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Public Policy toward Network Industries
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Corporate mergers and the consolidation of ownership in the American communications arena have long been sources of concern. The perception of a direct relationship between democracy and a vibrant communications system of diverse sources and owners is near universal, as is, for the most part, the converse fear that a communications system that rests in just a few hands will corrupt the freedom of speech, impair the practice of democracy, and impress an ideological pall on society. The Supreme Court's reasoning in the 1945 case of *Associated Press v. United States* expresses the issue plainly. In language that has since assumed a kind of supernatural status in discussions about the First Amendment and corporate power, the court stated 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, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression by private interests. (*Associated Press v. United States 1945*, p. 20)

A few years earlier in 1934, apprehension about private power in the then new medium of radio broadcasting saw Congress embed within the mandate of the Federal Communications Commission, broadcasting's new regulatory body, a general command to preserve competition in commerce in the broadcast medium and a specific directive to refuse a station license to any person judged guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication. While fear of governmental power and government control of media is central to American politics, the dismay over the concentration of private power in media is a very strong undercurrent. U.S. regulatory and antitrust policy customarily attempted to address the dangers of concentrated media power by securing a "diversity of voices," largely through rules regarding ownership.

Traditionally, the dangers of ownership concentration in the communications industry were addressed by a combination of antitrust and regulatory policies that attempted to attend to the amalgamation of corporate power but, of course, did not question private power itself. The logic of government policy generally derived from the juxtaposition of the antitrust laws and regulatory practice with free speech jurisprudence. The First Amendment arguments are familiar: The robust clash of opinions unimpeded by government is the prerequisite of democracy, that is, of self-government; an uninhibited exchange of diverse ideas yields better public choices, decisions, and policies; a free press provides a vital checking function on government actions and possible abuses; freedom of expression is a condition of being a human subject, enabling individuals to learn, grow, and realize their autonomy; the social system functions better when space is made for people to dissent or blow off steam publicly. The First Amendment literally

forbids government from abridging the freedom of speech or press. Absent such abridgement, the speech marketplace is expected to secure the benefits just listed. The "marketplace of ideas," is typically is the guiding metaphor in free speech jurisprudence.

But the concentration of private power in the communications media may skew, if not undermine, the presumed free marketplace of ideas. To stay with the metaphor, concentrated media ownership tends to corrupt the marketplace and renders it dysfunctional. At the most basic level, concentrated ownership constricts the number and kinds of speakers. Owners of the communication systems that deliver content can erect bottlenecks that favor certain content providers and thwart others. In more pointed analyses that link the ownership question to the predominantly advertiser-supported structure of U.S. media, concentrated mass media are understood to shape content in ways that reproduce the prevailing structures of power and dominant cultural norms. At the very least, a commercially based media system is structurally biased toward content connected to marketable products and services and is biased away from content valued by the poor. Content that cannot attract commercial sponsorship tends not to see the light of day. To rectify these problems, Congress, the antitrust agencies, and the Federal Communications Commission (FCC) enacted a set of policies over the decades designed to address media concentration by separating communication industries from each other and restricting common ownership. These policies were pursued under the general rubric of a concept of safeguarding a "diversity of owners" or "maintaining a diversity of voices." In some instances, such as those concerning telephone companies and broadcast outlets in the same market, or newspaper and broadcast outlets in the same market, common ownership was directly prohibited. Under the same diversity logic, the FCC also set ceilings on the numbers of broadcast outlets any single person or corporation could own.

As has been mentioned, Congress and the FCC typically addressed antitrust issues by separating communication industries from each other and restricting common ownership. One of the most important separations, enacted at the beginning of federal regulation, was that between broadcast and common carrier. A broadcaster could not operate as a telephone provider, and, effectively, could not own the delivery system that linked broadcast stations in a network. The broadcaster was explicitly responsible for the content aired over the station. Telephone companies provided access to the wired delivery system on a nondiscriminatory basis, and, as common carriers, were not responsible for the content sent over the system.

The legitimization of most of the FCC's structural and many of its behavioral and content rules weaved around the "diversity" rationale that was itself premised upon the proper role of government in licensing applicants of a scarce public resource. The scarcity theory, that broadcast frequencies were inherently physically (or "naturally") scarce and thus required government to assign them has come under considerable fire in recent years. Many courts and commentators have cast doubt on the continued relevance of the scarcity rationale, particularly given the recent growth of the medium and new technologies that allow for more intelligent broadcasting and receivers.

There has been some recent activity at the FCC regarding the rules of media ownership. The FCC relaxed one media ownership rule in late 2007 and held the line on another. Both decisions are likely to be challenged in federal court. By a 3 to 2, party-line vote, the commission partially lifted a 32-year-old ban that prevents a newspaper owner from also owning a radio or television station in the same city. In a separate, 3 to 2, split-party vote, the FCC reestablished a national cable television ownership ceiling at 30 percent, meaning one company cannot have more than

30 percent of all cable subscribers. The partial lifting of the ban would allow a newspaper in one of the nation's top 20 media markets to merge with a radio or television station in the same market, as long as the television station is not among the four highest-rated in that city. Mergers could occur in smaller markets, but they would have to pass a number of tests, including a demonstration that the newspaper was in financial distress. The relaxation of the so-called "cross-ownership rule" was championed by FCC Chairman Kevin J. Martin and supported by his fellow Republican commissioners, Robert M. McDowell and Deborah Taylor Tate. Michael Copps and fellow Democratic commissioner Jonathan S. Adelstein opposed it. Almost immediately, several Members of Congress expressed outrage and indicated that they would attempt to overturn the rule. On April 25, 2008 a "resolution of disapproval" passed in the Senate that would overturn the rules issued by the FCC. Although the White House has threatened to veto it, the bill remains alive.

Proponents of the rule change said it would mean more local news, with television stations drawing on newspaper reports and newspapers able to offset the cost of newsgathering with television advertising revenue. Newspaper companies fought hard for the rule change five years ago, but showed less interest in it this time because of changing market conditions in the television business. In the past, newspapers saw the high profits of television stations and envisioned significant cost-saving synergies between the properties. But that strategy was crippled by the rise of Internet video, which ate away at newspaper readers, television viewers, and the revenue of both mediums. Not surprisingly, both the Newspaper Association of America offered mild applause to the cross-ownership ruling, while the National Association of Broadcasters was enthusiastic with its response. This was the FCC's second attempt to relax the rule. A broader attempt in 2003 was remanded to the FCC by the U.S. Court of Appeals for the 3rd Circuit in Philadelphia, which said the agency did not adequately justify its reasoning. The new rule is expected to face legal challenge from a number of groups, including the Media Access Project.

Stakeholders expressed varied opinions on modifications to media ownership rules. Most business stakeholders are more likely to report that the rules should be relaxed. In contrast, nonbusiness stakeholders are more likely to report that the rules should be left in place or strengthened.

The FCC functions as an agent to multiple principal groups trying to influence FCC decision-making including Congress, the White House, FCC, industry, citizen groups, and the courts. Private sector stakeholders include industry representatives, public interest groups and individual citizens concerned about media. Stakeholders use various channels of influence with differing strengths to influence FCC regulatory behavior. All stakeholders, with the exception of the FCC itself, are also principal groups monitoring the FCC.

Interested industry groups include any for profit corporate entity such as a television or radio station owner or network; and any organization of broadcasters (either radio or television), especially the National Association of Broadcasters (NAB). It is widely understood that the regulated industry attempts to influence the decision-making of the FCC on multiple levels and is willing to spend money in the form of making campaign contributions, lobbying Congressmen, hiring legal representatives to write formal comments to the FCC and challenging existing statutes in court.

Public interest groups include any not-for-profit group that represents some component of the general public (e.g., Media Access Project, Common Cause, etc.). Also, unions and trade

organizations, religious groups, and academic groups have been involved due to the first amendment issues presented. Likewise, policy think-tanks and foundations such as the Benton Foundation have weighed in on the media ownership debate with policy analysis.

Congress has broad influence over the FCC through passing legislation, approving the FCC's budget, calling hearings on communications issues and confirming commissioners. Congressional committees like the Senate Commerce Committee and the House Telecom Subcommittee exercise special oversight over the FCC and therefore, members of these committees hold extra influence over media ownership rules.

As the head of the Executive Branch, the White House exerts influence over the FCC through its ability to appoint the Chairman of the Commission and to nominate candidates for the Commission. The political ideology of the president is a huge influence over FCC decision-making.

Finally, the courts have been involved in the FCC policy-making process by reviewing appeals of FCC decisions. First, the rules can be found unconstitutional; second, the rules may be remanded to the Commission for inadequate reasoning; and third, they can be remanded to the Commission if found to be arbitrary or capricious. The 3rd Circuit Court of Appeals stayed the implementation of the FCC's broadcast ownership rules in *Prometheus Radio Project v. FCC* (2003). The court found that the FCC used inadequate reasoning to defend their new broadcast ownership rules. Without this decision the new rules would have been implemented immediately.

To some degree, the stark differences between these perspectives on media concentration reflect a long-standing divergence among scholars and lawyers regarding the purpose of antitrust laws, and, more generally, a market economics versus social value perspective on communications policy. Media mergers, like all industrial combinations, require scrutiny by the Department of Justice and Federal Trade Commission. Section 7 of the Clayton Antitrust Act (1914) requires the DOJ and FTC to evaluate the anti-competitive ramifications of mergers, but also their potential efficiencies as well in terms of bringing economies of scale, lower transaction costs, and technological synergies, etc. In this view, the purpose of antitrust is to promote economic efficiency, not equitable distribution, making results (not actions) the criteria for legal judgments.

But antitrust law also encompasses other than economic concerns, including, for instance, preventing the loss of communities' local economic independence to large absentee corporations, protecting small business, and preserving the social and civic ties that bind communities. This emphasis on the social and political values of antitrust law is championed by the values approach to antitrust. Those values are part and parcel of the Federal Communications Commission's charge. Because of the special role that the communications and news media play in a democracy, especially, perhaps, at the local level, media mergers must be approved by the Federal Communications Commission.

As demonstrated here, the fight over media ownership regulations is not over. Recent developments in Congress ensure that interested stakeholders will continue to press their case for and against legislation, at the FCC, and in the courts. The case not only illustrates the interplay between these groups and public policymakers, but also between competing ideologies of anti-trust regulation and the role of media in a democracy.