

De-Regulation of the Air Waves: Is Antitrust Enough?

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DE-REGULATION OF THE AIR WAVES:

IS ANTITRUST ENOUGH?

EDWARD D. CAVANAGH

*There goes the last DJ
Who plays what he wants to play,
Says what he wants to say,
Hey! Hey! Hey!*

*There goes your freedom of choice.
There goes the last human voice.
There goes the last DJ.**

By enacting the Telecommunications Act of 1996¹, Congress mandated large-scale deregulation of the television, radio, telecommunications and cable industries. Having successfully de-regulated the airline, interstate transportation and energy industries, Congress sought to dismantle the tangled legal, administrative and regulatory structure that had governed broadcast media and telecommunications for decades and replace it with a competitive model. Its goal was to minimize the inefficiencies inherent in any regulatory scheme and allow participants to reap the economic benefits of the free market. Equally important, Congress wanted to be sure that the emerging cable, satellite and cellular technologies were not stifled by the incumbent regulatory structure, which many viewed as outmoded and ill-suited to the marketplace of the 21st century. To assure that competition would be preserved in the

* TOM PETTY, *The Last DJ*, on THE LAST DJ (Warner Brothers 2002).

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (stating purpose of act is to promote competition and reduce regulation so as to secure lower prices and higher quality for telecommunications consumers).

absence of regulation, Congress made clear that antitrust law principles would govern this newly deregulated market.²

Nowhere has the impact of the Telecommunications Act been more dramatic than in the radio field. The Act unleashed a merger wave which has dramatically altered the competitive landscape in radio. That merger wave has certainly benefited many station owners by permitting them to capture economies of scale that simply could not have been achieved under a regulatory regime which limited the number of stations any entity could own.

These greater operational efficiencies, however, have come at a price. Fewer owners have led to fewer choices for radio listeners and hence reduced content diversity. The consolidation wave has also reduced ownership diversity; a smaller percentage of radio stations are now owned by blacks and Hispanics. Increased emphasis on the bottom line has led many stations to abandon local programming in favor of nationally syndicated shows starring personalities such as Imus or Howard Stern.³ As Congress, the Federal Communications Commission and the courts have chiseled away at owner restrictions in broadcasting, critics have pointed out that it is "important to the health of a democracy that a few powerful economic interests do not monopolize information outlets."⁴ Moreover, especially in the case of radio, it is not clear that the foregoing risk factors are counterbalanced by increased benefits to consumers offered by emerging cable, satellite and cellular technology. The revolution in communication technology has not led to an increase in available radio wavelengths, which remain essentially the same as they were in the 1930's,⁵ although newly introduced satellite radio is intriguing.

This article examines the role of antitrust in preserving

² See Telecommunications Act §601(b)(1) (noting that nothing in Act shall be construed to modify, impair or supersede applicability of antitrust laws).

³ See Laura M. Holson, *With By-the-Numbers Radio, Requests Are a Dying Breed*, N.Y. TIMES, July 11, 2002, at C1 (arguing that use of national research by major radio chains has resulted in radio programming sounding similar across nation).

⁴ *Protecting Media Diversity*, N.Y. TIMES, Feb. 23, 2002, at A14.

⁵ See Michael Ortner, *Current Public Law and Policy Issues: Serving A Different Master-The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139,147 (2000) (explaining that unlike television, ceiling on number of options available to radio consumers has remained relatively unchanged for decades).

competition among radio broadcasting outlets in an era of deregulation. It concludes that traditional antitrust analysis has been narrowly applied in the radio arena. Unless antitrust enforcers begin to focus on broader public policy goals, which have historically governed radio, notably consumer choice and content diversity, antitrust will not be an effective tool in preventing the monopolization of radio outlets. That would leave it up to the FCC and Congress to re-regulate radio broadcasting in a way which would promote consumer choice while minimizing regulatory inefficiencies.

BACKGROUND: RADIO REGULATION IN HISTORICAL PERSPECTIVE

Radio communication began as a novelty: a means of transmitting wireless signals to and from remote points on the globe. As the potential of radio as an entertainment medium became apparent, entrepreneurs rushed in to establish broadcast outlets. Soon, confusion reigned; the airwaves were cluttered with static and interference from rival broadcasters. Disputes arose as to who owned the airwaves and who had the right to broadcast at a given time.⁶ Congress addressed this problem by enacting the Radio Act of 1912⁷ which authorized the Commerce Department to resolve these disputes. The Act did not, however, create an administrative board to oversee the process and that fact, coupled with an inhospitable judiciary, doomed it to failure.⁸

In 1927, Congress tried again with the Radio Act of 1927.⁹ That law established the National Radio Commission to provide comprehensive regulation of the broadcast field.¹⁰ Among other things, the 1927 Act empowered the Commission to issue broadcast licenses, establish hours of broadcast, and assign

⁶ See Ortner, *supra* note 5, at 141 (explaining that increase in number of radio stations in 1920s resulted in numerous controversies over which broadcasters had right to use which wavelengths).

⁷ Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912) (granting Secretary of Commerce and Labor power to resolve disputes as to who had right to broadcast over which radio wavelengths and when).

⁸ See Ortner, *supra* note 5, at 141 (stating that extensive chaos of early radio broadcast disputes could not be effectively regulated by Secretary and that court decisions "removed the teeth" of Radio Act of 1912).

⁹ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (establishing Federal Radio Commission and granting it authority to regulate radio broadcasting).

¹⁰ See Ortner, *supra* note 5, at 142 (stating Congress empowered Commission to regulate all radio transmissions, both public and private, in United States).

wavelengths.¹¹ It required the Commission in issuing broadcast licenses to assure that the licensee served the “public convenience, interest, or necessity” of the local listening audience.¹² Seven years later, Congress passed the Communications Act of 1934,¹³ which created the Federal Communications Commission (“FCC”), an administrative body charged with implementing and overseeing regulation of broadcast entities.

The 1934 Act retained the “public interest, convenience or necessity” language of its predecessor. From the beginning, the FCC, in enforcing the 1934 Act, sought to meet its mandate by pursuing the goals of programming diversity and service of the public interest.¹⁴ As originally drafted, the Act had no limitations on station ownership. Over time, the Act was amended to provide specific limitations on station ownership. Thus, immediately before passage of the Telecommunications Act of 1996, an entity could own no more than two AM and two FM stations in a given market¹⁵ and no more than 40 nationwide.¹⁶ The Telecommunications Act of 1996 significantly loosened these restrictions. Under the new law, an entity could own as many as eight stations in a given market; and the restrictions on the number of radio stations that could be owned nationally were abrogated.¹⁷

¹¹ See *id.* (stating Commission had authority to grant licenses, assign wavelengths and make specifications regarding equipment).

¹² See *id.* (stating that Act mandated that Commission’s legal discretion in granting licenses be aimed at assuring that broadcasters’ goals served public interest and convenience).

¹³ 47 U.S.C. § 151 (2000) (creating Federal Communications Commission to regulate foreign and national communication commerce in radio).

¹⁴ See *Great Lakes Broad. Co. v. Fed. Radio Comm’n*, 37 F.2d 993 (D.C. Cir. 1930) (affirming FCC’s denial of full broadcasting time to one radio channel and splitting of broadcasting times between two different radio channels); see also Ortner, *supra* note 5, at 145 (stating that *Great Lakes Broad. Co.* and its progeny signified FCC’s protection of public interest through commitment to programming diversity).

¹⁵ See *Revision of Radio Rules and Policies*, 59 Fed. Reg. 49006, 49007 (Sept. 15, 1994) (to be codified at 47 C.F.R. pt. 73) (limiting number of radio stations party could own to three in markets with fourteen or fewer commercial radio stations and limiting ownership to two AM and two FM stations in markets with fifteen or more commercial radio stations).

¹⁶ See *Revision of Radio Rules and Policies*, 59 Fed. Reg. at 49,008 (providing that no entity shall own more than 20 AM or 20 FM stations within two years of effective date of Rule); see also Ortner, *supra* note 5, at 145 (noting that amendments to Communications Act of 1934 specifically limited number of radio stations single entity could own to forty).

¹⁷ See *Telecommunications Act* §§ 202(a)-(b) (eliminating limitation on number of AM and FM broadcast stations that single entity may own or control and utilizing sliding

ANTITRUST ANALYSIS IN RADIO MERGERS

Historically, antitrust played almost no role in scrutinizing radio mergers. That is because FCC restrictions on station ownership (four in a given market, forty nationwide) were far more restrictive than what might be allowed under the antitrust laws.¹⁸ Antitrust became a factor in radio mergers only after the enactment of the Telecommunications Act with its mandate to loosen regulatory restrictions on station ownership.¹⁹ The impact of the Telecommunications Act on radio ownership was both immediate and dramatic. In the year immediately following passage of the Act, over one thousand radio mergers occurred.²⁰ In the period 1996-2001, the number of radio station holders declined by 25%, even though the total number of stations increased by 7%.²¹ The largest station owner, Clear Channel, now owns over 1200 stations.²² By contrast, the largest radio owner in 1995, Westinghouse and its affiliates, held 85 stations.²³ Notwithstanding the increase in the total number of stations, the number of owners has declined. From March 1996 to March 2000, the number of radio station owners per market declined by three.²⁴

scale of commercial radio station ownership based upon number of commercial stations in given market).

¹⁸ See Lawrence Fullerton, *Current Issues in Radio Station Merger Analysis, Address Before the Business Development Associates Antitrust 1997 Conference* (Oct. 21, 1996) (stating merger enforcement is new phenomenon in radio industry because FCC restrictions on station ownership tended to be more binding than antitrust constraints), available at http://www.usdoj.gov/atr/public/speeches/speech_fullerton.htm (last visited October 30, 2002).

¹⁹ See *id.* (stating that although Telecommunications Act raised station ownership limits, Act made clear that antitrust review of radio station mergers was left unaltered).

²⁰ See Joel I. Klein, *DOJ Analysis of Radio Mergers* (Feb. 19, 1997) (stating there has been explosion of over 1000 radio mergers since passage of Telecommunications Act of 1996), available at <http://www.usdoj.gov/atr/public/speeches/jik97219.htm> (last visited October 30, 2002).

²¹ See Federal Communications Commission, *Review of the Radio Industry, 2001* (Sept. 2001) (stating that over five year period between March 1996 and March 2001, number of commercial radio stations increased 7.1% while number of station owners decreased by 25%), available at <http://www.fcc.gov/mb/policy/radio.html> (last visited October 30, 2002).

²² See Media Access Project, *Issues: Media Consolidation/Encouraging Diversity of the Electronic Media* (stating Clear Channel Communications owned 1,202 stations in 2001), available at <http://www.mediaaccess.org/programs/diversity/index.html> (last visited October 30, 2002; see also Holson, *supra* note 3, at C8 (stating that Clear Channel has doubled its number of stations since 1999).

²³ See Media Access Project, *supra* note 22 (stating Westinghouse owned 85 radio stations in 1996).

²⁴ See Federal Communications Commission, *supra* note 21 (stating such decline is

In analyzing radio mergers, the Department of Justice Antitrust Division has focused principally on the questions of whether the mergers would lead to increased prices for radio advertising.²⁵ In answering this question, the Justice Department uses the analytical techniques embodied in the 1992 Horizontal Merger Guidelines.²⁶ The first step under the Guidelines is to define the relevant product and geographic markets. Products are considered to be in the same market if they are substitutes, price, use and quality considered. The principal focus of the debate on product market is whether radio is a separate and distinct product or whether it is part of a broader "media" market that would include radio, television, cable newspapers and the Internet. The Justice Department has consistently maintained that radio advertising is unique and not interchangeable with other forms of media advertising, and hence a relevant product market.²⁷

A geographic market is determined by the area of effective competition.²⁸ A geographic market may be local, i.e., a city; regional, i.e., a state or region of the country; national; or international. Because by its nature, radio advertising is highly localized, most mergers are analyzed in narrowly defined local markets.²⁹ Generally, in radio cases the issue of geographic market has not been a highly disputed issue.³⁰

Once a relevant market is defined, the next step is to determine the likely competitive effect of the proposed merger.³¹ Enforcers will challenge only those radio mergers, which are

due primarily to mergers between existing radio station owners).

²⁵ See Fullerton, *supra* note 18 (stating Department of Justice's review of radio mergers focuses on risk that mergers will result in increased radio advertising prices).

²⁶ 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sept. 10, 1992) (outlining enforcement policy of Department of Justice and Federal Trade Commission concerning horizontal acquisitions and mergers).

²⁷ See Fullerton, *supra* note 18 (stating Department of Justice has taken position that radio advertising is relevant product market for antitrust purposes).

²⁸ See 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41,552 (stating geographic markets are determined based upon where firms produce or sell).

²⁹ See Klein, *supra* note 20 (stating Department of Justice generally utilizes metropolitan areas as appropriate markets when assessing market power).

³⁰ See *id.* (stating problems only arise when argument is made that because radio station can be heard in given area station should be included within area's geographic market).

³¹ See *id.* (stating that once relevant geographic market is defined, Department of Justice then considers whether merger will create or enhance market power within geographic market).

likely to produce significant, non-transitory increases in advertising rates.³² As a rule of thumb a significant non-transitory price increase is one that results in rate increases of 5 percent for at least one year.³³

Coordinated effects are anticompetitive where the merger increases the likelihood the competitors in the post-merger market will cooperate on price rather than compete or where the merger would facilitate cooperation on price.³⁴ For example, assume that a relevant market has six competitors: A, B, C, D, E and F. A and B merge. Now there are five competitors. In analyzing the coordinated effects of the merger, the Justice Department asks whether the A-B mergers would facilitate collusion with C, D, E and F.

The theory of unilateral effects, which is the predominant mode of analysis in radio cases,³⁵ focuses not on the merger's impact on rivals, but on whether the merger would enable the new created entity unilaterally to raise prices for advertising. For example, X owns two of four rock stations in a given geographic market and seeks to acquire the other two. There are a number of other formats in this territory, including country, easy-listening, all-news and classical. Advertisers on the rock station are trying to target a certain audience. Prior to any acquisition of the other two stations by X, advertisers can seek to bargain with X to get lower rates on its stations by threatening to take their business to the rock stations X does not own. If X acquires the other two rock stations, that leverage that existed for advertisers prior to the merger is gone and rates are likely to go up.³⁶ Accordingly, anticompetitive unilateral effects have been established.

Given the likelihood of anticompetitive effects, the next

³² See Fullerton, *supra* note 18 (explaining that focus of Department of Justice review of radio transactions has been on prospect of increased pricing for radio advertising).

³³ See 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41, 552 (stating Agency will use 5% price increase to objectively determine effect of small but significant nontransitory price increases).

³⁴ See Klein, *supra* note 20 (stating mergers increase likelihood of coordinated anticompetitive effects because concentrated markets facilitate anticompetitive cooperation among competitors).

³⁵ See *id.* (stating that unilateral effects approach has dominated Department of Justice's analysis of radio mergers).

³⁶ See *id.* (explaining that when advertiser's first and second choices in radio stations merge, advertiser's ability to negotiate advertising prices has been diminished).

question is whether a price increase by the newly merged entity could be thwarted by rivals through, for example, entry of a new station or reformatting of an existing station.³⁷ If the answer is yes, then the merger will be permitted to go forward. If the answer is no, then the merger raises anticompetitive concerns.

Addressing these anticompetitive concerns is no easy task. There are no bright-line rules as to when a radio merger will be judged lawful or unlawful. Nevertheless, where a newly merged radio station has at least 35% of the advertising revenues in a defined market, antitrust enforcers are likely to sit up and take notice.³⁸

DOES ANTITRUST WORK?

The vast majority of mergers in radio pass muster under the foregoing analysis. This fact and the undeniable trend toward concentration in radio ownership which it has produced, has led critics to question the reliance of antitrust enforcement to assure competition and to call for re-regulation of broadcast media.³⁹ Antitrust may not be a reliable vehicle for assuring competition in radio for several reasons. First, its analytical focus is too narrow. Justice Department scrutiny of mergers has focused principally on the likely impact on advertising rates.⁴⁰ Antitrust analysis has not encompassed other important goals affecting consumer choice, including content diversity and the need for local stations to address local concerns. The concern here is that if the merger trend were to continue unchecked, the public would be exposed to content furnished by one or two providers. Choices would be severely limited.⁴¹

This concern is not unfounded. More and more, radio stations throughout the country are eschewing their own original

³⁷ See *id.* (explaining that once Department of Justice's merger analysis reveals anticompetitive effects, Department then determines if changed behavior by current vendors or possibility of new entrants to market will ameliorate harm).

³⁸ See *id.* (recommending that firms entering into merger agreements that will result in 35% market share seek advice of antitrust counsel).

³⁹ See *Protecting Media Diversity*, *supra* note 4, at A14 (arguing Congress has key role to play in restructuring regulatory system so as to make system more equitable).

⁴⁰ See Fullerton, *supra* note 18 and accompanying text.

⁴¹ See *Protecting Media Diversity*, *supra* note 4, at A14 (claiming that diversity in media programming is essential to health of American democracy).

programming in favor of syndicated programming.⁴² Thus, the Imus and Howard Stern programs, both of which originate in New York City weekday mornings may be heard throughout the country in real time. Other syndicated shows, such as Kasey Kasem's American Top 40, are prerecorded and may be aired at various times. This trend is not only to fill down listening time, e.g., overnight, but also extends to peak-listening drive-time slots. The result is less choice for the listener and less connection between the programming and the locality where it is aired.

Consumer choice is being undercut in a second, equally important, way as the radio industry becomes dominated by three or four radio conglomerates.⁴³ Radio programmers, intent on elevating ratings to shore-up the bottom line, no longer accommodate requests of individual listeners or play music by unknown bands.⁴⁴ Rather, they play only music that research polls indicate are favored by listeners. Some stations charge record companies as much as \$20,000 per song to "pretest" unreleased music on their nationwide networks.⁴⁵ All of this, critics say, has produced homogenized radio music and erected barriers to entry for new sounds.⁴⁶

There are two responses to these concerns. Antitrust conservatives would not be particularly alarmed about these developments from an antitrust perspective because the principal goal of antitrust enforcement is to assure that markets operate efficiently.⁴⁷ Antitrust in their view, should not be used to dictate programming decisions.

The second response is that consumer choice is an important aspect of a competitive market.⁴⁸ Put another way, reduction in

⁴² See Polly Higgins, *Tucson Radio Making Waves: Corporate Radio Moves In*, TUCSON CITIZEN, May 3, 2002, at A1 (noting that rapid increase of syndicated programming and decreased diversification is in sharp contrast with original purpose of radio to function as local medium).

⁴³ See Holson, *supra* note 3, at C1 (noting that world of radio is evolving into industry dominated by three or four major chains).

⁴⁴ See *id.* (stating that radio programmers no longer play songs requested by listeners or risk playing songs by unknown local bands).

⁴⁵ See *id.* (noting that radio division of Clear Channel Communications charges record labels up to \$20,000 to test unreleased music on its nationwide network of programmers).

⁴⁶ See *id.* (arguing radio programmers' quest for ratings has led to homogenization of music radio).

⁴⁷ See e.g., ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF; WITH A NEW INTRODUCTION AND EPILOGUE*, 50-90 (The Free Press 1993) (1978) (arguing that goal of anti-trust law is maximization of consumer welfare).

⁴⁸ See Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U.

consumer choice is a reduction in competition.⁴⁹ Under this view, antitrust is an appropriate vehicle to address reduction in content choice. Indeed, reduction in content choice was a significant issue in the AOL/Time-Warner merger.⁵⁰ The fact is, the view of the Chicago School notwithstanding, preservation of consumer choice has always been an important component of antitrust policy. The Supreme Court in the *Northern Pacific*⁵¹ case described the Sherman Act as a “comprehensive charter of economic liberty” which “rests on the premise that unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress. . .”⁵² Implicit in this declaration is that misallocation of resources and artificially high prices distort consumer choice.

Reduction of consumer choice has been explicitly held to be the basis for finding certain joint conduct illegal. In *FTC v. Indiana Federation of Dentists*⁵³ the Supreme Court found that an agreement among rival dentists to withhold patients’ dental records from insurers was unlawful for “limiting consumer choice by impeding the ‘ordinary give and take of the marketplace’”.⁵⁴ Similarly in *United States v. Visa Inc.*,⁵⁵ the trial court condemned exclusionary practices of Visa and Mastercard which

PITT. L. REV. 503, 503 (2001) (stating antitrust laws are designed to ensure competitive marketplace that produces worthwhile consumer options).

⁴⁹ See *United States of America v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 330-79 (S.D.N.Y. 2001) (holding defendant’s exclusionary rules restricted competition by denying consumers innovative and varied products); see also *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (holding dentists’ agreement to withhold particular x-ray services from patients was anti-competitive in nature and impaired market ability to advance social welfare).

⁵⁰ See *Protecting Media Diversity*, *supra* note 4 (suggesting media giants like AOL/Time Warner will benefit from District of Columbia Court of Appeals decision nullifying F.C.C cross-ownership rule and allowing same company ownership of both cable and local broadcasting systems).

⁵¹ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 2-12 (1958) (finding that Northern Pacific Railway manipulated economic power gained through its extensive landholdings to persuade purchasers and lessees to give Northern Pacific preference over competitors in transporting goods).

⁵² *Id.* at 4.

⁵³ 476 U.S. at 459 (holding dentists’ agreement to withhold particular x-ray services from patients was anti-competitive in nature and impaired market ability to advance social welfare).

⁵⁴ *Id.* at 459.

⁵⁵ 163 F. Supp. 2d 322, 330 (S.D.N.Y. 2001) (repealing defendant’s exclusionary rules because they served to restrict competition among card companies and harmed consumer choice).

it found had stifled innovation and had ultimately denied consumers choice in selecting payment instruments, including “smart cards”.⁵⁶

Finally, in *United States v. Microsoft Corp.*,⁵⁷ perhaps the most significant antitrust case of this generation, the central competitive concern has not been the monopolistic prices charged by Microsoft but rather the diminution in consumer choice caused by Microsoft’s stifling of innovation and delayed introduction of new products.⁵⁸

Professor Robert Lande, in his thoughtful article entitled *Consumer Choice as the Ultimate Goal of Antitrust*⁵⁹ has argued persuasively that consumer choice should be given a more prominent role in antitrust analysis. He correctly notes that a consumer choice orientation in antitrust cases will normally result in a continuation of current enforcement policies.⁶⁰ More important is Lande’s observation that the effect on consumer choice is a significant factor to consider in passing on media mergers.⁶¹ The acquisition of one radio station by another may not lead to any significant, permanent increase in advertising rates; but it may lead to loss of editorial diversity, a loss that cannot be regained through non-price competition among surviving firms, since any new product would bear the approval stamp of the merged company.⁶²

One example of how lack of editorial diversity can harm consumer interests is the fiasco that resulted from the media

⁵⁶ *Id.* at 347-353 (describing how smart cards function and how defendants impeded development of smart card technology and promoted anti-competitive practices).

⁵⁷ 87 F. Supp. 2d 30, 35 (D.D.C. 2000) (holding that defendant violated Sherman Antitrust Act by maintaining monopoly power and by attempting to monopolize Web browser market by illegally tying its Web browser to its operating system) *modifying* 253 F. 3d 34 (D.C. Cir. 2001) *cert. denied* 122 S. Ct. 350 (2001).

⁵⁸ *See id.* at 40 (stating Microsoft’s anticompetitive actions destroyed competitive process which stimulates innovation and conduces to benefit of consumers).

⁵⁹ *See* Lande, *supra* note 48, at 504-05 (arguing consumer choice centered antitrust policy will lead to more efficient market, lower prices, better quality, higher consumer surplus and will protect important elements such as innovation, variety, quality and safety).

⁶⁰ *See id.* at 514-15 (stating choice orientation to antitrust will result in continuation of current enforcement policies and will, in few situations, extend protections into new areas).

⁶¹ *See id.* at 517-18 (arguing media mergers should be scrutinized for loss of non-price competition along dimension of programming diversity).

⁶² *See id.* at 517 (stating that if one communications medium were to buy another of same kind, market would suffer loss of editorial diversity that could not be recreated through non-price competition mechanism).

attempts to project the results from Florida in the 2000 presidential election.⁶³ All six media outlets⁶⁴ involved called the election wrong *twice* because they all relied on the same polling data. Initially, each entity relied on its own data, but by the early 1990's the six outlets decided to merge their exit polling operations. This may have been good from a business perspective, but it was clearly bad for consumers.

Accordingly, the problem is not with antitrust itself but how it is implemented by enforcement agencies. The fact that antitrust enforcement is largely left to the discretion of agency heads, however, is a second reason that critics of the *status quo* lack confidence in antitrust as the guarantor of competition in radio broadcasting. The intensity of antitrust enforcement has historically been cyclical, as events in recent decades demonstrate. Antitrust enforcement in the Carter Administration was vigorous. In the Reagan Administration, federal civil antitrust enforcement virtually disappeared. Agency activity picked up moderately during the first Bush Administration and came into full flower during the Clinton years.

While it is still much too early to make any definitive judgments about the antitrust enforcement record of the second Bush White House, critics have voiced doubt about the Administration's commitment to antitrust. The focal point of this criticism has been a proposed pact,⁶⁵ since disbanded, between the Antitrust Division and the FTC, dividing responsibilities for the pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.⁶⁶ Under that Act, the Antitrust Division and the FTC share concurrent jurisdiction over pre-merger review.⁶⁷ In some cases, both agencies express

⁶³ See *id.* at 519-22 (discussing 2000 Presidential election as example of what can happen when inadequate competition in media sector leads to inadequate consumer choice).

⁶⁴ See *id.* at 519 (describing how every major network prematurely and incorrectly declared that Vice President Gore had won Florida primary).

⁶⁵ See Cheryl Leanza and Harold J. Feld, *Choice for Consumers*, LEGAL TIMES, May 27, 2002 at 54 (stating FTC and Department of Justice's rescission of agreement to assign antitrust review for each commercial sector to one agency bodes well for American consumers who benefit from overlapping jurisdiction).

⁶⁶ 15 U.S.C. § 18a (2002).

⁶⁷ See *id.* (stating FTC and Antitrust Division of Department of Justice must each receive notification).

interest in scrutinizing a proposed merger. When that happens, representatives of each agency meet to “clear” pre-merger review to one agency or the other to avoid duplication of effort and to assure consistency in decision – making. In 2001, to make the pre-merger process even more transparent and efficient, Charles James of the Antitrust Division and Tim Muris of FTC, proposed a pact that would determine in advance which agency would be responsible.⁶⁸ Under that plan, most media and communications mergers would fall into the bailiwick of the Antitrust Division.⁶⁹

Critics of the proposed division of labor expressed fear that if this plan were implemented, media mergers would be simply rubber-stamped by the Justice Department and escape any serious antitrust review.⁷⁰ They urged that the FTC, an independent agency of government, not be forced to cede jurisdiction of merger review in specified fields because having two rather than one watchdog was more likely to assure appropriate antitrust review of mergers in the broadcast industry.⁷¹

The firestorm surrounding this proposed plan has subsided because the agencies, under pressure from some in Congress,⁷² have decided to abandon it. Nevertheless, this tactical retreat by the agencies has done little to restore the confidence of critics that antitrust alone can effectively preserve competition in broadcast media. Indeed, recent court decisions⁷³ and the FCC’s own moderation of restrictions on broadcast station ownership are likely to accelerate the trend in media mergers.

The question is how to preserve the free market and at the same time preserve diversity of news, entertainment and

⁶⁸ See Leanza, *supra* note 61, at 54 (stating assistance attorney general for antitrust, Charles James, secretly negotiated with FTC Chairman Timothy Muris).

⁶⁹ See *id.* at 54 (stating FTC would have been precluded from acting in telecommunications and media merger cases).

⁷⁰ See *id.* (stating most controversial aspect of joint memorandum was assignment of telecommunications and media mergers to Department of Justice).

⁷¹ See *id.* (arguing that dual-agency review ensures that both agencies will develop comprehensive approach to examining difficult mergers).

⁷² See Caroline E. Myers, *Merger Review Plan Scuttled; Hollings’ Threats Kill Proposal*, THE WASHINGTON POST, May 21, 2002 at E-1 (stating Justice Department and FTC, in face of strong opposition from Senator Ernest F. Hollings, indicated to Senate that they would abandon agreement).

⁷³ See *e.g.*, *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (holding FCC’s decision not to repeal or modify national television ownership rule and cable/broadcast cross-ownership rule was arbitrary and capricious and contrary to law).

opinion, as well as localism. This is no easy task. Redirected antitrust enforcement is one potential avenue for preserving the balance between efficiency and diversity. But, any antitrust solution is necessarily short term and *ad hoc*.

Congress, the FCC and courts, by chiseling away at ownership restrictions piecemeal, have produced a patchwork quilt of uneven and perhaps inequitable regulation.⁷⁴ The current system is in obvious need of restructuring, and Congress is in the best position to revisit all issues affecting broadcast ownership and mergers. Deregulation, while a step in the right direction, is not the answer. Some modest regulation by Congress, which assures that the channels of mass communications, so vital to our democracy, are not merged into the hands of two or three media conglomerates, thereby preserving diversity of content and localism in broadcast media, is essential. Congress now has a window of opportunity in which to act; its failure to do so may have a devastating impact on the market for free ideas. In the meantime, it is both unfair and unwise to expect that antitrust can provide all the answers.

⁷⁴ See *Protecting Media Diversity*, *supra* note 4 (stating Congress, FCC and courts have chiseled away intricate web of media ownership rules designed to preserve competition and diversity in information marketplace and replaced it with process that has resulted in inequitable regulation).