THE FUTURE OF MEDIA

RESISTANCE AND REFORM IN THE 21ST CENTURY

EDITED BY
ROBERT W. McCHESNEY
RUSSELL NEWMAN
BEN SCOTT

WITH A FOREWORD BY
BILL MOYERS

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WHERE IS THE PUBLIC INTEREST IN MEDIA CONSOLIDATION?

THE HONORABLE MICHAEL J. COPPS

On June 2, 2003, the Federal Communications Commission, of which I am a member, cast its most important vote during my tenure. On that day, the FCC weakened its protections against excessive media concentration and empowered America's media conglomerates with unprecedented levels of influence over the media on which our society and our democracy so heavily depend.

On that day, the FCC found itself at a crossroads. Down one road was a reaffirmation of America's commitment to local control of our media, diversity in news and editorial viewpoint, and the importance of competition. This path beckoned us to update our rules to account for technological and marketplace changes, but without abandoning core values going to the heart of what the media mean in our country. On this path we also would reaffirm that FCC broadcast licensees have been given very special privileges and that they have very special responsibilities to serve the public interest.

Down the other road was more media control by ever fewer corporate giants. This path would surrender to a handful of corporations awesome powers over our news, information, and entertainment. Here we would treat the media like any other big business, trusting that in the unforgiving environment of the market, the public interest would somehow magically trump the urge to build power and profit for a privileged few. On this path we would endanger time-honored safeguards and time-proven values that have strengthened the country as well as the media.

At issue in that huge vote on June 2 was how America's TV, radio, newspapers, and even the Internet are going to look for many years to come. Who is going to control the media? How many—or, rather, how few—companies? For what purposes? Will we still be able to get real local news and clashing points of view so we can make up our own minds on the issues of the day? And how do we assure quality TV and music instead of being so often fed a diet of precanned and nationalized fare aimed primarily at selling products? I think I exaggerate not at all in control over our music, entertainment, and information; gatekeeper control over the civil dialogue of our country; and veto power over the majority of what we and our families watch, hear, and read. So the stakes are high.

With the vote, the majority of the Commission, over my dissent, took the wrong road. The decision would have allowed the big media companies to exert more pervasive influence by wielding up to three TV stations, eight radio stations, the already monopolistic newspaper, the cable system, cable channels, and the dominant Internet provider in the larger markets. It would have allowed each television network to buy up even more local TV stations to cover up to 45 percent of the national television audience—and, if those were UHF stations, potentially up to 90 percent. Newspaper-broadcast cross-ownership was henceforth to be acceptable in 179 of the country's 210 markets, and television duopolies got the green light in up to 162 of them. One broadcaster who was trying to figure out exactly what our new rules meant told me his numbers indicated one owner could hold up to 370 stations in 208 of the 210 markets. Where were the blessings of localism, diversity, and competition in that? *I saw centralization, not localism; I saw uniformity, not diversity; I saw monopoly and oligopoly, not competition.*

What I saw at this particular commission was a tectonic shift in policymaking across the whole wide range of media and telecommunications issues that are under our jurisdiction. It was a shift in decidedly the wrong direction. And in the process, the FCC was short-changing its responsibility to protect the public interest. The public interest—some claim it's unworkable, even unknowable. Yet there it is, appearing some 110 times in our enabling telecommunications statute, put there to be our lodestar. To fulfill our public-interest obligation, for decades we have promoted the goals of localism, diversity and competition—all building blocks for a healthy and dynamic media environment. These things aren't luxuries, nice things to have if we can afford them. They are necessities for a thriving American society, and we can't afford *not* to have them. And we need them across our entire media landscape.

The Commission's decision, now sent back to use for further study by the courts, would enable new waves of mergers and acquisitions and would guarantee that big-media companies exert even more pervasive influence. When is "big media" big enough? We have already opened the door to totally unanticipated levels of consolidation, and yet all the talk from the analysts and pundits is yet another Gold Rush of wheeling and dealing if the new rules eventually get the green flag.

Let's remember that when we talk about media concentration, we're not talking just about future threats. We're talking present reality. Fewer people own more properties. Big companies own radio, television, newspapers *and* cable—cable systems and cable channels. They own the production of programming, as you know all too well. They own the distribution. Increasingly, they own the creativity.

caps and limits eight years ago created real problems in radio, most experts agree. Now, arguably, consolidation also created some economies and efficiencies that allowed broadcast media companies to operate more profitably and may even have kept some stations from going dark and depriving communities of service. And that's fine. That's why many congressmen and senators voted as they did. But the consolidation that ensued went far beyond what anyone expected, leading to outrageous concentrations of social, cultural and political influence. Conglomerates now own dozens, even hundreds—in one case, more than a thousand—stations all across the country. Nearly every market is an oligopoly at best. Competition in many towns has become nonexistent as a few companies—in some cases, a single company—bought up virtually every station in the market. More and more programming seems to originate hundreds of miles removed from listeners and their communities. And we know there are one-third fewer radio station owners than there were before these protections were eliminated.

Respected media watchers argue that this concentration has led to less coverage of local news and public-interest programming. When it comes to entertainment, the Future of Music Coalition in its multiyear study found a homogenization of music crowding out local and regional talent. Others point out that radio now serves more to advertise the products of vertically integrated conglomerates than to entertain Americans with the best and most original programming.

Rather than learn the lessons of radio concentration, the FCC plunged ahead and voted to visit this "Clear Channelization" on the rest of our media. What we are seeing now is the closing off of distribution channels. And nowhere is this more evident than in television. Already, the big media conglomerates that own the networks control approximately three-quarters of the primetime audience—broadcasting and cable together. That audience share of households is approaching—and could soon surpass, according to the analysts—the share the three networks had during the 1960s and 1970s. And today, these conglomerates are more vertically integrated, controlling the production of most of the programs as well as the distribution. It was by adding distribution to production that monopolists like John D. Rockefeller amassed their power. History never repeats itself exactly, but sometimes there are enough similarities to indicate that we ought to pay more attention than we do. This is one of those times. By the way, in contrasting network power now with, say, thirty or forty years ago, remember that back then they didn't have their own stable of "owned-and-operated" stations, and we also had financial syndication rules as a check against market power.

Back then, when some expressed their concern about growing network power, they were told not to worry, that the rapidly expanding multichannel universe of cable TV would save us. What happened? Well, 90 percent of the top cable channels are owned by the same giants that own the TV networks and the cable distribution cable doesn't really nourish diversity, localism, or competition. So that didn't quite pan out. And now we're being told not to worry because the Internet will forever ensure the openness and diversity we crave. Well, guess who owns the top twenty Internet news sites. The same Big Media folks.

What we have to keep in mind is that this is only the latest, most radical step in a twenty-year history of undermining the public interest. Step by step, rule by rule, bit by bit, we have allowed the dismantling of public interest protections and given a green light to the forces of consolidation, until now a handful of giant conglomerates are in the saddle. Fundamental protections of the public interest have been allowed to wither and die. Vertical safeguards, such as the financial syndication rules, are long since gone. Horizontal protections were whittled down significantly long before June 2, 2003. Requirements like ascertaining the needs of the local audience, the Fairness Doctrine, teeing up controversial issues, and providing demonstrated diversity in programming have long since been abandoned. And rigorous public interest scrutiny is more a quaint relic of the past than an effective safeguard to protect against excessive concentration.

Over the years, the Commission has relied more and more on marketplace forces as a proxy for serving the public interest. Don't get me wrong—I don't have anything against folks making a buck from their media investments. We decided long ago in this country that the media would be part and parcel of our great system of capitalist enterprise, and that's fine. But our licensees, in return for the privilege of using airwaves that belong to somebody else—they belong to the people—undertook and pledged to serve the public interest. It's a very different and very special industry. And when its foundation stones begin to crack and things like diversity and localism and competition are imperiled, then it's past time that we do something about it. I think the heart and soul are going out of much of our media. And by neglecting to do justice to proposals that could supplement our ownership rules, such as requiring more independently produced programs and enforcing real public-interest performance standards on our stations, we are skirting perilously close to taking the "public" out of the public airwaves.

During the more than a dozen hearings and forums on media concentration that my colleague, Commissioner Jonathan Adelstein, and I attended from coast to coast, I saw and heard first-hand the stories of hundreds of citizens about the detrimental impact that consolidation has already had on their local media and their fears about where still more concentration will lead. We heard from people laid off from the newsroom when local news got the ax from the new owner. We heard from creative artists who couldn't get air time for their music because they weren't on the centralized, homogenized playlists. We heard from independent programmers who couldn't find outlets for their programming because the networks and the studios had a lock on so much of what is produced.

This popular outcry was one consequence of the June 2 vote that the Commission majority did not count on. Its determination to loosen the rules and its reluctance to share draft rules with the American people—or the Congress—before we voted awoke a sleeping giant: the people. Citizens across this land of ours let their voices be heard. They were downright angry that far-reaching changes were being plotted and planned behind closed agency doors. They didn't like the Commission messing around with their airwaves that way. And they made up their minds to make a difference.

In these times, when many issues divide us, an unprecedented coalition has taken shape—a coalition of left and right, liberals and conservatives, Democrats and Republicans, who understand the dangers of too much concentration and who went to work to do something about it. Concerned parents, creative artists, religious leaders, civil-rights activists, labor organizations, and broadcasters have all united on this issue. As Brent Bozell of the Parents Television Council so aptly put it one afternoon when this motley collection of folks was gathered around one table, "When all of us are united on an issue, then one of two things has happened. Either the Earth has spun off its axis and we have all lost our minds, or there is universal support for a concept." Well, it's the concept—a transcending, nationwide concept. It is an all-American, grassroots issue.

And then there was the "Tell Us the Truth Tour!" Several incredibly busy recording artists gave up their time and resources to raise awareness of this issue. They weren't doing it for money or because it would advance their careers. No—they volunteered because they wanted to awaken the country to an issue that affected not only them and their fellow artists, but each of us as citizens. Everywhere the tour went, they held press conferences, they discussed media concentration, and they performed a tremendous public service.

It took a lot of people to bring this issue to the forefront of the nation's consciousness. It took people raising their voices in song, in protest, in books and pamphlets, in whatever media and forums they could manage to penetrate, to get this issue front and center and to force the issue of media concentration outside the pages of *The Federal Register* and into the mainstream of America.

A lot of the so-called experts said that the coalition would have no staying power; that it would splinter and die right after the vote. It didn't. It stayed together. It went to court together. It went to Congress together. And it is getting results. Part of that difference is to be seen over at the FCC. The Commission now faces a far more informed and involved citizenry than it did just a year ago. The obscurity of this issue, which some relied on in the past, is gone forever. Part of the difference can be seen up on Capitol Hill, where long-time champions of good media policy found themselves joined by many more colleagues than they ever expected. The United States Senate has already voted to overturn the FCC decision in its entirety, and over 200 members of the House of Representatives have asked the house leadership for permission to vote on the same resolution of disapproval. Part of the difference can be seen in the courts, because a united coalition took one look at those awful rules that the Commission majority passed on June 2 and marched them right to court.

The court has now responded. On June 24, 2004, the Third Circuit overturned virtually all of the FCC's attempts to unleash more media concentration, ruling that the FCC's 2003 media concentration plan was legally and procedurally flawed.

The good news is that we have an opportunity to start over and come up with a set of rules that encourages localism, diversity, and competition in the media. But this is not a complete victory. It is merely a second chance to protect the people's interest in the people's airwaves, if we decide to do so.

So now is demonstrably *not* the time to slow down. This is the best opportunity this country will have, perhaps for years, to do something about media concentration and to make sure the public's airwaves serve the public's interest. This problem needs to be fixed now. And if it's not fixed now, the consolidation genie will be out of the bottle with an energy the likes of which we have never seen, and hungry to complete every kind of merger, acquisition, and swap imaginable.

There were so many questions that should have been addressed in the ownership proceeding that were not. Let me mention a few.

What might be the effects of further concentration on America's minorities in terms of providing Hispanic Americans and African Americans and Asian-Pacific Americans and Native Americans and other groups the kinds of programs and access and viewpoint diversity and career opportunities and even advertising information about products and services that they need? America's strength is, after all, its diversity. Diversity is not a problem to be overcome. It is our greatest strength. *Our media need to reflect this diversity and to nourish it.* Yet, the number of minority owners of licensed television stations has dropped to a shocking, and nationally embarrassing, 1.9 percent. And there has been an even greater drop in minority station managers and newsroom employees. Why not ask these questions *before* we change the rules instead of creating the potential for even more harm?

What is the impact on small, local broadcasters? Increasing consolidation threatens the very survival of independent broadcasters. Media analysts expect that the only option for local broadcasters will now be to sell. They conclude that those that want to remain will face an extremely tough road. They will find themselves less and less captains of their own fate and more and more captives of Wall Street and Madison Avenue manipulators. During our hearings, we heard from small broadcasters that had already been squeezed out of the market. These rule changes can only accelerate this trend. And many of these broadcasters are uniquely local stations that serve an important role in their communities.

How about the effects on our kids? Again, we failed the test. When this ownership proceeding was launched last September, we searched in vain for even a mention of the word "children" in the text. We should have examined the impact of consolidation on increasing sex and violence on the airwaves before we allowed further consolidation to take place. We should also have considered to a greater extent the relationship between concentration and children's programming. A recent study analyzed the market in Los Angeles and found that the number of broadcast TV programs for children dropped sharply after independent local stations were swallowed up in media mergers. The study found a 47-percent drop in children's programming, with duopolies accounting for the largest decreases. Another recent survey found that 80 percent of parents think the FCC is doing only a poor to fair job of protecting families and children. That's a sad indictment.

And then there is the question of local artists getting airtime on local stations. In our hearings across the country, we have heard time and again that with increasing consolidation, if you do not have a major label contract with promotional money behind it, you do not get airtime. We even heard from such recording artists as Tift Merritt who have major label contracts, but can't get airtime in their home states. Does local music no longer have a place on local commercial radio? Is that in the best interests of our citizens?

And there was the question of the impact on independent programming. Should we require a set amount of independent programming, so that a few conglomerates don't get a complete hammerlock on the creative entertainment that we see? Network ownership of the full range of prime-time programming constrains competition, consigns independent production to second-class roles, and cripples the production of diverse programming. It also entails serious job losses for thousands of workers, including creative artists, technicians, and many, many others.

There were many other questions that went unasked. What about the impact on advertisers, particularly small advertisers, trying to get their message out in a market where somebody controls most of the outlets? How does technology change the debate? We are transitioning toward the era of digital television, wherein broadcasters will be able to multicast six different channels. Does having one company control eighteen channels in a market not alter the ability of others to compete? These strike me as the kind of questions we should have vetted before we voted.

So the issue of media consolidation is now back before the Commission as a result of the appellate court ruling in June of 2004. The story is far from over. At the FCC, we are now considering other issues related to the public interest and our media. One area is in the public-interest obligations of local broadcasters. As we make the transition to digital, there is a crying need to update our rules on the public-interest obligations of those who are given the right to use spectrum, particularly those who will multicast additional program streams. The potential of digital television and radio is enormous, and I believe the rewards, for everyone, can be enormous, too. But while we have been very attentive to expediting the mechanics of the digital transition—things like DTV tuners and the like—and we've made progress there, on the central questions of what the digital transition means for the public interest, we have a bad case of lockjaw. The result is a great big digital gap. We actually started having a discussion about digital television and the public interest a few years ago, and it was a pretty good one. The Commission even initiated a couple of specific proceedings.

I want us to finalize action on these rulemakings and then go beyond that with a more comprehensive proceeding on the public-interest obligations of digital television broadcasters. I am pleased to see that a coalition—the Public Interest, Public Airwaves Coalition—is forming on this issue to press for such things as more local civic and electoral affairs programming and more independent programming. I also want to see us expand the public-interest discussion to include radio. We have an opportunity in radio to avoid the experience we have had so far with digital television and accord the public interest the high priority it deserves. The additional program streams that are becoming digital reality could be a real boost for localism, competition, and diversity. I hope we will not miss this opportunity to make sure that the American people realize the full benefits of the digital transition.

Another area that merits attention in our effort to increase localism, competition, and diversity is low-power FM stations. These community-based stations are licensed to local organizations and can help meet the needs of underrepresented communities. They can benefit recording artists by providing more outlets for airplay, especially on a local or regional level. We need to get serious about licensing more low-power FM stations.

Finally, let me mention one additional area—license renewals. I want the Commission to start taking this seriously again, like it used to do. Every three years, the FCC would look rather rigorously at what a station was doing to serve its community, working from a fairly specific checklist. That process has degenerated to the point that now, once every *eight* years, we go through a process that is pretty accurately defined as "postcard renewal." Unless a citizen of a community files a petition to deny the renewal, or unless there is a major complaint pending against a station, its license is almost automatically renewed. And, even though stations are required to keep a public inspection file, we don't generally even look at that file unless we hear from members of the community.

As big media gobbles up more local stations, we need a process to ensure that licensees are serving their local communities, your communities. Until we put such a process in place, we will rely on public input on how stations are living up to, or not living up to, their public interest obligations. Are stations adding to the civic dialogue? Are they covering issues of importance to the community? Are they responding to the community's needs?

I see a lot of challenges ahead. Am I worried? Of course, we should all be worried. Powerful economic forces that favor consolidation are converging with regulatory policies that pave the way. They could yet carry the day. But I also see opportunity and the good news is that we still have a chance to avoid all this. I believe, after traveling the length and breadth of this country, that our citizens want, deserve, and are demanding a renewed discussion of how their airwaves are being used and how to ensure they are serving the public interest.

If we roll up our sleeves, if we continue to work together now, all of us—business people, artists, workers, regulators, consumers, citizens everywhere—we can win the battle, we need to win the battle. We have a chance to settle this issue of who will control our media and for what purposes, and to resolve it in favor of public airwaves of, by, and for the people of this great country. Let's make it happen.

WHO IS WATCHING THE WATCHDOG?

JOHN DUNBAR

The Center for Public Integrity has been investigating the federal government for nearly fifteen years. We have made public all manners of corporate and other special-interest influence on Congress and the White House. In January 1996, we released the first *The Buying of the President*, which identified the major presidential candidates' career patrons—their most generous lifetime political donors—and documented what favors they had gotten in return. In September 1998, we released *The Buying of the Congress*, which scrutinized the top political donors to incumbents and to the House and Senate leadership. We have studied the all-too-often decisive influence of money on politics.

In August 2002, we decided to extend our reach beyond elected officials and into the sometimes mysterious workings of a federal agency, beginning a three-year investigation of the Federal Communications Commission. With the same leave-no-stone-unturned approach we had taken to money in politics, we likewise studied the FCC, filing dozens of Freedom of Information Act requests, compiling tens of thousands of records in databases, analyzing them, and presenting our findings on our Web site, www.publicintegrity.org.

We found that the basic data that is critical for the FCC to do its regulatory duty is usually supplied by private sources reliant on the industry, making it virtually impossible to perform a truly independent analysis of whether the agency is acting in the public interest. We discovered that, while every government agency suffers from the "revolving door" syndrome, the traffic of top FCC officials working in the industry is extraordinary. The door is not revolving, it is spinning. We showed that for years, FCC commissioners and top staff accepted millions of dollars in free travel and entertainment from the same companies the agency is supposed to be keeping an eye on. We were able to document that while public participation in FCC decisions is rare, the Commission has an open-door policy for top industry executives. Such ex parte meetings take place out of the public view, usually without public knowledge, and are entirely legal. In short, we found an agency so thoroughly beholden to the industry it regulates that the goals of governance and the goals of business were at times nearly inseparable.

The Unknown Agency

The FCC is often described as an insulated agency. Even its offices, tucked away in the concrete canyons of Southwest Washington, seem secluded. Commissioners are appointed by the president and confirmed by the Senate. Once they are in office, they all but disappear from public view. The Commission relies heavily on staff to make recommendations on telecommunications issues. Most rules are decided on before the commissioners even meet to vote.

The agency receives little coverage from the traditional media. Although some critics say that the lack of coverage reflects a conspiracy of silence—that broadcasters are unwilling to cover their own industry—a more likely explanation is that the FCC's work is by nature highly technical and often deathly dull. It does not make for good television.

There is also the issue of what to do with the news itself.

Because FCC decisions can make the difference between profit and loss for multi-billion-dollar companies, their deliberations are often covered on the financial pages. But business reporters have a very different agenda from those who cover Congress, and all too frequently issues like openness, public accountability, and industry influence are overshadowed by the economic consequences of FCC decisions.

Of course, we were not aware of any of this when we first began looking into the agency. Our first challenge was to define the telecommunications industry itself, which was no small task. To help us focus, we opted to look at all FCC-regulated companies. We took a pipeline approach: Any company that controlled the conduits of information and communication would be fair game for our investigation.

Given that the agency was soon to make a pivotal decision on ownership rules, we were especially interested in radio and television stations. We also wanted to find out more about the cable television industry, local- and long-distance telephone providers, and wireless companies. It took us months to gather the most basic information. Much of it came from FCC reports, which in turn attributed the data to private companies. In some instances, the data came from industry associations that also lobbied the FCC. When we constructed our searchable geographic database of media companies (www.openairwaves.org), FCC staff repeatedly referred us to private companies for basic information on ownership and audience reach. Getting market-share information, which is key when reviewing whether broadcasters are within existing FCC regulations limiting the number of households any one owner can reach, was all but impossible without going outside the agency.

The problem is that such data is systemically protected. You can get it, but it costs a lot, and once it is obtained, there are severe restrictions on how it can be used. (For example, making it available for free on our Web site for anyone to see is not allowed.) To get the data we needed for our project, the Center had to go through an inordinate number of hoops. More significantly, the FCC's heavy reliance on industry-provided information has serious public-policy implications, a point that was hammered home when we looked at how the agency researched the issue of the concentration of media ownership.

When the FCC was created in 1934, its primary responsibility was to keep fledgling broadcasters from stepping on one another's radio signals. They did that by setting up a licensing system. Each broadcaster got its own piece of the spectrum, which would remain public property. In return, the broadcasters would use their slice of the airwaves to broadcast programs that would serve "the public interest, convenience and necessity." While the definition of "the public interest" is subject to interpretation and considerable controversy, over the ensuing decades a key function of the FCC was to prevent a single broadcast company from gaining too much control over the public airwaves. Rules prevented television broadcasters from reaching too large an audience nationally and in individual markets. Radio broadcasters were limited in how many stations they could own, both nationally and in a single market. Broadcasters were banned from owning newspapers and broadcast stations in the same cities.

Things began to change in the 1980s. The Reagan administration, under the rubric of deregulation, began rolling back some of these rules. License renewals for broadcasters, an event that gives the government and the public an opportunity to see how well the public's interest is being served, became less frequent and less involved. Rules on ownership were loosened, though modestly so by today's standards.

In 1996, Congress passed a rewrite of the 1934 Communications Act. The Telecommunications Act of 1996 was an enormous and extraordinarily complex piece of legislation. Virtually every communications lobbyist in Washington worked Capitol Hill in advance of its passage in the hope that their industry would benefit. The lobbying was intense and expensive.

While the main selling point of the Act was to provide a way for telephone companies to compete for local phone business, it also made serious changes in how the media are regulated. Among the key changes were the removal of a national cap on radio station ownership and a mandate that the FCC examine ownership rules every two years. The radio rule gave rise to such broadcast giants as Clear Channel Communications Inc., and its 1,200-plus stations. The biennial review gave broadcasters a guaranteed opportunity every two years at convincing the FCC to loosen media concentration rules.

And here is where the trouble of relying on privately produced data arises. In November 2001, FCC Chairman Michael Powell created the Media Ownership

Working Group to help Commissioners in their review of broadcast rules. The group commissioned twelve studies examining the media marketplace, and these were released on October 1, 2002. Watchdog groups claimed that some of the studies were biased in favor of deregulation, and they asked that data used in them to reach conclusions about the marketplace be released. Four of those studies used proprietary data—produced by private companies that sold the data at a profit—to reach their conclusions. Unlike numbers generated by, say, the Census Bureau or the Bureau of Labor Statistics, the FCC was relying on numbers that it had not generated, that it, in fact, did not own and could not release to the public.

On November 4, 2002, the Commission's Media Bureau Chief Kenneth Ferree agreed to make the data available to the studies' critics, but only if those who viewed it agreed to an agency-prepared "protective order." The FCC made the data sets available only to "authorized representatives" of the viewing parties, or to anyone "designated by the Commission in the public interest." To see the data, the viewing party had to swear, in writing, not to share it with any unauthorized persons. Viewers were allowed to look at the data only at FCC headquarters and were prohibited from making copies.

"The protective order business is truly bizarre," said Andy Schwartzman of the Media Access Project, one of the groups that requested to review the FCC's numbers. "We ultimately got to see everything we needed to see and got access to data sets and everything, although there were a lot of controls placed on how we could do it."

He estimated that it took about six weeks from the time the order was issued until his organization was actually able to review the information. This was a critical lag for public-interest groups, as time was limited for them and other concerned parties to make their case on whether the rules should be revised before a comment deadline.

Commissioner Michael Copps at the time released a statement criticizing the Commission's handling of the information. "The FCC is required to seek public participation before it eliminates these rules," he wrote. "The Commission recently released a dozen studies for the public to review as part of this process. It withheld the data used in these studies, however, until releasing parts of it today." Public commentators complained that the comment period allowed by the FCC denied them the ability to participate meaningfully. Just as unreasonable, according to these commentators, is the fact that "the clock on the comment period has been running even while the underlying data was unavailable."

An FCC analyst told the Center that protective orders are not unusual with federal agencies, especially in proceedings dealing with large mergers.

Despite the lack of publicly available government data, the Center was able to construct a database of radio and television stations as well as cable and telephone companies. But the process took months, and the information gleaned from FCC

documents was often out of date and incomplete. To make the information useful required hundreds of hours of additional research.

Consider, for example, the way the FCC tracks information on cable television systems. The FCC's Media Bureau makes cable information available to the public through its Cable Operations and Licensing System, known as COALS. The data is available for download via the FCC's Web site and is updated nightly, according to the site. Among the most useful statistics tracked by the agency is a count of cable subscribers by community. After our research team downloaded a number of tables, linked them together, and totaled the subscribers, we discovered that the total was about 7.5 million fewer than the national number of subscribers the FCC lists in its most current cable-industry report. (That report, incidentally, is produced by Kagan World Media Inc., a private research firm.) In other words, after adding up all the cable subscribers the FCC claims live in Philadelphia, Boston, Wichita, and every other community in the United States, we found we were some 7.5 million subscribers short of the national figure that the FCC issues in its own cable-industry report.

An analyst in the Media Bureau told the Center that she did not know much about COALS or why total subscribers in that database were so much lower than the total cited in the most current FCC report. She referred the Center to Kagan (and provided a contact person). A programmer there said the subscriber information was not supposed to be in the COALS database and told Center researchers that the FCC stopped collecting it after "deregulation" of the industry in 1996. In short, the agency was posting nine-year-old data on its site and listing it as current.

And that is on par for the course of the FCC. Schwartzman notes that the Commission is collecting a lot fewer data now than it ever did, and he and some public-interest groups worry that with the increase in deregulation and the decrease in information available, the public will find it that much harder to have access to the information it needs.

"When the agency deregulates, and stops collecting data, they say we're going to rely on marketplace forces and public complaints to make us aware of problems," Schwartzman said. "Then the Commission takes away the means of members of the public to do that monitoring."

The Spinning Door

The FCC's reliance on industry to make its decisions may have surprised us, but once we started digging deeper, that reliance began to make some sense. We soon discovered that the agency itself was full of former industry executives and lawyers, and vice versa. We took a closer look at the revolving-door syndrome in early 2003.

We learned, for example, that SBC Communications Inc., the giant local-telephone-service provider, had hired the former chief of local telephone regulation at the FCC. Dorothy Attwood, former chief of the FCC's Wireline Competition Bureau, quit the agency on September 15, 2002, and joined SBC barely six weeks later as senior vice president for federal regulatory strategy. Attwood joined SBC just in time for the company to make its case in advance of a crucial FCC vote that could potentially make it more difficult for companies to compete with "Baby Bells" like SBC on local phone service.

"The stakes are enormous," Consumers Union's Gene Kimmelman told the Center at the time. "What the Commission decides . . . could be a dagger in the heart of potential telecommunications competition—or it could help keep fledgling competitors alive to fight another battle."

Prior to the vote, Attwood met with senior FCC officials a total of four times. Three of those meetings were with FCC Chairman Powell's senior legal adviser to discuss competition-related issues, FCC records showed. The former bureau chief was a favorite of the chairman's. Upon her departure from the FCC, Powell praised her for playing an "integral role in the FCC's implementation of the Telecommunications Act of 1996, and in shaping our policies in the transition to a more competitive telecommunications environment."

While job-hopping from government to industry is not illegal, it is certainly troublesome in some cases—especially when the one doing the hopping is in a senior position at an agency that regulates an industry and if the break between jobs is extremely brief. One concern is that the former government employee may use inside information, gained while on the public payroll, to benefit a new employer. Even more troublesome is the possibility that the employee could be tempted to rule favorably on industry matters in the hope of getting a lucrative private sector job.

According to the federal Office of Government Ethics, "A former employee is forever barred from representing another person or organization before a Federal Department, agency, or court on certain matters in which the former employee participated personally and substantially while working for the Government."

That's the harshest restriction. A lesser rule stipulates a two-year ban. "The post-employment statute provides that, for two years after terminating Government employment, a former employee may not represent another person or organization before a Federal department, agency, or court on certain matters which were pending under the employee's supervision during the last year of his Government service."

There is also a one-year "cooling-off period" for the most senior government officials. Attwood did not fall under the cooling-off rule because she was not senior enough. As for the lifetime and two-year bans, those prohibitions are for party-specific activity, usually related to some form of judicial or quasi-judicial

proceeding. Attwood's representation of SBC before the FCC does not qualify because the rule that was under consideration affected an entire sector of industry, and not just her employer.

Attwood told the Center that she was careful about meeting with FCC personnel, even though she is not legally required to restrict her visits. "I can recall three times going back, one in the nature of just saying hello to a new Commissioner," she stated, apparently referring to the meeting with Adelstein. Attwood assured us that she restrained herself from visiting the FCC and could have gone there "200 times" under the letter of the law.

We still felt this was an issue worth raising so that our report might spark some sort of reaction. We were wrong. The media, which frequently picks up Center reports, ignored it.

When the Center reached Attwood for comment, she seemed insulted that anyone would ask whether the job switch could be viewed negatively by the average citizen. She told us that when she left the agency, she was careful to ensure that she would not violate federal "revolving door" laws and sought the opinion of the FCC general counsel's office on post-employment rules. "I've been very careful in the approach I've taken," she said.

An SBC public-relations representative called the Center (unsolicited) to sing Attwood's praises. "For what it's worth, she is a person of utmost integrity. She goes out of her way to make sure there is not any problem in terms of her roles and that she is working within the letter of the law," he said. He went on the say that Attwood is "the breadwinner" for her family and that it would be a "shame" for her to be "tarred by living within the law."

The SBC caller's indignant tone began to make more sense when we dug further into the employment background of other FCC officials. The truth is that such moves from government to industry and back again are utterly routine at the FCC—standard operating procedure. While Attwood's case was a bit more blatant than some, dozens of examples can be found just by reading the FCC's own website and industry press releases. This is especially true in the pro-industry office of the chairman.

On Feb. 25, 2004, Powell's former senior legal adviser, Susan Eid, joined Hughes Electronics Corp., operator of television satellite broadcaster DIRECTV. She was hired as vice president of government relations. Hughes, which has sold a 34-percent stake in the company to the global media giant News Corp., left no doubt about the reason why Eid was hired. "Her vast public policy expertise and in-depth knowledge of the Beltway undoubtedly will serve Hughes well in our nation's capital," said company President and CEO Chase Carey. Eid was hired to oversee "all regulatory and legislative affairs for Hughes and its operating companies," a company release reads.

This was not the first time Eid had ducked through the revolving door. Prior to her FCC service, she was vice president of federal relations for Media One Group, one of the country's largest cable companies at that time.

Powell's former Chief of Staff, Marsha J. MacBride, left the FCC to become executive VP of the National Association of Broadcasters' legal and regulatory affairs division, overseeing the NAB legal team. The division represents broadcasters before the FCC and the courts. Prior to her job as Powell's top staffer, she served a stint as vice president of government relations for the Walt Disney Co. Before joining Disney, MacBride held several top staff positions within the FCC. She originally joined the FCC in 1991, after a six-year career as a communications lawyer in Washington.

John Muleta, chief of the agency's Wireless Telecommunications Bureau, came directly from Source 1 Technologies LLC, where he was president and CEO. Muleta previously worked at the FCC from 1994 to 1998, serving in the Common Carrier Bureau and the Office of Plans and Policy. He served as deputy bureau chief there and was chief of the Enforcement Division. After leaving the FCC, Muleta worked at PSINet, Inc.

Before being named a commissioner in 2001, Kathleen Abernathy was vice president of public policy at BroadBand Office Communications, Inc., a start-up telecommunications venture. Before that, she was a partner at Wilkinson Barker Knauer, a leading telecommunications law firm. She also served stints as vice president for regulatory affairs at U.S. West Inc. and as vice president for federal regulatory issues at AirTouch Communications Inc. In addition to her experience in the private sector, Abernathy held several positions at the FCC at various times. She was a telecommunications legal adviser to former FCC Chairman James H. Quello, legal adviser to former Commissioner Sherrie P. Marshall, and special assistant to the FCC's general counsel. Most of Abernathy's legal advisers also came directly from the private sector.

Hiring former FCC officials is no guarantee of a successful policy outcome. For example, Attwood's old connections at the FCC did not help SBC. A renegade commissioner, Kevin Martin, defied his fellow Republicans and voted with the two Democrats on the commission to keep in place the rules that SBC objected to. (That decision was recently reversed in a federal appeals court. The issue is far from settled.)

The FCC, meanwhile, found another revolver to replace Attwood. Washington attorney William Maher came to the FCC from the telecommunications law firm of Halprin, Temple, Goodman & Maher. Before that, he was at the U.S. Department of Commerce assisting on telecommunications issues. Prior to that job, he was at the FCC as a special counsel for competitive issues.

Frequent Flyers

Although the revolving-door report failed to draw much attention, another Center study that examined the cozy relationship between the agency and the industry certainly did. "On the Road Again—and Again" was released two weeks before the FCC was to vote on relaxing limits imposed on broadcasters about ownership concentration. At the time of the release, the commission, especially then-Chairman Powell, was under an unusual amount of scrutiny. Powell has been an unabashed proponent of deregulation throughout his tenure with the Commission and has called for doing away with most or all of the current ownership restrictions, pointing out they were put in place before the advent of the Internet, cable, and satellite broadcasting.

The media consolidation issue had struck a common chord across the nation. The FCC, after conducting only a single public hearing, was widely expected to vote in favor of allowing big media companies to become much bigger. As is often the case with the agency, most of the work was done behind the scenes, and the final vote was virtually a foregone conclusion. But the fear of a corporate broadcast "Big Brother" galvanized groups as disparate as the National Rifle Association and the National Organization for Women. Regardless of party or ideology, interest groups were concerned that a media landscape dominated by only a few players would keep them from getting out their message. More than 750,000 messages from irate Americans were received by the FCC following the decision. And the "On the Road" report added fuel to the fire.

The study showed that the FCC had accepted nearly $2.8 million from outside sources in travel and entertainment over eight years, most of it from the telecommunications and broadcast industries the agency regulates. The $2.8 million paid for FCC commissioners and agency staffers to attend hundreds of conventions, conferences and other events in locations all over the world, including Paris, Hong Kong, and Rio de Janeiro.

The biggest industry sponsor was the National Association of Broadcasters, whose members had a tremendous financial stake in the FCC's June 2 vote. Records showed that the broadcast lobbying group paid $191,472 to bring 206 FCC officials to its events. For example, the NAB spent $24,601 to bring 14 FCC officials to its annual convention in Las Vegas in 2002, including Chairman Powell and Commissioners Copps and Martin. Not far behind was the National Cable and Telecommunications Association, which spent $172,635 to bring 125 FCC officials to its events, including the $21,147 it spent to bring 13 FCC officials to its annual convention in Chicago in 2003. Coming in third was the Consumer Electronics Manufacturers Association, which spent $149,285 to bring 103 FCC officials to its events, primarily its glitzy annual Consumer Electronics Show held in Las Vegas each year. CEMA heavily lobbies Congress and the FCC on a variety of issues including digital television, broadband deployment, consumer home recording rights and spectrum management.

Among the top sponsors were companies that lobbied heavily for a relaxation of the ownership rules. Viacom, which owns CBS, sponsored seven trips on its own, costing $9,581. Viacom spent $6,901 to bring FCC Media Bureau Chief Ferree and Eid to a company management conference in March 2002. Ferree, the chief architect of the proposal to relax the media-ownership rules, did not respond to an interview request from the Center.

While the vast majority of the trips were sponsored by the telecommunications and broadcast industries, some were paid for by universities and international organizations. Still others were sponsored by companies that put together trade shows and conferences for a variety of industries.

The top traveling commissioner, according to the study, was Powell. He chalked up 44 trips costing $84,921. Powell almost always flies first class because of an injury to his pelvis, which he suffered in a vehicle accident while serving in the U.S. Army. (The Commission Chairman has never responded to any request by the Center for comment on any issue.)

All told, agency officials took more than 2,500 such industry-sponsored trips from May 1995 to February 2003. The Center report analyzed any trips costing more than $250 that were paid for by sources other than the FCC. FCC officials took 330 such trips to Las Vegas during the period, 173 to New Orleans, 102 to New York and 98 to London. Other popular destinations included Orlando, San Francisco, Miami, Anchorage, Palm Springs, Buenos Aires and Beijing.

The officials often served as speakers or panelists at the events, but many times they went only as attendees. They often stayed for the entire event at glitzy hotels, such as the Bellagio in Las Vegas, even though they may have been scheduled to give only a single speech or serve on a single panel, FCC travel records showed.

FCC commissioners went on dozens of trips each, often staying at posh hotels or resorts on the industry tab. Some of the sponsors had special dinners or other events to honor the FCC officials in attendance. They were sometimes provided with cars and drivers. Two top FCC policy advisers took more than 100 trips each during the period.

Michael Copps, a commissioner since June 2001, took 14 trips costing $15,410. Kevin Martin, a Commissioner since July 2001, has taken 12 trips valued at $14,857. He took another 7 trips valued at $8,966 while working in a previous capacity as a legal adviser at the agency. Jonathan Adelstein, who joined the commission in December 2002, took three trips costing $2,998. And Abernathy, a commissioner since June 2001, took 14 trips costing $16,185.

Like most FCC officials the Center contacted, Abernathy declined to be interviewed about her travel but issued a statement noting that at times, she accepts

reimbursement from outside groups for travel expenses in order to conserve FCC resources. "The Commissioner believes that meeting with a diverse range of groups, including industry, consumer groups, and other interested parties, serves a crucial information-gathering purpose that is necessary to effective decision making," read the statement. "The Commissioner occasionally travels to meet with interested parties for this purpose, particularly where parties seek to provide a tour or demonstration that cannot be provided in Washington, D.C."

Abernathy's take on the "benefits" of accepting industry-sponsored travel is not unique. Telecommunication industry representatives and some FCC officials defend the trips by arguing that they help to educate regulators on important issues and provide a voice to small companies and individuals who cannot afford to travel to Washington or hire a lobbyist. "We need to understand what the industry is doing and the industry needs to understand what we are doing," said Robert Pepper, chief of the FCC's Office of Plans and Policy, who took 104 trips costing $149,595 during the period studied, second highest among agency officials. "We need to get outside the Beltway in order to do that."

Pepper indicated that the FCC should pay for such trips in an ideal world, but that this procedure is not possible in an age of tight agency budgets. "I'm not crazy about having the industry pick up the tab, but I think it is the second-best option we have in tight fiscal times like now," he noted. "The other option is for us to just stay home. That does not benefit anyone."

But consumer advocates had a darker view of the practice. They told the Center that the trips are unseemly and represent an improper coziness between FCC officials and the businesses they regulate. "It is silly to say they [FCC officials] don't lose some of their objectivity when they are being wined and dined like they are at these industry events," said Mark Cooper, director of research at the Consumer Federation of America. "You would have to be superhuman not to."

Other critics worry that the trips could dull the objectivity of FCC officials and make the agency too chummy with the huge and politically powerful industry it is supposed to regulate. What is more, they point out, the industry enjoys much better access to FCC officials because of the trips, access that is not available to the public. "The problem for me is the access and the personal face time the industry gets with these top officials they bring out to their events," explained Schwartzman of the Media Access Project. "It's impossible for the public to get the same kind of access with those officials."

Roy Stewart, chief of the Office of Broadcast License Policy in the FCC's Media Bureau, took 107 trips, more than any other FCC employee. Stewart had been head of the agency's Mass Media Bureau since 1989. He lost that job in a restructuring ordered by Powell in March 2002. That restructuring put Stewart under new Media Bureau Chief Ferree, a former communications lawyer who first met Powell in college at Georgetown. Stewart says he considers travel to industry events a major part of his job.

"It is important for a government official like me to sit in a room with the industry and hear their concerns," noted Stewart. "Then it is my job to come back and relate those concerns to the Chairman and the Commissioners."

Some members of Congress clearly did not see it that way. Shortly after the Center's report was released, Senator John McCain offered legislation to outlaw the practice; it did not see the light of day. Other such attempts to stop the trips met a similar fate. But the pressure from Congress prompted Powell to substantially limit the practice, if not end it altogether.

On July 25, 2003, Virginia Republican Congressman Frank Wolf, chairman of the House appropriations subcommittee that oversees the FCC's budget, wrote Powell to ask that his agency stop accepting such travel. On Aug. 18, 2003, Powell wrote Wolf back, promising to request a $500,000 funding increase to cover necessary travel. "Even while this effort is underway, I have commenced a further review of our travel program to substantially reduce section 1353 [i.e., non-agency-funded] travel and to guarantee that all travel is necessary to advance the agency's mission."

While the Commission dramatically reduced such trips, the Center gathered documents showing that in the seven months following Powell's letter, FCC staff had accepted $90,000 worth of travel. While trips by commissioners and bureau chiefs had all but stopped, other managers and lawyers were still taking advantage of such benefits.

For example, the January 2004 International Consumer Electronics Show in Las Vegas was attended by five FCC employees, including three deputy chiefs and the chief of the Policy and Rules Division in the Office of Engineering and Technology. The trips totaled $6,355 and were funded by the Consumer Electronics Association, an industry trade group. But that was a dramatic decrease compared with the previous year, when twenty-seven FCC workers, including Powell and Commissioners Kathleen Abernathy and Jonathan Adelstein, attended. The total cost to the association was $45,736.

Wolf, while pleased that the agency had changed its travel policy, told Powell at the subcommittee hearing that he would prefer to see the trips cease altogether except when funded by charitable organizations. "I think our goal should be to get down to zero, with the exception being again on a charitable institution," he said. "And maybe the committee and your staff, we can work together to see if we can do that."

No mention was made of Powell's earlier intention to ask for a $500,000 increase in travel funds.

Behind Closed Doors

When they are not hobnobbing with industry officials in Las Vegas or New Orleans, the top decision-makers at the FCC often rub elbows with those they regulate at the

FCC's headquarters in Washington. Three days before the FCC voted 3:2 to loosen the media ownership rules, the Center released another report illuminating the chumminess between commissioners and top industry executives.

The Center reported that the nation's top broadcasters had met behind closed doors with Federal Communications Commission officials more than seventy times to discuss relaxing the media ownership rules. Media moguls Rupert Murdoch of News Corp., which owns Fox, and Mel Karmazin of Viacom, which owns CBS, virtually dashed from one FCC office to another for a series of private meetings with Commissioners and top staff in late January and early February, as the agency was crafting the controversial proposals.

All told, the five FCC Commissioners and thirty-one other top officials participated in such meetings from September 2002, when the new media rules were proposed, to June 2, when the FCC voted on them. A total of sixty-three executives and representatives of the nation's top ten television and radio broadcasters participated in the meetings.

One particularly busy day was March 11, when eighteen FCC officials met with executives and representatives of ABC and its parent company, Disney, in six different sessions. Some of the sessions included several commissioners and top staff, all gathered in one room to discuss the proposed rule changes with broadcasters. At some of the sessions, executives from the nation's top broadcasters, such as News Corp/Fox, General Electric/NBC, Viacom/CBS, and Disney/ABC, teamed together to lobby for the proposed changes. Among some of the more notable meetings:

- On January 30, Powell and legal adviser Susan Eid met with News Corp.'s Murdoch and two other company officials.
- On February 20, Powell and legal adviser Susan Eid met with Viacom's Karmazin and two other company executives.
- On April 1, Powell, Eid, and his chief of staff, Marsha MacBride, met with NBC President Robert Wright and other network brass. Commissioner Kevin Martin and Media Bureau Chief Ferree, the chief architect of the proposed rule changes, also attended that session.
- On May 1, Powell and MacBride met with Gannett President and CEO Doug McCorkindale and three other executives from the company.

The closed-door sessions, which are officially called ex parte meetings, are allowed under FCC rules. The meetings are not recorded, nor are the participants required to keep detailed minutes of the sessions. Non-FCC people who participate in the meetings are supposed to file a notice of the session by the end of the following day. The notice is meant to include a summary of what was discussed.

Some critics charge that the ex parte process simply allows broadcasters and other industries the FCC regulates to conduct their meetings out of the public eye. "Traditionally, these things have been done by the FCC without any sort of meaningful public involvement," remarked Robert McChesney, author of *Rich Media, Poor Democracy* (1999) and research professor in the Institute of Communications Research at the University of Illinois at Urbana-Champaign. "This is just par for the course with the FCC. They are much more interested in protecting business than looking out for the public."

And that is precisely what George Stigler, a conservative economist at the University of Chicago, whose economics department is synonymous with free-market advocacy, suggested would happen to government regulatory agencies. Stigler coined the phrase "captive regulator" and argued that, given enough time, a regulatory agency will end up beholden to, and even a defender of, the very industry it is supposed to oversee in the public interest.

Even Powell, the deregulation proponent, suggested in an interview with CNBC that industry influence over the commission may have gone too far. Powell stated that he believes the FCC to be the second-most heavily lobbied institution in the federal government, trailing only Congress. "I do think that—that sometimes it gets out of hand," admitted Powell. "I often think that we need time to do our work rather than hear pitches."

Does Powell's almost wistful expression of hoped-for change point to a new direction for the FCC? No one knows for sure, though long-time observers of the agency may be forgiven for expressing some skepticism. But whether Powell gets his wish or not, one thing has become clear: an agency too long noted for its seclusion and below-the-radar pronouncements and decisions can only benefit from the continued spotlight organizations like the Center for Public Integrity shine on it. At least the citizens on whose behalf the FCC is supposed to work may get clearer glimpses of exactly how it goes about doing its work.

THE MEDIA AND CAMPAIGN REFORM

VIDYA KRISHNAMURTHY

"Follow the money"—that's the mantra of campaign-finance reformers. And most of the time, they're talking about following the money in politics back to its source, the special interests that use campaign cash to win policy favors. But if you keep following the money, the trail will lead straight to the nation's media.

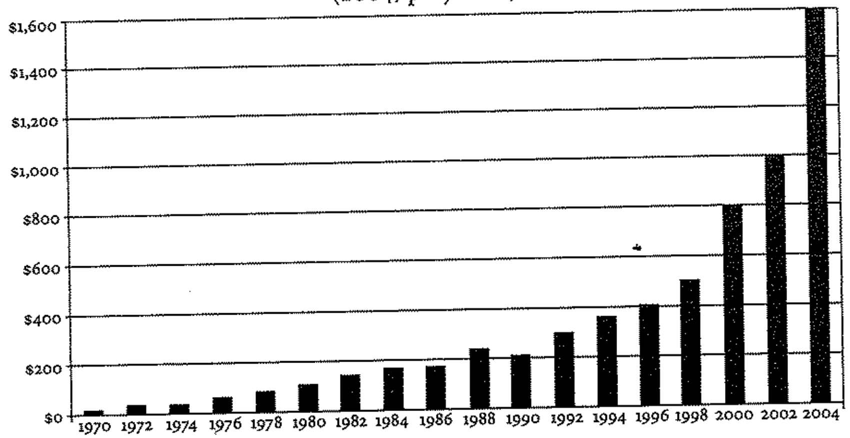
The skyrocketing costs of the paid political ads that dominate our television sets every even-numbered year represent the biggest expense in competitive federal races, according to the Committee for the Study of the American Electorate. And while the money-drenched campaign system serves the purposes of a whole gamut of special interests, none profits so richly as the media industry. In 2004, television stations raked in more than $1.6 billion from political ads aired by candidates, issue groups, and parties, according to the Alliance for Better Campaigns. In fact, in election years, television stations regularly take in more money from political ads than they do from automotive and fast food ads. As former New Jersey Senator and onetime presidential candidate Bill Bradley once remarked, "Today's political campaigns function as collection agencies for broadcasters. You simply transfer the money from contributors to television stations."

Meanwhile, station managers and network heads are pulling back from substantive coverage of campaigns, opting for ratings-friendly entertainment and focusing on the horse-race nature of campaigns when they cover them at all. This spurs an even greater need for candidates to rely on paid media, leaving fewer citizens with the information they need to cast an educated vote. The result, in former Federal Communications Commission chairman Newton Minow's words, is a colossal irony: "Politicians sell access to something we own: our government. Broadcasters sell access to something we own: our public airwaves. . . . By creating this system of selling and buying access, we have a campaign that makes good people do bad things and bad people do worse things."

Many campaign-finance laws, such as contribution limits and disclosure requirements, focus on the supply of campaign cash. However, the solution to the ubiquity of money in politics, and to a marked decline in civic engagement, must address the *demand* for all that campaign cash: the need to pay for airtime on commercial media to communicate with citizens. It seems clear that the goals of media reformers and campaign finance reformers are inextricably linked: To fix what ails United States democracy, you have to reform the media's role in campaigns and public affairs.

PROFITING FROM THE MONEY CHASE: POLITICAL SPENDING ON TELEVISION (IN MILLIONS)

Sources: Television Bureau of Advertising, PaineWebber, Harris Nesbit (2004, projected)



Politics on Television

California, launch pad for many a political trend, served up a new offering in 1998: the all-ad, no-news campaign. It was an open-seat race for the governorship of the nation's most populous state, widely believed to be the most important contest that year. But for most local television stations, the political unit may as well have been synonymous with the sales department. That's because the race, which opened with a fiercely contested Democratic primary, was virtually ignored by local television news—even while local television stations aired an eye-popping $100 million worth of advertising. According to a study by the University of Southern California, stations in the state's top five major markets devoted *less than 1 percent* of news coverage to the race.

The 2000 election cycle brought more of the same across the country: ads dominated news coverage, particularly for races below the presidential level. Across the board, the campaign coverage that actually aired on broadcast television featured little more than the usual horse race and sound bites. And even the sound bites

were getting clipped shorter and shorter: The average length of a sound bite by a presidential candidate on the network evening news went from forty-three seconds in 1968 to less than eight seconds in 2000. The incredible shrinking sound bite was just one of the horror stories that illustrated the state of politics on television that year. Broadcast news coverage was markedly down at the presidential level as well; the three main nightly newscasts devoted 28 percent less time to coverage of the 2000 campaign than they had given to the 1988 campaign, the last open-seat presidential race, according to the Center for Media and Public Affairs; nearly three-quarters of this coverage focused on the horse race of the campaign rather than substantive issue positions. In fact, the group's head, Robert Lichter, found that when candidate George W. Bush went on David Letterman's late-night talk show, he received more airtime in a single block than he received during all of October on the three major networks combined. The forums where viewers have a chance to hear more than just eight seconds out of a candidate's mouth, such as debates, also received short shrift from broadcast television. During the most tightly fought presidential election in history, for the first time ever, two of the major networks—Fox and NBC—decided against carrying all of the general-election presidential debates, choosing to run entertainment and baseball instead. This decision followed a primary season that featured twenty-two presidential debates, but just two on broadcast television. Coverage of the parties' nomination conventions was also sharply reduced; the three big networks cut back coverage by two-thirds compared to 1988.

Broadcasters justified this cutback by pointing to cable news channels. As veteran political correspondent Sam Donaldson told the *Dallas Morning News* during the 2000 primaries, "Outside of *Nightline* and our Sunday show, ABC News, in my view, has simply forfeited the field." He went on, "For us to run long programs in prime time as a public service doesn't make a lot of sense anymore to our bosses. All you have to do is tune to CNN, MSNBC, or the Fox News Channel." The decision to cede campaign coverage to cable sparked much hand-wringing within academic circles because of the loss of the "inadvertent audience"—those individuals who stumble across coverage. A 2000 poll by the Pew Research Center found that about 83 percent of people "bump into" campaign news, while just 15 percent actively seek it out. "For political junkies, it's the best of times," argued Princeton political science professor Larry Bartels. "For ordinary citizens, it's the worst of times." While cable news channels may be available in millions of homes just like the networks, their actual audiences are routinely dwarfed by nightly network newscasts. The migration of presidential coverage to cable in 2000 meant that fewer people were likely to stumble onto the information necessary for casting an informed vote.

On local television news, the picture is even grimmer. Down-ballot races aren't likely to be picked up by the CNNs and Fox News Channels of the world, so it isn't a question of ceding coverage to cable. All too often, the decision to shy away from political reporting comes from the advice of news consultants who do market research, helping to guide local television news staffs in building a broader audience. Among these hired guns, it is accepted wisdom that politics is a ratings loser.

Even though only a handful of congressional races and Senate races are competitive in most election years, local television stations are withdrawing from covering these contests. Not surprisingly, these races attract the lion's share of campaign dollars. With campaign coffers brimming with money to spend on television ads, station sales departments champ at the bit to sell candidates airtime, even as their counterparts in the news department opt against covering the campaigns for free in news reports. In 2000, for example, viewers tuning into the top-rated stations in New York and Philadelphia—host to two hot Senate elections as well as a gubernatorial contest in Pennsylvania—were ten times more likely to see a campaign ad than a campaign story during the evenings in the last two weeks before election, according to a study by the Alliance for Better Campaigns.

The trend has continued: In 2004, voters in presidential battleground states saw twice as much in the form of advertising as campaign news on their local evening news, according to the Lear Center, and races below the presidential level received short shrift. Viewers were hit by $1.6 billion worth of political advertising—the highest figure yet, and more than *fifteen* times the total spent thirty years ago, even adjusting for inflation. These dollars are hugely important to broadcasters' bottom lines. Political ads account for most of the projected growth in the year's spot advertising market, according to the research firm Competitive Media Reporting. Fueling the skyrocketing figures is the rise of political ad buying by outside groups, from issue groups such as NARAL Pro-Choice America and the Club for Growth, as well as from shadowy groups like Republicans for Clean Air, which served as cover for a few prominent individuals in the 2000 election, and so-called 527 organizations such as the Media Fund, active in the 2004 campaign. During the height of the campaign season, the additional demand from all of these players causes the price of airtime to spike, even as the additional clutter makes each individual ad even less effective.

What's more, this out-of-control demand for advertising time, and the resulting price spike, renders ineffectual the one policy that was originally intended to offer an affordable playing field to federal candidates. The "lowest unit charge" rule, passed in 1971, calls for stations that hold publicly granted licenses of the broadcast spectrum to offer their best rates on ad time to federal candidates in the closing weeks of an election. However, this rate is essentially a discount from whatever the going rate for ad time is on a station; as prices across the board skyrocketed during the final weeks of campaigns in 2000 and 2002, candidates saw their so-called discounted rate double and sometimes triple. Senator Dick Durbin [D-IL] compared the ad prices at a network affiliate in St. Louis before and after Election

Day in 2000: "On the early morning weekday news shows, the rate that this station charged after the political campaign was over went down 55 percent from the political campaign time. During noon weekday news, the rate went down 66 percent in the weeks after the election campaign."

Critics claim that the dominance of attack ads and sound bites has an impact on democracy and civic engagement in general, albeit a less measurable one than the colossal expense of political advertising and the resulting reliance of politicians on wealthy special interests. However, the deluge of ads in 2004 was part of an election that captured more interest than recent campaigns: 54 percent of registered voters responded that they were following election news "very closely" in the closing weeks of the campaign, 14 percentage points more than in 2000, according to the Pew Research Center for the People and the Press. More people paid attention, and more came out to cast ballots. At the same time, voters across the board noted that it was a banner year for mudslinging. 72 percent of voters thought that there was more negative campaigning in 2004 than in previous elections—more than double the percentage who expressed that opinion in 2000, according to the Pew pollsters. Arguably, viewers exhausted by the flood of political ads can become disaffected, uninformed citizens. In 1998, another year that saw a particularly high peak in advertising because of the rise of soft-money-funded issue ads, Democratic consultant Raymond Strother declared, "The most notable thing to me is how difficult it is this year to penetrate the public mind, how cynical they are and how they are skeptical of anything anybody says." Democratic media consultant Bob Shrum—adviser to both the Gore campaign in 2000 and the Kerry campaign in 2004—defended political ads: "The average sound bite in a news broadcast is now eight seconds. It makes a political ad look like *War and Peace*."

Only two groups benefit from this system of skyrocketing ad rates, waning coverage, and reliance on paid media. One group is composed of the candidates who can buy their way into office by saturating the media with political ads. This group includes those who are willing and able to raise immense amounts of campaign cash and look past the conflicts of interest in quid pro quo donations, as well as the millionaire candidates who can finance their own bids at high office. The second group that benefits handily, of course, is the broadcast industry. Its members pocket the cash from the ads and continue to enjoy their status as a very special interest.

The Impact on Policy and Politics

Former *Washington Post* political reporter Paul Taylor, who has advocated that broadcasters must give candidates free air time as a condition of their publicly granted license, calls the relationship between incumbent broadcasters and incumbent politicians "the most profitable, exclusive, and mutually beneficial relationship in the new Gilded Age of politics." For a quick example of what that relationship means, consider Dick Durbin's story of the St. Louis station. He recounted the tale in spring of 2001, as the Senate debated campaign-finance reform and considered how to make the cost of communication cheaper to candidates. A measure to fix the lowest-unit-charge rule passed in the Senate, supported by everyone from campaign finance reformer-in-chief Sen. John McCain [R-AZ], to reform's most ardent opponent, Sen. Mitch McConnell [R-KY]. But in the House, the measure died under an onslaught of lobbying from the broadcasters and compliant legislators. Broadcasters could continue cashing in on politics; House incumbents, who later enjoyed an almost 800-percent edge in campaign cash over their challengers in the 2002 campaign, wouldn't have to worry about their opponents getting more air time.

"No one has more sway with members of Congress than the local broadcaster," boasted the National Association of Broadcasters president Edward Fritts in 1995. Lawmakers and political observers seem to agree. The industry has scored repeated wins in Washington because of its lobbying power, its ability to contribute large sums of campaign cash, and its uniquely important role as the means of communication vital to virtually every politician's bid for reelection. McCain, who as chairman of the Senate Commerce Committee used to oversee telecommunications matters, calls them the most powerful lobby in Washington, noting, "My record with the broadcasters is unblemished by victory." Neil Hickey of the *Columbia Journalism Review*, who has written about the lobby group for years, remarks, "The NAB has chalked up a virtually unbroken series of triumphs against any enemy that would dare impose unwanted obligations on the broadcast industry." And during the tussle over the 1996 Telecommunications Act, conservative columnist William Safire wrote in the *New York Times* that the broadcasters showed lobbying muscle that "the vaunted gun lobby wishes it could generate." During that battle, the industry succeeded in receiving billions of dollars worth of additional spectrum from the public, free of charge—a move that was roundly criticized as a massive allocation of corporate welfare at the expense of the public good.

The industry has worked hard to preserve the current system of campaign financing. In the words of Paul Taylor, an advocate of free airtime, the broadcasters "profiteer on democracy." Such a lucrative set-up is hard to defeat. Between 1996 and 1998, the National Association of Broadcasters and five media companies owning local television stations spent nearly $11 million in lobbying to defeat campaign-finance reform, according to the Center for Public Integrity, a nonpartisan watchdog group. Killing the effort to close a loophole in existing law with the lowest-unit-charge rule in 2001 was just the latest example of their success. But as Taylor later wrote, the lowest-unit-charge provision is "more bandage than cure," a mechanism that is too easy for stations to evade, even if it could be repaired. "For a more market-friendly and sustainable way to lower the cost of campaign

communication on the broadcast airwaves . . . vouchers for free political ads . . . would work far better," Taylor argued. Many advocates have adopted this more aggressive perspective, which argues that there ought to be a law mandating free airtime for electoral speech in America, as there is in virtually every other industrialized nation. Countering the entrenched interests of profit-hungry broadcasters and reform-wary politicians will require a radical shift in the financing and mediation of public elections.

Civic Discourse and the Public Interest Standard

In 2004, media reformers came together under the rallying cry of "Our Democracy, Our Airwaves," to fight for new mandates that would ensure citizens have access to more and better election information. Reformers note that since the early years of broadcasting, the government has required that those who receive licenses to the public airwaves free of charge must serve the public interest. Courts have said repeatedly that civic discourse is at the heart of that standard. As the Supreme Court said in its *Red Lion* decision, broadcasters' status as public trustees means that they are "given the privilege of using scarce radio frequencies as proxies for the entire community [and] obligated to give suitable time and attention to matters of great public concern." Congress has also made it clear that electoral discourse is part of the public-interest standard. That concept is apparent in the equal-time requirement on broadcasters—by which licensees that sell air time to one candidate must offer equal air time to other candidates—as well as the aforementioned lowest-unit-charge provision and the requirement that broadcasters offer federal candidates "reasonable access" to purchase airtime.

A host of public-interest groups, media reformers, and academics agree that some system of free airtime ought to be made a mandatory part of broadcasters' public interest obligations. These could take the shape of vouchers for free ads, which would allow a floor for spending so that even candidates who aren't movie stars or millionaires will have a fighting chance against a well-funded incumbent. That provision might help bring back a little competition and give voters a sense that they have real choices. Instead, in 2002, 98 percent of House incumbents running for reelection and 83 percent of senators running for reelection were successful. What's more, experiments with voluntary donations of free airtime, in which stations required candidates to appear on air for a few minutes to address a particular issue, have shown that such formats can improve the level of political discourse on television. A study by the Annenberg Public Policy Center of the University of Pennsylvania of such an alternative that aired in the 1997 New Jersey governor's race found that these segments were less negative, more specific, and

Advocates for good government—and good journalism—recognize that several reforms by the nation's media would help to resuscitate electoral discourse in the United States. More debates, televised by a single station or all of the stations in a market at a time when people are actually watching, could help the processes of reform. So would a commitment to actually covering issues and framing campaign stories as matters that have an impact on people's lives, instead of as spectacles made up of strategy, tactics, fund raising, and poll numbers. After every election, round tables of political journalists, consultants, and academics wring their hands and promise to do better next time. Citizens can certainly play a role in demanding that journalists live up to these promises. But they can also demand that their elected representatives take some concrete action to change the way politics and elections happen on television. As public trustees, the licenses broadcasters hold over the public airwaves are immensely profitable. Asking them to give a little time so that citizens can hear from candidates ought to be the least that broadcasters can do to serve the public interest.

Reforming the nation's media isn't the silver-bullet solution to all that ails American elections. Even if free time was granted, political coverage was robust, and debates were aired and watched by all, wealthy interests would still be able to influence politicians. There would still be critics who would agree with Jerry Nachman, former editor of the *New York Post*, who once complained, "The problem is that today's politicians who have all the money in the world to spend on commercials have nothing to say." But if broadcasters used their control over the public airwaves to offer meaningful, engaging programming, and if candidates didn't have to rely on raising mountains of cash to have a fighting chance at the ballot box, more citizens would get real choices and better information. They would be better able to hold candidates and parties accountable. And on election day, maybe more Americans would actually show up ready to cast a truly informed vote. The fact is that the media are part of the problem. They have to be a part of the solution.

THE LEGAL CASE FOR DIVERSITY IN BROADCAST OWNERSHIP

ANDREW JAY SCHWARTZMAN, CHERYL A. LEANZA, AND HAROLD FELD

Broadcast ownership regulation dates to the Radio Act of 1927, yet it was not until 2003 that media concentration became an issue of broad general concern. FCC Chairman Michael Powell's effort to lift many of the FCC's broadcast ownership limitations sparked an extraordinary bipartisan grassroots reaction that was unprecedented in size, duration and impact.[1]

The Powell FCC was repudiated in the Courts as well. An appeal challenging the decision was filed under the case name *Prometheus Radio Project* v. FCC.[2] On September 3, 2003, a panel of the United States Court of Appeals for the Third Circuit in Philadelphia issued an order blocking the new ownership rules from going into effect. On June 24, 2004, the Court reversed the FCC's ownership decision, sending the case back to the FCC for a top-to-bottom revision.

As of this writing, it is impossible to predict what will happen next. Supreme Court review is possible, but congressional legislation to block the FCC's decision may supercede further judicial or FCC action. What is more certain is this: there is now broad public opposition to increased media ownership consolidation, and future FCC chairpersons are likely to wish to follow a far less deregulatory course of action.

What the FCC Did

The 1996 Telecommunications Act was a product of the Republican takeover of Congress in 1994. Although congressional Democrats and the Clinton administration were able to blunt some of the worst aspects of the bill, the multipart legislation is highly deregulatory in nature. Enactment of the 1996 law led to the greatest wave of media consolidation in history. The worst provision of the new law lifted all limits on how many radio stations one company could own. Within five years, Clear Channel Communications, Inc., grew from about forty stations nationally to about twelve hundred. Television chains bulked up to the new maximums as well, and TV "duopolies" (ownership of two stations in one community) became common.

Having received slightly less than what they wished, big broadcasters left a time bomb buried in the new law. Section 202(h) directed the FCC to review all its ownership rules every two years and to consider eliminating any provisions which might become outdated. While this review requirement appears to be a relatively benign measure which calls for little more than reporting to Congress, Rupert Murdoch's News Corporation (whose lobbyist was reported to have had a major hand in drafting this part of the law) convinced a panel of the Reagan-Bush dominated Court of Appeals in Washington, D.C., to turn Section 202(h) into a powerful instrument for deregulation. In its February 2002 decision, *Fox Television Stations, Inc.* v. FCC, the Court ruled that Section 202(h) "upended" traditional legal principles so that the FCC was expected to apply a "presumption in favor of deregulation."

FCC Chairman Powell and his Republican colleagues enthusiastically accepted their new mission. In the fall of 2002, they started a new proceeding intended to apply the Court of Appeals' "presumption" to all existing broadcast ownership rules. Their request for written comments signaled a desire to repeal or relax almost all of these rules. Spurning calls for public hearings and pressing for rapid action, they voted on June 2, 2003, to adopt an order drastically cutting back existing restrictions. The two Democratic Commissioners voiced powerful dissent; Commissioner Michael Copps said:

> The majority . . . chooses radical deregulation . . . . This decision allows a corporation to control three television stations in a single city. Why does any corporate interest need to own three stations in *any* city, other than to enjoy the 40-50 percent profit margins most consolidated stations are racking up? What public interest, what diversity, does that serve? This decision also allows the giant media companies to buy up the remaining local newspaper and exert massive influence over some communities by wielding three TV stations, eight radio stations, the cable operator, and the already monopolistic newspaper. What public interest, what new competition, is enabled by encouraging the newspaper monopoly and the broadcasting oligopoly to combine? This decision further allows the already massive television networks to buy up even more local TV stations, so that they control up to an unbelievable 80 or 90 percent of the national television audience. Where are the blessings of localism, diversity and competition here? I see centralization, not localism; I see uniformity, not diversity; *I see monopoly and oligopoly, not competition.* [Emphasis in the original.]

The intensity of negative public reaction to the FCC's decision stunned observers on all sides. Several measures to overrule all or part of the new scheme were introduced in Congress, receiving favorable votes despite efforts of the Republican leadership to derail them. Backing down on a veto threat, President Bush signed one such measure that was attached to an appropriations bill in January 2004. This measure rolled back the limit on national TV ownership to a 39-percent share. (Under the 1996 deregulation, TV broadcasters were allowed to own stations reaching no more than 35 percent of the nation's TV homes; the FCC had raised that limit to 45 percent. Loopholes continue to exist. According to an outdated regulation, UHF stations' audience is "discounted" by 50 percent, so that an all-UHF broadcaster can now reach 78 percent of the nation's homes.) The measure also cut back the review required under Section 202(h) to a quadrennial rather than biennial schedule.

What the Court Did

The Court of Appeals majority decision reversing the FCC's ownership deregulation action is 121 pages in length; one judge, who disagreed with substantial portions of the opinion, wrote another 92 pages in dissent. A complete summary is neither possible nor necessary to show how decisively the Court repudiated Chairman Powell. The Court was even more forceful in unanimously rejecting some broadcasters' claims that the FCC's deregulation had not gone far enough and that ownership rules were unconstitutional.

It is difficult to overstate the political significance of the Court's ruling. The decision rejects the legal premise of the FCC majority's action, the FCC's application of the facts to the law and even the fact-finding itself, criticizing its failure to obtain meaningful public participation in the decision-making process. These actions, combined with the extraordinarily negative reaction of a Congress controlled by the FCC Chairman's own party, will have a lasting impact on how broadcast ownership will be addressed in the future by any FCC.

From a technical standpoint, the most important part of the Court of Appeals decision is the holding that Section 202(h) of the 1996 Communications Act does *not* contain within it a "presumption in favor of deregulation." This means that the next quadrennial review (in 2006), will be conducted without the built-in bias that infused the 2003 decision.

From a practical standpoint, the most important aspect of the decision was the Court's rejection of Chairman Powell's elaborate "diversity index" mechanism, which purported to substitute a single formula to guide decisions on ownership of TV-radio and newspaper-broadcast combinations in a single community. While the majority left room for the FCC to adopt a different replacement formula, any further FCC action will likely make few if any changes to these rules. (This includes newspaper/TV combinations; although the Court ruled that the FCC could properly end the previous rule which nominally banned newspaper owners from buying broadcast properties, the practical effect of the Court's decision is that such combinations probably will not be permitted in the future.)

One especially interesting aspect of the Court of Appeals action is its clear awareness of the increased public concern about media concentration. This is not to say that the Court was simply acceding to the public will, but its understanding of the importance attached to this question clearly affected its decision to stay the FCC's decision as well as its assessment of the way that the FCC compiled and analyzed the factual record on which it acted.

Why Broadcast Ownership Matters

One can fairly ask why progressives have devoted so much effort to preserving diversity in ownership of over-the-air broadcasting. After all, over-the-air broadcasting (which is today more accurately referred to as "terrestrial" broadcasting) is a very mature industry. Commercial radio broadcasting is more than eighty years old, while television service has been available to most of the nation for almost sixty years.

Satellite technology has decreased dependence on terrestrial broadcasting by bringing vastly increased choice to the public over the last three decades. While about half the programming viewed by cable TV and direct broadcast satellite (DBS) subscribers on an average night remains available through over-the-air channels, this situation is a far cry from the state of affairs twenty-five years ago, when ABC, CBS, and NBC typically shared nearly 90 percent of the prime-time TV audience. Satellite-delivered radio service is just beginning to come to market, but many people believe that commercial radio has become fat and lazy since deregulation began under the Reagan administration and that it will rapidly lose much of its audience in the coming years.

Another reason that broadcasting seems less important to activists is the growth of the Internet. The open architecture of the Internet offers unlimited content choice, unless and until policymakers impose restraints upon it. Broadband technology will eventually permit audio and video programming to be available on demand, thus greatly vitiating the importance of whatever remains of broadcasting's power and influence.

All of that is true enough, but it does not really change the need to address broadcast ownership as one of the most important influences on democratic self-governance in America. Here is why progressives should continue to regard consolidation in broadcast ownership as one of the greatest challenges to democratic self-governance.

First, however insignificant broadcasting may become some day, it remains for the foreseeable future the most powerful political, social, and cultural force shaping American thought. Cable news networks are increasingly important for those motivated to follow news and public affairs issues, but the vast majority of Americans get most of their news, information, and culture from over the air TV and radio channels, including local and network newscasts and talk radio. (Most consumers now receive this broadcast video programming through cable or satellite systems, but that does not change its influence.)

Second, television and radio form the centerpiece of most major media empires. Broadcasting is the cash cow which has funded the expansion of NBC, Disney, Fox, Viacom, and Clear Channel into new media. Cable giant Time Warner is the only major content provider for which broadcasting is a minor component. (As evidenced by its unsuccessful attempt to acquire Disney, Comcast owns a vast distribution system but produces very little of its own content.)

Third, the political and financial muscle of television broadcasters has assured them important future roles. In what was perhaps its greatest legislative accomplishment since its founding, the National Association of Broadcasters inserted into the 1996 Communications Act an extraordinary provision giving existing TV licensees exclusive use, free of charge, of a huge swath of prime spectrum for digital TV transmission. Access to this spectrum assures placement on cable TV systems from the "must-carry" and "retransmission" rights granted in the 1992 Cable Act. Thus, however vestigial over-the-air TV technology may become in the future, over-the-air TV stations will have top billing on the nation's cable TV systems. The same is essentially true for radio; the FCC has authorized a "digital audio" technology that locks in the rights of existing broadcasters and makes it almost impossible for new commercial competitors to obtain spectrum.

None of this is to say that cable television ownership, newspaper dominance of local markets, the supremacy of a few companies in the music industry, and the threat of content control over the Internet are unimportant now, or in the future. But those who say that broadcasting is a dead industry, and that the fight over broadcast ownership is best left to the last century, are very wrong.

Why the Public Needs Competitive, Diverse Media

The Supreme Court of the United States has stated that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." The Court has applied this principle of diversity of views as a necessary stimulus of democracy and vigorous public debate to entertainment as well as news production.

Many citizens fear a world in which a few media gatekeepers control access to the mass media. At best, these multimedia conglomerates will homogenize news and entertainment into a single "infotainment" package leveraged across multimedia platforms and targeted primarily at advertiser-coveted demographics. At worst, the few media gatekeepers may suppress news or perspectives that run counter to their economic or ideological interests, or they will do so to curry favor with the government.

These problems are not new. However, the threat they pose is more palpable today. Indeed, the public's perception that this already began appearing earlier probably accounts for the public's visceral reaction against further relaxation of the rules.

Contrary to the assertions of those favoring deregulation, the media marketplace is not open and competitive. The government prohibition on broadcasting without a license, together with the economic structure of the cable industry, has created a highly concentrated market with effectively impenetrable barriers to entry. Moreover, even if the media marketplace were competitive, legal principles as old as this country state that the news and information deserve treatment as something more than mere commodities. Democracy depends upon a competitive marketplace of ideas; it is a compelling governmental purpose "of the highest order" to take prophylactic steps to ensure that market does not fail.

Ownership restrictions offer a far more effective means of achieving the needed diversity to ensure a robust democracy with less damage to the First Amendment. Because the connections that allow large corporate interests to influence content are complex and subtle, structural rules that protect diversity by fragmenting ownership are essential. Indeed, if media ownership restrictions were removed, the only way to ensure diversity would be to impose explicit content mandates and access rules.

Media Concentration Will Exacerbate Existing Market Failures

Contrary to the arguments of those favoring deregulation, the current "market" in news and entertainment is not characterized by competitive entry or abundance. Further, the majority of media owners are vertically integrated, multinational conglomerates with diverse economic interests. Accordingly, the economic incentives of media content suppliers do not necessarily align with the interests of viewers and citizens.

Critically, broadcasting remains a government-controlled monopoly, and only those with a government license can broadcast. No matter how much money one wants to invest to develop better or more popular television or radio programming, these productions will not reach potential audiences unless someone with a federal license agrees to carry them. When these local broadcast licenses become concentrated in a few hands, those few hands decide what is aired. Cable television operators are monopolies in virtually every market, and they are typically vertically

integrated. Thus, cable viewers who want a different type of programming have no competitive options if they do not like the selections available on their cable systems. They cannot pick and choose to pay for only one or two channels; they must pay for a whole package in order to receive most channels.

The development of the Internet does not change this calculus. Because of the economics of news production, only a handful of websites control the bulk of news generation and distribution over the Internet. Although anyone remains free to set up a website and post or send information to the rest of the world, this freedom does not equate with an ability to effectively compete with existing media companies. The question is not whether news is somehow discoverable, but whether it enters into the public's awareness. Finally, fights over access to content and technological limitations have prevented streaming media from emerging as serious competitors to either radio or television. In addition, as even supporters of deregulation agree, neither cable networks nor the Internet provide local news.

Although consumers display a considerable interest in local news, and local news remains critical to maintaining an informed local electorate, increased concentration harms, rather than enhances, the production of local news. An independent study from the Pew Foundation's Project for Excellence in Journalism (PEJ) found that stations owned by small companies (three stations or less) were more than twice as likely than the largest owners to receive the PEJ's highest news quality score.

The structure of the industry bears this out. Local stations generate local news from local revenues. Because typical margins on a well-run television station in a top market are 60 percent (and even weak performers earn between 50 and 55 percent), owners of large groups of stations view them as cash cows and absorb the local revenue for other corporate purposes, such as servicing debt.

As a result, deregulation and increased concentration result in failures in local news markets. Even on a national level, economic incentives lead to market failure in news production. Several PEJ studies support the conclusion that major networks prefer to produce soft news about the entertainment industry or "infotainment" stories dwelling on the misdeeds of celebrities than report hard news on significant public policy issues.

Even where broadcasters or other providers of programming rely solely on their interests in the broadcast markets, the results can still be detrimental to the broader concerns of democracy and civic discourse. Two recent cases—ABC-Disney's attempt to replace the popular news show *Nightline* with *Late Show with David Letterman* because of the desirability of the latter's perceived viewer demographic, and CBS-Viacom's attempt to interview former Iraqi prisoner of war Jessica Lynch—demonstrate the fallacy of relying on economic incentives to ensure a mass media market that produces accurate, unbiased, and detailed news programming, even when such news programming is both popular and profitable.

First, in 2002, ABC attempted to replace Ted Koppel's news program *Nightline* with *Late Show with David Letterman*. Although more people watch Koppel than Letterman, Letterman draws a younger demographic that is more desirable to advertisers, which will pay a premium for shows that are less popular overall but that concentrate on that desirable demographic.

By the same token, a cable company has a greater incentive to air its own programming than to give access to another company's product. In the second, more disturbing, example, there is a demonstration of how economic incentives of vertically integrated media conglomerates can warp news coverage, as in the recent attempt by CBS, a subsidiary of Viacom, to secure an interview with U.S. Army Private First Class Jessica Lynch. PFC Lynch attracted public attention during the Iraq war when a squad of Marines apparently rescued her after her capture by Iraqis. To land the first interview, CBS offered to leverage PFC Lynch across Viacom's media properties. In addition to a news interview promoting Lynch, Viacom offered to provide a two-hour CBS news documentary, a reunion with her rescuers, and a publicity campaign. The latter would feature segments on several CBS news programs including the *CBS Evening News*, an MTV appearance, a Country Music Television concert in her hometown, a two-hour made-for-TV movie produced by CBS Entertainment, and book publication with the imprimatur of Viacom's Simon & Schuster.

Although this proposed deal made economic sense for Viacom, it represents a serious breakdown in the ability of the public to receive news with confidence that it meets high standards of journalistic integrity (rather than simply being a cross-promotional advertisement). The same incentives problem exists in the production of entertainment. Because media conglomerates have multiple platforms, the industry has increasingly come to rely on "repurposing," i.e., reusing entertainment developed on one property for another.

Although this practice saves costs, it severely undercuts the argument that greater concentration leads to an increase in original programming, or that more outlets without ownership limitations guarantee more programming variety. In one case study of the Los Angeles market, where television stations increasingly have come under common ownership, the quantity of children's programming in the market decreased (as stations stopped competing with each other and segmented the market), and the quantity of original children's programming declined precipitously (as commonly owned stations repurposed children's programming from their sister stations and affiliated cable networks).

Indeed, a company may prefer to air a show of poorer quality that the company produces itself than to air a higher-quality, independent show. The same company may continue to air its own show despite low ratings, solely because it can reuse the programming. Programming in such situations does not have to be the best to succeed, as would be necessary in a competitive market. It merely has to be good enough to prevent viewers from abandoning television altogether. Finally, as illustrated by the Letterman-Koppel example, relying on market forces will leave underserved those markets that advertisers see as less desirable from a demographic standpoint. Society should not have to tolerate a media market in which programming is aimed almost exclusively at eighteen- to thirty-five-year old white males. Increasing the diversity of owners by limiting horizontal and vertical integration creates a greater likelihood that minority demographics will be served. Studies show that minority owners are more likely to program for minorities and that local owners are more likely to program for the local community than the national demographic.

Accordingly, the Supreme Court has consistently recognized that the broadcast and cable markets are not functioning free markets; rather, they are a system of government broadcast monopolies and "natural" cable monopolies. A privileged few are free to make programming decisions based not on free market principles and genuine audience interest, but on the ability to control captive customers.

We Must Distinguish Between Toasters and Information

Ronald Reagan's FCC chairman, Mark Fowler, famously said that television was "simply another appliance . . . a toaster with pictures." While Chairman Fowler can be complimented for having a direct and clear philosophy, he was utterly wrong in his belief.

Why do the American people have an interest in maintaining a competitive and diverse mass media? Antitrust law applies to the media, so why does the public need more protection? Since the founding of the nation, believers in our democratic form of government have argued that the public must remain informed of the news and stimulated with debate. No less a figure than James Madison, who regarded deliberative debate as a necessary element of democracy, articulated the principle that the government has an obligation to protect the marketplace of ideas when private interests threaten it.

In the words of the Supreme Court, "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal." As a result, Congress and the Supreme Court have identified the maintenance of a competitive media marketplace as a "government purpose of the highest order."

Because the broadcast media remain the primary means by which the public receives information and entertainment, the government has a vital interest in maintaining competition and diverse ownership in this sector. Proponents of deregulation respond that competition has replaced the need for regulation. When these ownership rules were made, they argue, three networks were broadcasting and most Americans had access to only a handful of local channels. Now anyone can subscribe to systems that provide access to hundreds of channels. This argument misses the mark for several reasons. As discussed above, Americans depend on their local broadcasters and newspapers for local news. To allow local news to become dominated by a single provider would undermine democracy as much as a monopoly on national news would. Even without an owner consciously slanting the news, the deterioration of local news coverage from concentration justifies ownership limits that preserve multiple local outlets. More important, the First Amendment command that the government ensure a robust marketplace of ideas is, like the world of communication itself, an expanding ideal, not a minimum threshold. The continued availability of newspapers did not negate the need to ensure diversity in broadcasting, nor did the continuation of broadcasting negate the need to preserve diversity in cable. Rather, as the Supreme Court has stressed, the government has a duty to preserve more than a "rump" information market, and should instead promote "the widest possible dissemination of information from diverse and antagonistic sources."

The Threat Is Real, If Subtle

Proponents of deregulation make their argument in a *reductio ad absurdum*. Because information cannot be completely suppressed, it follows that fears of media concentration are unfounded. At the FCC hearing adopting the deregulation order, GOP Commissioner Kathleen Abernathy mocked "speculation about hypothetical media monopolies intent on exercising some type of Vulcan mind control over the American people."

This demand for absolute proof that news outlets will be influenced in all cases by the economic interests of the news outlets' parent companies creates a diversion, as Commissioner Abernathy failed to confront the realities of public debate served by the First Amendment. The question is not whether information is somehow discoverable, but whether the public at large has sufficient information to stimulate debate on public affairs and to ensure an informed and active electorate.

As a practical matter, because the public generally relies on daily newspapers and broadcast media for its news and entertainment, these outlets generally set the public agenda. As for irrefutable evidence, rarely do corporate heads send notices directing their staffs to cover only one side of a story or to omit coverage of an issue. As with all social-policy issues, the question of cause and effect is subtle, and it is not always easy to measure it empirically. Further, the impact on our news and culture from large media owners is many-layered. Nevertheless, the Supreme Court has found that the FCC can, and indeed must, consider the effects of concentration on public discourse.

Moreover, there is powerful evidence that ownership influences media coverage in both gross and surreptitious ways. A survey by the Pew Research Center and the *Columbia Journalism Review* (CJR) demonstrated that 25 percent of local and national journalists have intentionally avoided newsworthy stories, the same number have softened the tone of stories to benefit the interests of their news organizations, and 41 percent have done both. Of those surveyed, "one-third (35 percent) say news that would hurt the financial interests of a news organization often or sometimes goes unreported, while slightly fewer (29 percent) say the same about stories that could adversely affect advertisers."

Indicative of the subterranean nature of the problem, 26 percent of local reporters in the Pew-CJR study believed that a directive to avoid a story for other reasons was really a pretext to protect the financial interests of the corporate owner. Anecdotal examples abound to support the link between the size and identity of a station's owner with that station's content and quality. For example, newspapers' and cable news' coverage of the broadcast provisions of the 1996 Telecommunications Act directly correlated with whether the corporate parent derived significant income from broadcasting properties. Those that derived significant income from broadcasting properties supported the measure; those that did not opposed it. Similarly, local radio-station managers sponsored prowar rallies when they suspected that their efforts would be greeted with welcoming telephone calls from corporate headquarters that invested mightily in shoring up links with the current administration.

Furthermore, although they may be rare, centralized decisions do occur, and the instances that become public should raise concerns about what happens behind closed doors. For example, at one talk-radio station, a corporate policy prohibits airing any callers who sound "old" in order to better target the more profitable twenty-five- to fifty-four-year-old age group. There is also strong evidence that General Electric exercised corporate influence over its subsidiary, NBC, not to cover governmental investigations of GE's pollution of the Hudson River.

Owners may also make central decisions to support government policy as a means of currying favor, further compromising the critical role of the media in democracy. For example, Clear Channel management sent a list of 160 songs to its stations that were deemed inappropriate for air time after 9/11, among them antiviolence songs such as John Lennon's "Imagine" and Bob Dylan's "Blowin' in the Wind." After a member of the Dixie Chicks criticized the Bush administration's Iraq policy at a concert, radio stations owned by Cumulus and Clear Channel banned the group from airplay. Although the Dixie Chicks have survived (after lead singer Natalie Maines apologized for her remarks), the chilling message to less popular musicians was quite clear: "toe the corporate party line, or else."

Examples of other Western democracies that do not have ownership limitations provide lessons of the danger of concentrated ownership to democratic discourse.

In Canada, for example, CanWest, which owns more than 14 metropolitan daily newspapers, 120 community newspapers, 16 television stations, 7 networks, and an Internet news portal, ordered all its daily newspapers to carry the same national editorials as of December 2001 and prohibited editorials or letters to the editors that contradicted an approved editorial on Palestinian-Israeli relations. In Italy, Prime Minister Silvio Berlusconi's ownership of the three commercial Italian broadcast networks (as well as his influence over the content of the three government-owned networks) gives him effective control over news programs, which inevitably support the position of the government.

Finally, politicians who set national and local policy believe that broadcasters are in a unique position to control their access to constituents. They therefore will rarely oppose policies favored by the broadcast industry. Consider again the TV spectrum giveaway in the 1996 Telecommunications Act, which gave broadcasters $70 billion in spectrum for free. Bob Dole, then a candidate for the Republican nomination for president, opposed the giveaway. On the eve of the Iowa caucus, Dole received a letter from the owner of several Iowa television stations threatening to support other candidates if he did not change his stand. A few days later, Dole withdrew his opposition.

As broadcast outlets concentrate in the hands of fewer interests, these few owners wield a proportionately greater influence. When these owners are not merely broadcasters, but multinational, vertically integrated corporations with a multiplicity of interests, the ability of these few media giants to shape national policy through their direct influence on legislators (at both the national and the local level) becomes frightening indeed. Decentralizing ownership defuses the threat to democracy. Maximizing the number of media owners does not eliminate the influence of economic interests, but at least multiple owners will have different interests. In a world with many media owners, if one refuses to cover a newsworthy story, rivals will do so instead, and the public will ultimately be informed. If a news manager is fired for certain practices, he or she may be able to find a job elsewhere. But if a few owners with similar economic interests dominate the media, stories will go uncovered and will essentially be suppressed.

Structural Rules Facilitate the First Amendment

Those who oppose ownership restrictions accuse opponents of attempting to control content. If a station owner supports the Iraq war and therefore chooses to ban the Dixie Chicks from having airtime, the First Amendment protects this choice; no one has claimed otherwise. Rather, what the U.S. Supreme Court and supporters of ownership regulation have pointed out is that the First Amendment also requires that no one person or oligarchy can act as censor for the rest of the

country. Ownership restrictions thus protect the rights, assured under the First Amendment, of broadcasters to make independent editorial choices and of the public to have a diversity of views.

Media ownership rules are like a breakwater or anchor that keeps some boundaries on the decision-making process. They preserve a minimum level of competition sufficient to encourage the production of quality news and entertainment, serving diverse segments of our society without imposing content mandates. More important, they protect our society from corporate censorship as inimical to our democratic society as government censorship. At a minimum, if one corporation has a conflict of interest with respect to a story, at least another outlet is available to investigate it. As a result, media ownership rules free those who depend upon the media—not merely performers like the Dixie Chicks or others in the entertainment industry, but politicians as well—to speak their minds. First Amendment analysis recognizes that even small threats to speech can have a chilling effect on speech.

This effect is no less powerful when the private sector is doing the threatening.

Notes

1. A portion of this chapter appeared in *Communications Lawyer*, Fall 2003, at pp. 12, 18–22 under the title: "More Than 'A Toaster With Pictures': Defending Media Ownership Limits," by Cheryl A. Leanza and Harold Feld.
2. The authors served as counsel to the Prometheus Radio Project.