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In the Matter of:)
)
The Future of Media and) **GN Docket No. 10-25**
Information Needs of Communities)
In a Digital Age)

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FCC's "Future of Media" Campaign vs. Separation of Speech and State

The Duty to Expand Communications Liberty

The First Amendment doesn't need a bailout. That one sentence sums up what most urgently needs saying in the Federal Communications Commission's Future of Media campaign.¹

The Future of Media project seeks "to help ensure that all Americans have access to vibrant, diverse sources of news and information that will enable them to enrich their families, communities and democracy."

Occasionally the opportunity presents itself to make a case for a major advance in liberty, something particularly momentous when the issue is as fundamental as communications; by this we mean speech *genuinely* apart from the myriad compulsory aspirations of elected government and its unelected agencies.

This proceeding represents an opportunity to reiterate the proper stance of government with respect to society, the creation and provision of information content, and infrastructure, unobstructed by the coercive goals of the political sector.

The premise of the Commission's Future of Media campaign is that media face various threats requiring government action. In reality, however, there exist today an abundance of opportunities for the creation of information, access to it, and avenues for personal expression that pave the way for government to leave the realm of communications alone.

One could talk endlessly about those well-known competitive options and the bounties available to communities, minorities, the general public, targeted audiences, mass audiences, and many commentators will.² Indeed, trying to assess all the options in media today is like flailing one's arms at a swarm of hornets. But while hornets stay basically the same year after year, tomorrow's media marketplace will be one we would be incapable of comprehending today—we could, however, undermine its potential. But the compulsion to regulate doesn't respond to such demonstrations of the existence of competition in media, since competition isn't the goal, control is. And in the case of the FCC, the objective is seemingly to retain powers that otherwise wither and dissipate. So it's important not to argue on that turf if one's goal is advancing communications freedom as a policy imperative.

We're not taking that bait. (FCC asks for it in its in many areas, but particularly the section in the Public Notice on "Information Needs of Communities" and "Business Models and Financial Trends"). We will focus instead on pre-requisites for the creation of media and information wealth as generations pass. What media was yesterday (the Big Three, for example) is different from what it is now; what it will be in the future likely will not resemble what it is today. The

¹ <http://reboot.fcc.gov/>

² See, e.g., Comments of Progress and Freedom Foundation in FCC Future of Media Proceeding (GN Docket No 10-25), May 5, 2010. <http://www.scribd.com/doc/30931985/Comments-of-Progress-and-Freedom-Foundation-in-FCC-Future-of-Media-Proceeding-GN-Docket-No-10-25>

claims of crisis in journalism threaten to freeze aspects in place rather than foster communications liberty and healthy upheaval.

A Crisis in Journalism?

Change often generates discontent, and those disadvantaged by it sometimes seek to use government apparatuses to block it. In this case, upheaval in the journalism field helps to achieve this end. Groups the FCC quotes at the beginning of its Public Notice have agendas and interests of their own. Fair enough, but FCC's selective quotations are solicitous of a body of comments that will largely reinforce and expand its own continued role in communications, a questionable goal that Congress should scrutinize.

Some groups contending a journalism crisis even advocate government support of news organizations, as exemplified in a recent Federal Trade Commission workshop.³ The dangers to freedom inherent in the concept of government-funded ideas and the impact on critique and dissent seem to bother few.

Former CBS news anchor Dan Rather, for example, made the following two contradictory statements in the same speech:⁴

I personally encourage the president to establish a White House commission on public media.

And then:

A truly free and independent press is the red beating heart of democracy and freedom.

He is correct in noting that the free press is (supposed to be) a "watchdog on power." But that's not compatible with the idea that government is responsible for ensuring the survival of the free press. A press funded, promoted, propped up, and subsidized by government is not a free press. Nor is such a press in any position to be a watchdog; instead, it's more likely to become a megaphone for the state's preferred ideas and supportive of the expansion of government in other spheres, such as health care, energy, finance, telecommunications, scientific research and policy, and so on.

These fundamental misunderstandings of free speech and government's role with respect to the institutions of democracy and individual rights are very worrisome. We're witnessing an increasingly obsolete FCC effectively advocating a self-aggrandizing campaign to establish government-enabled access to information and, in turn, its own permanence in an era characterized not only by instant availability of information of every kind, but also by instant broadcast capability at the level of each *individual human being*.

³ By BRENT KENDALL And THOMAS CATAN, *Wall Street Journal*, "FTC to Examine Possible Support of News Organizations," December 2, 2009.

http://online.wsj.com/article/SB10001424052748704107104574569661532881656.html?mod=WSJ_hpp_MIDDLETOPStories

⁴ <http://www.aspendailynews.com/section/home/135834>

Not to be outdone, the Georgetown Center for Business and Public Policy hosted a recent conference entitled, “The Crisis In Journalism: What Should Government Do?”⁵ with the defining question, “How can government entities, particularly the Federal Trade Commission and the Federal Communications Commission, help to form a sustainable 21st-century model for journalism in the United States?”

Long ago, America actually resolved the question of “what government should do” in a manner that influenced the entire world, with passage of the Bill of Rights and its First Amendment. The Constitution was ratified by nine states on June 21, 1788. Interestingly, Georgetown University was founded Jan. 23, 1789. Georgetown didn’t hold a “Crisis In Journalism” conference that week, even though there was little national media to speak of and, for many reasons, much more of a prevailing “crisis” situation than we allegedly face today.

Then the Bill of Rights was ratified on December 15, 1791—and still no Georgetown conference. At the time, our ancestors thought it appropriate for the federal government to establish a First Amendment and *step aside*, even though there were no televisions or radios, or Internet and websites, iPods, or stories broken by Twitter. There wasn’t even an FCC yet to ponder a “sustainable 19th century model for journalism in the United States” or the Future of Media.

Media at that time barely existed compared to what abounds today. Yet there was no crisis. Nor is there one now. The FCC’s comment period is designed to invite ways for an increasingly obsolete agency to expand its purview so it has jurisdiction over a now-unknown future that doesn’t require its input. No surprise there, but most importantly, *free societies do not entertain bureaucratically established “models” for functions as vital as free speech and media.*

Nothing in government’s legitimate scope qualifies it as a fountain of superior, purer information or a source of social cohesion. In fact, it’s uniquely prone to corruption. Indeed, government is historically well known for perpetrating censorship and propaganda, or outright control, like the mandating of library filters and ratings for movies, music and videogames.

What this insincere crisis signifies is, on the one hand, pure indulgence of a wealthy society struggling with “creative destruction” in hyper-intense new media; and, on the other, the desire to retain or extend political control of information flows and public opinion rather than enshrinement of the only condition appropriate to a free society—the *preservation of competing biases*. These are ultimately far more important than pretended objectivity in both the preservation of our liberties and in the creation of “information wealth.” Too often, the class interest of non-entrepreneur-intellectuals is statism, as Austrian economist Joseph Schumpeter famously argued. The journalism industry is especially vulnerable to these dangerous impulses.

Speech: Free, Unless Government Interferes

Convincing the public and policy makers that media is in crisis is essential to maintain federal and bureaucratic influence now: while progressives long since successfully established

⁵ Georgetown Center for Business & Public Policy event: The Crisis in Journalism: What Should the Government Do?, <http://events.georgetown.edu/events/index.cfm?Action=View&CalendarID=672&EventID=73536>

government agencies with broad political control over communications in an era of spectrum “scarcity,” today they find that control slipping in an era of media abundance that undermines those agencies’ very reason for being.

Along with artificial “crises” in media and online, the condemnation of “big media,” (heard less now because of journalism turmoil) and undignified and self-serving calls for public funding of journalism, “public spaces,” information commons, and other such indulgences draw energy from the premise that capitalism and freedom are inimical to civil society and the diffusion of ideas, when they are instead the prerequisites. America established a First Amendment *precisely because* government and political machinery can threaten these precious values.

Competition in the creation of goods and services creates tangible wealth. *Competition in creation of ideas* (including scientific research, an important issue related to the present one) also underlies wealth creation and enhances liberties. Government “models” and taxpayer funding remove the element of competition, on purpose, while claiming to add “voices.”

Obviously some businesses are indeed being upended by the digitization of information and the personalization of broadcast. But media, information, journalism—whatever this enterprise is called—can only be damaged irreparably by *censorship*, the only crisis to which journalism is ever truly vulnerable. But it also counts as censorship if information is politically controlled or funded; furthermore, it qualifies as censorship when governments disrupt proprietary business models in the content, reporting and *communications infrastructure* of the future. That means even compulsory “net neutrality” is properly regarded as a First Amendment issue.

We cherish a free press, dissent, and debate precisely because *governments* can threaten these values. We need markets to maximize output, including media output, and including output of true and useful “public” information, the raw materials of democracy.

The inclination of some academics and public authorities to despise the commercial Internet and consolidation and splintering in media (they seem to criticize both) grows tiresome, not just because they often occupy a stance parasitic with respect to the commerce they denounce—the non-profit sector depends upon the private sector’s success, after all—but because their notion of public spaces and central oversight would enshrine a political rather than civil view of communications and social interactions. When one peers beneath the bromides of diversity, localism and democracy, the proponents of such opposing regimes as media ownership restrictions on the one hand and government funding of media on the other advocate government control of information flow. There is no case to be made that we acquire and safeguard diversity, independence of voice and democracy via government control of the microphone. Those values spring not from government coercion, but from a separation between government and media. Just as religious freedom does not depend upon government influencing the reach of any faith (indeed, precisely the opposite), information diversity will flourish without the FCC.

The FCC states that “[a]ny time the government reviews the structure of the news media, it must do so with great sensitivity to the paramount need to protect free speech and an independent press.” Not quite; press is already independent by definition unless government interferes or attempts to influence its operation, as the Future of Media project itself invites. The government

doesn't need any "sensitivity," it just needs to leave private citizens alone, to not prohibit or interfere with their speech. The only crisis speech ever faces is censorship by government.

Questions for the FCC

Today's focus belongs not on the energetic media marketplace, but on the FCC itself, and what it is doing (or undoing) compared to its initial and now defunct oversight mission with respect to government-granted monopoly communications. One could argue that the FCC has been an impediment to freedom and flourishing of communications, from the uncertainty created in non-committal deregulation, to unauthorized commandments with respect to net neutrality, to delays in liberalizing spectrum, to content regulation and censorship.

The Future of Media project should ask a different set of questions. Among them:

- In what way has past FCC interference contributed to sub-par performance today?
- In what manner is a *government* proceeding on "future of media" arguably fundamentally inappropriate?
- What is FCC doing specifically to roll back government involvement in private individual and business decisions about the creation and distribution of digital information?
- In what way does the agency see the layoff of journalists, which it puts front and center in its Public Notice, as potentially a healthy development and indicative of a non-gatekeeper society in which individuals share unfiltered information? (This disinclination to see in what manner journalists replaced by eyes-everywhere represents progress of a sort delegitimizes the proceeding.)
- Does the FCC recognize that big media and small can coexist; that the church bulletin can coexist with *USA Today*, and that there is nothing more to be said?
- In what way is media concentration, when it occurs, a positive development and a spur to new kinds of information media?
- In what way does the agency recognize the importance of competing biases in the presenting of ideas? (For example the blogging revolution has shown that open partisanship, not pretended objectivity, can root out the truth also.)
- What liberalizing moves, like further removal of ownership restrictions and antitrust relaxation, might aid the ailing journalism industry?

One Constructive Alternative to FCC's Make-Work Future of Media Program

The most useful statement in FCC's Public Notice is the following:

The digital age is creating an exciting variety of new sources, business models and delivery methods for news and information. Citizens act increasingly not only as information consumers, but also as information providers. Small start-ups, Internet giants and traditional media companies have accelerated the pace of innovation. In some parts of the media, consumers have more choices than ever and it's not hard to see how the digital revolution will positively affect news gathering, journalism and information dissemination in many ways.

This was all that needed to be said; all trends have been and remain positive, and the atomization will continue. The FCC could have made this statement, and bid farewell.

Instead it proceeds in the opposite direction. FCC's Future of Media project as described on reboot.fcc.gov says:⁶

The goal of this project: to help ensure that all Americans have access to vibrant, diverse sources of news and information that will enable them to enrich their families, communities and democracy.

Pre-Internet, with limited broadcast licenses, one could credibly ask such questions with a motive toward liberalizing communications. But to ask it now in the face of the progress FCC itself notes signals a pre-disposition to regulate no matter how diverse and hyper-competitive communications become. It signifies a disregard for acknowledging the sources of information wealth creation, and true information in a diverse society, and aspirations to maintain control instead.

In the body of the Public Notice, the FCC posts dozens of questions. But whatever the answer to any of them, nothing implies any energized government role except with respect to removing government barriers. Especially in a digital era with cheaper and personalized communications, these simply aren't matters of *public policy*. (Been there, done that, bought the T-shirt.)

The kinds of questions posed in Public Notice either don't have answers, or don't need them, or both; or answers are irrelevant. Answers in 2010 won't be what answers in 2020 are. On the other hand, if this were a proceeding that recognized that reality, and then responded to it by specifically about how to further separate speech and state and liberalize communications in a free society, it might be a different story.

In today's environment of shakeout, upheaval, concentration, collapse, splintering, blurring of boundaries between devices and citizen-broadcast, the FCC should limit itself to the communications equivalent of picking a state bird rather than seeking justifications for future interference. In *Communications without Commissions*,⁷ we suggest:

(1) Set regulatory boundaries

- Preemption – Analyze which governmental authority—federal or state—is best suited for the role of regulator (if government regulation even remains required due to legacy *government granted* monopoly power).
- Prevention – Restrict the FCC's jurisdiction by creating a firewall that would prevent it from regulating new competitive services.

(2) Revisit rationales for economic and social policy regulation

⁶ <http://reboot.fcc.gov/futureofmedia/blog?entryId=302806&sblog=y>

⁷ Braden Cox and Wayne Crews, "Communications Without Commissions: A National Plan for Reforming Telecom Regulation," Competitive Enterprise Institute: *Issue Analysis* 2005 No. 9, October 18, 2005, <http://cei.org/pdf/4911.pdf>

- Eliminate Economic Regulation – Rules that regulate prices and access need to be phased out entirely.
- Divest Social Policy – Social goals should be disentangled from industry-specific taxes, price controls, technological mandates and other economic regulations.

(3) Reform the Federal Communications Commission

- Restructure – Eliminate FCC functions that could be done by other agencies.
- Reform Spectrum – FCC should get a clear mandate to get spectrum into the market with secondary trading rights.

That and little else. This particular hearing takes for granted a substantial future FCC role. Alternatively, recommendations like these recognize the limitations of central authority in vital communications.

Like the net neutrality proceeding⁸, this one diverts thousands upon thousands of otherwise productive hours, and will lead to massive waste as economic participants are compelled to respond and defend against accusations solicited by this project, which pits sector against sector artificially, just as the net neutrality proceeding does.

Misconstruing “Democracy”

The agency launched with an interventionist appeal on page one.

The digital age is creating an information and communications renaissance. But it is not serving all Americans and their local communities equally. It is not yet serving democracy fully. How we react, individually and collectively, to this democratic shortfall will affect the quality of our lives and the very nature of our communities.

This is on the one hand emperor’s-clothes gobbledygook, on the other an abuse of the term democracy, much like calling a national government “federal.”

The Notice further claims “These trends could have dire consequences for our democracy and the health of communities, hindering citizens’ ability to hold their leaders and institutions accountable.” It must be said that an appeal to “democracy” is an interesting stance for an agency attempting to regulate “net neutrality” with no authority from Congress with total detachment and unaccountability to voters.⁹

Democracy as a concept and political system is not at stake, as observers such as Dan Rather think, when a particular business model engaged in public communications and broadcasting suffers at a particular point in history. It’s been beaten to death, but everyone knows the transformative importance of the Internet and its role in making voices heard that never had a chance when Rather and his two rival channels dominated the news and airwaves for 30 minutes each evening.

⁸ Clyde Wayne Crews, Comment to FCC in the matter of Preserving an Open Internet, January 14, 2010. <http://cei.org/rcandtestimony/2010/01/14/net-neutrality-comment-fcc-net-neutrality-vs-bandwealth>

⁹ Charles Cooper, CBS News, “The FCC's "Third Way," Will it Work?” May 6, 2010. http://www.cbsnews.com/8301-501465_162-20004332-501465.html

Truly, what is FCC even talking about with this use of language? What about people deciding for themselves what to do at the ballot box? Have political mailings and TV ads disappeared? Have congressional and .gov websites vanished? With regard to news (as opposed to entertainment), markets are surely capable of providing unfiltered information; If we are patient, we may one day even witness the founding of a straight, unfiltered channel showing what politicians are up to at work all day. We could call it something like “C-SPAN.”

Media itself, the subject of this proceeding, also takes big government for granted when it was supposed to have been a watchdog. Today’s largest and most trafficked media outlets don’t ask basic questions related to containing the power of the state in political campaigns and policy debates (“What are you doing to roll back the influence of Washington, D.C. in people’s retirement choices, particularly the unborn who need not be herded into the current broken system?”; “What will you do Mr. President to ensure that government plays as little role in health care as possible?”; “How is this new law based on an enumerated, delegated power?”) Such questions would be alien in, say, a media-hosted presidential debate—yet we’re supposed to accept the claim of a crisis in journalism and democracy since there are fewer reporters to *not* ask such watchdog questions?

Some might argue that talking to journalists about their liberal bias is like talking to a fish about water. (“What’s water?”) Nonetheless, democracy is still safe, no matter one’s opinion on whether media is too liberal (MSNBC) or too conservative (Fox). We do not call for government to intervene in the nation’s newsrooms to protect “democracy”; we embrace the war of ideas. Dan Rather and others perform a disservice in advocating marriage or co-habitation between the national government and media.¹⁰

Especially when one looks at the development of new media, some anti-corporate advocates of so-called diversity and government control are getting a bit greedy. Non-commercial interests already dominate the .org and .edu Internet domains, where non-profit associations and colleges and universities largely reside. There was even a movement to assure that non-commercial interests are represented in the .us domain.¹¹ Governmental information of course is widely available given that an entire top-level domain, .gov, is devoted to the goings-on of the federal government, and not subject to capture by private media.

The notion of restricting media ownership is contrary to the concept of democracy. One cannot reconcile the claim to support democracy and choice—while simultaneously supporting centralized governmental control of the size and structure and trajectories of private media outlets. From the standpoint of liberty, the two tenets are not reconcilable.

We must dispel the bias against bias. Biased private information can offset the biased information coming from those whose class interest lies in expanding government. And even

¹⁰ Wayne Crews, “Is the Internet Bad for Democracy?” Cato Institute: *TechKnowledge* No. 18, August 31, 2001, http://www.cato.org/pub_display.php?pub_id=11555.

¹¹ See for example, comments of NetAction to the National Telecommunications and Information Administration: *Comments on the Enhancement of the .us Domain Space, in response to the Request for Public Comment* (Docket No. 980212036-8172-03), October 2, 1998, <http://www.netaction.org/old/action/domains-ltr.html> .

there, biases still must compete. The underlying, inherently biased institutions of freedom of speech and property rights are necessary to move beyond hopelessly politicized information; what other source is there?

Nothing about the sweeping changes ushered in by digitization represent valid threats to free speech or democratic values in a free society, and the scale and scope of private media organizations are not appropriate targets of coercive public policy. Citizens remain forever free to establish new media outlets, and investors free to fund them. More emphatically, far from a threat to free speech, media consolidation is one exercise of that freedom. Radio station owners have a right to boycott the Dixie Chicks if they want to; more than ever given new competition.¹² If it's a dumb decision, it won't (didn't) stick.¹³ Only governments can censor or prohibit free speech, or the emergence and funding of alternative views—and in turn democracy. Government restrictions on or micromanagement of ownership are themselves censorship, and a coercive impediment to speech and a threat to democracy and wide-scale expression. No political enterprise should ever threaten a network owner over his legitimate, private, business decisions. That can be left to the marketplace.

Indeed, some of FCC's questions are simply inappropriate in a liberal, free society: At one point it asks the following:

Compared to earlier decades, are Americans more or less likely to seek and find more specialized media (i.e., that focused on a specific topic, appealing to a specific demographic group, or promoting a similar ideology or world view)? What are the positive and negative consequences of such patterns?

To this, one must ask, *What business is it of the federal government what anybody's "worldview" is?* No one has the right to use force fraud or violence against anyone else on the basis of their worldview. Otherwise, ideas compete.

FCC's Anti-"Big Business" Bias (but Lack of Corresponding anti-big-agency bias)

Citizens need not fear media monopoly; rather, every media mogul and news organization and dominate website lives in fear of the power of consumer choice.

It's often an entertaining discussion when the biggest entity of all, and the only one with the power to compel—the federal government—starts talking about other big entities.

"The future of media is a topic of great consequence to all Americans, so this discussion should not be the purview of only communications companies and their Washington representatives."

Note the disdain here; In other words, the companies that create great information-delivery enterprises don't get to have primary say over their operations. One problem is that government

¹² For example see "Dixie Chicks Boycott Starts," MSNBC, March 14, 2003, <http://stacks.msnbc.com/local/wgal/a1532063.asp>.

¹³ Richard Skanse, "Chicks Boycott Overblown," *Rolling Stone*, March 19, 2003, <http://www.rollingstone.com/news/newsarticle.asp?nid=17757>.

interference deprives consumers of healthy competitive responses to companies that over-reach. More important, these “only communications companies” are shareholder owned. Speaking of the democracy the FCC invokes when it serves its own oversight aspirations, by spreading actual ownership, corporations are one of the more democratizing institutions ever devised; as distinguished from the one institution—government—with the power to compel.

Both concentration and diversity are presented as harmful to democracy assuring regulators a role either way. Concentration remains the subject of debate in some cases, but the sweeping change now is entry barriers in the past versus cheapness of gathering and sharing information today.

Despite the rise of the Internet, old-economy “big media” goliaths—ABC, NBC, News Corporation, and so on, along with the old/new economy hybrids they create—like the *Washington Post*’s experimentation with political blogging—continue their march across America’s landscape.¹⁴

At one point, as such companies in the late 1990s and early 2000s sought to consolidate and otherwise expand their reaches across the nation, there was renewed concern over the implications for free speech and the diversity of ideas. Streams of completed or proposed media and telecommunications and radio mergers, coupled with a loosening of FCC regulations dictating media ownership structures, have brought concentration to the forefront. That problem was said to require government intervention; the current problem is said to be that journalism is in crisis in old media, and—wonder of wonders—that too calls for government intervention.

But we need not regard the advance of big media, shakeup in big media and everything in between as negative developments. Free speech, diversity, and consumer choice are not fundamentally imperiled by the fact that communications can be big business. Indeed, the current crisis shows that the Internet has undermined old models. Each represents competitive exercises of free speech, and increasingly grapples with small-business communications and the splintering of broadcasting.

The Federal Communications Commission a few years back had been forced to grapple with media ownership issues due to court-ordered reviews of certain outdated ownership restrictions.¹⁵ Back in 2003, the FCC voted to slightly relax some of these rules.¹⁶ Prominent among them was a prohibition on a broadcast company’s owning stations that reach more than 35 percent of the public, which the FCC voted to slightly loosen to allow market reach of 45 percent. Other restrictions included those on local television station ownership, radio/TV cross-

¹⁴ The notion that mainline media companies wouldn’t stand idly by as Internet media emerged was apparent long ago: for example, see Amey Stone, “The Big Media Are Slow, But Hardly Out of the Race,” *Business Week Online*, August 27, 1998, <http://www.businessweek.com/1998/36/b3594014.htm>.

¹⁵ See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, rehearing granted, 293 F.3d 537 (D.C. Cir. 2002) (addressing national television ownership) and *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (addressing local television ownership).

¹⁶ “FCC Sets Limits On Media Concentration: Unprecedented Public Record Results in Enforceable and Balanced Broadcast Ownership Rules,” Federal Communications Commission Press Release, June 2, 2003, http://www.fcc.gov/Daily_Releases/Daily_Business/2003/db0602/DOC-235047A1.pdf.

ownership, newspaper/broadcast cross-ownership, and restrictions on local radio ownership.¹⁷ Restrictions on cross-ownership of TV stations and newspapers in a given market were removed as well.¹⁸

The uproar from the FCC's attempt to deregulate was instantaneous. Complaints spewed from every quarter, with seemingly universal agreement that media is too large, out of control and monolithic.¹⁹ But the rhetoric in these complaints is often contradictory: the media are either too liberal or too conservative, too censored or too libertine—too something-or-other. Groups on the left, like Consumers Union and the Media Access Project (author of the counterpoint to this article), alongside conservative organizations like the Family Research Council and the National Rifle Association, all supported government regulation of media ownership and oppose deregulation.²⁰ But this motley coalition of poles-apart groups is revealing. That is, when *each* of these diverse groups takes issue with the media, the necessary implication is that overall media offerings are—well, diverse.

Despite claims about the death of diversity, localism, democracy and political participation through control in the hands of a few, proponents of *mandatory* ownership rules in fact advocate their own versions of media control and, ultimately, control of content and information. Thus ironically, the groups favoring “diversity” are united in their rejection of consumer sovereignty in the marketplace, and in favor of a real monopoly—government control.

The current environment has led to calls for relief for media with respect to ownership restrictions, as well as antitrust exemptions and tax exemptions.²¹

Indeed, ideas can never truly be bottled up by “big media” in a free society, but individuals do have plenty to fear from a government that believes it acceptable for politicians and bureaucrats to block or control media voices—even if they happen to be the “big” ones. Fundamentally, it is only government action, not the existence of big media outlets, that can obstruct citizen's access to information.

Information Cannot Be Monopolized

A frequent rationale for restricting media concentration is to prevent monopolization of viewpoints expressed in the media, to protect diversity in ideas.²² The tension between that idea and the current crisis are notable, and imply that had there been possibly more concentration in

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ For example the Media Access Project said “Democracy took a hit today.” (“The Public's Law Firm at the FCC, Media Access Project, Reacts to FCC's June 2, 2003 Media Ownership Decision,” Media Access Project press release, June 2, 2003, <http://www.mediaaccess.org/programs/diversity/2JuneMAPPressRel.pdf>.)

²⁰ Frank Ahrens, “Unlikely Alliances Forged in Fight Over Media Rules,” Washington Post, May 20, 2003, P. E1, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A12773-2003May19¬Found=true>. See also Christine Hall, “New Media Ownership Rules Continue to Split Conservatives,” *CNSNews.com*, August 22, 2003, <http://www.cnsnews.com/Nation/archive/200308/NAT20030822b.html>.

²¹ <http://articles.latimes.com/2009/feb/04/opinion/oe-rutten4>

²² See the Media Access Project's June 2, 2003 press release, as noted above. See also the website of the Center for Digital Democracy: <http://www.democraticmedia.org/issues/mediaownership/index.php> .

the past there might be less crisis today. In any event, media are merely conduits for information of every sort, and information fundamentally is not “monopolizable” in a free society whose government does not practice censorship. The media are an *implementation* of free speech rather than its enemy.

While this is not the venue for a treatise on the follies of antitrust law over the past century (which has of late found potential “monopolies” in pickles,²³ “intense mints”²⁴ and premium ice cream²⁵), let it at least be offered for consideration that there is no such phenomenon as a “media monopoly” unanswerable to the rest of society.

Absent government censorship—private parties cannot censor—there is no fundamental scarcity of information, nor can there be; more information can always be created, and in a free society, nobody can silence anybody else, something increasingly true in the social networking era. The most “big media” can do is refuse to share megaphones and soapboxes, which is not a violation of anyone’s rights. Real suppression requires governmental censorship, the actual *prohibition* of the airing of alternative views. Ironically, opponents of liberalization feel entitled to commandeer someone else’s resources, to limit the size of someone else’s soapbox. That is the true violation of free speech that should be of concern.

The fact is that it is extraordinarily difficult to create or maintain such a thing as a “monopoly” on information. Any would-be monopolist would need a stranglehold both on both *infrastructure* and *content*. He would need to monopolize both the *hardware* of the wired or wireless networks of today and of those yet to be—along with the *information* that travels across them. Twitter alone makes this a difficult proposition.

In grappling with the principle that information is not subject to scarcity and can’t be monopolized, it is instructive to contemplate the imaginary worst-case scenario of those who would regulate media ownership. Instead, imagine that an insatiable News Corp merged with cable companies and ISPs and controlled broadband infrastructure and content in America, then proceeded to proclaim that the earth is flat and the center of the universe, and that the moon is made of cheese. What then? Under the institutions of a free press and fluid capital markets, Wall Street would simply fund new media companies to replace the new conglomerate or to compete against it. Advertisers, venture capitalists, programmers, disgruntled reporters, and consumers would flee to the new enterprise, taking their funding, talent, and attention with them. In short, the limitations and discipline imposed by the mobility of capital also apply to unruly media, and are a better disciplinary (and democratic) force than political interventions. Media companies do not exist in a market vacuum, and cannot escape hostile competition, as today’s “crisis” proves. Media is a *business*, with upstream and downstream threats and pressures—disgruntled customers, programmers of content, authors, artists, advertisers, hostile takeovers. If

²³ “Federal Trade Commission Votes to Challenge Hicks, Muse’s Proposed Acquisition of Claussen Pickle Company,” press release, October 22, 2002, <http://www.ftc.gov/opa/2002/10/vlasic.htm>.

²⁴ “Federal Trade Commission Clears Acquisition of Nabisco By Philip Morris,” Federal Trade Commission press release, December 7, 2000, <http://www.ftc.gov/opa/2000/12/nabisco.htm>.

²⁵ “FTC To Challenge Ice Cream Merger,” Kirkpatrick Stockton Antitrust Legal Alert, March 2003, http://www.kilpatrickstockton.com/publications/legal_alerts_detail.aspx?ID=1205.

reporters feel undue influence—the early 2000s argument, not the argument today in the crisis—they rebel and leave. They can even separate and form a new newspaper, or join a competitor.

If ever a justification existed for media ownership restrictions, the circumstances justifying those restrictions no longer exist. Media ownership rules were largely devised during the middle of the 20th century, from the 1940s to the 1970s, when the broadcast landscape, both nationally and locally, was drastically different.²⁶ They emerged before the advent of thousand-channel cable television, satellite TV and radio, and of course, the Internet and its broadcast capabilities and Facebook and blog-journalism.

Now, several channels of 24-hour news, plus round-the-clock science, music, home improvement, weather, food and sports, and even individual sports like racing coexist. Yet we've only barely begun to realize the potential of satellite, Internet, and unused spectrum. Niche markets of the future will make possible 24-hour, self-created "stations" of ever more obscure topics, 24-hour skateboarding, skiing, fishing, etc. Wireless changes everything. Nonetheless future broadband infrastructure ventures like fiber-to-the-home could expand our options still further.

Without the FCC's recent rule change, it remains against U.S. law for a broadcast network owner to "speak" to 70 percent of the public via its stations. Rather, each remains limited to a maximum audience of 39 percent of the viewing public. Despite this explicit regulatory limitation, the advocates of "free speech" do not condemn this violation of the core principle of free speech, but want to keep the restrictions in place.

The FCC provides waivers to its rules for special circumstances, such as when a newspaper or broadcaster is about to go out of business.²⁷ But these exceptions are a tacit admission that scale can affect dissemination of speech in a positive way. The logical conclusion is that, if companies aren't free to grow, they may be forced out of business (particularly in the smaller markets of the country), leaving consumers even *fewer* "viewpoints" to choose from. We should not encourage a regime where waivers are special "favours"—all should be free to expand as market circumstances propel them. Pandering to politicians for permission to expand one's business is something, but it is not free speech.

Regulating media market structure is both a violation of free speech, and bad antitrust and regulatory policy. It is a needless and counterproductive declaration that you don't get to speak if your microphone is too big—a situation that will be remedied, if necessary, in the unforgiving marketplace of ideas. Of course, one may not like the end results of some collective market decisions, but today's age of "narrowcasting" rather than broadcasting leaves less room to complain.

Constraints should be removed not merely to allow "big media" to concentrate, but to preserve a marketplace in which upstarts can serve national and local markets unimpeded as well. If

²⁶ Remarks of Michael K. Powell Chairman Federal Communications Commission At the Media Institute, March 27, 2003., http://www.mediainstitute.org/Speeches/powell_speech.html.

²⁷ For example, see "FCC Chairman Defends Position Ahead of Media Rules Vote," *CNN.com*, May 28, 2003, <http://www.cnn.com/2003/ALLPOLITICS/05/28/fcc.media/>.

Viacom is prevented from reaching half the country thanks to limitation rules, then so are others. If one's concern is diversity of voices, rules that deliberately hamper incumbents cannot help but also impede potential competitors who might otherwise have seen clear to mounting a profitable challenge. Thus, ownership restrictions apply to potential *new* voices as well—and make their emergence less likely. The prospect of a large audience can be critical to an upstart's decision to establish a new network. And the existence of many large voices can leave room for and even generate new demand for “boutique” voices.

Rule relaxation can increase total wealth and options and even the opportunities for local control. If the possibility of a national reach is ruled out, other opportunities can suffer too.

The Case for Localism, and the Case *against* Localism

A prominent issue in the Future of Media project is the protection of local interests, the “Information Needs of Communities and Citizens.” In some circumstances, “localism” might not be all it's cracked up to be. In fact, one might argue people have been in flight from it since time immemorial. People were arguably constrained, not liberated, by locality, if one compares today to the era of Walter Cronkite and a local newspaper. Thus, the “demise” of local programming may not always be inherently bad. Perhaps your local news is lousy and stilted and prejudiced. Whatever the case, in principle, the existence of *USA Today* doesn't necessarily contradict or threaten the church bulletin; yet people may, and often do, prefer national news. National news has helped spur an open society, and added to opportunity, not subtracted, since a national media is what often gives a broad voice to local stories that resonate. With today's online news, the scale is international, which benefits individuals across the globe.

Most importantly, under the institution of a free press, the national/local dichotomy does not exist. Consumers decide what's important, be it local or foreign, and entrepreneurs cater to them. In many instances, the decline of some local media can simply mean we are seeing in play the old economic principle of *comparative advantage*, which can apply to media “goods” as well as ordinary goods. It is often cheaper to consolidate newsgathering, and it may not make sense to do all reporting at the local level. Even so, local resources are quite powerful -- after all, it is really the local advertisers (and their customers), who are calling the shots.

Sometimes, too, the argument for restrictions resembles a protectionist one: “local” fare is to be imposed by regulatory restrictions, regardless of people's demonstrated enjoyment of national fare like *USA Today* and cable news. Many seem to be airing their gripes and personal preferences about media content—which they have no legitimate right to impose on others—rather than raising legitimate issues of free speech. For example, a frequent complaint is that modern radio programming consists of supposedly “local” disc jockeys who are actually broadcasting from across the country.²⁸ That may be a reasonable gripe, but remote broadcasting and innovations like it do not rise to the level of violations of free speech and diversity.

Airwaves Are Not Public Resources

²⁸ For example, see Marc Allan, “Some 'Local' Disc Jockeys are Neither Live Nor Local: New Technology has Saved Money, Cost Jobs,” *PopCultMedia*, January 17, 2002, <http://www.polarity1.com/pcrr12.html>.

Ultimately, to rise above the Future of Media squabble, we must let go of the idea that the airwaves are a limited public resource; as noted, FCC's exclusive task should be that of liberalizing spectrum and remove any and all artificial scarcity fostered by regulations. The cornucopia of today's offerings will be dwarfed by the media avenues of tomorrow yet to be created. And when they are, they should not be regarded as public resources to be regulated by the government, susceptible to today's conceits.

Government intervention is not a good substitute for healthy market turmoil, which as noted includes discipline from programmers, consumers, already-poised rivals, new entrants, wireless innovations, narrow-casting, and so on. When politics or regulations intervene, consumers never receive the benefits of those responses and the true media marketplace is stunted.

Policy makers can cause considerable damage when interfering with media companies and network industries' efforts to orient themselves to suit customers' needs. There's lots of experimenting to do, and media companies may occasionally seek "monopoly" profits in order to develop the communications frontier and expand consumer benefits. But today's vast evolving marketplace increasingly tempers that by putting consumers in more direct control of their viewing experiences and in direct control of what gets said. Such innovations magnify consumer choice, allowing the end user to serve as programmer and scheduler—should they desire. No one will be able to dictate tomorrow's prime time.

Turmoil in the media and Internet sectors provides ample reason and opportunity for rethinking the premises of intervention rather than rationalizing intervention. In today's shaky economy, debts, overcapacity, price wars, and efforts to sustain growth create competitive impulses that should be allowed to play out, as resources are reallocated and arbitrary market straightjackets removed. Ill-considered ventures, when they do happen, are self-correcting. Cyberspace and information are about as infinite as we choose to make them.

Conclusion: Media as a Competitive Business, with Government on the Sidelines

All FCC's proposals should be deregulatory in emphasis, not continued micromanagement or quests for new campaigns. The agency is has been a terrible magnet for political rent-seeking, and a negative influence on communications investment. If there is policy making to be done with regard to media, it ought not to target the private sector but instead government's own regulatory policies that create artificial scarcity of bandwidth and spectrum; these are the true barriers to new voices and the "Information Needs of Communities."

Given today's debates over so-called "net neutrality," content regulation of media, "a la carte" pricing of programming packages, mergers successful and not, privacy, social networking, online search dominance, and so much more, the stakes of this debate are high for the communications industry and consumers. Controlling the structure of media is a way of regulating it across the board, whether through outright regulations or threats of regulation. The entire communications industry—from broadcasters to content providers to infrastructure providers—should be on guard. An unearned political victory invites retaliation, distorts the path of innovation, and draws artificial boundaries between content and infrastructure.

It will take vast resources to create the increasingly narrow-casted content that consumers are demanding, and to build the broadband networks of 2020, 2050 and 2100. Mergers and cross-ownership freedom, perhaps on an unprecedented scale, can be part of the market processes required to make it happen. There are no public policy implications of this turmoil in private, voluntary activity in the communications sector. It doesn't need government to do anything, except not interfere.

Yet here we stand with a Federal Communications Commission engaged in expanding its reach and intervention rather than yielding to the First Amendment and the blessings of competing ideas, content and broadband business models, and competing infrastructure. Competing, proprietary infrastructure indeed seems held in contempt, as a brand new effort to regulate broadband under Title II telephone regulation attests.

A "bailout for the First Amendment" is inappropriate policy, even if its advocates' purported goals are merely to make us all enlightened citizens. FCC calls this project reboot.fcc.gov. It would more appropriately be shutdown.fcc.gov when it comes to an obsolete FCC grasping for a role to play. Appropriations for these counter-democratic campaigns should be revoked.

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