

## The Corporatization of Communication

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**Dana Gold:** Our next panel discusses the corporatization of communication. I want to introduce the moderator of this session, who is my colleague, Mr. Eric Chiappinelli. He is our Associate Dean for Alumni and Professional Relations. More relevant perhaps than his role as moderator is his role as one of our most esteemed professors of business law here at the law school.

**Eric Chiappinelli:** Thank you very much, Dana. Thank you all very much for coming to this session on the corporatization of communication, vis-à-vis the Madisonian First Amendment. We have three wonderful speakers. I have had a little preview of what they are going to discuss, and I know you are going to be engaged and interested in what they have to say.

Our first speaker is the founder and the Executive Director of the Center for Digital Democracy. He has also founded a number of other non-profits regarding media policy. He has also worked on a project on open access and the future of the Internet. His new book is called *Digital Destiny: New Media and Future Democracy*.<sup>1</sup> Please welcome Jeffrey Chester.

**Jeffrey Chester:** Thank you very much. I want to thank Dana Gold and everybody here for inviting me.

If you look back at what we have in the United States, it is the failure of the media policy process (and the media industry as a whole) to effectively develop the kind of civil society sphere that would promote, ensure, and engage the public with meaningful civic participation. When you look back, you will see that we do not have a system of diverse

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1. JEFFREY CHESTER, *DIGITAL DESTINY: NEW MEDIA AND FUTURE DEMOCRACY* (2007).

media ownership; indeed, we have a system where women and people of color own hardly any of the major outlets. There are increasingly fewer owners of the major outlets of newspapers, broadcast stations, and cable systems and their programming channels. You will witness, as the digital era progresses, further increased consolidation with our media. A key reason for all this consolidation, and the disregard of what a robust and public-spirited press and electronic media should provide us, is the very corrupt nature of media politics in Washington D.C. (as well as state capitols and city halls). We are facing a very critical transition period as the so-called old media merges with the “always-on, always-connected” world of interactive media. We need to look at what is ahead for us if we want to better protect the public interest.

Key principles for a media of openness, diversity, and access that should help create a media system that really fulfills a vision of democracy can be fostered, but it can only be accomplished, in my opinion, by addressing what is about to happen; not, sadly, what was lost years ago when the Communications Act was enacted in 1934.<sup>2</sup>

All of the things people are talking about in terms of the dot-com revolution during the 1990s—such as the long-awaited emergence of interactive broadband communications—are here. The infrastructure to deliver broadband content to PCs, mobile devices, and digital TV sets is here. But we have lost an important safeguard for broadband—what’s now called “network neutrality” (and what used to be known as “open access”). The structure that evolved for the internet from the days of dial-up access was that the network was a neutral party—the phone wire couldn’t determine or shape what content you used. Before AOL merged with Time Warner in 2000—in part to get access to its cable TV-based broadband pipeline—it was the leading corporate campaigner for open access. Once it merged with the cable giant Time Warner, however, AOL abandoned its call for a national policy designed to keep the broadband internet from under the control of powerful network gatekeepers. That’s because AOL was now owned by one of the key gatekeepers—Time Warner owned the second largest cable television distribution platform (and its high-speed internet service, Road Runner).

All major media mergers have implications for the public interest, including democratic expression. Mergers involving the future of our media raise even more important concerns. Like other large cable and telephone companies, AOL Time Warner wanted to operate a digital distribution platform where its content received favorable treatment such as

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2. Communications Act of 1934, Pub L. No. 416, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–614).

faster connection speeds, better processing power, and greater visibility than competitors (think about the fate of the start-up or not-for-profit digital content service under such a regime). Therefore, mergers need to be fought in order to impose safeguards and some form of public accountability. That's what a number of groups, including my own Center for Digital Democracy, were able to do. Professor Lawrence Lessig played a key role in helping us convince the FTC [Federal Trade Commission] that merger rules for AOL Time Warner were necessary to ensure some greater access for competitive internet service providers and content makers.

This was an attempt to sort of look ahead at what was coming overall in the United States' digital content and distribution sphere. These are global trends, of course, but I do want to focus on the U.S. We will need to face, I believe, a converged, consolidated, and hyper-commercialized media environment. There are now greater threats to civil discourse, political speech, and access to the news and information in civil society than I think there have ever been before. I called my book *Digital Destiny: New Media and the Future of Democracy* because it sounds an alarm about what will likely be unless we act now. I don't think public interest groups and other advocates are paying sufficient attention to what is going on in the commercial digital media market. Indeed, the Google and YouTube deal and the News Corp./Rupert Murdoch takeover of MySpace are examples of new and extending forms of convergence, consolidation, and commercialization.

When we talk about the media system, you need to look at three spheres or three platforms that will determine public consciousness via the interactive flow of broadband communications: the personal computer (PC), the cell phone or mobile device, and interactive TV (or internet protocol TV). TV will be interactive. It will be personalized. It will be much more powerful and a very important medium to think about.

The media industries—advertisers, marketers, technology companies, and the major content companies (such as Time Warner and Google)—are all working together and have perfected a system designed to deliver very powerful interactive content wherever you go. A ubiquitous digital media environment will be here with the “always-on, always-connected” qualities we have discussed. Accompanying this system is an incredibly sophisticated marketing engine designed to collect data about each and every one of us to profile each and every one of us. This is so advertising and messages from powerful brands can be delivered to us, enveloping us in a system designed to promote their interests (for sales and influence over our market and, eventually, political choices). As we speak, this “interactive advertising ecosystem,” as they term it, will

follow you through thousands of web sites as you go through cyberspace, whether in front of a PC or via interactive television. This system is pervasive. It is under the radar screen.

And why is it happening? Because the principal ideology governing this system, I'm sad to report, is strictly to make profits. It is motivated in part by the largest advertisers who spend \$400 billion globally. Yahoo! did a very interesting study in 2005 which looks at global youth.<sup>3</sup> It is very revealing because it documents the trends I have discussed regarding digital media consumption and how marketers can take advantage of it. Yahoo! and others are afraid that the eyeballs of younger people, here and abroad, have left television. And the advertisers want to make sure that they have a system which can reach and influence young people, who are the emblematic and "with it" users of the new technologies. It does not matter where the youth are. The advertisers are able to engage youth via social networks, instant messaging, and broadband entertainment.

All this marketing is not just about concerns over a direct sale of products and services. It was very interesting having this conversation this morning because their marketing has fundamentally changed. This is something concerned advocates need to be better informed about. The new approach to marketing is based on what is called "personalization." If you do a Google search for "Engagement and Advertising Research Foundation," you will see that advertisers in this country and globally are engaged in multiple initiatives to make sure they can reach us in very profound and distinctive ways. Advertisers are now engaged in neuro-psychological research through what is known as the MI4 initiative (run by the Advertising Research Foundation).<sup>4</sup> Marketers are funding viral marketing and stealth marketing research. It is a whole new array of techniques to promote what I've termed "brandwashing." And, if advertisers are doing it now, you can be sure politicians and others will follow, but that's the dominant vision. One-to-one marketing, *personal* personalization, is the key paradigm here.

Now, we have the new media principally focused on the needs to serve advertising. This would be bad enough, as they say, but what you have now are decades of consolidation within the "old" media meaning fewer companies controlling broadcast, cable, major daily newspapers, and broadband internet access. Indeed, I spend most of my time in Wash-

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3. See Press Release, Yahoo! & OMD, From 'My Generation' to 'My Media Generation': Yahoo! & OMD Global Study Finds Youth Love Personalized Media (Sept. 27, 2005), available at <http://yahoo.client.shareholder.com/ReleaseDetail.cfm?ReleaseID=174993> (describing contents and results of study) (last visited May 17, 2007).

4. See Ravi Balakrishnan, *The Blind Men*, ECON. TIMES, Aug. 2, 2006.

ington fighting such consolidation and helping lead the campaign—a successful campaign that sort of stopped it for a moment in 2003—against fewer owners of television stations, cable systems, and phone companies.

Accompanying this consolidation is a very real and disturbing deterioration of the news media system to effectively engage in reporting and critical analysis. I am furious that they failed us in terms of the lead-up to the Iraq war (challenging the fallacious notion of weapons of mass destruction). Here's another example—you don't hear anything, at least I don't in the papers that I read, about what is going on in the Gulf Coast (such as New Orleans). There are no headlines saying, "Hey, they took away habeas corpus" (I'm referring to the new Patriot Act), because there is a deep crisis within the news media today, especially television. Terrible things have happened to once renowned newspapers, such as Tribune's *Los Angeles Times* and *Baltimore Sun*. Now, bottom-line operators like Dean Singleton operate the *San Jose Mercury News* because the venerable Knight Ridder chain was forced to implode by greedy investors. There have been layoffs, cutbacks, firings, and early retirements. As a result of media ownership policies and market forces, I believe that much of the current news media is incapable of serving us effectively.

So, you might say, as Federal Communications Commission (FCC) Chairman Michael Powell did say during his tenure in 2001-2003 when he conducted a sweeping review of federal media rules, "you have the internet." But we no longer can be guaranteed that we have the internet in the near future as the open and robust medium it is today. Why? Because the internet was developed as an open system. It was developed by people who wanted to make sure that all kinds of communications could get through. The people who created the internet are still around. You can talk to them. The principle they articulated was called "end-to-end." Larry Lessig has done the best work explaining, through his accomplished and articulate writings, what this means for us.<sup>5</sup> The key principle is nondiscrimination.

It was clear that broadband would be the key way of delivering online content because you want it fast and it must deliver video-based applications. The only two industries capable of delivering broadband to the public in the United States were the cable companies and the phone companies. They already had the wire. What did the cable industry do to the FCC in 2002? It lobbied and was able to get the Bush FCC to declare that when cable delivers broadband, it does not have to act in a nondis-

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5. See Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001).

criminy fashion.<sup>6</sup> It can put its bits and other bits, and it can deny other internet service providers, of which there once were around 7,000, access to its broadband wire (something which federal rules had prohibited with dial-up service). What did the phone companies do? They also lobbied, and in 2005, they won a similar policy at the FCC eliminating nondiscrimination and open access.<sup>7</sup>

We no longer have a system for broadband communications in the United States that has to operate in a nondiscriminatory manner. That's what the network neutrality debate is about, and you've seen quotes from the phone and cable company executives, such as AT&T, saying that they want to put our content on the fast lane. These same companies have just bid on, and successfully won, huge chunks of additional wireless spectrum. Thus, you have consolidation within the broadband market itself. You have two companies in charge of cable today: Comcast and Time Warner basically control the cable industry. And, you have three companies—Verizon, Qwest, and AT&T, which is about to swallow up Bell South—that are in control of the phone industry.

What you are about to see, I predict, is that this handful of companies will soon be able to buy a tremendous mass of power through the purchase of broadcast stations, newspapers, and radio stations without any public policy to ensure diverse access. Meanwhile and disturbingly, they have embraced a business model that is focused on pure monetization (that's what they call it). Whatever the traffic will bear, that is what I am going to charge you. If you want your content to be the most effective, I can put you on my fast lanes and deliver your content to individuals (via the PC, mobile, or TV and any mix thereof). Advertising will be the dominant application. I suggest to you that's a recipe for disaster for our civil society unless we intervene. Thank you.

**Eric Chiappinelli:** Thank you, Jeffrey. I appreciate that very much.

Our next speaker is Assistant Professor of Law at the Michigan State University College of Law. He received his J.D. from University of Pennsylvania, and then went on to clerk for the Honorable J. Clifford Wallace in San Diego, the Chief Judge of the United States Court of Appeals for the Ninth Circuit. He has been an attorney advisor with the FCC in both their media bureau and their common carrier bureau, and for a

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6. See *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002) (concerning cable modem service), *rev'd on other grounds*, *Brand X Internet Servs. v. F.C.C.*, 345 F.3d 1120 (9th Cir. 2003), *rev'd on other grounds*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

7. See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853 (2005) (concerning DSL service).

time he was engaged in the private practice of law at Jones, Day, Reavis & Pogue. Please welcome Adam Candeub.

**Adam Candeub:** Thank you very much. Again, thanks to the Law Review for its superb work in putting this tremendous symposium together.

I will first analyze the FCC's current ownership regulations and their treatment by the courts. The FCC has, almost since its inception as an agency in 1934, regulated the number of media outlets that one entity can own and control. Its ownership regulations have evolved into a highly complex set of rules affecting virtually every media. Recently, however, its ownership regulations have faced stiff resistance from the courts; hardly a single regulation has been substantially upheld in the last decade. Second, with this background, I would like to examine *why* the FCC has failed in crafting a workable ownership regulation. Then, I will briefly talk about some suggestions for reform.

Media ownership regulation limits the size and number of outlets that one entity can own. The most important rules include:

- the national television multiple ownership rule,<sup>8</sup> which caps the number of television stations a single entity may own nationwide;
- the national cable ownership rule,<sup>9</sup> which limits the size of cable systems and their degree of integration with program providers;
- the local television multiple ownership rule,<sup>10</sup> which places limits on the number of stations a singly entity may own in a local viewing market;
- the radio/television cross-ownership rule,<sup>11</sup> which limits joint holdings among those media within a given media market subject to the 1999 thresholds discussed above;
- the dual network rule,<sup>12</sup> which prohibits combinations among the four major TV networks;
- the newspaper/broadcast rule,<sup>13</sup> which limits cross-ownership of television stations and daily newspapers within the same local media; and

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8. National Broadcast Television Ownership Rules, 72 Fed. Reg. 16283-02 (Apr. 4, 2007) (to be codified at 47 C.F.R. pt. 73.3555(e)).

9. Communications Act of 1934 § 613(f)(1)(A), ch.652, 48 Stat. 1064 (current version at 47 U.S.C. § 533(f)(1)(A) (2000)); 47 U.S.C. § 533(f)(1)(B) (2000); 47 C.F.R. § 76.503 (2006).

10. 47 C.F.R. § 73.3555(b) (2006).

11. 47 C.F.R. § 73.3555(c) (2006).

12. 47 C.F.R. § 73.658(g) (2006).

13. 47 C.F.R. § 73.3555(d) (2006).

- the local radio ownership rule,<sup>14</sup> which governs the amount of consolidation permissible in a local listening market.

In 1996, Congress enacted the Telecommunications Act,<sup>15</sup> which required the FCC to revisit these regulations in various biennial reviews and discard those that it deemed no longer in the public interest. These reviews, which largely defended the existing rules, were challenged in court with very disappointing results (for the FCC, that is). In *Sinclair Broadcasting Group, Inc. v. FCC*,<sup>16</sup> and *Fox Television Stations, Inc. v. FCC*,<sup>17</sup> the D.C. Circuit remanded significant portions of the FCC's regulations, requiring further agency justification.

Consolidating these remands with reviews of other media ownership regulations, then-FCC Chairman Michael Powell attempted significant liberalization of the ownership restrictions. The 2002 Biennial Media Ownership Order raised national and local television ownership caps and eliminated cross-ownership restrictions.<sup>18</sup> On appeal, however, the Third Circuit in *Prometheus Radio Project v. FCC* rejected most of the 2002 Biennial Media Ownership Order, sending the proceeding back to the FCC for further justification.<sup>19</sup> These proceedings are still languishing at the FCC.

That's the current state of the most significant regulations. I would now like to discuss the justification for ownership restrictions. These restrictions seem, at first blush, to raise First Amendment concerns because by restricting the ability to own media outlets, the FCC is in effect limiting the ability to speak. Yet the Supreme Court has upheld FCC ownership regulations for decades. The classic statement justifying ownership restrictions is found in *National Citizens Community for Broadcasting*: "[T]he 'public interest' standard necessarily invites reference to First Amendment principles,' and, in particular, to the First Amendment goal of 'achieving the widest dissemination of information from diverse and antagonistic sources.'"<sup>20</sup> The Supreme Court took that very general and broad principle and essentially gave the FCC carte blanche to craft very specific ownership regulations on how many radio stations an entity can

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14. 47 C.F.R. § 73.3555(a) (2006); see generally CRS REPORT FOR CONGRESS: FCC MEDIA OWNERSHIP RULES: CURRENT STATUS AND ISSUES FOR CONGRESS (2006), available at <http://fpc.state.gov/documents/organization/70045.pdf> (last visited May 17, 2007).

15. 47 U.S.C. §§ 151–710 (1996).

16. 284 F.3d 148, 155 (D.C. Cir. 2002).

17. 280 F.3d 1027 (D.C. Cir. 2002).

18. *In re* 2002 Biennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, 18 F.C.C.R. 13620, 13627 (2003).

19. 373 F.3d 372 (3d Cir. 2004).

20. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) (citations omitted).



own and how many television stations it can own. Recent Supreme Court decisions, however, have imposed stricter constitutional scrutiny for the non-broadcast media.<sup>21</sup> It is far from clear whether the FCC's ownership regulation will be free from constitutional doubt in the future.

Of course, there are darker justifications for ownership regulation that we must recognize. Many claim that ownership restrictions are really not about the public good but are about serving politicians. Many of the ownership restrictions go back to the New Deal—and it is clear that the genesis of many ownership rules is rooted in political consideration. For example, consider the memorandum that President Roosevelt sent to Chairman Howard Fly, a Harvard Law School New Deal bureaucrat. The memorandum stated, “Will you let me know when you propose to have a hearing on newspaper ownership of radio stations?”<sup>22</sup> The question resulted in the FCC denying radio licenses to newspaper owners. Roosevelt's antipathy towards newspaper ownership of radio stations was not rooted in any profound beliefs in the perils of concentrated media ownership. Rather, Roosevelt harbored a political animus against newspapers which in the 1930s were the mainstream media. Newspapers, by and large, opposed much of the New Deal. Roosevelt, who could be a very vindictive politician, wanted to ensure that they couldn't own radio stations.

The FCC under Richard Nixon, another chief executive who had issues with the press, instituted a formal prohibition against newspaper ownership of television stations.<sup>23</sup> Again, most observers see this move as based almost exclusively in politics.<sup>24</sup> As these examples illustrate, despite the importance and ubiquity of media ownership regulation, they developed without a coherent plan and without stated goals and clear justifications. Regulations were haphazard at their best and stomach-churningly political at their worse.

What was so interesting about the 2002 Media Ownership Biennial Order<sup>25</sup> is that it marks one of the few times that the FCC attempted to

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21. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

22. 2 E. BARNOUW, *A HISTORY OF BROADCASTING IN THE UNITED STATES: THE GOLDEN WEB* 170 (1968).

23. Multiple Ownership Second Report and Order, 50 F.C.C.2d 1074 (1975); see also Susanna McBee, *Justice Department Move on Media Surprised White House*, WASH. POST, Jan. 21, 1974, at A2; Editorial, *The FCC's Ghost from Watergate*, WASH. TIMES, Aug. 7, 2003, at A18.

24. See 47 C.F.R. § 73.3555(d) (1976); see generally Sean Michael McGuire, *Media Influence and the Modern American Democracy: Why the First Amendment Compels Regulation of Media Ownership*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 689 (2006).

25. *In re* 2002 Biennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, 18 F.C.C.R. 13620, 13627 (Jun. 2, 2003).

create an intellectually coherent basis for media ownership regulation. It forwarded three justifications for limiting media ownership: competition, diversity, and localism. That its definitions of these terms are problematic perhaps led to the Order's failure before the Third Circuit in *Prometheus Radio Project v. FCC*.<sup>26</sup>

The Order defined diversity for purposes of its regulation primarily as "viewpoint diversity," which in turn was defined as being maximized by "a larger number of independent owners [because they] will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners."<sup>27</sup> Contrary to past FCC practice, competition was not defined in terms of the higher rates broadcasters charge advertisers. Instead, the FCC (rather vaguely if not incoherently) tied competition to the "interest, the convenience, and the necessity of the . . . consuming public," as well as to prices and innovation.<sup>28</sup> Finally, the FCC defined localism as the inclusion of "programming responsive to local needs and interests, and local news quantity and quality."<sup>29</sup>

The problems with these concepts are many. The definitions, as you can see, are in many ways almost bizarrely vague. Further, they can conflict with each other and resist quantification. Competition conflicts with diversity. As the famous Steiner and Hotelling-influenced economic models show, the more media firms in a market, the less diversity in content, at least under certain conditions. This somewhat counterintuitive result stems from the fact that media companies will tend to cater to the "common taste"—because that is the largest market. On the other hand, a monopolist, which by definition already has captured the most common taste, might have the incentive to cater to different, more diverse tastes in order to increase its revenue.

Similarly, localism conflicts with diversity. Essentially, the localism mandate will crowd out other types of programming thereby resulting in more homogenous programming. If the mandate were not there, one would likely see more types of programming involving a greater variety of topics rather than just local topics.

Like individuals and businesses everywhere, government agencies face conflicting goals all the time. In the case of the FCC, the logical first step given these conflicting aims would be to envisage optimal levels for its three divergent goals. And the problem is, of course, measuring or quantifying optimal levels. Unfortunately, these regulatory concepts resist non-controversial quantification. How in the world do you measure

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26. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

27. *2002 Biennial Regulatory Review*, 18 F.C.C.R. at 13627.

28. *Id.* at 13630–32.

29. *Id.* at 13633–38.

what constitutes diversity or localism or even competition given the oddly vague definitions the FCC adopted?

Consider diversity. How does one determine whether a given media market is diverse? Economists and social scientists have put forth numerous clever ways of doing so. For instance, Joel Waldfogel of the Wharton School looked at formats as defined by Duncan, a service for advertisers that classifies by format every radio station in the country.<sup>30</sup> Waldfogel and his coauthors looked to see whether merged radio conglomerates produce more formats. The other approach is to use graduate students. Put them all in a room, and then ask them whether this format is different from that format? Or, does this news program provide more or different news than that news program? These approaches can be very interesting from an academic perspective. The problem from a regulatory perspective is that the data is inevitably messy, and regulators have difficulty reviewing inevitably ambiguous and somewhat controversial data.

The FCC's approach to the problem of defining and quantifying diversity is to simply sidestep it. As I mentioned earlier, the FCC uses diversity of ownership as a proxy for diversity of viewpoint, and so it just counts heads. Is a media market diverse? The FCC answers this question simply by counting the number of firms in that market. The first problem the FCC has faced with this approach is the difficulty in determining which firms count—the internet, cable, small local newspapers. And, second, when are there enough firms so that the FCC can determine there is sufficient diversity?

To expand on the second point, if your diversity standard is just counting noses, how many noses is enough to make you happy, so to speak? The FCC has not been able to answer this question satisfactorily—or, at least, in way that has been satisfactory to reviewing courts of appeals. As I read the major recent cases reviewing the FCC's ownership rulemakings: *Sinclair Broadcasting Group, Inc. v. FCC*,<sup>31</sup> *Fox Television Stations, Inc. v. FCC*,<sup>32</sup> and *Prometheus Radio Project v. FCC*<sup>33</sup>—cases which for the most part have rejected these rulemakings—these courts have found the FCC's explanation of when enough is enough unconvincing, and this failure was crucial in these courts' decisions to vacate or remand.

So, should we just get rid of media ownership completely? I would argue that the FCC's regulatory goals—competition, diversity, and

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30. Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 QUARTERLY J. OF ECONOMICS 3 (2006).

31. 284 F.3d 148, 155 (D.C. Cir. 2002).

32. 280 F.3d 1027 (D.C. Cir. 2002).

33. 373 F.3d 372 (3d Cir. 2004).

localism—are too intractable. Instead, the FCC should employ a more modest goal: simply improving the democratic process by increasing the output of news about politics. The FCC can alter the quantity and nature of news production through its regulation of media industry's ownership and geographic structures. New economic and social science research has shown that these structural features strongly influence news content. For instance, the greater degree of overlap between media markets and political jurisdictions increases the amount of political news coverage. Media ownership regulation can use these insights to further ownership structures and geographic media markets that maximize output of political news.

**Eric Chiappinelli:** Thank you very much.

Our next speaker teaches at Marquette University where he is the Colnik Professor of Communication. His research interests include private restrictions on free speech among other things. He's been a journalist, and he has a Ph.D. from Michigan State University. He's an author of a number of books including *Leasing the Ivory Tower: The Corporate Takeover of Academia*,<sup>34</sup> *Free Radio*,<sup>35</sup> and *Censorship, Inc.*<sup>36</sup> Please welcome Lawrence Soley.

**Lawrence Soley:** It's been interesting to be here, and I'm thankful to be here, but I tend to do a very different type of research than what has been presented so far today. I tend to be primarily a quantitative researcher, and I tend to use quantitative techniques to investigate what I think are important policy issues. To give you an example, Professor Skover mentioned a study that was done by Ron Collins a number of years ago called *Dictating Content*.<sup>37</sup> I actually came across this study first while reading a news report. As I was reading about Collins's study, the report started talking about a study that I had done that was not yet released; it was a survey study of newspaper publishers, disclosing what the level of pressure had been on them from their advertisers.<sup>38</sup> That's the sort of type of stuff that I do, and so I'm going to try to integrate a lot of that type of research into the discussion of broadcasting. I'd actually like to pick up almost exactly where Adam left off in his presentation.

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34. LAWRENCE C. SOLEY, *LEASING THE IVORY TOWER: THE CORPORATE TAKEOVER OF ACADEMIA* (1995).

35. LAWRENCE SOLEY, *FREE RADIO: ELECTRONIC DISOBEDIENCE (CRITICAL STUDIES IN COMMUNICATION AND IN THE CULTURAL INDUSTRIES)* (1998).

36. LAWRENCE SOLEY, *CENSORSHIP, INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES* (2002).

37. RONALD K.L. COLLINS, *DICTATING CONTENT: HOW ADVERTISING PRESSURE CAN CORRUPT A FREE PRESS* (1992).

38. Lawrence Soley & Robert Craig, *Advertising Pressures on Newspapers*, J. OF ADVERTISING, Dec. 1992, at 1–10.

A recent study by the Center for Media and Public Affairs shows that election coverage in my city during 2004 was significantly less than in the past, and that only about 5% of local news coverage dealt with local races and ballot issues.<sup>39</sup> This was part of a larger study done in multiple cities.<sup>40</sup> In Milwaukee, 500 hours of programming was content-analyzed leading up to the 2004 elections.

One reason for the decline in local news coverage is that it's much more efficient for large media companies to package national and regional news and to focus on entertainment, which relies very heavily on video news releases and trailers, than it is to actually hire and send out into the field journalists who would have to report on just one city. There are economies of scale in network and regional news production that you can't get on the local level. Of course, economies of scale make the media much more profitable for the owners.

The same loss of localism is also associated with radio where chain broadcasters, for the most part, have eliminated local news, and even the airing of music by local artists. This is a problem, and part of the problem was demonstrated in 2002 by a train derailment in Minot, North Dakota, where toxic fumes had engulfed the city. City leaders tried to contact the six automated stations in the town, all of which were owned by Clear Channel Communication. They couldn't get through. As a consequence, it was very difficult, if not impossible, to efficiently inform people of the town about the toxic cloud that was covering the city. One person in Minot died, and quite a few people were injured. After that, Lowry Mays, who's the Chairman of the Board of Clear Channel, explained his corporation's position. He stated, "We're not in the business of providing news and information. We're not in the business of providing well-researched music. We're simply in the business of selling our customers' products."<sup>41</sup> Of course, the customers' products that are being sold, at least alluded to here, are advertising. So, there's been a reduction in localism as a result of conglomeration and the passage of the Telecommunications Act of 1996.<sup>42</sup>

But there have also been some other detrimental economic effects, I think. One of those is that there are also economies of scale in the selling

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39. Center for Media and Public Affairs, 2004 Campaign News Study in Chicago, Milwaukee and Portland Markets (for the Media Policy Program of the Campaign Legal Center), Aug. 10, 2005, available at <http://www.oregonfollowthemoney.org/FreeAirTime/CMPA%20Study%20FINAL.pdf> (last visited May 17, 2007).

40. *Id.*

41. Christine Y. Chen, *The Bad Boys of Radio: Lowry Mays and Sons Made Enemies Building Clear Channel into an Empire*, FORTUNE, Mar. 3, 2003, at 118.

42. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

of advertising time that commands monopoly profits in cities where these large communication companies operate. To give you an example, Jacor Communications, which was taken over by Clear Channel Communication, started gobbling up stations in the Cincinnati market after the passage of the Telecommunications Act. Jacor managed to capture about 30% of the listening audience in Cincinnati, but was able to gobble up 60% of the advertising revenues. The reason they were able to do that is because the economies of scale associated with advertising: large advertising agencies find it far more efficient to go to a single source to obtain advertising than to a multiplicity of small radio stations that have very fragmented audiences. Not only that, advertising agencies make their money through commissions on the purchase of advertising time, which is an incentive to overspend on advertising, making media profitable.

However, despite these problems, I don't think that what has been said about media consolidation since the passage of the Telecommunications Act is correct. I don't think that there has been an increase in media biases or an increase in distortion in reporting. I think there has been some of that, but I don't think it was caused by the Telecommunications Act. We hear all kinds of these stories about Viacom taking *The Reagans* off CBS and putting it on their pay channel Showtime or Disney's decision not to distribute Michael Moore's *Fahrenheit 9/11* or Sinclair Corporation's decision to air *Stolen Honor* on their sixty-two broadcasting stations. We hear about these mainly because there are now a large number of groups out there, such as Fairness and Accuracy in Reporting (FAIR), The Center for Media and Public Affairs, The Free Press, The Media Access Project, and others, that are able to disseminate information about such decisions much more efficiently than was possible in the past, largely because of the new media.

Probably the most widely publicized incident was the boycott of the Dixie Chicks by country and western radio format stations following the lead singer's statement in London that she was ashamed to be from the same state as George Bush. Cumulus Broadcasting, which owns over 300 AM and FM stations, dropped the Dixie Chicks from its stations and sponsored tractor crushings of their tapes and cds in some of their stations' parking lots. Cox stations joined the boycott, and some of the Clear Channel stations did as well. *Airplay Monitor*, a trade publication in the broadcasting industry, said that there were about seventy-four stations that joined the boycott, many of them in the largest markets. As a result of that, the Dixie Chicks' song, *Traveling Soldier*, which was at the number one spot when the story broke, dropped off the charts within two and a half weeks.

However, these types of boycotts have been going on for a long, long time in broadcasting. Even before the passage of the Telecommunications Act, country stations in Missouri, Kansas, Montana, and elsewhere boycotted k.d. lang and her songs after she appeared in a pro-vegetarian commercial for PETA, People for the Ethical Treatment of Animals. The program director of one station, KBOW in Butte, Montana, declared, "If she's going to boycott one of our state's major industries, we're going to boycott her music."<sup>43</sup>

These types of boycotts actually go back as far as television. During the 1950s, there was a blacklist, and it was much more extensive and pervasive in broadcasting than it was in film. We hear a lot about the blacklists in the film industry, but they were far deeper and far longer lasting in broadcasting than they were in film. A reason for that is the very close relationship between the advertising industry and broadcasters, who rely on advertising dollars for profits, something that filmmakers don't. Because of the clout that advertisers have, they're able to demand or exert pressure on broadcasters to replace actors or remove directors of shows that they sponsor.

For example, General Foods back in the '40s and '50s was a large advertiser and, of course, is still one today. In their case, they pressured William Sweets into resigning from one of the programs that they sponsored, *Gangbusters*. He was also a director of another one, *Counterspy*. He was pressured into resigning from that show, too. The following year Jean Muir was fired from NBC's *The Aldridge Family* at the urging of General Foods. General Foods also received complaints about Philip Loeb, another actor who was in CBS's *The Goldbergs*, and General Foods similarly asked that he be removed, and, in fact, he was. Of course, this occurred despite New York and California state statutes protecting employees' political speech and association rights from workplace retribution.

To make sure that few complaints were received, advertisers developed whitelists of people who could be hired and blacklists of people who couldn't be. Often these were developed in association with professional anti-Communist companies like America Business Consultants, AWARE Inc., and groups like that. These blacklists weren't broken until people like John Henry Faulk won judgments against the blacklists, and that formally ended blacklisting. The people who were blacklisted remained in a state of limbo until they were invited back into the broadcast media—usually it wasn't by the advertisers. It was broadcast employees that did the inviting. An example of that is provided by Pete

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43. Richard Harrington, *Radio Stations Ban Singer After Ad*, HOUS. CHRON., Jul. 3, 1990, at 5.

Seeger, who was removed from the blacklist after being invited onto the *Smothers Brothers Comedy Hour*. That broke the blacklist for Pete Seeger. Not long after that, CBS killed the *Smothers Brothers* show because they started bringing political content in it. The Smothers Brothers have been on the concert circuit since then and most recently appeared in Eureka Springs, Arkansas.

Of course, blacklisting didn't just begin in the 1940s or the 1950s. You can go back throughout history. You can talk about the boycott of *Citizen Kane* by William Randolph Hearst and the media that he controlled: Hearst controlled radio stations and newspapers in many different cities. In case there's a little bit of confusion there, he prohibited any mention being made of *Citizen Kane* in any of his media.

A whole host of other individuals have faced pretty much the same problem as the Smothers Brothers where they work. They are told they have to follow the company line. This has been pretty consistent in the broadcasting industry, and advertisers can still pressure the media, and oftentimes media companies react to advertising pressures. One of the reasons, for example, that Viacom moved *The Reagans* from CBS to Showtime had to do with an advertising boycott that was being pushed by members of the Republican Party, and so it made economic sense for Viacom to shift from its broadcast-advertiser supported network and move *The Reagans* to its pay network. Recently, Whoopi Goldberg was eliminated as a spokesperson for Slim-Fast. She had been, as it was called, at a celebrity "hate fest" of the Republicans where she made a crude joke about Bush's name. As a result of that, there was pressure put on Slim-Fast, and indeed they dropped her as a spokesperson.

But, of course, this pressure doesn't just originate with the political right. There are examples at both ends. For example, when Laura Schlessinger signed a contract with Paramount, which is a Viacom subsidiary, to do a television show, another advertising boycott was initiated against that show by liberals, and the show pretty much went into a rapid demise as a result.

But advertisers still respond to public pressures, and there are a huge number of examples of their succumbing to public pressures. Advertisers also function as pressure groups themselves. I actually have probably hundreds of anecdotal examples of advertising pressure that was put on newspapers and broadcasting stations to kill stories that advertisers didn't like. I did multiple surveys of the broadcasting industry, of newspapers as well, that show that this type of pressure is pervasive. As a result of that, advertisers have been able to more and more shape our media content. For the most part today, the media don't initiate in-



vestigations of corporations, particularly their advertisers, until after the demise of the company.

One of the things the tobacco companies did pretty consistently during the 1950s, the 1960s, the 1970s, and even into the 1980s was to pressure media into not carrying stories about the dangers of smoking. I wrote for *Mother Jones*, having received the Sigma Delta Phi award for a story I wrote for them. *Mother Jones* had all their tobacco advertising pulled out after carrying a story on the dangers of smoking, and this wasn't something that just happened to *Mother Jones*. It was something that happened to a whole host of publications, including *Reader's Digest*.

So not only are advertisers successful in killing stories and black-listing individuals and framing content, but more recently we have seen them being successful in killing commercials for public interest groups. For example, I'm originally from the Twin Cities where the Prairie Island Sioux Tribe tried to buy time for commercials criticizing a large advertiser, Northern States Power Company, and broadcasting stations in that market refused to sell them time.

I think there is something that can be done. I don't want to sound like a dinosaur going back into past history, but there was in effect until 1987 something called the "Fairness Doctrine,"<sup>44</sup> which I think was the single most important doctrine for assuring fairness in broadcasting. If the Fairness Doctrine had still existed when Sinclair Broadcasting said that they were going to air *Stolen Honor*, the anti-John Kerry program, Kerry would have had an opportunity to reply. Under the Fairness Doctrine, if broadcasting stations carry commercials for one advocacy group, other advocacy groups could demand time as well. Thus, I believe in the Fairness Doctrine and in resurrecting it. In fact, the FCC was given the power to promote reply time in terms of tobacco advertising under the *Banzhaf* decision,<sup>45</sup> a policy that is badly needed today.

**Eric Chiappinelli:** And now we'll have replies. Thank you, Larry. Thank you to all three of you.

**Jeffrey Chester:** I would like to add something; I left out what we should do about it. As I said before, take the principles, but update them to a new environment, and we need policies. We need to reframe the First Amendment to the digital landscape. We need policies. We need projects, and we need business models. In other words, we're not going to get the kind of media environment we want unless we go out and create it. It's not going to be delivered to us by the major media companies in my opinion. That includes the Googles and Yahoos. So, we need to

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44. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969). The FCC's abolishment of the Fairness Doctrine was affirmed in *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

45. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).

think about it. There's a phrase called access to knowledge, which is a very useful phrase, but we need to create this access on multiple levels.

I don't want to go into it further, but imagine the kind of media system locally and nationally that you want. I suggest to you we need to do it, but we may have to do it by selling advertising but doing it in a responsible way, because we need to have, in fact, business models for this new system while we wait for the policies. But we clearly have to intervene now in this new media market place.

**Audience Participant:** Well, I'm kind of a skeptic of the whole thing; that is, the whole business media model. [Professor Soley] gave a nice little summary of all the censorship that's going on for several decades now, long before the internet or recent media consolidation. It seems to me we need to remove the media, or at least a large segment of it, from commerce. I mean, let's think about buying political candidates. I mean, we sort of do that, but, you know, it's not really kosher, one dollar, one vote. How much better does it work when it's one dollar for one hour on TV?

**Jeffrey Chester:** I didn't mention this, but I do think that one of the key issues for the advocates concerned about applicable communications is to understand what the system looks like and getting access to all three platforms, to understand the business models that are being imposed, and to understand how they want to charge for this access, let alone the privacy issues, and to think about what the public policies are so you can have political communications and civic discourse and access to information across all those platforms.

But there's no longer really a kind of spectrum scarcity to regulate in that way. You have this kind of giant broadband system with all the media merging. You're not going to get the corporations out of it. It's too late. When you look at the deals made by the Viacoms and the largest advertising companies and the Googles, it's too late. I think we have to be realistic here. They created this structure where advertising, marketing, and content are all intertwined and are ubiquitous throughout the system. They've eliminated the public policy safeguards. We've got to think of real alternatives while people also work on a philosophical approach to redoing it.

**Audience Participant:** As far as I could tell, all this structure is set in a bunch of laws, not even in the Constitution. I guess there are certain people who say that the Constitution requires private ownership of the airwaves and media, but except for those people on the far right extreme, you're talking about a legal framework, and just as the laws were created to favor corporate consolidation, certainly the laws can be amended and changed to authorize public ownership.

**Jeffrey Chester:** Let me say one more thing. I think I may be more of a realist. They are about to unleash this. This is going to be a powerful torrent of commercialized, focused media.

So, yes, in the long term we need to, in fact, create the public sphere. And maybe you could take it back, but you know what? You don't have that much time, because young people in particular like the advertising. They have fewer problems about the data collection. They're going to be shaped by this market in a very profound way in terms of their psychosocial development. And if we want to get them as citizens, we have to act now while folks work on the long-term principles. They've won it because our side has been weak and because the FCC's been politically corrupt since 1927.

**Adam Candeub:** Since '34. The FCC was established in 1934.

**Jeffrey Chester:** No, it was under the Federal Radio Commission as well.

**Adam Candeub:** If I could respond about the laws, I mean, it's interesting to realize that most of the stuff that I went through was promulgated under the very broad public interest standard. Since a lot of this has happened through the hidden corridors of power in Washington, these rules are the result of complex negotiations and political power plays among the FCC, Congress, and communications industry.

Once in a while, Congress makes a media ownership rule directly. So, for instance, the national local broadcast for television limit of 39% came out of a Republican Congress because they didn't like Michael Powell's moving it up to 45%.<sup>46</sup> The reasons for this I think are really quite complex. Politicians like their local broadcasters. I wonder why. Who else would report about them?

**Jeffrey Chester:** But I'll tell you why it was at 39%. It was because Viacom and News Corporation were at 39%, right?

**Adam Candeub:** Right, and that's why cable was at 30% because that's where TCI was. But I think there are mechanisms for people, and Congress is responsive for a variety of reasons on some of these ideas.

Audience Participant **Erik Jaffe:** What would be wrong with the sort of old-fashioned digital public square model? Rather than taking over the airwaves, the government just sort of created common space that would be open in the same way the public square was open so that everyone had minimum access, and it could be a substantial minimum without shutting down the private?

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46. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004); National Broadcast Television Ownership Rules, 72 Fed. Reg. 16283-02 (Apr. 4, 2007) (to be codified at 47 C.F.R. pt. 73.3555(e)).

**Jeffrey Chester:** That's what I think they need to do, and it needs to be throughout the digital landscape wherever political consciousness is formed. They need to create this kind of open space. We need to build the institutions, provide the data, but we need more than just the space. We need guaranteed access into the portals, into the very mechanisms that will be used to garner the public's attention, so civic content isn't sidelined and marginalized.

**Eric Chiappinelli:** Let me take a moderator's prerogative to ask this question. As I understand, sort of the basic thrust of all of you is that the media these days is essentially advertising driven because the owners of the media rely on advertising revenues, which essentially leads to both concentration of ownership and homogenization of content. My question is if you move to this open access, with every person with an access, you have a media that is public access television, and we've all watched *that*.

**Jeffrey Chester:** That's not a homogenization. It's the YouTube model really, but they will own whatever. They will have a piece of all that diverse content, but that diverse content will reflect the kind of narrow parameters that the advertisers in particular wish to fulfill.

**Eric Chiappinelli:** Which I assume then goes to giving people what the advertisers think they want. And with increasing sophistication, they know what people want. Why is it we should invest public policy and resources to provide things that readers won't read, listeners won't listen to, and viewers won't view?

**Adam Candeub:** I'm not a big advocate necessarily of huge market regulation. If people don't want news, the media shouldn't give it to them. However, presumably people want democracy, and *that* desire has certain consequences. Effective democracy requires citizens to have information about government. They use this information to monitor their elected officials. Where do they get this information? The press, the news. After all, in order to learn what your politicians are doing, it's much easier to watch the news than make incessant FOIA requests or watch C-Span 24/7.

Thus, it's not so much that people want news more than they want to watch *Desperate Housewives*. It's that *if* they want democracy, they need information about their elected officials. Consequently, media ownership policy should be directed at creating industrial structures that maximize the output of news. Now, viewing the purpose of media regulation to reduce the monitoring costs of government by encouraging the output of news presents interesting questions of *which* jurisdiction's monitoring costs should be reduced. In other words, about which jurisdiction should regulation aim to maximize news coverage.

You mentioned public access. I have a newborn, so I'm up late night, and I also have cable. I have the basic system, so I do watch a lot of public access, and I know a lot about my local high school's student government, which public access covers. Interestingly, I don't know very much about my state government, which happens to be just a few miles down the road in Lansing. And why is that? Well, because the cable franchise is done locally, and, therefore, public access channels tend towards local news. Franchising is not done on the state level, and that's an example of how ownership structures set by the government influence the type of news that—

**Jeffrey Chester:** Adam, you're wrong. It's not fair for you to say that. The fact that it's not state-based news is because the broadcasting industry, which has those stations, and the cable systems, which have production power, have decided not to do news, not to report on the state capitol, not to invest in news. Look what's going on with NBC just yesterday: \$700 million in cutbacks in news. All the consolidations with the cutbacks in news have caused the crisis going on. Anybody in journalism knows about the crisis going on with local journalism and national journalism because they have made political and economic decisions. Hence, we need to open up to the extent to allow the people that want to do it to do it.

**Adam Candeub:** Jeff, if we allocated spectrum not on a local level but on a state or national level—

**Jeffrey Chester:** It should be everywhere.

**Adam Candeub:** Hold on one second. So if 93.7 were the state frequency so that no matter where you were in the state you could listen to that channel, which is not the case now, then have you created economies of scale so that the private companies would, in fact, create more state news? My only point is that there's a relationship between the media industry's structure, its ownership and geographic features, and the type of scale economies that we get and consequently the news that we get.

Audience Participant **David Skover:** Many of the concerns that you, Adam, and you, Larry, have voiced I think were tied to older forms of media where the catalyzation costs of entering the market are so high that essentially we had scarcity. You couldn't go out and build your own television station to get your viewpoint out.

The free speech libertarians who look at the digital market are making the argument that despite concerns that you're talking about, Jeff, that the upstart costs of becoming your own publisher, your own producer, your own distributor of information are so low that, for all practical purposes, we don't have to concern ourselves anymore with the Fairness Doctrine, the regulation of scarce resources, et cetera. This is

particularly going to be the case as all the media converge into sort of internet-driven technology. Now, we don't even have to worry about the television using a limited spectrum because television is going to be in this one internet-driven medium, and now we could all potentially become television producers, too.

Given the future technology, I'm wondering if many or all of your concerns are not somewhat alleviated.

**Lawrence Soley:** Except Jeff's.

**David Skover:** But, I actually wonder about his concern.

**Jeffrey Chester:** No, indeed because the TV platform and the mobile platform are, in fact, consolidated, concentrated. You don't have access to them. Mobile platform, which is key, and the interactive television platform are closed platforms.

**David Skover:** Okay, so net neutralities.

**Jeffrey Chester:** No, no, no. They're closed platforms. They are being designed, and hence they're unregulated. The broadband content that comes through them, unless you can rig it up, will be controlled by the network provider.

**David Skover:** I see. Now, would you address, though, whether you think your two concerns are really relevant?

**Adam Candeub:** My point is not based on the scarcity doctrine. Market structure plays a role in determining the type and quantity of political news, and media regulation must account for this.

And you're right, the internet has lowered the barriers of entry incredibly, but are people writing news, writing about what's going on in the state government? Are they engaging in investigative reporting of the tedious—yet vital—goings on in the various bureaucracies? I would argue that they are *not*. Citizen reporters have yet to emerge, and there will always be a need for a professional press to sort, clarify, and make easily readable the news. If that's the case, then I would say that there is some need to look at the media markets and the role government plays in influencing their structure.

**Lawrence Soley:** Every time a new media appears, there are a group of people who bury the previous media. So when radio originated, they said newspapers were dead. When television appeared, they said newspapers and radio were dead. Well, they haven't died. They are still major media. In fact, most surveys show that most people go to broadcast television to obtain local news information, and it remains the high source of profitability for broadcasting stations. I got up today. I went into the restaurant, and they had the *NBC Today Show* on. I got a local newspaper that was hanging on my door, and I read it. This is still the way that news tends to be consumed.

Now, when new technology are available and it's opened up, often times the FCC makes previous licensees those that will get into the new portion of the spectrum. They did that with the upper AM band rather than opening it up to new licensees. It was provided to those that already had AM broadcasting licenses. When they gave licenses for digital television, they didn't expand those. They gave it to current licensees.

That's really the issue. These technologies remain major sources of information. The doctrines that existed previously I think are still relevant, and they provided a type of access and debate that didn't exist previously.

**Audience Participant:** My concern is why should they supply things to a public who don't want it and won't listen to it? It's an assumption that the people don't want good information, rather than that people don't have a choice about the information being fed to them. Public television is an example. The people have to pay to get it. We send donations. We do that. Now, these are people who don't have big dollars, and they're trying to get an alternative to what is fed to us. This attitude seems to be that the people are just too dumb, like kind of what the framers saw. We're not capable. We're too arbitrary. It scares me that we seem to now be trying to put it down on ourselves that we don't want to have an option. This is what we want, we keep being told, and that's why we're giving it to you.

Insofar as that's what America wants to be, then I guess we buy it. But if it's not, in a democratic society what we want, because a democratic society suggests you look at the society and you do something for the whole, then we might want to argue for difference. We might want to open up the opportunity for people to have access to television.

**Jeffrey Chester:** All of sudden anyone can be a content provider, and I believe that. We encourage people to create the kind of programming which talks to us seriously and entertains us seriously. They can make the money. They can make a living.

You think about news channels. Do you know how many reporters want to work somewhere else? Doing investigative reporting about what's really going on? They would love to. If they had access to distribution, they could make it. I said there are no channels owned by African-Americans, and very few channels owned by women, in fact, hardly any channels owned by women. There is a market there. We have to allow things and consciously foster the creation of those markets and services.

**Audience Participant:** I'm just getting really tired of your misleading comments you made in your last comment about what's available in the political market, and maybe you guys are all living in the clouds here

and just are focusing on your larger market. I come from a smaller community, and for one there is a low political rate with advertising, and it also happens to be owned by a woman, who owns several TV stations. And so, please—

**Jeffrey Chester:** I'm sorry, I meant national. I meant the national networks, the national cable networks, and the national cable systems. None of the national cable programming networks, none of the national cable systems, and none of the national television broadcast networks are owned by women. Only 3% of the radio television stations are owned by African-Americans. So there may be things in the local market, I'm glad, but nationally, it's a very poor picture.

**Audience Participant:** You know that's not going on in the whole United States. I mean, I know there are challenges, the biggest ones being why some of the restrictions that apply to over-the-air broadcasting don't apply to cable and why we had to have high-definition television. I mean, the cost is the same for the larger markets as it was for the smaller market. How does that benefit us as a society?

**Jeffrey Chester:** Well, ask the National Association of Broadcasters because they lobbied for that in 1996 as part of the Act.<sup>47</sup> The NAB was one of the biggest giveaways of public property: \$70 billion given to incumbent broadcasters. They lobbied that, and they inserted that into the '96 Act.

**Audience Participant:** I was very troubled by what Professor Soley had to say about the ability of private television companies to control the content of political messages and pick and choose what messages they want to allow and not allow. This issue has come across my desk. I'm an ACLU lawyer. Is there anything we can do about it? What's your view on this? The Fairness Doctrine sounds like it's dead. Is there anything else out there?

**Lawrence Soley:** Well, there have been attempts to resurrect the Fairness Doctrine. I don't think it needs to be dead. I think that Congress can pass it. The idea of the Fairness Doctrine isn't just a scarcity issue. I mean, certainly that's part of it, but it's also based on sort of a public policy approach that is one that I think applies to cattle grazing. Large ranchers are allowed to use public lands for their own profit. But, at the same time, they're not allowed to post signs that the land is private, and they cannot deny legal access to other members of the public.

That was one of the underlying philosophies of the Fairness Doctrine. It applied to everything except candidates running for public office,

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47. See CYNTHIA GORNEY, *THE BUSINESS OF NEWS: A CHALLENGE FOR JOURNALISM'S NEXT GENERATION* 52–54 (discussing the National Association of Broadcasters' lobbying efforts regarding the Telecommunications Act of 1996).



so section 315 of the Telecommunications Act applies to candidates running for office.<sup>48</sup> We had a discussion about that previously. In theory, it's the lowest unit cost. If that is given to one candidate for public office, then it has to be given to the others. Sometimes they don't do that. So, everybody's paying the highest rate, but everybody's paying the same rate rather than getting advertising discounts because of quantity purchases, which is typical of commercial advertisers. The answer is that, with the exception of political candidates running for federal public office, there's nothing that can be done unless the Fairness Doctrine is resurrected. And even then it would require going back to the *Banzhaf* interpretation of the Fairness Doctrine which applied the doctrine to advertising.

**Jeffrey Chester:** Can I ask you this? That's not even the way TV's going to work. You're going to be downloading individual programs. So think about it. What should the Fairness Doctrine look like in the digital age? Maybe if party *A* paid Comcast money to download their program onto your hard drive or your TiVo, which is what's going to happen because that's all for sale, then there need to be public policies to ensure other points of view have an opportunity at that rate.

That's how you have to think: where it is, where it's going, and what do we do about it because these guys are already working on it. Go to Comcast Spotlight and do a search if you want to see personalized advertising, political advertising, and where it's going.

Audience Participant **Tamara Piety:** I think this panel illustrates why the media is not really an adequate watchdog for the kind of issues that were raised in our panel. This is one of the things that the public wants, to *escape* from advertising—with TiVo being one example of that. The [media] keep throwing roadblocks in trying to get away from that by trying to find other ways to reach us, so it's impossible to escape from advertising. I look at some of this stuff, and I think: why is it that all research on human subjects is being completely unregulated? I mean, they send this stuff to us to see how we would react and then craft the environment around us.

**Jeffrey Chester:** Well, look, we need to intervene. What they are doing is creating this kind of purposely immersive virtual reality personalized data collecting environment, associating the content with the advertisers and the brand entertainment model, and where they are going is deceptive and unfair. We should be engaged in a host of proactive legal and advocacy efforts around it. I absolutely agree, and I think you can try to do something. But as I said, I'm concerned it's already so big,

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48. 47 U.S.C. § 315 (2006).

it's already the model they've all embraced, so it's going to be very hard to disable it now, except for the worst aspects like those for kids. Some of the worst aspects can be disabled.

**Audience Participant:** I'm wondering about your view of the future and this approach. Is it going to be applied in areas other than entertainment? There's a whole realm of areas where there's an interactive approach such as healthcare. I mean, there's no limit.

**Adam Candeub:** Do you have a discount card in your supermarket? That's a wonderful example. They're keeping track of exactly what you eat, and they're stocking their shelves so that they have the food you want. Is that an Orwellian manipulation of your reality? I don't think that it is.

**Jeffrey Chester:** It's on when you turn on the TV. When you go on your mobile phone, the ad will be there. That's what they already are doing, what's underway already. I think that is Orwellian, and that's why the companies, including Microsoft, are opposed to a privacy policy where consumers would have to opt in. They don't want us to opt in because once you're given the choice, they know no one will allow them to collect all that kind of data. They understand your psychological vulnerabilities.

**Audience Participant:** My point is partly that when we talk about public policy, the concern is where we should be advocating. It's not just the entertainment information industry. It's much larger.

**Jeffrey Chester:** It's across the board, right.

**Audience Participant:** I'm not so sure, though, that we are as weak and vulnerable as is being portrayed because, in some cultures and in some countries, steps are being taken to emancipate people, and people can individually make those choices, too. You don't have to watch. But, in other places, you can get open source software. In some places in the world, such as in Munich right now, open source software is the system that's being used by government entities.

We happen to believe right now that in the United States maybe there's nothing we can do, but I would suggest there are things we can do, and perhaps this is the seedpod. Here and other places that you gentlemen and other speakers here are addressing, we're the seedpods for making that change. Perhaps not immediately, but the change is occurring in other places on the other sides of the oceans and on the other sides of national boundaries.

Just because here we feel helpless doesn't mean we cannot make those massive changes because abroad they are making them, notwithstanding the fact we're stuck in the mud over here.

**Jeffrey Chester:** It's true that in Europe right now there's a debate about whether to have network neutrality. Companies want to eliminate network neutrality. There are privacy safeguards in the EU that we should replicate. We should do more things like Larry Lessig did with his Creative Commons. There are models that we desperately need to embrace here but that will take a political movement on our part to do that. I agree with you.

**Audience Participant:** I would like the panel's response to this. I heard this statement maybe ten years ago on a panel on public broadcast: the accuracy of the news is inversely proportional to the size of the ownership.

**Adam Candeub:** You know, localism and local ownership of broadcast are generally considered to advance civic participation, but I actually think that's a debatable claim. In fact, the emphasis on local ownership may hide the more problematic ownership structure—common ownership of the press with other industries and commercial interests.

Certainly an alliance of a local interest with other large local business concerns could have a tremendous slanting approach on the news. The effect of that would be much worse because in small, isolated communities there are fewer sources of news. If the owner of a local plant is also the owner of a local newspaper or radio station, I think the people would be much worse off than if there was only one independently owned media outlet without financial interests in any other industry.

So I would disagree with that. I think that it's a very difficult determination.

**Lawrence Soley:** Well, I'm not sure what you mean by localism. I'd like to point out that you had up there on your power point a reference to the Prometheus Project,<sup>49</sup> and the Prometheus Radio Project was actually an attempt to localize radio. It was an attempt to get low wattage stations on the air, some that were five watt and some that were fifty watt stations. The Federal Communications Commission at the last moment decided that they wanted to legalize these stations and went ahead and put out a call for filings to get low power licenses. That was an example of more people in history filing comments with the FCC than in any other time in history. They adopted a policy to establish these local power free radio stations, and at the last moment the National Association of Broadcasters lobbied Congress to, in effect, stop this from taking place, so there wasn't any local market in any medium.

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49. Prometheus Radio Project, <http://www.prometheusradio.org> (last visited May 18, 2007).

**Adam Candeub:** I'm not supporting that. The only question was, is local ownership necessary, or how is it related to the accuracy or the skewing of news? It's an open question I think.

**Jeffrey Chester:** Look, there's no question in my mind that consolidation and concentration, which has been a long-term problem with the press, has had a deleterious effect upon the news media. The FCC allowed the takeovers to occur in '83 and '84 when TV was just a "toaster with pictures," according to the FCC chairman at that time. Under the Reagan regime, they allowed the takeover of all three of the networks. That's when the investigative units were killed. That's when the overseas bureaus were eliminated. That's when all the networks merged their voting return operations. They created a company called Voter News Service that played a sad role in the 2000 presidential election.

Local ownership is key, and I think the best example is the *Seattle Times*. There was only one publisher who stood up for the public interest advocates to fight media consolidation, and that was Frank Blethen, owner of the *Seattle Times*. There's something to be said about having a local independent ownership and groups that care about the community.

**Audience Participant:** Well, I was just going to debate your point about the local ownership of the *Seattle Times*. I know that the *Times* likes to emphasize it's a locally owned company, but it's also trying to shut down its competition, the *Seattle Post-Intelligencer*, which is owned by Hearst. I understand you to be advocating for a diversity of viewpoint. It seems to me it's inconsistent to say that local ownership is the answer in and of itself.

**Jeffrey Chester:** It's one of the answers. There was a joint operating agreement that Blethen and Hearst have. I think local owners are better. This would not be possible given the policies which the FCC, under Chairman Mike Powell, supports (a view shared by many large media companies). Under Powell's policy, in one large community, you could own three TV stations, eight radio stations, the daily newspaper, the cable company, and one of the principal internet service providers in the town. One company with that massive power without any safety guards for broadband and non-discriminatory access, that's what they wanted. That's likely what they're going to get. That's what we're facing.

**Lawrence Soley:** Let me make one last comment about low-power radio, because that still is a possibility. It is actually being implemented outside of medium and large metropolitan areas because of the two-channel separation that exists. That sort of technology is available. It's an old technology, but it's certainly new in the way that it will be used in the United States.

I would argue that this type of technology and this type of approach to broadcasting enhance discourse in a lot of ways. Let me give you an example. Local advertisers who aren't chains in a large market could advertise just in the local area on these lower-powered stations. They could effectively compete with chains like McDonald's, which get these huge economies of scale from buying one spot or two spots on that television station, and they get it to support maybe twenty, twenty-five, and thirty different food stores, if you want to call them that. You cannot compete in the advertising world today in broadcasting unless you get those types of economies of scale. And to some degree, the reason why we have this homogenization all over the United States is because of the broadcast media and the economies of scale that are available to these large retail chains.

Low-power broadcasting is something that could challenge that. It could localize the advertising and make messages available more broadly for smaller advertisers, but at the last moment, the NAB lobbied to kill it. This is what my book, *Free Radio*, is about, free radio electronic civil disobedience and how the free radio movement put these stations on despite the FCC trying to shut them down.<sup>50</sup>

**Jeffrey Chester:** This is who we're going to have to fight: the National Association of Broadcasters, the National Cable Telecommunication Association, the National Advertising Association, a host of think tanks, and a host of universities they help fund.

The telecommunications industry has built a very formidable, legal, and intellectual, political infrastructure. They're spending tens of millions of dollars flooding the airwaves in Washington and elsewhere over this Telecommunications Bill<sup>51</sup> that is now before Congress that ends the only policies that we've developed in this country to ensure there is some localism, namely the local cable franchise. That's gone because it's in the way of the phone and cable companies. They don't want to have any kind of local accountability, so there's a huge infrastructure beyond the NAB that we have to reckon with.

**David Skover:** Larry, when answering my earlier question, you quite correctly said that because there is a new medium, it's not as if the old media goes away.

I absolutely acknowledge that, but as Marshall McLuhan would say, as soon as there is a new medium that becomes dominant, the old

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50. SOLEY, *supra* note 35.

51. Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. (2006).

media become classic or they become art.<sup>52</sup> What he meant by that is that in order to justify their existence, they have to give a different value that is not competitive with what the new dominant medium is doing just as well as they. I think we're seeing this, for example, in the newspaper. Increasingly newspaper content is altering and we're getting news analysis which is the kind of commentary that arguably the newspaper can do better than the Drudge Report on the internet.

I'm not certain what we're going to see in terms of the new formats that come in more traditional media because of the new medium. But one thing I probably would be more certain of, just because if one looked at the evolution of media you see it again and again, is that the content format is likely to change in order that the medium be seen as providing something different, something better than what you'd be getting out of the new medium. So I'm wondering if the analyses that you're doing, not just you, but that the panel is doing, is not taking account of that phenomenon.

**Lawrence Soley:** Well, I think it does take into account that phenomena. When you talk about internet distribution news, you're primarily talking about the internet distribution of newspaper companies reformatting the medium with which they deliver pretty much the same message. It doesn't matter whether it's the *Washington Post* online, whether it's CNN.com, or whether it's *USA Today* online. For the most part, we're talking about the same companies.

It's conceivable that they could, for example, have pay-per-access, and many of them now are doing that, or they could disseminate the newspapers electronically, and you could conceivably print it out or could print it out in your own home. It's not a question of technology as much as it is the companies that are actually controlling it. That's one thing.

And the second thing is that, yes, we do have new technologies, but the ratings for CNN are very, very small compared to what the network evening news is. Of course, one of the problems with the network evening news is that it's a skewed demographic. This is why if you turn it on, you see a lot of ads for Viagra, anti-cholesterol drugs—all kinds of drugs. The networks have been attempting to adjust to that by bringing in new anchors, repackaging it, and repositioning it, but the networks aren't the same companies as the new media. If you're talking about Viacom, you know, you're talking about CBS. If you're talking about Disney,

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52. See generally MARSHALL McLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (MIT Press 1964).

you're talking about ABC. If you're talking about Fox, you're talking about Twentieth Century Fox.

**Jeffrey Chester:** Find yourself a tween. Look at your 8 year old—that's where they're focusing the structural changes. It's an entirely new approach to youth media. The system is being structured to focus on them. They're the key group.

The Web 2.0, the social networking model of building community and of being there and everywhere, will be, in fact, the kind of dominant model for television, for radio, for everything. As Larry pointed out, I am concerned that you have the major players of old and new media working together. They've eliminated these safeguards. They've eliminated ownership. The model of this community goes back to advertising, because they understand that word of mouth and developing relationships with individuals is the most effective way to sell a product for life-long service. They are creating that system using the Web 2.0 model to expand their power and worldview. That's what we need to face, and we need to, I believe, create an effective media alternative that promotes the civic sphere.

**Eric Chiappinelli:** Jeffrey Chester, Adam Candeub, and Lawrence Soley, thank you very much.