

LIMITS OF THE FIRST AMENDMENT AND ANTITRUST LAW IN PLATFORM GOVERNANCE AND MEDIA REFORM

Robert G. Picard*

Growing dissatisfaction with the current state of mass communication in the United States and other nations has produced demands for media reform, governance of digital platforms, public intervention to support public interest information and news, increasing diversity and pluralism in ownership and content, and fostering a robust and informed public sphere in the service of democracy.¹ These are laudable objectives, but simplistic responses will not deliver them.

Some argue that an expanded perspective of the First Amendment, stronger application of antitrust law and deliberate structural regulation of media are bases on which U.S. media reform, control of digital platforms, and journalism support should be built.² Their arguments are based in the purpose of the

* Senior Research Fellow, Reuters Institute at University of Oxford; B.A. La Sierra University; M.A. California State University, Fullerton; Ph.D. University of Missouri.

¹ Leonard Downie Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. 4 (October 19, 2009); ROBERT W. MCCHESENEY & VICTOR PICKARD, *WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT* (2011); Robert W. McChesney, *Journalism is dead! Long live journalism? Why Democratic Societies will need to Subsidize Future News Production*, J. OF MEDIA BUS. STUD., 13(3), 1–8 (2016); JULIA CAGE, *SAVING THE MEDIA* 95 (2016).

² Adam Candeub, *Media Ownership Regulation, the First Amendment and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1611 (2007-2008); Clay Calvert, *Bailing Out the Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis*, 40 MCGEORGE L. REV. 661, 671 (2009); Nick Gamse, *Legal Remedies for Saving Public Interest Journalism in America*, 105 NW. U. L. REV. 329, 336 (2011); Victor Pickard, *Reclaiming a Progressive First Amendment to Save Journalism*, in JOURNALISM HISTORY (2019).

First Amendment to support democratic expression and the use of antitrust to halt private actions that may interfere with that expression. This reliance on the two legal approaches raises fundamental questions about whether the First Amendment and antitrust mechanisms can effectively address economic conditions affecting journalism, consolidated media ownership, and corporate constraints on communications.

The First Amendment, of course, protects freedom of expression in various forms from inappropriate governmental constraint. Its primary purpose is to ensure that voices of citizens are not restrained by government, an essential requirement for democracy to function.³ Antitrust law and competition policy were established to protect markets from inappropriate private constraints and to promote competition. Their primary purposes are to halt actions that harm markets, competitors, and consumers.⁴ The First Amendment and antitrust law fundamentally address different concerns and challenges and differing sources of constraints. One is specifically concerned with expression. The other is not.

³ NOAH FELDMAN & KATHLEEN SULLIVAN, *FIRST AMENDMENT LAW* 5 (7th ed. 2019).

⁴ E. THOMAS SULLIVAN, ET AL., *ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS* 1 (7th ed. 2014).

Before directly addressing whether these two protections provide effective bases for solving contemporary media structural and operational challenges, it is important to consider contemporary discussions about the need to save journalism and undertake media reforms.

The financial crisis affecting journalism today may be contemporarily salient, but the challenges of media serving democratic needs and the public sphere are hardly new developments. The U.S. media system's ability to serve democratic needs was hindered by one-newspaper cities becoming the norm in the 1920s, by rampant commercialism of broadcasting that pushed public interest aside in the second half of the twentieth century, by the disappearance of almost all remaining separately owned daily newspapers in cities by the end of the century, and by the rapid development of a few enormous firms controlling critical digital infrastructure and platforms in the new millennium.

In addition, policy changes and decisions during the past five decades have diluted minority ownership preferences in broadcasting,⁵ relaxed policies to allow increased newspaper

⁵ W. LaNelle Owens, *Inequities on the Air: The FCC Media Ownership Rules - Encouraging Economic Efficiency and Disregarding the Needs of Minorities*, 47 HOW. L.J. 1037, 1038 (2002-2004); Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235, 236 (2004-2005).

television cross ownership,⁶ generated large newspaper chains and media conglomerates, permitted enormous consolidation in broadcast ownership,⁷ and facilitated a reduction local content production.⁸ All these actions diminished opportunities for expression, debate, and diversity in the public sphere. The public sphere represents space in which social developments, issues, and matters of governance are discussed and determined. Its scope and the extent to which it is inclusive, affords participation, and provides equality and equity affects its democratic performance.⁹ Concerns about the future of journalism and reforming media structures and operations are fundamentally grounded in ensuring that an active, expansive, and effective public sphere is afforded and maintained.

⁶ Judith C. Aarons, *Cross-Ownership's Last Stand - The Federal Communication Commission's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 317, 336 (2002-2003); Jonathan A. Obar, *Beyond Cynicism: A Review of the FCC's Reasoning for Modifying the Newspaper/Broadcast Cross-Ownership Rule*, 14 COMM. L. & POL. 479, 480 (2009); Alicia Flarity, *David slays Goliath: the fight against the FCC's recent relaxation of the newspaper-broadcast cross-ownership rule*, 61 BAYLOR L. REV. 261, 262 (2009).

⁷ Enrique Armijo, *Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 N.C. L. REV. 1482, 1501 (2003-2004); Rachel M. Stilwell, *Which Public - Whose Interest - How the FCC's Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape from the Swamp*, 6 LOY. L.A. ENT. L. REV. 369, 371 (2005-2006).

⁸ Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL'Y STUD. J. 372, 380 (2001); Kristine Martens, *Restoring Localism to Broadcast Communications*, 14 DEPAUL-LCA J. ART & ENT. L. REV. 285, 288 (2004); Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 333 (2004-2005).

⁹ JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 85 (Polity 1989); see also Antje Gimmler, *Deliberative Democracy, the Public Sphere and the Internet*, 27 PHIL. & SOC. CRITICISM 21, 22 (2001); ALAN MCKEE, *THE PUBLIC SPHERE: AN INTRODUCTION* 35 (Cambridge Univ. Press 2005).

Many discussions of potential remedies for current conditions are underinformed by or disregard previous efforts to support journalism and media, advocating for interventions that have previously been employed without consideration of their effectiveness and efficacy. In the U.S. and elsewhere, policymakers have used direct and indirect subsidies, large-scale tax exemptions, and a variety of other policy tools to support journalism and journalism enterprises since the 1950s.¹⁰ Those efforts have produced mixed success in their limited objectives of legacy media, and none have been decidedly beneficial in producing or maintaining the broader democratic public sphere desired, despite decades of state intervention.

We are once again discussing the challenges of journalism and potential remedies to address journalism sustainability challenges. There is little recognition of the limits of traditional tools in producing broader results and there is a naïve belief that

¹⁰ Robert G. Picard, *State Intervention in U.S. Press Economics*, 30 GAZETTE 3, 3 (1982); Robert G. Picard, *Patterns of State Intervention in Western Press Economics*, 62 JOURNALISM Q. 3, 3 (1985); Robert G. Picard, *Free Press and Government: The Ignored Relationships of U.S. Newspapers in MEDIA STRUCTURE AND THE STATE: CONCEPTS, ISSUES, MEASURES* 133, 134 (K. E. Gustafsson ed., Göteborg Univ. 1995); Paul Murschetz, *State Support for the Daily Press in Europe: A Critical Appraisal: Austria, France, Norway and Sweden Compared*, 13 EUR. J. OF COMM. 291 (1998); Robert G. Picard, *Issues and Challenges, in the Provision of Press Subsidies*, in PRESS SUBSIDIARIES IN EUROPE 211, 211 (Isabel Fernandez Alonso, et al., eds., Generalitat de Catalunya 2007); Mart Ots & Robert G. Picard, *Press Subsidies*, in OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION (Jon Nussbaum et al. eds., Oxford Univ. Press 2018); Mart Ots, *Efficient Servants of Pluralism or Marginalized Media Policy Tools? The Case of Swedish Press Subsidies*, 33 J. OF COMM. INQUIRY 376 (2009); STATE AID FOR NEWSPAPERS: THEORIES, CASES, ACTIONS 52 (Paul Murschetz ed., Springer 2013).

addressing journalism sustainability and structural issues alone will produce the expansive public sphere needed for effective democratic engagement and participation. A closer look at the First Amendment and antitrust law as potential solutions reveals constraints on their fitness for purpose.

I. THE LIMITS OF FIRST AMENDMENT AND ANTITRUST LAW

Many hoping for change and policy reform cite the fundamental democratic ideals and principles and the protections of freedom of expression that the First Amendment affords as the bases for action. Although the ideals and principles of freedom of expression provide bases for arguing for intervention, the First Amendment itself does not. The First Amendment is a specific and narrow provision designed to limit government constraints on expression.¹¹ It does not directly address constraints created by private entities, economics, or consumer choice. Attempting to use the First Amendment as a solution to private infringements on expression misconstrues the purpose of the amendment and the history of related adjudication.

¹¹ John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 573; EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 1 (6th ed. 2016).

The First Amendment thus cannot be relied upon as the fountain of actions to support journalism and media because it was not created as an affirmative expression measure. Although the First Amendment provides extensive protection against intrusion of government on expression, it does not place an affirmative obligation on government to facilitate and enlarge that expression.¹² As much as we might like, it does not provide means to halt the intrusion of private companies on expression.

With all due respect to Professor Jerome Barron and others who have argued for an affirmative First Amendment right over the past fifty years,¹³ it remains an asserted and not a recognized right. To believe that the theory can be the basis for solving today's challenges is wishful thinking. It may well be possible to construct legislative and administrative policies and law that restrict private intrusion on expression and constrain the abilities of platforms to reduce speech. Relying on courts to fabricate and recognize an affirmative First Amendment right in the foreseeable future is unrealistic, however.

¹² Jack M. Balkin, *The Future of Free Expression in the Digital Age*, 36 PEPP L. REV. 427, 427–28 (2008-2009).

¹³ Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641, 1654 (1967); Jerome A. Barron, *Emerging First Amendment Right of Access to the Media*, 37 GEO. WASH. L. REV. 487, 489 (1968-1969); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 794 (1980-1981); Charles A. Reich, *Affirmative Action for Ideas*, 38 CASE W. L. REV. 632, 634 (1987-1988).

Some argue that competition policy and antitrust law can be used to help pursue the objectives of freeing expression from private constraints and solve challenges presented by mergers and acquisitions in media that may harm “the marketplace of ideas.”¹⁴ They believe antitrust authorities should not be precluded from considering other factors and that there is support in legislative intent and legal rulings for antitrust to be given consideration to the effects of mergers on the First Amendment concerns involving marketplace of ideas and democracy.¹⁵

Others have sought to free newspapers from antitrust liability by allowing them to cooperatively negotiate terms and prices with digital platforms through the Journalism Competition and Preservation Act,¹⁶ following a path of antitrust exemption for newspapers created in the 1970s in an effort to save editorial voices.¹⁷ This raises significant questions about whether free expression is best served through protective

¹⁴ See, e.g., *U.S. v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) (“Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas.”).

¹⁵ Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 *ANTITRUST L. J.* 249, 249 (2001); Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector’s Unique Role in Our Democracy*, 42 *CONN. L. REV.* 101, 137 (2009-2010).

¹⁶ Journalism Competition and Preservation Act of 2018, H.R. 5190, 115th Congress (2017-2018).

¹⁷ 15 U.S.C. § 1801 (2011); See generally JOHN C. BUSTERNA & ROBERT G. PICARD, *JOINT OPERATING AGREEMENTS: THE NEWSPAPER PRESERVATION ACT AND ITS APPLICATION* (1993).

exemptions from competition or by finding ways to increase competition and competitive behavior.

The marketplace of ideas has always been an imperfect and contested metaphor. It has become more problematic since political philosophers of the seventeenth century adapted terminology from market economics to explain democratic needs. Today, the marketplace is cluttered and dominated by commercial concerns, making the self-correcting principle of truth prevailing in the marketplace questionable.¹⁸ Applying antitrust market-based principles to ideas is unproven, but it has been a First Amendment rationale for press freedom since Justice Oliver Wendell Holmes Jr. employed it in his dissent in *Abrams v. United States* in 1919.¹⁹ Attempting to use antitrust law to address the marketplace of ideas presents enormous challenges because it must deal with a market unlike commercial markets. There are no known and accepted tools and means of analysis for measuring the “idea market.”

Antitrust law exists to restrict and remediate anticompetitive practices and the growth of market power that affects competitors and consumers. Antitrust law relies upon

¹⁸ Robert Schmuhl & Robert G. Picard, *The Marketplace of Ideas*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE PRESS 141, 147–48 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

¹⁹ See 250 U.S. 616, 629–31 (1919) (Holmes, J., dissenting).

quantifiable evidence of competitive effects on price, quantity, and quality and market power and analyses focus on current competition conditions but do not effectively project future conditions.²⁰ Concepts of democratic needs, citizenship, information, and expression are absent in the formulation of competition policy and antitrust law and their application and do not effectively address current situations, much less future conditions. Efforts to use these approaches to preserve competition and multiple competing owners in media and communications have failed or have produced ineffectual results because of constraints in the application of fundamental bases of existing law.

Although there are non-economic objectives for antitrust actions,²¹ courts and antitrust authorities have focused on market efficiency and economic evidence—such as price effects—in evaluating acquisitions, mergers, and company behavior. They have been generally resistant to non-economic evidence,²² in

²⁰ Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 *Antitrust L.J.* 1, 2 (2012).

²¹ Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 *U. PA. L. REV.* 1076, 1077 (1979); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 *NOTRE DAME L. REV.* 191, 192 (2009); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2406–07 (2013).

²² See, e.g., William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 *ANTITRUST L.J.* 207 (2003); see also Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 *ANTITRUST L.J.* 835, 853 (2014).

good part because existing merger guidance does not provide effective methods for measuring other types of competitive effects.

A significant underlying challenge results from the analysis of market power, which requires a relevant market definition based on product characteristics and the geographic area in which trade occurs. The methods for doing so have been debated,²³ but the U.S. antitrust authorities established standards in the 1980s and later combined them in joint merger guidelines.²⁴ Firms that own 1,000 radio stations or 100 newspapers in different locations in the United States generally will not meet market power limits because they are almost always found to participate in 1,000 *separate* radio markets and 100 *separate* newspaper markets rather than a single national market. This is compounded because their price and competitive effects in the local markets are difficult to empirically establish.

This issue of local versus national markets developed through business practices and national policy that historically

²³ William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 938 (1981); Thomas G. Krattenmaker, et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 248 (1987); Richard Schmalensee, *Another Look at Market Power*, 95 HARV. L. REV. 1789, 1793 (1982); George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L. REV. 807, 809–11 (1992); Jonathan B. Baker & Timothy Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L. J. 3, 4–5 (1992); Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 32 (2014).

²⁴ U.S. DEP'T OF JUST. AND F.T.C., HORIZONTAL MERGER GUIDELINES 1 (2010).

made most U.S. media local operations. For the entire history of the United States, newspapers were established in individual cities, towns, and counties to serve their populations and local commercial interests. Many printers and papers in the Midwest and West were originally subsidized by local merchants, members of town councils, and local governments to promote communities and commerce.²⁵ Newspapers were tightly tied to the communities by readers needing local information and by the provision of local advertising.

Congress and the Federal Communications Commission specifically designed radio, and then television broadcast policies, to create local stations that produced some local content and operated in highly defined geographical broadcast signal service areas.²⁶ When cable television systems developed, they were authorized with the same localism approach, requiring specific authorization to serve individual cities and counties.²⁷

²⁵ William A. Katz, *The Western Printer and His Publications, 1850–90*, 44 J.Q. 708 (1967); BARBARA L. CLOUD, *THE BUSINESS OF NEWSPAPERS ON THE WESTERN FRONTIER* (1992).

²⁶ Alan G. Stavitsky, *The Changing Conception of Localism in U.S. Public Radio*, 38 J. BROADCASTING AND ELECTRONIC MEDIA 19, 20 (1994); Gigi B. Sohn and Andrew Jay Schwartzman, *Broadcast Licensees and Localism: At Home in the “Communications Revolution*, 47 FED. COMM. L.J. 383, 388 (1994); Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL’Y STUD. J. 372, 373 (2001); CHRISTOPHER ALI, *MEDIA LOCALISM: THE POLICIES OF PLACE* (2017).

²⁷ John W. Witt, *CATV [Community Antenna Television] and Local Regulation*, 5 CAL. W.L. REV. 30, 32 (1968); James A. Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501, 506–07 (1977); Linda A. Rushnak, *Cable Television Franchise Agreements: Is Local, State or Federal Regulation Preferable?*, 33 RUTGERS COMPUTER & TECH. L.J. 41, 46–47 (2006).

Only satellite television and the internet were designed for larger regional and national geographic markets.

Over time, owners purchasing newspapers, broadcasters, and cable systems across the nation removed local ownership from many communities. That issue is only rarely addressable using market power concerns because of the relevant market issue. Even when a national market definition is appropriate for consideration of media activities, defining the relevant product market and showing market power through traditional tests is difficult. The multiplicity of providers of news, information, and advertising in different forms across varying platforms makes establishing appropriate concentration measures difficult, and the measurement of price and other competitive effects is challenging and debatable.

Mergers and acquisitions have spurred concern by many observers. There is a visceral reaction by media critics to any such consolidation. Many individuals interested in media and democracy argue that mergers and acquisitions concentrate media ownership, reduce diversity and pluralism, and harm public information and the public sphere.²⁸ There is a great deal

²⁸ See generally ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (New Press 1999); C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007); VICTOR PICKARD, *AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* (2015).

of evidence supporting their views, but in most countries competition policy and antitrust law rarely have the competency to deal with those issues.

Part of the problem is that mergers and acquisitions are not anti-competitive in and of themselves in economic and market terms. This presents difficulties in the use of antitrust law to stop them. Consolidation can indeed produce increased costs for consumers and make survival more difficult for other firms;²⁹ however, consolidation can also produce cost savings for firms and consumers, increase productivity, and may improve firms' sustainability and competitiveness and thus keep more firms in a market.³⁰

Projecting which outcome will occur is difficult because the ultimate consequences of a merger or acquisition are never guaranteed. Determining how a single merger or acquisition, however large, will ultimately affect the public sphere is even more uncertain.

When large companies exist because of market success and consumer choice, application of antitrust and competition

²⁹ RUTH COHEN & P. LESLEY COOK, *EFFECTS OF MERGERS*, (Reprt ed. 2003); Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, 11 *ANTITRUST* 21, 22 (1997).

³⁰ THE ECONOMICS OF CORPORATE GOVERNANCE AND MERGERS (Klaus Gugler & B. Burcin Yurtoglu eds., 2008); David T. Scheffman & Mary Coleman, *Quantitative Analyses of Potential Competitive Effects from a Merger*, 12 *GEO. MASON L. REV.* 319, 324 (2003).

policy is difficult unless it involves specific proscribed activities. *United States v. Alcoa* made clear that becoming or being a monopoly is not the same as monopolizing.³¹ Whether concentration results from choices in the market or from mergers and acquisitions, antitrust authorities and courts must determine if the attendant market power reduces market efficiency or is used to increase prices and profits, constrain investment by others, or reduce innovation.

Even when evidence of market constraints is found, antitrust actions breaking up established firms are difficult and extraordinary. Enforcement is more likely to be negotiated in merger approval, seek divestiture of operations acquired in a previous merger or acquisition that subsequently prove problematic to competition or to seek regulatory oversight of those activities.³²

Divestment may support economic competition objectives but does not necessarily support objectives in the marketplace of ideas. Even when voluntary divestment has occurred in media and communications firms without antitrust

³¹ 148 F.2d 416 (2d Cir. 1945).

³² William J. Baer & Ronald C. Redcay, *Solving Competition Problems in Merger Control: The Requirements of an Effective Divestiture Remedy*, 69 GEO. WASH. L. R. 915, 916 (2000-2001); E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565, 573, 610 (2001-2002); John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979, 980 (2012).

law or competition policy intervention, the results have been acquisitions and operations by other commercial entities that have not enhanced the public sphere.

Traditional competition law and market analysis are thus not likely to be the solution to concerns about media and democracy. They may be a part of an overall solution but cannot be conceived as the primary element because many concerns about the state of media today are not the result of issues addressed by competition and antitrust laws.

II. THE URGENT CHALLENGE OF PLATFORM GOVERNANCE

Despite its limitations, antitrust law can be useful in addressing some current media concerns, especially those involving digital markets. This is important because the dominant vehicles for conveying information and ideas in society are changing. Propelling those changes are dominant digital platforms that are compounding their power by monopolizing data and advertising across digital services including search engines, social networks, content aggregation, and ecommerce. Data is often used to lock in consumers, advertisers, and partners to products and services, creating conditions in which breaking away will decrease the ability of

consumers, advertisers, and partners to communicate and access desirable information.

Data are critical across digital market segments and perhaps should be considered a separate market. Data are the driver of all business and revenue models in the individual segments and certainly compounds market power in those segments.

Network economics provide immense advantages to large platform firms, affecting consumer and advertiser choices and creating market power that makes it nearly impossible for content providers to effectively negotiate use of their content on those platforms. The scale and scope of these firms and their activities far exceed monopolies and oligopolies in legacy media and telecommunications firms, in part because of the enormous financial resources created by investors in stock markets.

Companies such as Apple and Microsoft have market capitalizations exceeding \$1 trillion.³³ Alphabet, Amazon, and Google have market capitalizations exceeding \$800 billion, and

³³ Market capitalizations described are as of November 2019. *See Apple, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/AAPL/fundamental/market-cap> (last visited July 2020) (showing Apple's market capitalization since 2016); *Microsoft Corp.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/MSFT/fundamental/market-cap> (last visited July 2020) (showing Microsoft's market capitalization since 2016).

Facebook has market capitalization of \$550 billion.³⁴ By comparison, AT&T has a market capitalization of \$288 billion, Disney \$260 billion, Comcast \$202 billion, and Gannett \$1 billion.³⁵ Even leading firms such as WalMart, Exxon Mobil, and Bank of America have market capitalizations below \$300 billion.³⁶ These massive financial resources provide the leading

³⁴ Market capitalizations described are as of November 2019. See *Alphabet, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/GOOG/fundamental/market-cap> (last visited July 2020) (showing Alphabet's, which own's Google, market capitalization since 2016); *Amazon.com Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/AMZN/fundamental/market-cap> (last visited July 2020) (showing Amazon's market capitalization since 2016); *Facebook, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/FB/fundamental/market-cap> (last visited July 2020) (showing Facebook's market capitalization since 2016).

³⁵ Market capitalizations described are as of November 2019. See *AT&T, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/T/fundamental/market-cap> (last visited July 2020) (showing AT&T's market capitalization since 2016); *The Walt Disney Company*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/DIS/fundamental/market-cap> (last visited July 2020) (showing Disney's market capitalization since 2016); *Comcast Corp.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/CMCSA/fundamental/market-cap> (last visited July 2020) (showing Comcast's market capitalization since 2016); *New Media Inv. Group*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/GCI/fundamental/market-cap> (last visited July 2020) (showing New Media Investment Group's, which owns Gannett, market capitalization since 2016).

³⁶ Market capitalizations described are as of November 2019. See *Walmart, Inc.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/WMT/fundamental/market-cap> (last visited July 2020) (showing Walmart's market capitalization since 2016); *Exxon Mobile Corp.*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/XOM/fundamental/market-cap> (last visited July 2020) (showing Exxon's capitalization since 2016); *Bank of America*, ZACK'S INV. RES., <https://www.zacks.com/stock/chart/BAC/fundamental/market-cap> (last visited July 2020) (showing Bank of America's market capitalization since 2016)

digital players the ability to acquire any firms with innovative and potentially competitive technologies and services, and to spread into multiple lines of business. These practices make it nearly impossible for competitors to arise or for consumers and content providers to effectively exercise countervailing power through the market. No jurisdiction or policy domain alone can govern these firms and platforms. Although oversight will require multistate and multinational actions and employment of multiple types of policies, antitrust can play a vital role.

When the founders conceived the First Amendment, the most powerful existing institution was government, so they created protections against governmental interference with expression in order to support self-governance. Today, digital firms and platforms are every bit as powerful an influence on expression. They structure its presentation, they convey it, and they increasingly control it through company policies and actions that constrain expression and both the marketplace of ideas and the economic markets surrounding it. Platform company employ policies, for example, to determine the types and range of ideas and opinions presented, the language used in that expression, and who is permitted to continue using the

platform. These content moderation choices align their activities more with publishing than acting as a common carrier.

Solutions for digital monopolies and more antitrust enforcement of mergers and acquisitions and business practices are warranted and must be sought. Structural and behavioral remedies should be considered. New regulations such as consumer data portability, interoperability requirements to counter network effects, or treating them as regulated monopolies or public utility are needed.

Antitrust enforcement, however, remains the focus of contentious debates about how enforcement should deal with high-tech industries and issues of innovation, cooperation among firms, and anti-competitive actions involving intellectual property.³⁷ Addressing the challenges of antitrust enforcement involving digital firms and platforms must be supported by better policy and legislative action, probably including more flexibility in regulation that will allow adjustment to future changes in

³⁷ ILKKA RAHNASTO, *INTELLECTUAL PROPERTY RIGHTS, EXTERNAL EFFECTS, AND ANTITRUST LAW: LEVERAGING IPRs IN THE COMMUNICATIONS INDUSTRY* (2003); Herbert Hovenkamp, *Antitrust and Innovation: Where We are and Where We Should Be Going*, 77 *ANTITRUST L.J.* 749, 749–50 (2011); Marshall Leaffer, *Patent Misuse and Innovation*, 10 *J. HIGH TECH. L.* 142, 147 (2010); David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 *BERK. TECH. L.J.* 729, 765 (2001); Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 *ANTITRUST L.J.* 313, 314 (2012).

industry products and services, business configurations, and business models.

Policymakers and regulators should focus on digital players' conduct in dealing with content producers and seek transparency about advertising pricing, revenue, and its division. Increased privacy rights and consumer protections to reduce misuse and abuse of personal surveillance and the asymmetrical power of suppliers and consumers in media and communication markets should be sought. Some of these issues can be addressed with antitrust law because they involve specific conduct of digital firms, and antitrust application is traditionally conduct-specific in its approach.

III. DOES THE FIRST AMENDMENT CONSTRAIN ACTION?

Digital practices and copyright are increasingly reinforcing private constraints on access to information, reducing the ability of the public to be informed participants in society.³⁸

Some might question whether the First Amendment limits the government's ability to use antitrust law or other policy to address private infringements on expression. A balance

³⁸ Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 358 (1999).

between First Amendment prohibitions of government restraints on expression and government policies that promote expression has developed, however. That balance, established in jurisprudence, particularly involving broadcasting, permits policies -designed to serve the clear public purposes of increasing expression and its availability if they are narrowly tailored to achieve this government interest. In *Associated Press v. United States*, the Supreme Court established that the First Amendment does not protect private restraint of trade in information.³⁹ Likewise, the Court decided in *Red Lion Broadcasting Co. v. FCC* that there are public benefits from availability of diverse information, ideas, and opinions to which the public has a right.⁴⁰ And in *Metro Broadcasting, Inc. v. FCC* the Supreme Court ruled that policy promoting minority ownership in broadcasting serves important governmental interests.⁴¹

Many additional policy options for supporting journalism and a robust mediated public sphere exist including public media, subsidies, and philanthropy. Identifying the policy domains, mechanisms, and tools that can be employed and

³⁹ 326 U.S. 1, 20 (1945).

⁴⁰ 395 U.S. 389–90 (1969).

⁴¹ 497 U.S. 547, 566 (1991).

developing the public support and political will to employ them will be required.

A. A Wider Array of Actions will be Required

Reforming the structure of journalism—and indeed all media provision—will require complex, coordinated policies across domains, ranging from competition policy to industrial policy, from innovation policy to privacy policy, and from labor policy to media and communications policy. It cannot be accomplished merely by asking competition authorities to strengthen enforcement of existing laws or by inducing legislatures to subsidize journalism organizations.

The challenges of journalism and democratic needs are systemic rather than discrete issues that can be dealt with by employing simplistic policy solutions. They are based in political, economic, and social arrangements; means of participation provided; and power afforded in governance. Addressing conditions or influences in one part of the system will rarely alter conditions or influence in others.

Many observers are suggesting policy tools such as structural intervention, subsidies, tax benefits, and operational interventions before fully defining the breadth of the policy

problem, the principles that should guide policymakers, the objectives, and the mechanisms that will be employed. If the policy tools are determined before the problems, principles, objectives, and mechanisms are clarified, the policy almost always leads to inadequacy or failure.

To effectively pursue media reform and policy action, a comprehensive policy problem statement and a set of solutions need to be developed rather than addressing multiple and disparate issues separately. Clearly, presentations of the primary principles and objectives for approaching the problems must be presented. These principles and objectives might include supporting startups; bringing new owners into media and journalism; providing preferences for ownership by smaller firms; helping smaller firms acquire capital to provide desired services; making charitable status for journalism non-profits easier as sought through the Saving Local News Act;⁴² emphasizing local, community, and minority media; supporting independent journalism; and breaking up unhealthy conglomerates. These will help inform choices of the proper mechanisms and tools to overcome the challenges.

⁴² Saving Local News Act of 2019, H.R. 3126, 116th Cong. (2019).

This is not an easy task, nor will it be a short-term activity. It will require serious policy research, analysis, and sustained advocacy for multiple policies. The coordinated advocacy groups and policy networks necessary to undertake and continue extensive and effective advocacy do not yet exist.

One must also recognize the political realities of policymaking. Because of general distrust toward the media today, the public and Congress cannot be expected to support federal intervention that would benefit the media. There is some evidence that more political will exists at local and state levels, however, and some activities to support journalism and promote and protect the public sphere are emerging there.⁴³

Ultimately, society must ask whether public intervention should be the only approach used to reform media. Might placing greater effort into private actions be quicker and less burdensome than trying to promote state actions? Might media reform be sought through private activities involving socially conscious investment funds; media venture funds; corporate social responsibility programs; journalism cooperatives; or some

⁴³ New Jersey, for example, has established a state fund to support local journalism. See Rick Rojas, *News from Your Neighborhood: Brought to You by the State of New Jersey*, N.Y. TIMES (July 30, 2018) <https://www.nytimes.com/2018/07/30/nyregion/nj-legislature-community-journalism.html>.

forms of private-public partnerships that can be pursued more rapidly?

Simultaneous public and private action will be necessary. Addressing the challenges limiting attainment of a robust public sphere requires broad initiatives across society, not merely governmental intervention. Policies requiring affirmative governmental action to promote expression and diverse media ownership should be sought, but they must be founded outside the First Amendment and enacted within media and communication policy and other policy domains. New media and communications ownership structures can be pursued but will require significant revision of existing antitrust law and its application, as well as changes in media policy, industrial policy, tax policy, and a host of related policies.

Efforts to expand antitrust law to specifically address concerns about the marketplace of ideas and democratic considerations are needed in order to include measures in antitrust guidelines and practices and to seek beneficial approaches in other areas of policy. These will conflict with entrenched beliefs and practices of liberalization of ownership of media and communications in Congress and the Federal Communications Commission. Achieving significant change or

reform of media and communications will require overcoming the well-entrenched neoliberal market-based philosophy that had driven deregulation, privatization of services, reduction in government spending, and free trade for several decades and significantly influenced media and communications policy and policy in related areas.⁴⁴

First Amendment and antitrust mechanisms can be used to facilitate part of that change, but their abilities to address fundamental issues in the public sphere are limited. Many issues will have to be addressed by the Federal Communications Commission and Congress. These issues include implementing and enforcing policies promoting media pluralism and diversity; controlling media and communications ownership; restraining intellectual property rights involving information; reducing protections afforded to online platforms in statutes; providing and enforcing tangible consumer rights in transactions with information service providers; and creating extensive privacy rights appropriate for the digital age.

Actions must be guided by the two fundamental questions: freedom for what? and freedom from what? Freedoms

⁴⁴ See generally DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (Oxford Univ. Press reprint ed. 2007); DES FREEDMAN, THE POLITICS OF MEDIA POLICY (2008); SEAN PHELAN, NEOLIBERALISM, MEDIA AND THE POLITICAL (Palgrave Macmillan 2014).

must be sought that provide a robust public sphere supporting democratic activity. To achieve conditions in which media and communications support citizen needs for information and democratic participation will require freedom from public and private constraints that harm it and promulgating requirements that they serve citizens. These are lofty and normative aspirations, but they require rational and practical actions and policies in their pursuit.

Ultimately, making journalism sustainable and achieving successful media reform will depend upon whether there is political will to achieve the requisite changes. That remains an open and significant question.

IV. CONCLUSIONS

The First Amendment and antitrust law afford inadequate means for pursuing platform governance and media reform and cannot be exclusively relied upon because of limitations established on their use through statute, jurisprudence, and practice. Advancing First Amendment and antitrust conceptualizations and applications conducive to robust platform governance and advancing media reform might be possible in the remote future, but absent consequential change

in the construction, interpretation, and implementation of the Constitution and existing statutes that approach will not be efficacious.

More plausible and expeditious support for the governance and reform objectives is feasible through policymaking based in legislation and administrative rulemaking, supporting private initiatives to reform communications firms and structures, and harnessing public pressure to induce better behavior by platform companies and media firms. Those opportunities should not be discounted.