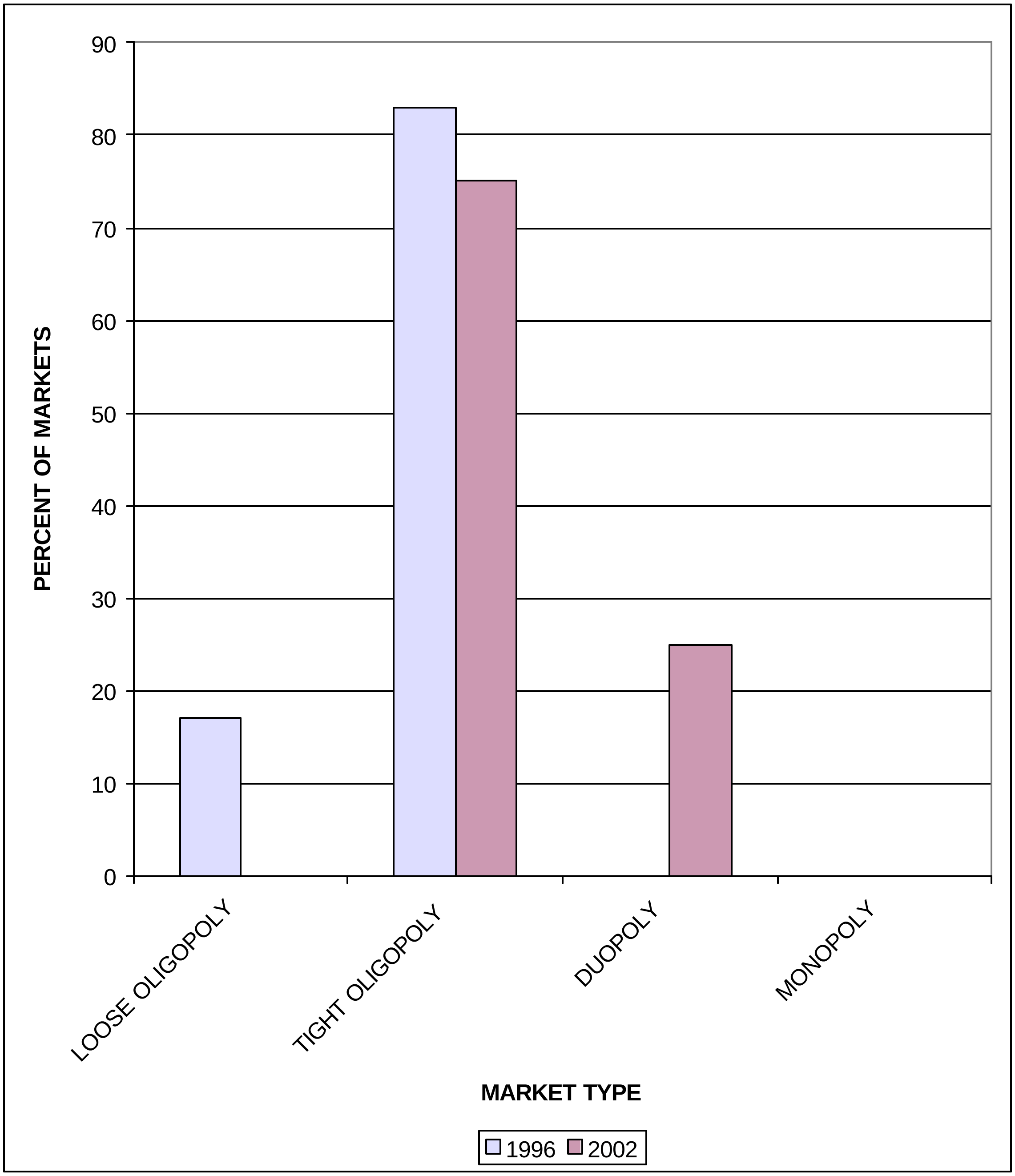
[375] For purposes of this analysis, loose oligopolies were defined as markets with a four firm concentration ratio less than 60 percent.

EXHIBIT XII-3: SHIFT TOWARD CONCENTRATED MARKET TYPES: ALL MARKETS



Source: Sources: Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002);

EXHIBIT XIII-4: SHIFT TOWARD CONCENTRATED MARKET TYPES: TOP 50 MARKETS



Sources: Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002);

3. Other Examples

We have already pointed out two other instances in which the relaxation of structural policy has had an impact on ownership. The repeal of the Fin-Syn rules resulted in a dramatic increase in concentration.

Another example that has been referred to is the relaxation of public interest obligations. When the FCC reduces or eliminates these obligations, media owners cut back. We have noted the reduction in TV news operations, in spite of the increase in stations. The same thing happened in radio. While the number of stations has been increasing, the number of newsrooms has been declining.[376] Interestingly, the same policy decisions that have reduced the number of TV stations doing news affected the radio market.

> Most must stations dropped news after 1984, when the FCC lifted its requirement that all radio stations must include a certain amount of news and information in the programming schedule.[377]

The small size of newsroom staffs for radio limits their ability to add diversity to civic discourse at the level of information. The concentration of radio ownership into chains has cut back on local reporting.

> Metro Networks alone is – by far – the largest producer of radio news in the country. Although its name is never mentioned on the air, Metro provides newscasts to some one hundred fifty-five stations and seventeen hundred radio stations. Its *average* market penetration is twenty-three affiliates per market. Metro says that it provides news services in sixty-seven of the top seventy-five markets, and that its newscasts are heard by one hundred million people every day. It brags to advertisers that it offers them "the opportunity to reach a broad-based local, regional [,] or national audience, through a single purchase of commercial airtime inventory" by Metro.

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[376] Stone.

[377] Kathy Bachman, "Music Outlets Tune in More News Reports," *MediaWeek*, October 29, 2001. The article notes that these music stations are adding news, but it takes the form of a minute an hour from national services, hardly representing either an independent or local voice.

> In a large market like Baltimore, which has forty radio stations and twelve TV stations, I believe Metro provides all or most of the news to about twenty-five radio stations – well over half – and two TV stations.
>
> So much for diversity. There is now, at most, one reporter covering City Hall for all those stations. There is no one to bring a different perspective, to provide the safety valve for a lazy, or even corrupt reporter willing to overlook a story for the wrong reasons.[378]

B. QUANTITATIVE ESTIMATE OF THE IMPACT OF ELIMINATION OF THE CURRENT RULES

Using this as a basis for predicting mergers, we would expect about 200 newspapers to quickly merge with TV stations if the newspaper/broadcast cross-ownership ban is lifted (see Exhibit XII-5). Ultimately, it is likely that most dailies would be combined with TV stations.

As noted in the introduction, there are about 360 independent owners of broadcast TV stations nationwide and about 290 independent owners of daily newspapers. Thus, the total of 650 owners would decline to well below 500 very rapidly. In the long term, it is likely that most newspapers would be cross-owned with TV stations.

Even on a market-by-market basis, this merger wave would have a dramatic impact. In this analysis, we ask how large a reduction of independent voices would take place within individual markets and ignore effects in neighboring markets. Today, there are about 2,000 independent media voices spread across all 210 DMAs. That number would be reduced to fewer than 1,600 by a merger wave between broadcast TV stations and daily newspapers. In other words, the number of independent major local media voices would be cut by one-quarter. Another hundred owners would be eliminated by lifting the national cap.

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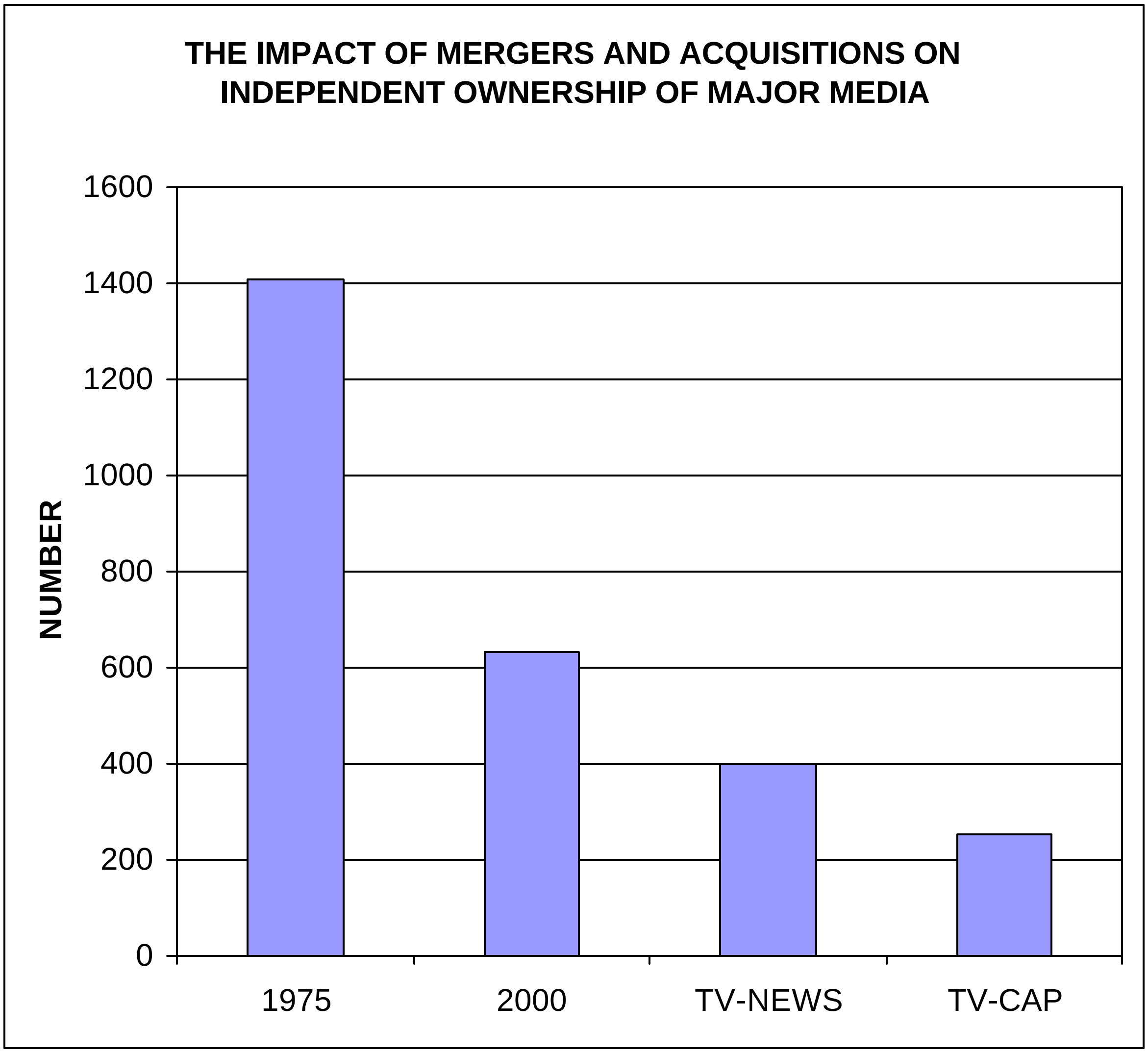
[378] Andrew J. Schwartzman, "Viacom-CBS Merger: Media Competition and Consolidation in the New Millenium," *Federal Communications Law Journal* 52, 2000, p. 516.

EXHIBIT XII-5: NUMBER OF OWNERS HAS DECLINED SHARPLY AND WOULD BE SLASHED BY MORE THAN HALF, WITH RELAXATION OF CURRENT RULES



Sources: Federal Communications Commission, *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking*, MM Docket No. 01-235, 96-197, September 20, 2001. Lisa George, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets* (2001); *Editor and Publisher, International Yearbook*, various issues. TV-News assumes 80 percent of all newspapers enter into cross ownership relations with TV stations, per duopoly rule behavior. Assumes that the networks would acquire affiliates in 80 percent of the markets where acquisitions would be allowed. This would mean buying out 110 stations each and reducing the number of independent owners from 360 to 250.

Relaxation of the national cap on broadcast TV station ownership would reduce the number further. If behavior parallels the activity after the duopoly rule, another 100 owners of TV stations would be eliminated by acquisitions. The number of independent owners of TV stations and newspapers would be reduced to about 300.

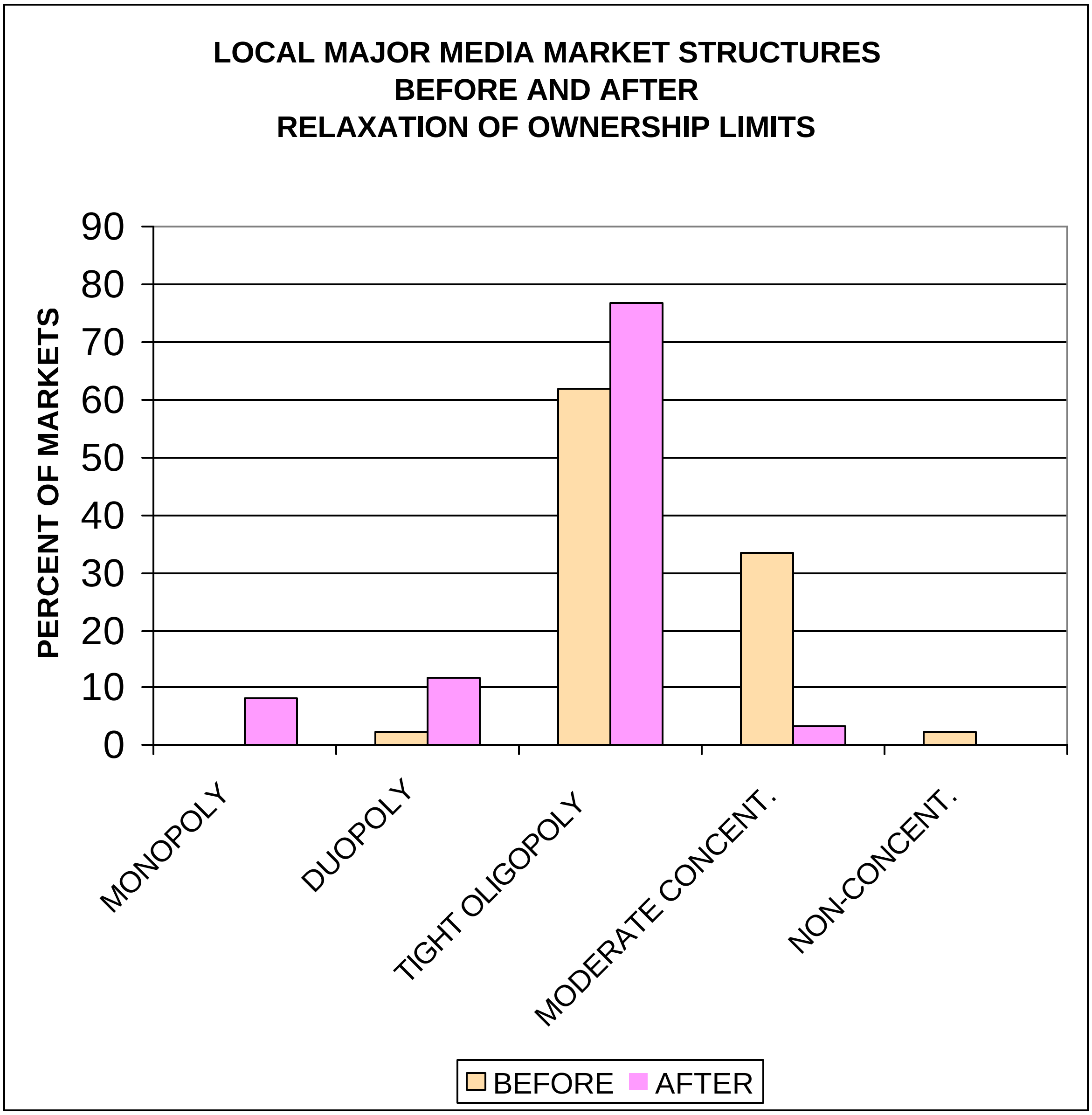
When HHI information is used to inform the voice count analysis, as in Exhibits XII-6 and XII-7, we find that these markets would be much more concentrated. Virtually all markets would be at least highly concentrated.

C. QUALITATIVE DISCUSSION OF THE IMPACT OF INCREASE CONCENTRATION, CONGLOMERATION AND INTEGRATION INTO NATIONAL CHAINS

Even tough the FCC has no direct authority over newspapers, the experience of newspapers undergoing a wave of conglomeration and concentration into national chains is relevant to the estimation of the impact of the relaxation of the FCC's ownership restrictions in several ways. The economic "logic" of pursuing profits through conglomeration, concentration and national integration is potent, but the commission's job is to consider the impact of those economic trends on the quality of civic discourse. It cannot pay homage to the pure economics, but then ignore the end point to which reliance on pure economics will drive civic discourse.

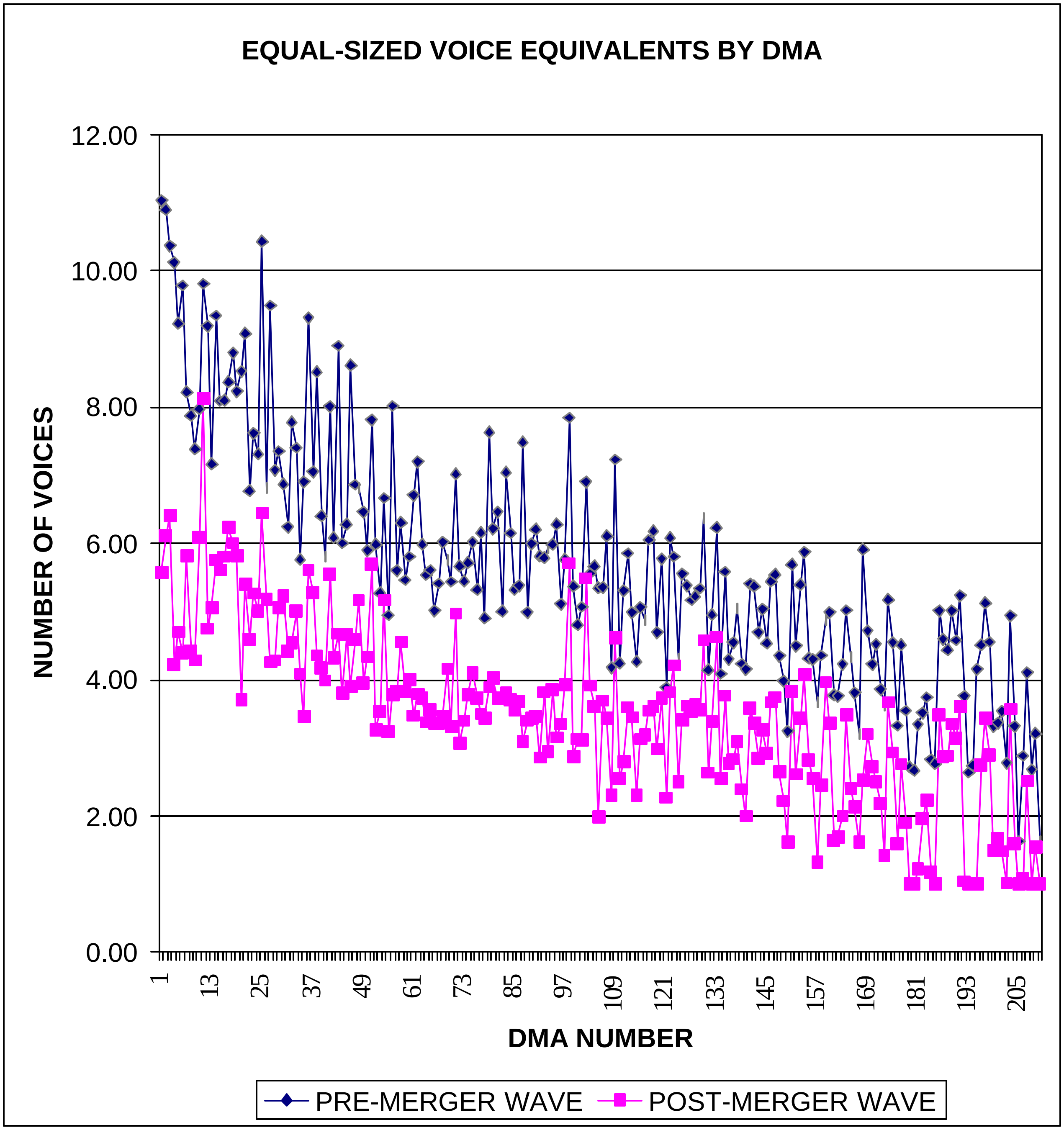
At the simplest level and most general level, to the extent that newspapers have experienced the trends more in the past, they may be an indication of what will happen in other media. Indeed, given the developments in radio during the rapid acceleration of integration of stations into nation chains unleashed by the 1996 Telecommunications Act, as noted in the introduction, the general impact of these trends on civic discourse seems clear and should be a major source of concern to the commission.

EXHIBIT XII-6: OWNERSHIP OF MAJOR MASS MEDIA IN VIRTUALLY ALL LOCAL MARKETS WOULD BECOME HIGHLY CONCENTRATED



Source: See previous exhibit.

EXHIBIT XII-7: HHI ADJUSTED VOICE EQUIVALENTS



More directly, we have described a complex relationship between newspapers and TV. On the supply-side, the antagonism between TV and newspapers is an important element of promoting civic discourse. At the same time, the operation of newspaper newsrooms produces many stories, especially local, that become an input for TV news. Without the much more intensive and in depth news gathering of papers, the news product space will be reduced. On the demand side, we observe that newspapers and television are complements. Consumers seek more in-depth follow-up of news headlines that they encounter in broadcast. We want to preserve the antagonism and in dependent resources that newspapers bring.

To the extent that its regulation of the media subject to its authority has the consequence of preserving the antagonism between the print and broadcast media and foreclosing an avenue of integration that would be particularly destructive of the journalistic values in our society and destructive of the symbiotic relationship and competitive relationship between newspapers and broadcast that disciplines the broadcast media, it should look to the impact of its policies on the print media. If relaxation of the structural limits would accelerate the trend of conglomeration, concentration and vertical integration between the media and raise it to an entirely new level, it could seek to slow those trends in order to promote the bold aspiration for the First Amendment.

Thus the commission can legitimately enquire into the impact of conglomeration, concentration and integration in each of the media on civic discourse. Several recent books about newspapers paint an extremely troubling picture.

In 2003 and beyond, these analysts believe that health of both American journalism and the newspaper industry will depend on its ability to successfully achieve three things: diluting what has become an increasingly over-concentrated marketplace; better managing the balance between providing informative, influential news coverage and sustaining a profitable newspaper; and recommitting ourselves to, as Leonard Downie, Jr. and Robert G. Kaiser of the *Washington Post* put it, "independent, aggressive journalism [which] strengthens American democracy, improves the lives of its citizens, checks the abuses of powerful people, supports the weakest members of society," and, ultimately, "connects us all to one another."[379] Put more simply by Bartholomew Sparrow, quoting former Journalist Harold Evans, "[T]he challenge before the American media 'is not to stay in business – it is to stay in journalism."[380]

1. Concentration Eliminates Diversity

In *Taking Stock* Cranberg, Bezenson and Soloski argue that if any one thing is to blame for the deterioration of American newspapers it is the over-concentration of the marketplace.[381] The efforts of the large newspaper corporations to monopolize regions and their respective voices has lead to an entirely profit-driven business model that has in turn deprioritized product quality and debilitated most news operations' ability to fully serve a free press.[382] Companies like Gannett and Knight Ridder, two of seventeen dominant chains, have taken control of dozens of newspapers, buying out hundreds of competitors along the way, and reducing citizens' access to probing, helpful information that is vital to daily life.

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[379] Downie, Leonard, Jr., and Robert Kaiser, *The News About the News* (New York: Alfred A. Knopf, 2002), p. 13.

[380] Sparrow, Bartholomew, H., *Uncertain Guardians* (Baltimore: Johns Hopkins, 1999), p. 103.

[381] Cranberg, Gilbert, Randall Bezanson, John Soloski, *Taking Stock: Journalism and the Publicly Traded Newspaper Company* (Ames: Iowa State, 2001).

[382] Cranberg, Bezanson and Soloski, cite Gene Roberts, "Corporatism vs. Journalism," *The Press-Enterprise Lecture Series*, 31, February 12, 1996; for recent discussions see also Dugger, Ronald, "The Corporate Domination of Journalism," in William Serrin (ed.), *The*

as many of the public companies have begun to seek advantages from grouping papers into dominant metropolitan and regional chains and then combining many aspects of news operations and sharing news among all of the nominally separate papers. This is a strategy of vertical integration through control over content.[383]

This has an immediate and negative impact on any given local news consumer, as he is fed a generic dose of coverage that does not likely inform him of what is going on nearby. In Wisconsin, for instance, Gannett purchased Thompson's central holdings (8 dailies and 6 weeklies) to add to the two it already owned there, effectively monopolizing the area.[384] Suddenly, thousands of subscribers lost their essential local coverage. Unfortunately, the coverage that disappears tends to deal with schools, localized government affairs, and other community-strengthening material that enables people to live secure, educated lives.[385]

Similar cases can be found all over the country.[386] CNHI bought 8 Thompson dailies in Indiana, adding to the four it already owned there. CNHI and Gannett now account for 40% of Indiana's daily circulation. The consequences of this are clear: fewer voices and perspectives are provided and the ability of the people to "make judgments on the issues of

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Business of Journalism (New York: New Press, 2000). Sparrow, Bartholomew, H., *Uncertain Guardians* (Baltimore: Johns Hopkins, 1999); Sparrow, Chapter 4.

[383] Cranberg, Bezanson and Soloski, p. 11.

[384] Bass Jack, "Newspaper Monopoly," in Roberts, Gene, Thomas Kunkel, and Charles Clayton (eds.), *Leaving Readers Behind* (Fayetteville: University of Arkansas Press, 2001), p. 111.

[385] see also Pat Gish and Tom Gish, "We Still Scream: The Perils and Pleasures of Running a Small-Town Newspaper," and Shipp, E. R., "Excuses, Excuses: How Editors and Reporters Justify Ignoring Stories," in William Serrin (ed.), *The Business of Journalism* (New York: New Press, 2000). Complaints about the failure to cover larger national and international stories also abound (see Phillips, Peter and Project Censored, *Censored 2003* (New York: Seven Stories, 2002); Borjesson, Kristina, *Into the BUZZSAW* (Amherst, New York, Prometheus Books, 2002).

the time," something central to the American Society of Newspaper Editors' *Statement of Purpose*, is hindered (86).[387]

The statistics at this point are staggering. Chains own 80 percent of America's newspapers and the aforementioned content-sharing has become one of our biggest hurdles.[388] In the Southeast, Knight Ridder shares content between three of its papers, *The Charlotte Observer, The State* (Columbia, SC) and *The Sun News* (Myrtle Beach, SC), which are at least one hundred miles away from each other and span two states. The likelihood of this coverage being pertinent to individual readers in districts this far apart is virtually nil. In Baltimore, Times Mirror Co. bought a Patuxent chain of 13 weeklies in the Baltimore Suburbs even though it owns *The Baltimore Sun*. If any of those thirteen weeklies were offering opposing viewpoints to the Baltimore Sun, the citizens' access to this competing dialogue and ideology was cut. In monopolizing these mini-marketplaces of ideas the newspaper corporations demonstrate that they are not committed to upholding their position as *the* "broadly democratic and broadly representative source of information in our democratic society."[389]

Family operated papers are being swallowed up by the corporate papers who toss fists full of money at these small-time business families.[390] In Hartford, Times Mirror Co. bought *The Hartford Advocate*, a weekly created for the sole purpose of competing with the Times

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[386] Bass, p. 111.

[387] Cranberg, Bezanson and Soloski, p. 86.

[388] Downie and Kaiser, p. 68

[389] Downie and Kaiser, p. 13.

[390] From this we can easily conclude that "the owners most likely to encourage their editors' ambitions, give them adequate resources and support aggressive, intelligent journalism are companies controlled by a single family (Downie Jr. and Kaiser 76)."

Mirror-owned *Hartford Courant*, the dominant daily.[391] In Montana, Lee Enterprises bought *The Hungry Horse Tribune* and *The Whitefish Pilot* and began running identical editorials as if the two communities had the same concerns.[392] In Westchester County, Gannett combined ten papers it owned and created one, *The Journal News*, sacrificing successful, respected papers such as *The Tarrytown Daily News.*[393] These practices undermine the peoples' right to a free, diverse press which, when realized, informs a world of stimulating ideas which shape everything from our laws to our culture.

2. Profit At The Expense of Journalism

The frightening reality of this corporate stronghold is that these companies, over the past few decades, have shown a declining interest in journalism and an overwhelming interest in profit-maximizing business practices. This 'business over news' attitude has countless drawbacks that have manifested themselves in various forms at hundreds of now-weakened newspapers.

Before identifying the specific ails it is important to understand the corporate structures and mandates that have undermined America's newspapers' goals. Cranberg, Bezenson and Soloski note that "news has become secondary, even incidental, to markets and revenues and margins and advertisers and consumer preferences."[394] This list of motivating factors sums up where the newspaper chains' allegiances lie. This is due, in large part, to the make up of the corporate boards that run the newspaper companies. "They draw heavily from

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[391] Bissinger, Buzz, "The End of Innocence, in Roberts, Kunkel and Clayton, p. 83.

[392] Bissinger, p. 103.

[393] Roberts, Gene, Thomas Kunkel, and Charles Clayton, "Introduction," in Roberts, Gene, Thomas Kunkel, and Charles Clayton (eds.), *Leaving Readers Behind* (Fayetteville: University of Arkansas Press, 2001), p. 5.

[394] P. 2.

industry, finance and law for outside directors."[395] The Taking Stock research indicates that "of the 131 outside directors on the boards of the 17 dominant chains, only 17 (13 percent) have had experience on the editorial side of a news organization."[396] Furthermore, seven companies "have *no* outside directors with a newspaper background" and "a half-dozen only have one."[397] Without dedicated newspaper people involved in the highest level of management, the publicly owned (and traded) newspaper becomes a stock market entity like any other, and the product, news, becomes an expendable commodity that is "altered to fit tastes" and used to drive shareholder value up, without regard for journalistic integrity.[398]

While Taking Stock does concede that "some editors may still dominate corporate conversations about what constitutes news and how to deploy news gatherers," it cautions that "most no longer make such determinations singly or without elaborately justifying the effects on the bottom line."[399] In surveying the CEOs of some of these companies we find a common commitment to shareholders and stock value, not news and readers. William Burleigh of Scripps Howard points to a "suitable return" as his obligation, while Robert Jelenic of Journal Register Co. says his "mandate from the board is to produce longtime shareholder value."[400] The simple omission of news and readers as motivation speaks on how these papers are run, assembled and presented to the public – as money-making machines that subvert their

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[395] Cranberg, Bezenson and Soloski, p. 42.
[396] Cranberg, Bezenson and Soloski, p. 42.
[397] Cranberg, Bezenson and Soloski, p. 42.
[398] Cranberg, Bezenson and Soloski, p. 108
[399] Cranberg, Bezenson and Soloski, p. 78.
[400] Cranberg, Bezenson and Soloski, p. 64

"primary purpose of gathering and distributing news and opinion [in order] to serve the general welfare (American Society of Newspaper Editors *Statement of Purpose*)."[401]

3. The Three-Fourths Estate

The fallout is felt across the country. Editors at papers big and small describe the stress caused by major newspaper corporations bearing down on their news operations, enforcing a bottom line principle on them and, ultimately, infringing on their editorial role and the newspaper's output. Taking Stock sites an editor survey in which ninety percent of the editors interviewed affirmed that they felt pressure from the bottom line, many adding that they felt "resignation" and "resentment" because of this pressure.[402] Geneva Overholser, former editor of *The Des Moines Register*, conducted a study for the American Journalism Review and found that "ownership by public corporations has fundamentally and permanently transformed the role of editor," noting that of the seventy-seven editors surveyed, "half of them said they spent a third or more of their time on "matters other than news."[403] The News About the News explains that editors who once "spent their days working with reporters…now spend more of their time in meetings with the paper's business-side executives, plotting marketing strategies or cost-cutting campaigns."[404]

The result of the 'business over news' attitude has been the deterioration of the American newspaper. *The Philadelphia Inquirer*, for example, became one of the nation's strongest papers while Gene Roberts was its editor. When Knight Ridder bought the daily,

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[401] Cranberg, Bezenson and Soloski, p. 86.

[402] Cranberg, Bezenson and Soloski, p. 89; *The Business of News, the News About Business*, Neiman Reports, Summer 1999.

[403] Downie and Kaiser, p. 93

they began slashing the staff and putting tremendous pressure on Roberts to increase profits. Roberts soon had had enough of the corporate newspaper model and retired with the *Inquirer's* daily circulation at 520,000 and its Sunday circulation at 978,000. Eleven years later the paper's circulation had plummeted to 365,000 daily and 732,000 Sunday.[405] Surprisingly, Knight Ridder's profit margins rose an astonishing 16 percent (to just under 20 percent) during that time, epitomizing what has become an industry trend: "publicly traded newspaper companies have seen significant growth in their cash flow, despite modest growth in revenues (Cranberg, Bezenson, Soloski 38)." This means that although subscription rates are dropping because the quality of the papers is dropping, the chains are still profiting.

In order to accomplish this, the major corporations often hire analysts to determine how much of their newsroom staff and its resources they can cut. At *The Winston-Salem Journal* in North Carolina, a newspaper owned by Richmond's Media General, a consulting firm (DeWolff, Boberg & Associates) was brought in to analyze how efficiently the paper's staff was operating. After making the reporters keep "precise diaries on how they spent their time over three weeks, DeWolff, Boberg produced a "grid" describing how much time various journalistic endeavors should take.[406] Based on the placement of a story within the paper, the analysis professed how much time should be spent working the story (down to the tenth of an hour), whether or not a press release should be used, how many and which types of sources should be used and, of course, how long the story should be. It took three months for the

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[404] Downie and Kaiser, p. 68; Layton, Charles, "What do Readers Really Want?", *American Journalism Review*, March 1999, reprinted in Gene Roberts and Thomas Kunkel, *Breach of Faith*.

[405] Downie and Kaiser, p. 8.1

[406] Downie and Kaiser, p. 97.

editors to convince the owners that "creative work like journalism cannot be governed by such arbitrary formulas."[407] Nonetheless, Media General laid off twenty percent of its workforce by the time DeWolff, Boberg had completed their consultation.

Knight Ridder had a similar outlook for the *San Jose Mercury News* whose publisher, Jay T. Harris, revealed that "the drive for ever-increasing profits [was] pulling quality down." What eventually drove Harris away from the paper was Knight Ridder's demands that the paper reach "a specific profit margin, an exact percentage figure" that would give them a suitable return. Harris could no longer stomach Knight Ridder's lack of regard for the paper's journalistic responsibilities and left.[408]

These instances of staff cutting by corporate companies have piled up over the past two decades. When Gannett bought *The Asbury Park Press* (boosting its and Newhouse's combined share of New Jersey's circulation to a whopping 73 percent) it immediately liquidated a fourth of the newsroom staff, from 240 people to 185.[409] Next, the news hole was reduced, bleeding out niche local coverage that was vital to a highly subdivided area with many townships and districts. The *Press* had trained itself to adequately serve its varied readership, setting up localized bureaus and printing 5-zoned editions. Gannett swiftly dropped the *Press* to four zoned editions and in a final swipe at the newsroom staff, the chain increased workloads and took away overtime pay.

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[407] Downie and Kaiser, p. 97.
[408] Downie and Kaiser, p. 109
[409] Layton, p. 143.

The *Press* is one of hundreds of papers wrestling with these new terms of competition, terms that “have little or nothing to do with news quality.[410] MediaNews acquired the *Long Beach Press-Telegram* and immediately cut 128 jobs. Knight Ridder acquired the *Monterey County Herald* and dropped 28 employees on day one. The Journal Register Co. bought the *Times-Herald* (Norristown, PA) and subsequently fired 25 people. Their op-ed page was dropped, the mayor stopped subscribing and within one year the paper was completely detached from Norristown’s immediate needs, having its buttons pushed in a high-rise far, far away. Time and again economic pressures have swelled, undermining “traditional journalistic standards and values” and proving that “there is no obvious way to simultaneously shrink a newspaper and make it better.”[411]

4. Happy News

The corporate paper takeovers of the past two decades have also resulted in the ‘softening’ of news to appease advertisers who want buoyant, happy readers perusing their ads. Avoiding content that some advertisers find boring (mainly government, especially state and local government) or unlikely to give readers the zest they need to buy, has become commonplace as the papers remove hard news sections to add “reader-friendly” content, as Gannett calls it. Their aforementioned *Asbury Park Press* reporters were told that “there will be no bad news in the “Day in the Life” stories,” and “no aggressive reporting or attempts to expose problems or wrongdoing.”[412] Gannett’s *Courier-Journal* in Rockford, Illinois was criticized in an evaluation by former editor Mark Silverman for emphasizing “hard-news subjects” and suggested the paper consider “more how-to stories, stories that show how a

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[410] Cranberg, Bezenson, and Soloski, p. 13.

[411] Downie and Kaiser, p. 69.

person or a group of people accomplished something, question-and-answer columns, 'ask the experts' call-in hot lines, and even first-person stories by readers."[413] These are examples of the "prevailing ethos" at Gannett and other corporate newspaper companies – soft news is easy and inexpensive to cover; it is devoid of controversy and is therefore safe; and, most importantly, it makes advertisers happy.

The dilemma here is not that the chain-owned newspapers are adding content --that, in theory, is a good thing. But, in order to make room under the shrunken budgets these companies supply their papers with, other content has to be cut, and it almost always comes out of the hard-news bin. This means that Gannett can easily and profitably remove hard-news reporters at the *Asbury Park Press*, load up on AP story releases, shrink hard-news story length, and add low-cost sections like "Whatever," a teen beat section, and "Critters," a pet section which includes pet obituaries that cost readers at least 50 and sometimes 300 dollars to print.[414] To compensate, the chains do a significant amount of the cutting in the state government bureaus. In 1998, "only 513 reporters" nationwide were covering state government full-time.

Breach of Faith points out that, contrarily, over 3000 media credentials were issued for that year's Super Bowl.[415] The corporate departure from state government coverage has come with little or no regard for journalistic integrity or the benefits the public receives from this coverage. The bureaus at hundreds of papers across the country have been slashed. The *Journal-Constitution*, in Atlanta, used to house one of the most prolific state government

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[412] Downie and Kaiser, p. 87.
[413] Downie and Kaiser, p. 91.
[414] Bass, p. 145.

bureaus in the nation, boasting 12 esteemed reporters. When Cox bought the paper it was left with 3 statehouse reporters. Shortly thereafter, the *Journal-Constitution* had slanted, one-sided coverage that did not have the resources to inform itself adequately and, in turn, inform the public sufficiently. When the reporter crunch received bad press, Cox doubled its number of statehouse reporters.

In Montana, the *Great Falls Tribune* earned a great reputation for state government coverage, only to have Gannett buy the paper and attempt to shut down the entire bureau in order to rely strictly on the Associated Press. The editors talked new president Chris Jensen out of it, only to find copies of the paper on their desks with "Gs" "marked on any story he considered too governmental."[416] The editor's copy and budget were being cut, to the point where law books that were vital to the reporting were no longer being ordered.

Former Georgia Governor Zell Miller's concern is that the turnover of the statehouse reporters and their relative youth and mobility detract from the coverage, coverage that is already being hampered. "They don't have a long view of the leaders," he said. "They don't have context. There's no historical perspective whatsoever."[417] Reaching this low-point in state reporting is the function of nearly two decades of corporate ownership demoralizing the veteran reporters, forcing them to leave for papers where they can truly pursue their journalistic endeavors and substituting in young, inexperienced reporters who need jobs, the kind of staff that will do what you tell it. As this cycle permeates the rest of the newsroom, as

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[415] Roberts, Kunkel and Clayton, p. 10.

[416] Walton, Mary and Charles Layton, "Missing the Story at the Statehouse," in Roberts and Kunkel, p. 14.

[417] Walton and Layton, p. 21.

other departments are slashed, the chain-owned papers will have an increasingly difficult time serving a free press.

5. Underserving, Commercially Unattractive Audiences

The other major tactic the corporate papers use to cut cost and boost profit deals with putting circulation "quality" over circulation quantity. This means that newspapers determine the value of a region with respect to its attractiveness to advertisers. The advertisers are not interested in pitching their products to economic and social groups that they do not normally attract or who fall into unwanted demographics. So, they put pressure on the papers to get their ads to the "right" people for the smallest price.

According to Taking Stock, "the practice of cutting circulation has increased in the past two decades, with papers halting circulation to areas where readers don't interest advertisers."[418] The result of this is that the lowest circulation penetration is found "in areas with high concentrations of both low income and minority populations."[419] This leaves the minority and low-income populations underserved by the press, with fewer opportunities to access the valuable daily news and entertainment that people in higher "quality" socioeconomic groups are supplied with.

Furthermore, "competition for socioeconomically defined market segments increasingly takes the form of altering the subject matter and shape of news content, delivering the types and forms of information that persons in the socioeconomically defined market prefer."[420] This means that not only are the chain papers physically not getting copies to certain social groups (their tactics will be highlighted momentarily), they are slanting the

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[418] Cranberg, Bezanson and Soloski, p. 93.
[419] Cranberg, Bezanson and Soloski, p. 96.

news that does print to please the readers that the advertisers want pleased. At this point, the low income and minority populations are doubly deserted. The financial motivations of the corporate owners strip the newsrooms of their ability to justly report and inform, and prohibit us from celebrating, mourning and co-existing, as a culture, fruitfully.

The "deliberate industry strategy to pursue a more upscale readership" has been exposed by researchers at the University of Iowa's school of journalism by surveying directors at the largest 90 U.S. dailies. The research states:

Interviews…made it evident that lower-income neighborhoods were being disadvantaged by such tactics as requiring payment in advance, refusing to deliver to public housing, door-to-door sales efforts only on days of the month when government checks were due, and denial of discounts. Combined with "aggressive pricing"- that is, charging more – the practices amount to writing off a whole class of potential readers.[421]

These tendencies are reinforced by a relative absence of minorities from newsrooms. Vanessa Williams weaves together the relationship between communities, journalists, news organizations, reporting and democracy that we have highlighted throughout this analysis.

> Black and white and red all over: the continued struggle to integrate American newsrooms. It's a play on an old riddle. In this case, the black and white refer to race, although I might add that in recent years the industry, faced with the rapidly changing demographics of the country, must also be concerned with Asians, Hispanics, and Native Americans. The red refers to the heated emotions that color this struggle: frustration, embarrassment, anger.
>
> What does this have to do the news product? Everything. News organizations' continued inability to integrate African-Americans and other journalists of color into their newsrooms and to more accurately and fairly represent racial and ethnic communities threatens the credibility and viability of daily general-circulation newspapers. How can a newspaper claim to be a journal of record

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[420] Cranberg, Bezenson and Soloski, p. 10.
[421] Cranberg, Bezenson and Soloski, p. 95.

> for a given city or region if it routinely ignores or misrepresents large segments of the population in the geographic area it covers?..
>
> Our greatest concern about the industry's failure to grasp the gravity of its diversity deficit should be the potential harm to society. Many Americans continue to operate out of misinformation and misunderstanding when it comes to perceptions and relationships between racial groups, between religious groups, between men and women, straight and gay people, young and old people, middle-class and working-class people. The press, by failing to provide more accurate, thorough, and balanced coverage of our increasingly diverse communities, has abdicated its responsibility to foster an exchange of information and perspectives that is necessary in a democracy.

D. CONCLUSION

We have demonstrated that TV and newspapers still dominate the mass media and that while the number of outlets has increased; the number of owners of the major mass media has declined. Radio has shrunk dramatically as a source of news and information. There are hundreds of channels available, but they too are dominated by a handful of owners. We have also shown that relaxation of the rules restricting horizontal concentration and cross-ownership would result in a substantial increase in concentration and loss of independent voices, rendering most markets highly concentrated.

Structural policy can improve the chance that people will listen and learn. Structural policy can make it easier for people to hear civic discourse because it is spoken by louder voices or voices in languages they understand and with content that is interesting to them. It can promote the mingling of ideas so that accidental exposure is more likely to occur. It can prevent the narrowing of focus through institutional diversity so that important issues that might attract attention in one form of media are not excluded through merger. It can help to ensure that people who want to speak with different voices have access to the most commonly used media.

The unique "market failures" discussed in the previous section provide the basis for public policy intervention to ensure robust civic discourse. That is, if we were only concerned about the traditional market failures described in the previous section, we might rely on antitrust policy, perhaps with a more rigorous set of structural screens and a heightened concern for vertical/conglomerate issues. The unique market failures demand much more public policy intervention to promote robust civic discourse.

When entities merge, everyone in the market loses an independent voice, while a small segment of the market gains better coverage. In fact, depending on the distribution of preferences, the least well-served in the market may become even less well-served, if the merged entity drives out sources that are targeted to the needs of minorities and atypical groups. This is particularly true when a national entity buys out a local entity. When the merger crosses institutional lines, it may result in an equally severe loss of institutional diversity.

The wave of mergers that is likely to be unleashed by the relaxation of the cross-ownership and national cap rules raise all of these concerns in a way that is unmatched in our nation's history.

Even though structural policy cannot be expected to single-handedly accomplish the goals of promoting diversity, it is an inviting approach. The First Amendment forces policy makers to steer clear of content regulation. Under the First Amendment, we can never tell people what to say, and we certainly cannot make them listen, but under the Communications Act and to serve our constitutional principles we can organize the structural rules of the industry to increase the likelihood that more people will engage in a richer civic discourse.

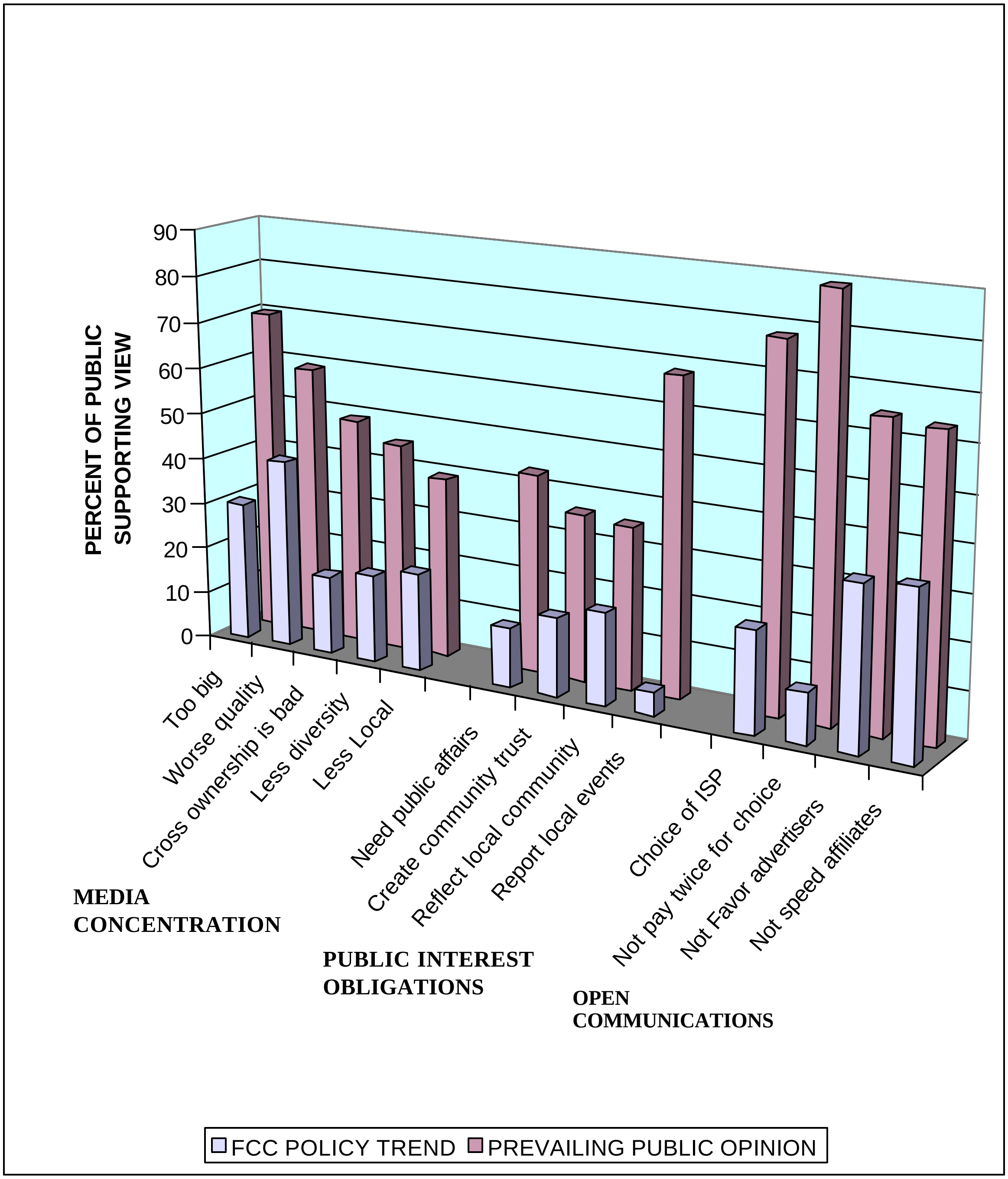
XIII. PUBLIC OPINION SUPPORTS A CITIZEN-FRIENDLY MEDIA AND COMMUNICATIONS INDUSTRY IN THE DIGITAL AGE

A. PUBLIC OPINION DOES NOT SUPPORT THE FCC'S MARCH TOWARD CONCENTRATED MEDIA MARKETS AND CLOSED COMMUNICATIONS NETWORKS WITH DIMINISHED PUBLIC INTEREST OBLIGATIONS

The previous discussion has demonstrated the legal framework for a bold aspiration of the First Amendment in the digital information age. It has shown the economic fundamentals of commercial mass media will not drive the industry toward that goal. On the contrary, the empirical evidence indicates that the industry has become highly concentrated and will become much more so if the limits on ownership are relaxed or eliminated. The commercial tendencies of the media will result in the under representation of minority points of view. Public opinion polls indicate that citizens understand these matters. Their attitudes are consistent with the law, economic theory and empirical evidence discussed in the earlier chapters and at odds with the tendencies expressed by recent statements and proposals by the FCC (see Exhibit XIII-1).

The public is troubled by the growing concentration of the media. The public expresses strong support for public interest obligation for both television and the Internet. In contrast to FCC rules that have opposed requirements that advanced telecommunications

EXHIBIT XIII-1: FCC POLICY IS OUT OF STEP WITH PUBLIC OPINION



SOURCES AND NOTES: See next page for questions.

Exhibit XIII-1a: Media Concentration

	RESPONSE		**%**	
1. Media companies are getting too big:	Definitely disagree	1	5	FCC
		2	7	
		3	19	
		4	31	Public
		5	24	
	Definitely agree	6	15	
2. Mergers between media companies provide better content and services:	Definitely disagree	1	12	Public
		2	16	
		3	30	
		4	31	FCC
		5	8	
	Definitely agree	6	2	
3. For you and your community, how would it be to allow TV companies to own more than one station and to own newspapers in one market:	Very good		4	FCC
	Somewhat good		13	
	No difference		30	
	Somewhat bad		25	Public
	Very bad		24	
4. If these mergers take place, editorial viewpoints would become:	Much more diverse		7	FCC
	A little more diverse		12	
	Stay the same		19	
	A little less diverse		19	Public
	Much less diverse		26	
5. If these mergers take place, varieties of points of view in covering local news would:	Decrease a lot		21	Public
	Decrease a little		18	
	Stay the same		36	
	Increase a little		13	FCC
	Increase a lot		5	

6. Intentionally left blank

Sources: Q1-Q2: *Digital Media Forum Survey Findings on Media Mergers and Internet Open Access*, September 13, 2000. Q3-5: Consumer Federation of America, *Media Policy Goals Survey*, September 2002. Percentages may not sum to 100 due to rounding and the fact that "Don't Know" responses are not included in the Exhibit.

Exhibit XIII-1b: Public Interest Obligations Of Television

	RESPONSE	**%**	
7. How important are each of the following public services to you? Producing public affairs programs that discuss local issues	Not at all	13	→FCC
	Somewhat	43	
	Very	43	→Public
8. How important are each of the following public services to you? Creating a public or community broadcasting trust fund to support public programs:	Not at all	17	→FCC
	Somewhat	43	
	Very	36	→Public
9. How important are each of the following public services to you? Producing shows that reflect the cultural and ethnic make-up of your local community:	Not at all	20	→FCC
	Somewhat	42	
	Very	35	→Public
10. How important are each of the following public services to you? Reporting on local news and events:	Not at all	5	→FCC
	Somewhat	25	
	Very	68	→Public

11. Intentionally left blank

Sources: Consumer Federation of America, *Media Policy Goals Survey*, September 2002. Percentages may not sum to 100 due to rounding and the fact that “Don’t Know” responses are not included in the Exhibit.

Exhibit XIII-1c: Open Communications

12. I shouldn't have to use the Internet service affiliated with my cable company:	Definitely disagree	1	3	FCC
		2	2	
		3	6	
		4	25	Public
		5	27	
	Definitely agree	6	38	
13. I shouldn't have to pay my cable company extra to use the Internet service provider I prefer:	Definitely disagree	1	5	FCC
		2	5	
		3	11	
		4	25	Public
		5	24	
	Definitely agree	6	30	
14. Search engines should not give preferred placement to their advertisers:	Definitely disagree	1	5	FCC
		2	7	
		3	23	
		4	35	Public
		5	18	
	Definitely agree	6	13	
15. Search engines should not speed up access to companies that advertise with them:	Definitely disagree	1	6	FCC
		2	6	
		3	24	
		4	35	Public
		5	16	
	Definitely agree	6	14	

Sources: *Digital Media Forum Survey Findings on Media Mergers and Internet Open Access*, September 13, 2000. Percentages may not sum to 100 due to rounding and the fact that "Don't Know" responses are not included in the Exhibit.

networks provide nondiscriminatory access to unaffiliated Internet service providers,[422] the public strongly supports open communications networks.

As proceedings to consider the rules governing media ownership and the flow of information over communications networks play out at the FCC, it is critical that policymakers recognize that the public has a vision for democratic mass media and advanced communications networks that is much more consumer and citizen friendly than the apparent view of the Chairman and the majority at the FCC.

B. MEDIA CONCENTRATION

Across a range of questions, public concern over increasing media concentration appears to have increased since the mid-1990s when the passage of the Telecommunications Act of 1996 deregulated media and triggered a wave of mergers. By a wide margin (70% vs. 30%, Exhibit XIII-1a, q1), survey respondents believe that media companies are becoming too large. This concern reflects their belief that mergers between media companies do not lead to better content and services (58% vs. 41%, Exhibit XIII-1a, q2). They believe that mergers result in higher, not lower, prices (50% vs. 12%, Exhibit XIII-2) and worse, not better, quality (36% vs. 14%, Exhibit XIII2). Consequently, they think it should be harder, rather than easier, for media mergers to be approved (55% vs. 32%, Exhibit XIII-3). They are strongly

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[422] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities Universal Service Obligations of Broadband Providers Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards And Requirements*, Federal Communications Commission, CC Dockets Nos. 95-20, 98-10, February 15, 2002. *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-05, March 15, 2002.

opposed to very large mergers, like the AT&T/Comcast merger (66% vs. 12%, Exhibit XIII-3).

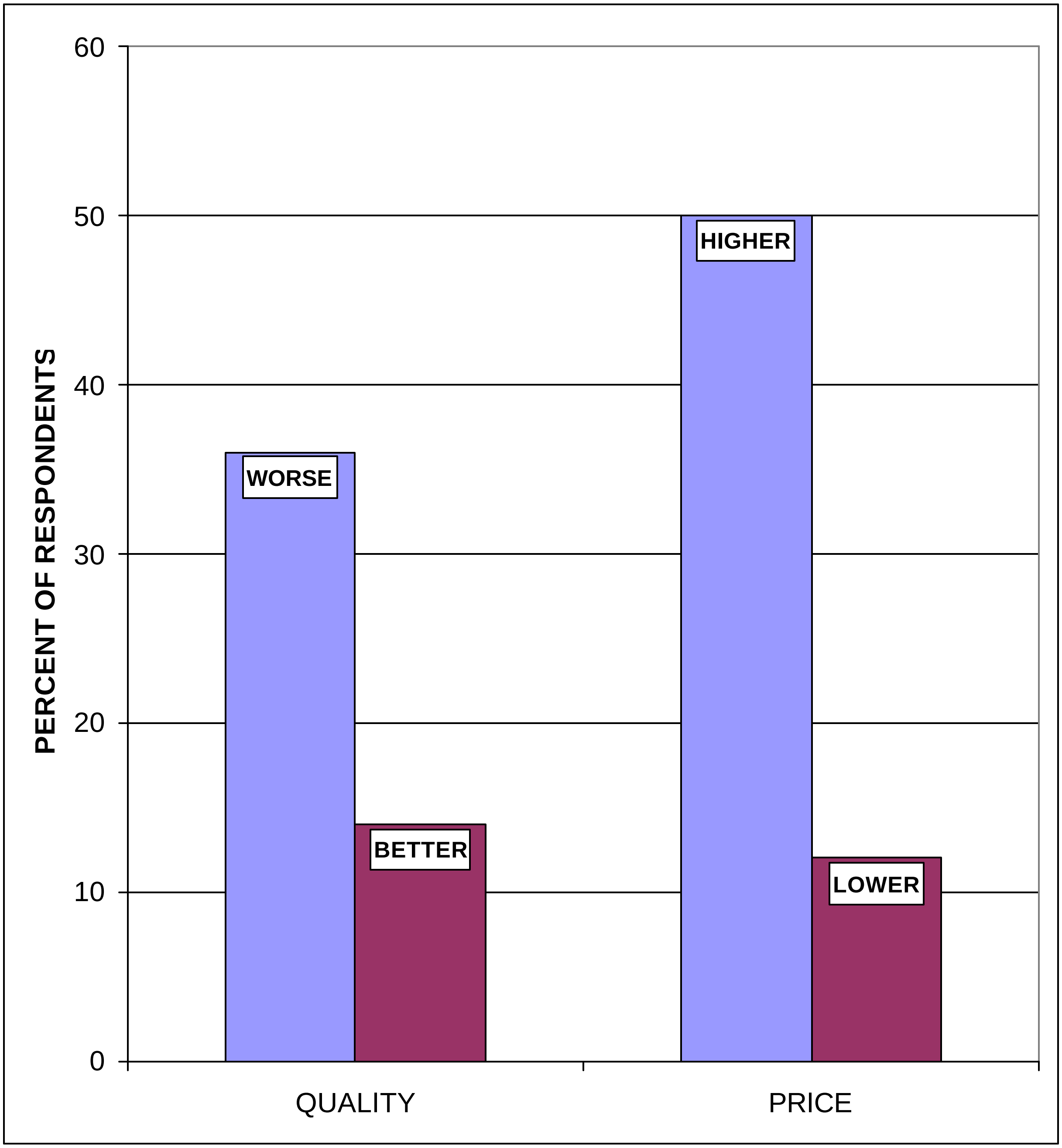
The public also opposes mergers across media types, such as between broadcast stations and newspapers. Asked whether such mergers would be good or bad for their communities, respondents felt it would be bad by a three to one margin (49% to 17%, Exhibit XIII-1a, q3). Asked whether such mergers would be good or bad for the country, their negative reaction was even stronger. Between 55 and 75 percent of respondents said mergers would be bad, compared to fewer than 15 percent who said mergers would be good (Exhibit XIII-4). These cross-media mergers are a source of concern because respondents felt there would be less, not more, diversity of editorial points of view (49% vs. 18%, Exhibit XIII-1a, q4) and that varieties of points of view in covering local news would decrease, not increase (39% vs. 21%, Exhibit XIII-1a, q5).

C. PUBLIC INTEREST OBLIGATIONS

Concern about the impact of mergers on the quality and content of programming reflects a deeply seated concern among consumers about the media. They do not feel that television accurately represents the average consumer (60% vs. 28%, Exhibit XIII-5). Almost one half (47%, Exhibit XIII-5) does not trust the information they find in the news.

Respondents deem it important that shows reflect the cultural and ethnic make-up of the community (very important = 35%, somewhat important = 42%, not important at all 23%, Exhibit XIII-1b, q9). Similarly, they deem it important to have public affairs programs that discuss local issues (very important = 43%, somewhat important = 43%, not important at all 13%, Exhibit XIII-1b, q7). They find it very important (68% = very, 25% = somewhat, Exhibit XIII-1b, q10) that local news and events are reported.

EXHIBIT XIII-2: IMPACT OF MERGERS ON QUALITY AND PRICE



Sources: *Mergers and Deregulation on the Information Superhighway: The Public Takes a Dim View: Results of a National Opinion Poll* (Consumer Federation of America and Center for Digital Democracy September 1995)
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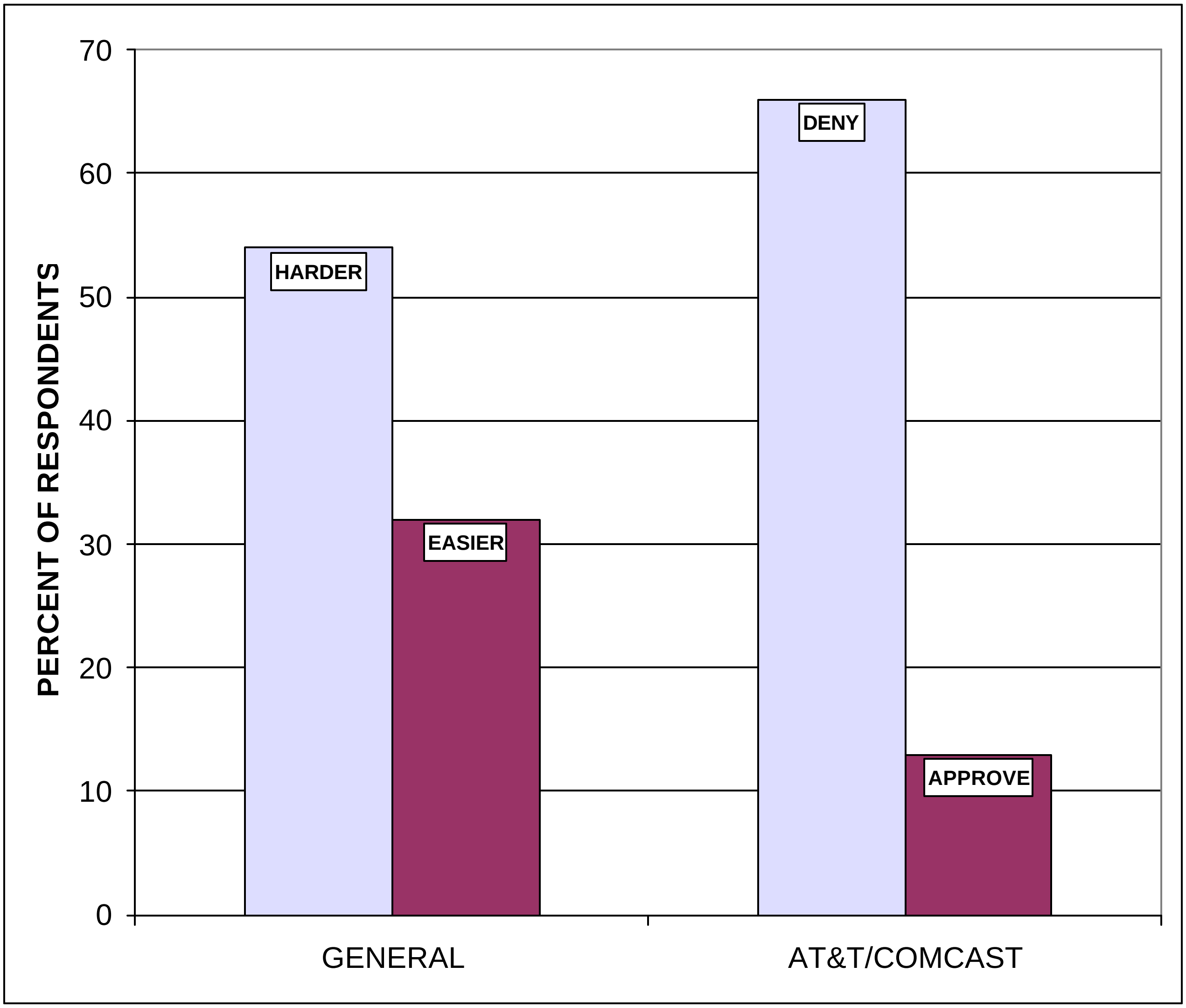
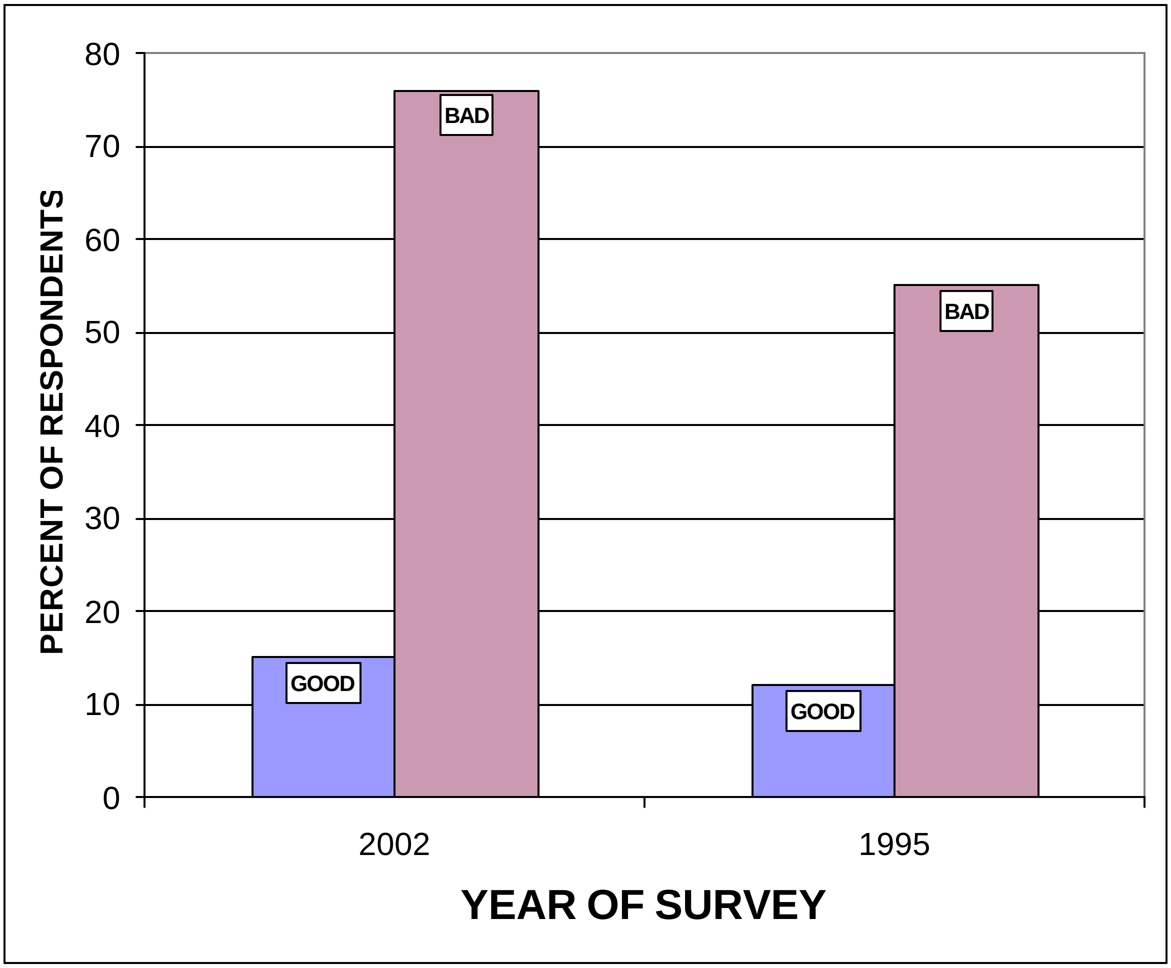
EXHIBIT XIII-3: MERGER APPROVAL



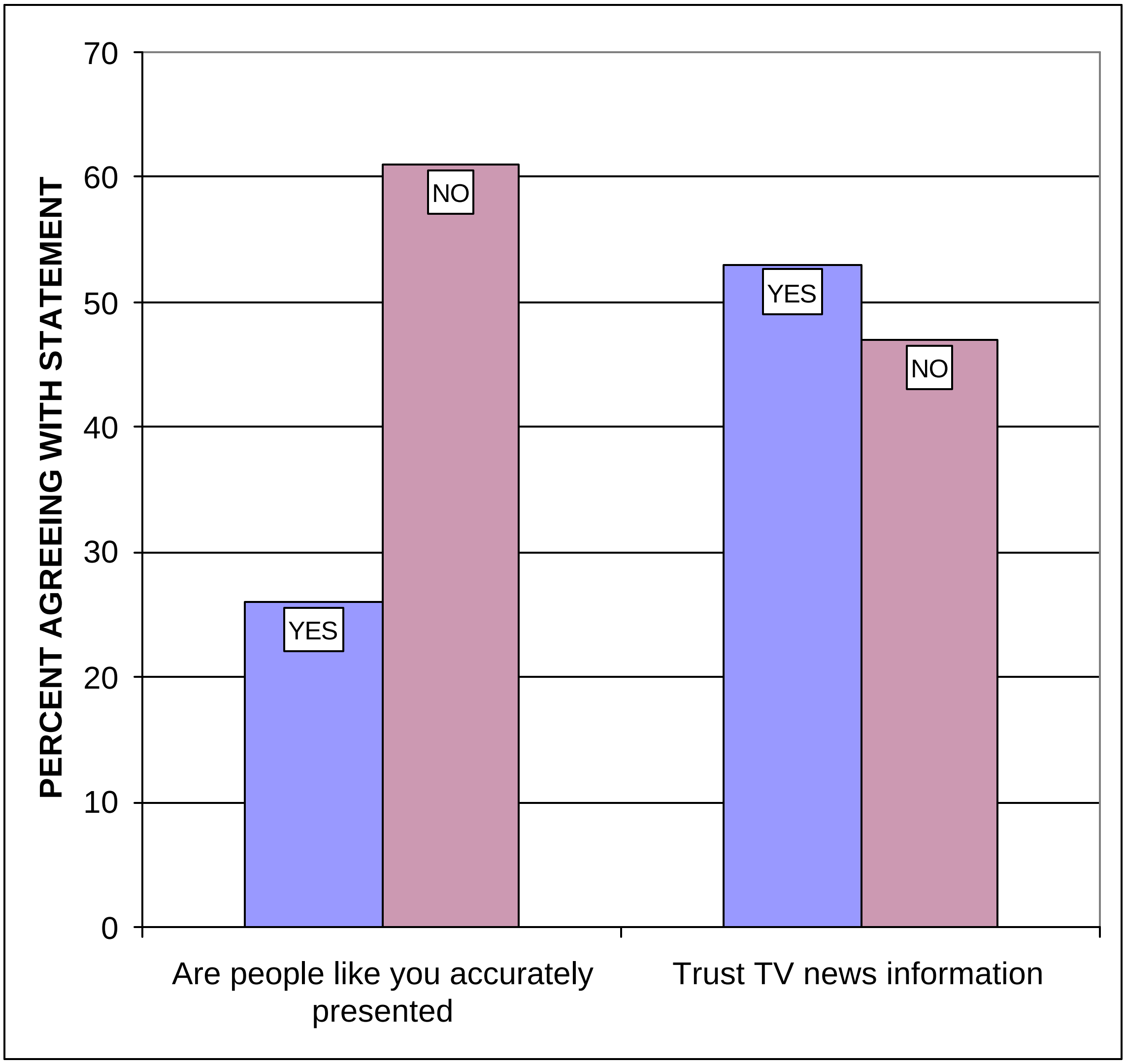
Sources: *Mergers and Deregulation on the Information Superhighway: The Public Takes a Dim View: Results of a National Opinion Poll* (Consumer Federation of America and Center for Digital Democracy September 1995), Laurer Research, *Cable/Satellite Television Survey*, March 2002.

EXHIBIT XIII-4: ATTITUDES TOWARD CROSS-OWNERSHIP OF TV-NEWSPAPERS IN ONE CITY



Sources: *Mergers and Deregulation on the Information Superhighway: The Public Takes a Dim View: Results of a National Opinion Poll* (Consumer Federation of America and Center for Digital Democracy September 1995); Laurer Research, *Cable/Satellite Television Survey*, March 2002.

EXHIBIT XIII-5: ATTITUDES TOWARD TV ACCURACY



Sources: *Digital Media Forum Survey Findings on Media Mergers and Internet Open Access*, September 13, 2000; *Project on Media Ownership, People for Better TV, Findings of a National Survey*, Lake Snell Perry & Associates, May 1999. Percentages may not sum to 100 due to rounding and the fact that "Don't Know" responses are not included in the Exhibit.

The public supports a range of public interest obligations. Almost two-thirds of respondents believe that broadcasters will just maximize profits if not directed to air public interest programming (63%, Exhibit XIII-6, q1). Substantial majorities of respondents believe broadcasters should provide public service programming and services. For example, approximately 70 percent of respondents say broadcasters should be required to provide more educational programming (Exhibit XIII-6, q2), and that figure rises to 85 percent when the new digital spectrum can be used for this purpose (Exhibit XIII-6, q3). The public supports a community trust fund to support public programs (very important = 36%, somewhat important = 43%; not important at all 17%, Exhibit XIII-1b, q8).

The support for community-oriented activities with respect to television has transferred to the new communications media – the Internet. Respondents express support for public interest obligations extending to the Internet. They would like some sections of the Internet to be commercial free (82%, Exhibit XIII-6, q4) and protected from commercial development (77%, Exhibit XI-6, q5). They believe some of the space on the Internet should be devoted to public forums (72%, Exhibit XIII-6, q6) and non-profit groups (68%, Exhibit VIII-6, q7). They believe Internet service providers should give free advertising to charities (65%, Exhibit XI-6, q8) and regularly post public service announcements (59%, Exhibit XIII-6, q9).

D. OPEN COMMUNICATIONS NETWORKS

The public strongly supports open communications networks. Open networks not only ensure the free flow of information, but they keep citizens in the decision-making role. Respondents do not want to be forced to use the Internet service provider (ISP) affiliated with their cable company (89% vs. 11%, Exhibit XIII-1c, q12) or to be forced to pay more for the privilege of choosing an ISP not affiliated with their cable company (78% vs. 22%, Exhibit XIII-1c, q13).

They do not want search engines to give preferential placement to their advertisers (65% vs. 35%, Exhibit XIII-1c, q14) or to speed up access to companies that advertise with them (64% vs. 35%, Exhibit XIII-1c, q15).

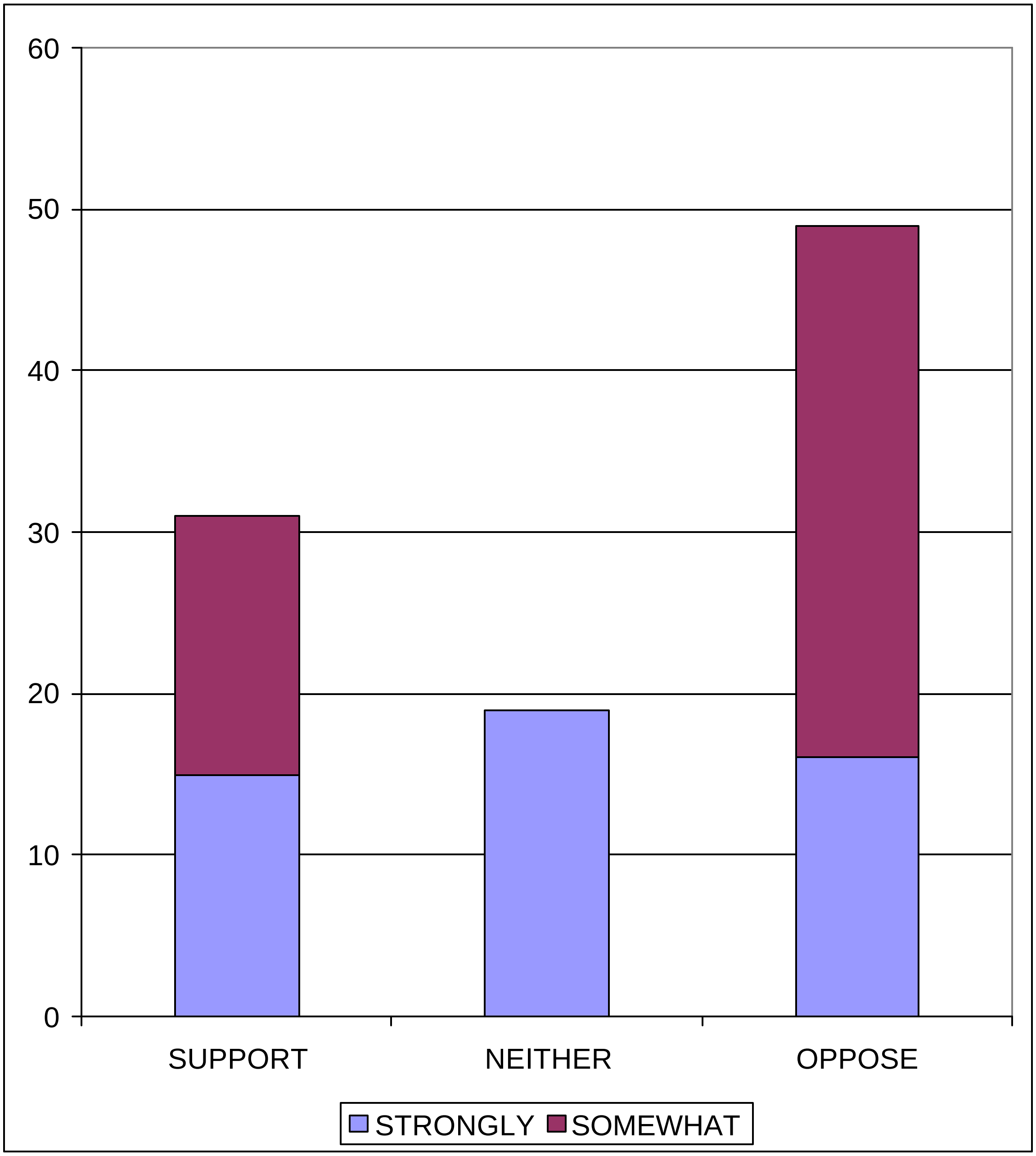
They do not want their media equipment (TVs, DVDs, CD players) to restrict their ability to copy and replay content (49% vs. 31%, Exhibit XIII-7). Respondents want to control the collection of data (Exhibit XIII-8). They want to decide whether data on their usage is collected (49%) or to ban such data collection altogether (20%). Respondents express little support for approaches that put network operators in control, like collecting data until the consumer says stop (7%) or just providing a warning that data is being collected (13%). Over 70% of respondents do not want cable operators (Exhibit XIII-9, q1) or Internet service providers (Exhibit XIII-9, q4) to track their activity. If such tracking takes place, for both cable operators (Exhibit XIII-9, q2, q3) and Internet service providers (Exhibit XIII-9, q5, q6), approximately 90 percent of respondents want to be informed and have the option of blocking such tracking.

EXHIBIT XIII-6: BROAD CONCERN FOR PUBLIC INTEREST OBLIGATIONS

	AGREE	DISAGREE
If unregulated, digital broadcasters will use the airwaves only to maximize profits.	63	37
Broadcasters should be required to air more educational programming.	70	30
Some new digital channels should be dedicated to educational programming.	85	15
Some sections of the Internet should be commercial free.	82	18
Some sections of the Internet should be protected from commercial development.	77	23
Some sections of the Internet should be devoted to providing public forums.	72	28
Some sections of the Internet should be devoted to non-profit groups.	68	32
Internet service providers should regularly post public service announcements.	65	35
Internet service providers should give free to charities.	59	41

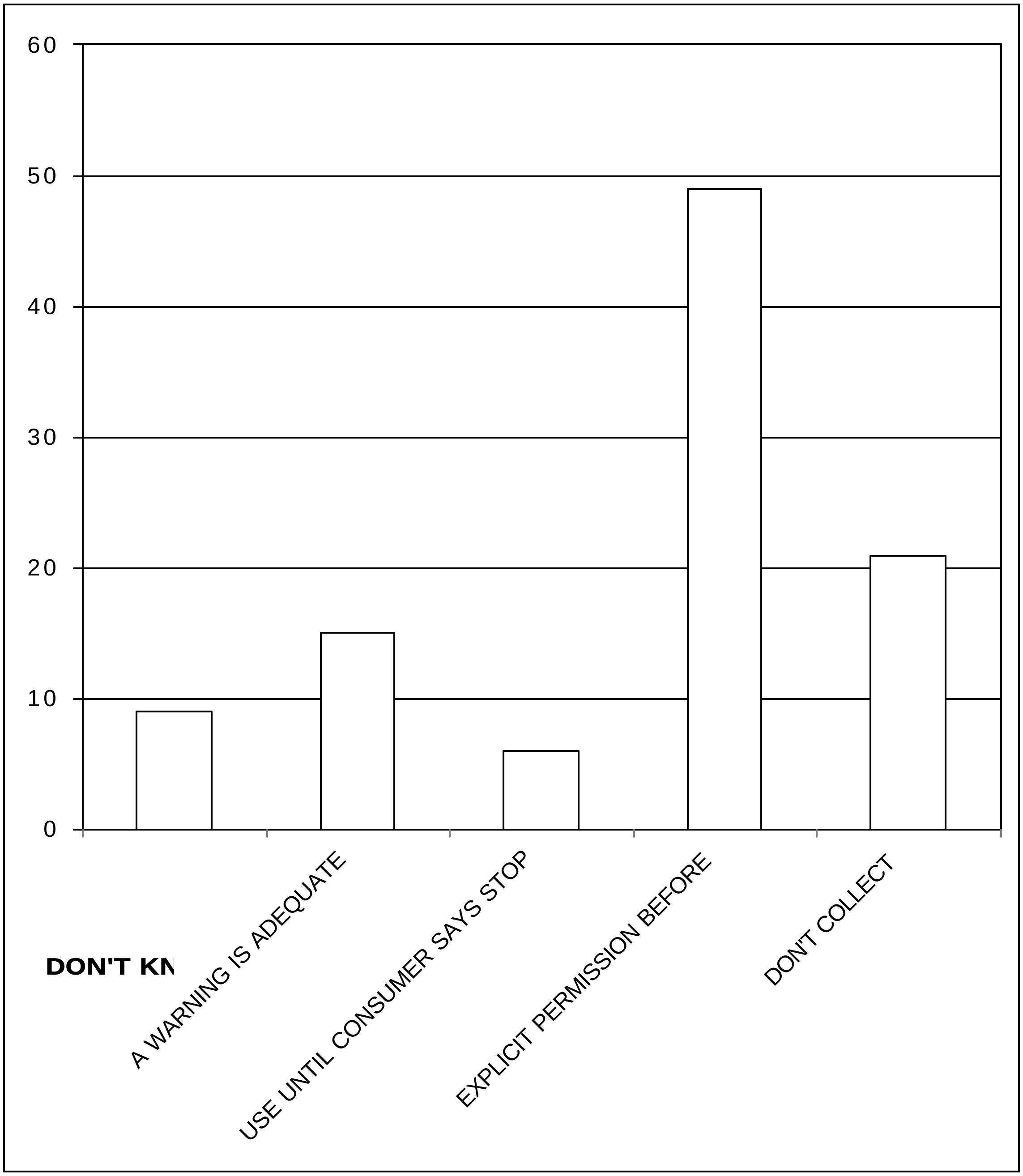
Source: *Digital Media Forum Survey Findings on Media Mergers and Internet Open Access*, September 13, 2000. Percentages may not sum to 100 due to rounding and the fact that “Don’t Know” responses are not included in the Exhibit.

EXHIBIT XIII-7: DO YOU SUPPORT LAWS THAT WOULD REQUIRE EQUIPMENT TO RESTRICT COPYING



SOURCE: Consumer Federation of America, *Policy Goals Survey*, September 2002.

EXHIBIT XIII-8: ATTITUDE TOWARD CONSUMER ROLE IN DETERMINING DATA COLLECTION AND USE



SOURCE: Consumer Federation of America, *Policy Goals Survey*, September 2002.

EXHIBIT XIII-9: BROAD CONCERN FOR PUBLIC INTEREST OBLIGATIONS

	AGREE	DISAGREE
Cable companies should be allowed to track how individuals use the web.	27	73
Cable companies should alert users if they are collecting usage information.	90	10
I should have the option to prevent cable companies from tracking my Internet use.	89	11
Internet services should be allowed to track how individuals use the web.	29	71
Internet service providers should alert users if they are collecting usage information.	87	13
I should have the option to prevent Internet services from tracking my Internet use.	88	12

Source: *Digital Media Forum Survey Findings on Media Mergers and Internet Open Access*, September 13, 2000. Percentages may not sum to 100 due to rounding and the fact that “Don’t Know” responses are not included in the Exhibit.

XIV. CONCLUSION: LAW, EMPIRICAL EVIDENCE AND PUBLIC POLICY SUPPORT CURRENT STRUCTURAL LIMITS

A. WHEN YOU ARE HEADED IN THE WRONG DIRECTION, GOING FASTER DOES NOT HELP

This paper has shown that legal principles, economic analysis and decades of empirical evidence do not support the relaxation of structural limits on media ownership and the dramatic increase in concentration that would inevitably follow. The Federal Communications Commission has the ammunition to defend the current rules.[423] The failure of the working group studies to support the Chairman's view is more telling.[424] Chairman Powell's decision to defines the agency's task as promoting economic efficiency and profits

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[423] The Chairman and the head of the Mass Media Bureau have expressed their disdain for public input on important policy issues Chairman Powell has expressed his doubts about the ability of the public to understand the issues (Jurkowitz, Mark, "FCC Chairman: Consolidation Hasn't Inhibited Variety, Fairness," *Boston Globe*, April 17, 2002,

> The Citizen Kane anxiety… could be genuine in some instances. But it is very difficult to discern what exactly are these viewpoints that are eking through that we're worried about… I think to the average consumer this is too sublime a concept for a lot of them to get agitated by.

Kenneth Ferree, head of the Media Ownership Task Force appointed by the Chairman dismissed the idea of holding public hearings with the claim that they would be "an exercise in foot stomping," (Labaton, Stephen, "A Lone Voice for Regulation at the F.C.C." *New York Times*, September 30, 2002. Another aide to Chairman Powell argued that "What the head of the PTA in Kansas City has to say about the issue isn't going to add anything that's not already in the record," Boliek, Brooks, "FCC's Copps to Conduct Hearings," *Hollywood Reporter*, November 22, 2002.

[424] Chairman Powell cites a need to rely on empirical evidence, not public opinion in examining the rules, Boliek,

> An aide to Powell said the chairman was unconcerned about the political fallout. His main concern is getting the evidence to back up the commission's decision that will stand up in court. The federal court has thrown out several media-ownership rulings, contending that they have not been backed up by empirical evidence. Powell's major thrust is to develop economic data that will allow the court to uphold the commission's decision.

in the entertainment industry and to reduce the public interest to variety in entertainment programming sells short the bold aspiration the Supreme Court laid out for the First Amendment when it declared that the public interest demands *the widest possible dissemination of information from diverse and antagonistic sources*." The First Amendment policy issue is about ensuring vibrant civic discourse through diversity of viewpoints and vigorous competition between institutions in the gathering and dissemination of news and information."

The only way the Commission can conclude that the rules are not justified is to

- look at variety of entertainment when he should be focused on diversity of information,
- count the number of outlets when strength of journalistic institutions is what matters to ensure a fourth estate that fulfills it watchdog function,
- downplay the key role of ownership and its concentration in national conglomerates, which freeze out local points of view, and
- ignore the size and diversity of the population served by the media to avoid recognizing the barrier that huge, concentrated and vertically integrated media conglomerates pose to the ability of citizens to speak and be heard in civic discourse.

The stakes for citizens, consumers and the nation are huge – no less than the viability of democratic discourse in the digital information age. The mass media are the primary means through which citizens gather news and information. TV in particular is the primary vehicle for political advertising. At the same time, digital media are at the center of the information economy and the emerging multimedia environment in which consumers and citizens will not only listen and watch, but must also be able to express their opinions and views.

Ironically, the empirical evidence we have reviewed will support strong structural limits even if they are viewed from an economic perspective. That is, we have shown that television and newspaper markets serve distinct product and geographic markets in which mergers should be restricted.

- We have shown that the TV and newspapers are overwhelmingly the dominant means of dissemination of information.
- We have shown that they are not substitutes; each of their products is distinct.
- We have shown that each of the markets in which they sell products is at least moderately and more likely highly concentrated already.
- We have shown that vertical integration and conglomeration between the television and newspapers raises strong concerns about the abuse of leverage and the creation of unacceptable market power from both the economic and civic discourse points of view.
- We have shown that the video programming market is already dominated by a small number of programmers, each of whom has guaranteed access to distribution and they use that advantage to favor their own programming at the expense of independent production.

In light of these findings, public policy should be seeking ways to deconcentrate and decentralize mass media markets, not making it easier for increased concentration and centralization through vertical integration.

B. A RIGOROUS, CAUTIOUS APPROACH TO MEDIA OWNERSHIP LIMITS

Contrary to the suggestions of some, the D.C. Circuit Court of Appeals has not compelled the FCC to gut the rules restricting media ownership. It has simply demanded an internally consistent, evidence based approach. We believe that the qualitative evidence as presented is more than adequate to justify the current limits.

However, if such a framework is deemed necessary, we believe economic concepts can be used as if carefully embedded in a framework that recognizes the fundamental difference between commerce and discourse, between consumers and citizens. We suggest that the FCC could apply an HHI-Adjusted voice count and apply a cautious approach that gives special weight to the importance of the abuse of market power in civic discourse.

The rule is driven by the FCC's authority to ensure that TV station owners in local markets, as owners of the most powerful means of information dissemination, do not accumulate excessive market power over civic discourse. Their holding of a license to distribute television programming within a given local area would not be in the public interest if they accumulated excessive influence over civic discourse, either by controlling too large a share of the local TV market or by combining their market power in television with ownership of newspapers or radios. The rules apply to each of theses markets separately and jointly, when vertical or conglomerate mergers are discussed.

Recall that the antitrust authorities have adopted guidelines in which mergers raising the level of concentration are likely to cause competitive concerns. For highly concentrated markets, virtually no mergers involving leading firms are suspect. The guidelines declare that

> mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns… Where the post-merger HHI exceeds 1800, it will presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.

A firm with a 15 percent market share that sought to buy another with a 2 per cent market share would violate the 50-point threshold. If the firm being acquired had a market share just over 3 percent, it would violate the 100-point threshold. For moderately concentrated markets, the guidelines state "[m]ergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns."

The antitrust authorities make lots of exceptions when mere economic commodities are involved. We suggest that the FCC could easily defend the current rules in terms of HHI-adjusted guidelines like these that take a much more cautious approach to making exceptions. The importance and nature of civic discourse demand that the FCC err on the side of less concentrated markets.

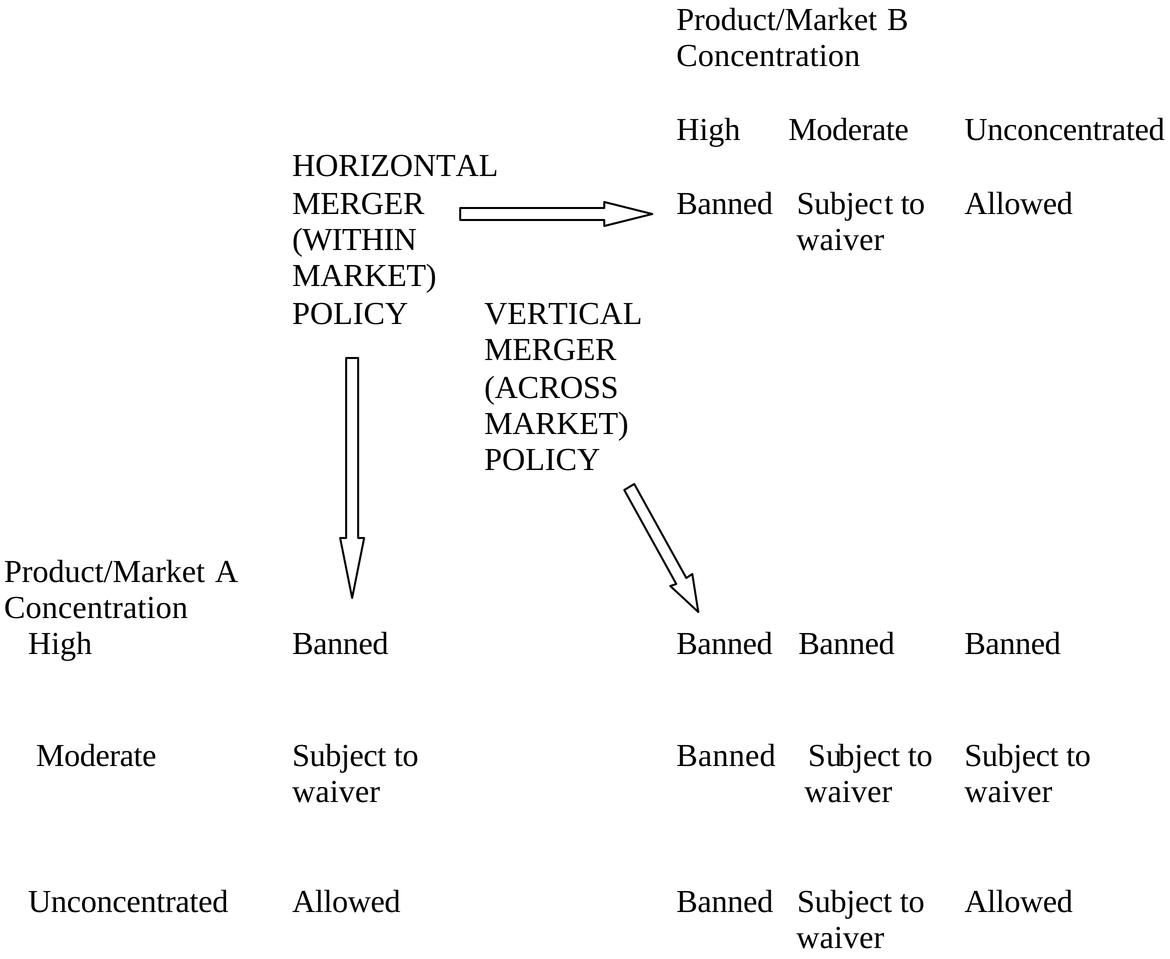
By an HHI adjusted voice count, we mean that the FCC would calculate market shares in each local media product market separately (e.g. full power television in the New York DMA). The FCC would then determine the level of concentration by taking the inverse of the HHI.

- It should define highly concentrated as HHI-adjusted voice count of fewer than 6 equal-sized voices or a four-firm concentration ratio above 60 percent.
- It should define a moderately concentrated market as having between 6 and 10 equal-size voices or a four-firm concentration ratio between 40 and 60 percent.

The products and markets need to be carefully defined, as will be discussed below. Each market should be defined separately – that is the concentration in TV, newspapers and radio markets should calculate separately (see Exhibit XIV-1).

- The FCC should not allow horizontal mergers in properly defined media markets that are highly concentrated, post-merger. That is, if the merger proposed is in a market that is highly concentrated or would result in a market that is highly concentrated it should not be allowed.
- The FCC should not allow vertical or conglomerate mergers between major firms (top 6) in which **either** of the television or the newspaper markets involved is highly concentrated.

EXHIBIT XIV-1: A CAUTIOUS, HHI ADJUSTED VOICE COUNT APPROACH TO MEDIA MERGERS



		Product/Market B Concentration		
		High	Moderate	Unconcentrated
	HORIZONTAL MERGER (WITHIN MARKET) POLICY	Banned	Subject to waiver	Allowed
	VERTICAL MERGER (ACROSS MARKET) POLICY			
Product/Market A Concentration				
High	Banned	Banned	Banned	Banned
Moderate	Subject to waiver	Banned	Subject to waiver	Subject to waiver
Unconcentrated	Allowed	Banned	Subject to waiver	Allowed

Because of the dominant role of television and the unique role of newspapers in civic discourse the FCC must apply these rules to vertical/conglomerate mergers between these two media.

Subject to the other public interest standards (beyond concentration) that the FCC is required to apply to the transfer of licenses, mergers should be allowed under the following circumstances.

- The FCC should have a waiver policy on horizontal mergers in properly defined media markets that are moderately concentrated (post-merger). The merging parties should be required to show that the merger will promote the public interest. The FCC should require the preservation of functionally separate news and editorial departments in the subsidiaries of the merged entity.
- The FCC should have a waiver policy for vertical and conglomerate mergers in properly defined media markets that are moderately concentrated (post-merger). The merging parties should be required to show that the merger will promote the public interest. The FCC should require the preservation of functionally separate news and editorial departments in the subsidiaries of the merged entity.
- A *de minimus* exception should hold for moderately concentrated markets. Market participants in one media market should be allowed to acquire small firms (market share less than 2 percent) or start genuinely new enterprise in different (product or geographic) markets.

C. PRODUCT AND MARKET DEFINITIONS

If the FCC adopts this type of economically-based quantitative approach, it must be much more rigorous in its geographic market definition. The existence of three distinct categories of product markets – video, print, and audio – has been amply demonstrated. Defining geographic markets and identifying the specific products to include in each market requires care, but is manageable. It must be based on market realities and empirical facts. Product market shares should be based on users – TV or radio rating and newspaper circulation for owners, not outlets, must be the basis of a market-based standard.

The DMA is far too large a geographic area for all three media (TV, radio and newspapers). If the FCC decides to use a market-based approach it must define the markets more carefully.

- We have shown that the city/county is a much more appropriate unit of analysis for newspapers.
- Not all broadcast networks are carried throughout the DMA. While the major networks are likely to be carried throughout the DMA, smaller stations are not. Separate HHIs should be calculated for specific areas where lesser networks are not carried. A weighted average DMA should be estimated.
- Radio station markets must be defined more carefully by their signal strength.

At present, the Internet should not be included as a distinct media type. We have seen that the amount of news and information gathering on the Internet is small and most of it involves visits to the web sites of existing information producers – TV stations and newspapers. Therefore, a proper treatment of the Internet for purposes of news and information market definition that looks at actual usage, is not likely to alter the conclusion based on the analysis of the commercial mass media. Under the 1996 Act, the Commission will review this decision on a biennial basis.