Anti-Monopoly in the Media Industries: A History

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When viewed through the lens of technological development, the history of the media in America's twentieth century appears to be defined by proliferating diversity, as newspapers were joined by radio, then television, and then the Internet (in all of its multiplicities). But when viewed through the lens of political economy, a different history of the media emerges – one in which consolidation and centralization of ownership has posed ongoing challenges to media diversity. The number of newspapers in the nation, for instance, reached its highest point in 1909, and has been declining ever since.[i] Witnessing the rise of newspaper chains and one-newspaper towns, commentators have been worrying about the disappearance of a diverse daily newspaper market for just as long. When broadcast media emerged in the interwar years, similar issues of centralized control arose when networks developed and when newspaper publishers began purchasing stations to create the first mixed-media companies. And from William Randolph Hearst to Rupert Murdoch, fear of the power of media barons has been a recurrent feature of American political culture across the century. As was typical of so many other economic fields, these processes of centralization and consolidation were often criticized as signs of "monopoly" – a label that grasped powerful tendencies in the media industries, even if a perfect monopoly in the media never emerged.

Monopoly in the media poses unique challenges to American democracy. Self-rule and the formation of public opinion rely on the free flow of information to the public, but the actual

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circulation of information in the twentieth century polity rested on media markets that were structured by economics, not by abstract norms of democratic theory. At the same time that liberal philosophy came to embrace the notion of a "free market of ideas" as the *sine-qua-non* of a democratic public sphere, the actual media market was consolidating and centralizing. There have always been straightforward normative reasons to favor diversified ownership in the media as a good in and of itself – it deprives media barons of untoward power over public discourse; it provides greater checks on corruption; competition provides a check within the media landscape itself.[ii] And it seems hard to have a robust and diverse public sphere, full of contrasting view points and multiple sources of information, when ownership forms a bottle-neck in the marketplace of ideas.

Finding a policy solution to increasing concentration in the media industries, however, has proven elusive. This chapter narrates a history of anti-monopoly efforts in the media industries since the late nineteenth century. It argues that while concern about media monopoly arose repeatedly across the century, efforts to address trends to consolidation were always partial and inadequate. This was the case for two primary reasons.

First, the strange and complex economics of the media industries upset efforts to articulate clear policies of diversification. Unlike most industries, there are two consumers involved in any transaction in the media marketplace – the citizen-consumer who has purchased the media commodity to read, watch, or listen to the media content; and the advertiser who has purchased the advertising time or white space in the media content to reach the citizen-consumer. Increasingly, the sale of white-space to the advertiser became the central economic relationship in the media field. As Walter Lippmann put it in a study of the newspaper business in the early 1920s, "circulation is, therefore, the means to an end. It becomes an asset only when it can be sold to the advertiser."[iii] By the second half of the twentieth century, newspapers earned something like 70% of their revenue from advertising; broadcast media like radio and television were completely free to the consumer and the broadcasters made money exclusively by selling the attention of their audience to the advertisers.[iv] Nevertheless, media companies in the twentieth century were always involved in a triangular trade, selling to two consumers.

The result was that policy-makers seeking to diversify the media were faced with two sets of consumer interests to manage when seeking to intervene in markets trending toward monopoly. They could try to directly promote the interests of the citizen-consumer in receiving diverse forms of content by articulating something like a public interest defense of media diversity – a move which made sense in terms of democratic desires to create a well-informed public, but which tended to bracket the advertising exchange at the heart of the industry's actual economics. Or they could try to defend competitive economics in the media industries by regulating the advertising market – a move which promised to address the mechanisms by which smaller media players were actually driven from the market, but which protected the consumer interest in media content only indirectly, as a potential downstream beneficiary from a more competitive media marketplace. As we will see, while reformers flirted with both approaches, they never fully embraced either. In part, this was because the ambiguities of media economics made it hard to apply the consumer-interest standard which drove most anti-trust policy in the twentieth century.

There was also a second reason that these efforts to develop pro-diversity policies were only ever partial – they were always deeply controversial, and opposed by the media industries themselves. Throughout the century, the media industries mobilized a third vision of ideal policy in the media – a laissez-faire vision that any form of pro-diversity policy was a statist interference with the free marketplace of ideas. On this view, which obviously benefitted the bottom-line of powerful media enterprises, any concentration that emerged in media markets was a function of aggregate consumer demand, and hence more democratic than any top-down regulatory framework could ever be. Moreover, media industry lobbyists argued, any state regulation of media economics was a form of statist interference in the public sphere, and hence a form of potential censorship that threatened the "free marketplace of ideas" that the First Amendment was intended to protect. Compared with the ambiguities posed by developing a public interest approach to media regulation on behalf of the citizen, or the difficulties and technocratic minutiae involved in minimizing uncompetitive practices in the advertising marketplace, this was a vision of media policy compelling in its simplicity, one that mobilized democratic and civil libertarian norms to shore up already existing media economics. Over the course of the twentieth century it played a central role in first blunting, and then rolling back efforts to confront media consolidation.

Throughout the twentieth century, as this chapter traces, media policy emerged out of clashes between these three visions: a public interest vision centered on the citizen-consumer; a pro-competitive vision centered on economistic regulation of the advertising marketplace; and a laissez-faire vision of the "free marketplace of ideas." The chapter begins in the long progressive era, documenting the rise of concerns about media concentration and monopoly. Part 2 then explores anti-monopoly activity during the late New Deal, when anti-trust action in the newspaper and radio fields came closest to developing a public interest approach to media policy – only to be confronted and curtailed by vigorous arguments from the media industries that a laissez-faire policy was necessary to protect civil liberties from statist regulation. The compromise that emerged from this clash is the subject of part 3, which shows that media policy in the two decades after World War II was defined by attempts to protect competitive economics in the industry on strictly economic criteria – they took a technocratic form far-removed from the democratic passions that mobilized the public-interest approach. And while such economistic approaches might have accomplished much to diversify media if they had been whole-heartedly embraced, they were only applied in a partial and incomplete fashion. As Part Four shows, the mid-1960s did witness a brief resurgence of interest in media diversity and an attempt to more rigorously apply pro-competitive policies. But amid political backlash from the media industries, a general turn to free market economics, and a proliferation of new media technologies, the period since the 1970s has witnessed the triumph of the laissez-faire vision of media policy – as well as an ongoing consolidation of media ownership.

PART 1: The Problem of Media Monopoly

In the second half of the nineteenth century, the media landscape of the U.S. underwent a series of remarkable transformations. Increasingly urban and increasingly literate citizens provided expanding markets for newspaper publishers. A booming advertising industry, keen to access those markets of potential customers, provided new streams of revenue. And a series of interlocking transformations in printing technology – the application of steam power to the press, new methods of newsprint production, and the mechanization of type-setting – meant that newspaper publishers had the capacity to print ever-larger newspapers in ever-larger numbers. In short, the press underwent an industrial revolution.[v]

But as in so many industries in the gilded age, industrialization threatened diversity in the newspaper industry. It was expensive to purchase and run the plant required to produce one of the new mass newspapers – creating a newspaper, as one journalist observed in 1892, now "involved the sinking of considerable capital."[vi] The only way to cover those costs was to rely on advertising revenues. But advertisers were incentivized to purchase white-space only with the most successful papers in any given market, for that would allow them to reach the widest number of readers at the lowest cost per reader. This created a dangerous spiral, in which profitable newspapers with a large market-share grew ever more profitable, with greater resources to grow their market-share still further. Smaller newspapers, by contrast, became starved of revenue, unable to compete with their expanding rivals. As early as 1900, one industry-watcher was already declaring that "the newspaper business, if not a 'natural monopoly,' is at least a business in which a large aggregation of capital and a widespread and unified organization for news-gathering and news-distribution is essential to success."[vii] Or as another commentator put it in 1915, "the increased cost of production in every department will drive the weaker and less efficient papers either to merge with the stronger or suspend."[viii]

The first decades of the twentieth century thus witnessed both the growth of overall circulation, and a decline in diversity. Newspaper consolidation took two primary forms. First, as smaller newspapers went under, one-paper towns became the norm – in 1910, 689 cities had competing dailies; by 1930, only 288 did.[ix] Second, the remaining newspapers were increasingly united under common ownership. By 1933, there were 63 newspaper chains in the nation, which held 37% of daily circulation[x] Frank Munsey, one of the first men to establish a chain newspaper, explained what was going on: "The same law of economics applies to the newspaper business that operates in all other important businesses today; small units in any one are no longer competitive factors."[xi] Oswald Garrison Villard reached the same conclusion, complaining in 1931 that "the daily tends to disappear…there is now evidence that the trend among newspapers is as distinctly toward monopoly as elsewhere in industry."[xii]

The same reformers who were generally agitated by the rise of monopoly were also concerned about the consolidation of the newspaper industry, which seemed to pose particular threats to the democratic process. It didn't take long for the muckrakers to explore the ways that monopolistic business interests were controlling public opinion through economic influence over the press – Ray Stannard Baker revealed "How Railroads Make Public Opinion," while Charles Edward Russell explored the "Keeping of the Kept Press," in which the press was responsible for "not so much (in the old phrase) molding public opinion as perverting or poisoning it." (Pearson concluded that the press was "gag[ged] through the irresistible medium of the advertising business."[xiii]) As Richard John shows in this volume, Henry George's interest in monopoly was sparked by his failure to purchase a wire subscription for his San Francisco newspaper, and he continued to be concerned about the "bondage of the press" to business interests in the early twentieth century.[xiv] In 1911, William Jennings Bryan, who had complained about corporate corruption of the press since his 1896 electoral defeat, asserted that "so many newspapers are owned by, or mortgaged to, speculators, capitalists and monopolists, and are used for advocating or excusing legislation, having for its object the conferring of special privileges upon a few of the people at the expense of the rest of the people, that the press has been robbed of much of its legitimate influence."[xv] Control over the press, reformers worried, had become consolidated in a few hands, closely aligned with the interests of the economic elite.

Such concerns about media monopoly reached a crescendo during the New Deal. New Deal investigations of the corporate economy confirmed the many ways in which monopolists influenced public opinion through the increasingly consolidated press. FTC explorations of the public utilities industry, for instance, revealed the prevalence of power industry propaganda throughout the press. Press critics decried the power of the "Utilities octopus" over the press; one commentator noting that it was a "result of the incorrigible forces of economic determinism" – or, more precisely, "the concentration of ownership and control in the newspaper field similar to what is going on elsewhere."[xvi] Meanwhile, as newspapers expanded their holdings in the radio – they would own 1/3 of radio stations by decade's end – critics worried that the rise of the new medium inaugured an era of increasingly powerful cross-media companies. "If monopoly is bad in the material realm," declared one such critic, "it is infinitely worse in the realm of instruments for the formation of public opinion." Or as one letter writer to the *New York Times* put it, if newspaper publishers are allowed to own radio stations, the "circle of transmitting information will be disastrously closed with dangerous consequences for the spirit of the free press principle." In the same years, tellingly, people began to describe such media combinations with a new, troubling, metaphor – they were media "empires."[xvii]

Creating particular concern in the minds of reformers was the outsized role that powerful, deeply conservative media barons were playing in opposing the New Deal. William Randolph Hearst used his vast media holdings to criticize FDR's administration, as did the *Chicago Tribune*'s Robert McCormick – the reformist impulses of the New Deal not only upset these men's conservativism in principle, but efforts to introduce measures like "truth-in-advertising" threatened their bottom lines. Soon the publishers were working to defeat FDR in the polls. Hearst organized Alf Landon's campaign, publisher Frank Knox was Landon's vice-presidential candidate, McCormick funded Landon campaigners, and only 37 percent of newspapers endorsed the sitting president. "The electorate went to the election booths," observed Oswald Garrison Villard, "under the strongest impression not only that the press was mainly Republican, but that it was fighting not for the country as a whole but for its own personal interests."[xviii] Such press politicking continued in the late 1930s. Frank Gannett, head of the large Gannett newspaper chain, for instance, funded a Committee to Uphold Constitutional Government to attack FDR's plans to pack the Supreme Court and reorganize the executive – he also fancied a run for the presidency in 1940.[xix]

In this context, media critics became increasingly convinced that consolidation in the media industries was interfering with the flow of information to the public, and hence distorting the formation of public opinion. Max Lerner thought that "the American press today is 90 percent a class monopoly. That means that it responds to the pressures and compulsions to which other big business enterprises respond."[xx] Such complaints were echoed by those within the administration. In 1938, Sherman Minton declared that the press was so opposed to the New Deal that "the administration can't get a headline in the newspapers" and criticized the "propaganda that appears in the sheets of this country."[xxi] In 1940, Edward Flynn, chair of the Democratic National Convention, asserted that the newspapers "are under a real dictatorship, a financial dictatorship of their advertisers and stockholders."[xxii] The key figure in the New Deal assault on the media barons was Harold Ickes, who published a book – *America's House of Lords* – in which he attached the "misrepresentation of individuals and propaganda directed against the public welfare in the interest of the further enrichment and enhancement of the power of our economic royalists." Ickes, who also engaged in a public debate with Gannett in which he accused the press of bondage to financial interests, worried that the newspaper industry was suffering from the "same disease that affects the general national economy" – a trend towards monopoly.[xxiii]

Economic trends toward media monopoly, in the eyes of New Dealers and Popular Fronters alike, posed foundational threats to democratic life. The media were not acting as a neutral arena for political debate. Rather, the press was now a "part of big business," journalist Irving Brant concluded, so the press "thinks and acts with big business just as a man's arm or leg or optic nerve functions in the organic whole of which it is a part." Observing the role of the press in the 1940 election, Brant worried that "alliance between the press and Big Business throws into the political scales, all on one side, a crushing weight of propaganda and money."[xxiv] Bruce Bliven of the nation came to a similar conclusion. He thought that powerful media magnates like Hearst and McCormick "wield more power than is safe in a democracy."[xxv]

PART 2: The High-tide of Anti-Monopoly in the Late New Deal

Given New Deal concerns about conservative control of the nation's media landscape, alongside the resurgence of anti-trust activity under Thurman Arnold in the late New Deal, there was considerable interest in anti-monopoly activity in the media industries in the early 1940s. On multiple fronts, New Dealers sought to create a more diversified media landscape in the belief that a more competitive media ecosystem would better serve American democracy.[xxvi] More media outlets, they argued, would minimize control over the organs of public opinion, increase the variety of voices and modes of information available to the public, and create a public sphere more accommodating to the "free marketplace of ideas" than the monopolistic and biased public sphere that they blamed on conservative business control. Given their critique of the existing media market, they felt no need to distinguish arguments based on neutral or proceduralist grounds from arguments based on partisan interest. Rather, they believed that diversification would simultaneously produce public goods on both procedural and partisan grounds – diversification would produce more competition by creating space for media more hospitable to their broader reformist, liberal agenda.

New Dealers first focused their energies on the radio. In 1939, FDR appointed James Lawrence Fly as chairman of the Federal Communications Commission. Fly had studied under

Felix Frankfurter at Harvard and then worked for the Attorney-General's office as special assistant with responsibilities for anti-trust, before becoming a key player in the TVA's legal department. He was a loyal New Dealer and a committed opponent to media monopoly. Worried about "the increasing domination of the media of communication by a few economic entities, and the resultant lessening of opportunities for the full, free spread of all kinds and shades of opinion," he championed the "need for diversity of control over the various media so that the public may have access to a variety of opinions."[xxvii] Two years later, Fly was joined on the FCC by Clifford Durr, Hugo Black's brother-in-law, and a lawyer with similarly liberal commitments – Durr had resigned from the Reconstruction Finance Corporation to protest its lack of commitment to anti-monopoly laws.[xxviii] In 1941, the newly reformist FCC issued a *Report on Chain Broadcasting*, which outlined eight new rules to prevent network control of their affiliates in an effort to diversify the voices and content on the radio spectrum – in particular, to help the relatively new Mutual Broadcasting System compete with the established NBC and CBS networks. Most significant was a rule that no company could maintain more than one network – a challenge to NBC, which owned two of the three major networks. The overall philosophy of the rules reflected a faith that "competition, given a fair test, will best protect the public interest. That is the American system." Fly hoped that there might ultimately be six, rather than two national networks.[xxix]

Interest in injecting more competition into the radio industry also required confronting cross-media ownership, and taking action to break apart radio-newspaper combinations. A Payne Fund report had called for the separation of newspapers and radio ownership in 1935. Two years later House and Senate resolutions had been introduced to begin exploring whether the FCC could take action in the field, only to be side-lined by more pressing matters (Burton Wheeler, for instance, had been consulting with the FCC on the issue until he was distracted by the outbreak of the court-packing scandal).[xxx] But in December 1940, FDR wrote to Fly to ask for hearings on the matter. On March 21, 1941, the FCC launched much publicized and deeply controversial hearings into whether there should be a ban on cross-ownership. Media reform advocates used the hearings to critique media consolidation and call for greater diversity. Morris Ernst, for instance, complained about the "bottle-necks going into the marketplace of thought," which he thought the "most important problem facing the American people." Ernst had written a Brandeisian critique of corporate consolidation entitled *Too Big* the previous year; in 1946 he would apply the same anti-monopoly framework to media consolidation in *The First Freedom*.[xxxi]

In 1942, the Justice Department extended anti-monopoly activity into the newspaper industry directly when it charged the Associated Press with anti-trust violations. The AP was a cooperative news-gathering enterprise – the 1200 newspapers that subscribed to the wire service shared stories exclusively with each other, which provided members with a diversity of content at a minimal cost. The DOJ's case in 1942 was sparked by the effort by Marshal Field III to start a new daily paper in the Chicago newspaper market – he argued that his efforts to do so were hamstrung by the fact that, under AP bylaws, the *Chicago Tribune* was able to block Field subscribing to the service. This fact, argued Field and the DOJ, amounted to a restraint on trade – it was not economically feasible to start a rival newspaper without an AP subscription, and the

AP membership laws thus perpetuated newspaper monopolies and prevented the operation of a truly free press. By 1942, AP members had 96% of the morning circulation and 77% of the evening circulation, only six newspapers had successfully joined the service in the twentieth century – over 100 had tried. And that was *after* the AP had reformed its by-laws in both 1900 and 1915 in response to earlier anti-trust suits.

In its particulars, it was also a deeply political case. Field's new paper was intended to provide an internationalist, pro-FDR voice in a newspaper market dominated by one of the administration's most vociferous conservative critics.[xxxii] And the AP had long been subject to criticism by media reformers who complained that the service circulated biased stories about race relations (produced by monopoly Democratic papers in the U.S. south) or labor relations (produced by monopoly papers owned by conservative newspaper barons).[xxxiii] But the AP suit was also of a piece with a broader New Deal interest in media diversification. As the Department of Justice explained in a press briefing on the suit:

> the national policy in favor of freedom of the press requires that newspapers engaged in disseminating news be unhampered and unrestrained in selecting the particular news they choose to publish….a corollary of such national policy is that newspapers be unhampered by any artificial or unnecessary restraints….[because] the public interest is promoted by the establishment and continued availability to the public of as many responsible newspapers, representing differing and varied points of view, as can successfully participate in the business of disseminating news and related comment.[xxxiv]

Seen together, the chain-broadcasting case, the cross-ownership hearings, and the AP anti-trust action constituted a multi-pronged effort to inject renewed competition into the media industries in the early 1940s. They were of a piece with a broader New Deal interest in cultivating alternative channels of information through which the public sphere could operate without relying exclusively on organs owned by capitalist media barons, many of whom were plainly hostile to the broader economic reforms of the period. Alongside cultivating new owners of media outlets – particularly those, like Field, who shared their policy goals and who undermined the monopolies of old foes like McCormick – the New Deal also experimented with new forms of direct address that would connect the regulatory state with the public directly, without relying on the media. The Fireside Chats were the most famous of these experiments; probably more influential was the rise of a rash of publicity agencies within the regulatory state, which produced a torrent of news handouts and press releases to explain to the public the policies being implemented. It all amounted to an effort to rebalance the public sphere away from corporate control, so that the reformist state could be more plainly understood by the public. It was all undertaken in the interests of what was understood to be a public interest in diversity in the media landscape, one that required state intervention to arrest the economic drift of media markets to monopoly.[xxxv]

Lawyers for the media industry opposed all of these policies, arguing that such state intervention was, of itself, a form of statist interference with democratic liberty. They particularly relied on assertions that the First Amendment protected them from any such economic regulation. NBC argued that the FCC's chain regulations exceeded the regulatory powers granted it by the Communications Act of 1934, and that such sweeping regulations interfered with their right to free speech.[xxxvi] Industry journal *Broadcasting* asserted that the FCC was practicing "Gestapo tactics" when it began investigating newspaper ownership of radio stations. "If ever an industry cringed in a virtual state of terror," it asserted, "it is broadcasting today under the lash of the FCC."[xxxvii] Such classically liberal, anti-statist arguments were made with particular force when newspapers, always vigilant guardians of their press freedom, were involved. During the hearings into cross-ownership laws, an array of experts – including Roscoe Pound, Frank Luther Mott, and Fred Siebert – testified on behalf of the newspapers that any economic regulation of the press would violate civil liberties and threaten democracy. James Stahlman, publisher of the *Nashville Banner,* refused to even recognize the subpoena calling him to testify before the FCC, asserting that such administrative hearings were unconstitutional interferences with press liberty.[xxxviii] The AP and Robert McCormick made similar arguments in the AP case, claiming that the First Amendment protected the press from all economic regulation, because any such regulation opened the door to dictatorial control of the news media. If the anti-trust action was successful, charged one newspaper industry lawyer in 1943, the "people of the US will be confronted just as the people of Germany today are confronted, with a government-controlled press."[xxxix]

But whereas such classical visions of press freedom had assumed that the state had to be kept out of the "free market of ideas" to allow for the flourishing of a diverse marketplace, the New Dealers were attempting to articulate a theory of media freedom more appropriate to the twentieth century – one in which the state had obligations to confront centralizations of power within the market. During World War II, in lower-court decisions upholding anti-trust actions against NBC and the AP, Learned Hand gave this new theory its most significant articulation. Authoring a majority decision for the District Court for the Southern District of New York, Hand determined in 1942 that the FCC's chain regulations did not violate the First Amendment because they protected the "very interests which the First Amendment itself protects, ie. first, of the 'listeners,' next, of any licensees who may wish to be freer of the 'networks' than they are, and last, of any future competing "networks."[xl]

This was an important effort to reorient U.S. conceptualization of the rights protected by the First Amendment. Rather than focus on the right of the speaker – in this case, the newly regulated networks, who claimed that state regulations intervened in their free speech – Hand was focused on the rights of the receiver. Seen from this angle, the First Amendment legitimized state intervention to diversify a media market where it was tending to monopoly; the First Amendment authorized anti-trust activity, it did not block it. The next year, in his decision on the AP suit, Hand applied the theory to justify anti-trust action in the newspaper field, and again tried to think about the social or public interest in the right to a free press:

> Neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets or colors as is possible. That interest is closely akin to, if indeed not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues.[xli]

The hesitant, probing language is telling – for Hand was articulating a new theoretical defense of free competition in the media marketplace, one updated for the era of media monopoly. Others were groping in the same direction. Freedom of speech, James Fly argued, is "not just the clothing of the individual with the legal power of expression" – the more important right was the "right of the listener." (And if that was your framework, he continued in a jab at the media industries, “then you cannot take the position that the operator of the broadcasting station can do whatever he chooses with the powerful instrument he has been licensed to use.")[xlii] Durr made the same point in a 1944 article entitled “Freedom of Speech for Whom?” in which he criticized concentration and commercialism in the radio industry and hoped for a radio “as uncurbed by commercial as by political restraints” because “democracy can function only in an atmosphere of full information and frank discussion.”[xliii] In later decades, media reformers would repeatedly return to these ideas in an effort to contend with media monopoly in their own era. But Hand’s lower-court jurisprudence was the closest the U.S. ever came to articulating a citizen-oriented theory of monopoly regulation in the media industries. These thoughtful rulings, emerging from the decades-long critique of media consolidation as well as more recent partisan ructions during the New Deal, were the high-water mark for this public-oriented defense of media diversity.

Media industry representatives quickly appealed to the Supreme Court to overrule Hand’s decisions in both the NBC and the AP cases. And while the Justice Department won both appeals, the decisions of the Supreme Court justices in the cases marked a retreat from Hand’s public-interest theory of media diversity. This was plainest in the AP case, in which a fractured court issued a technical and confusing five-three decision that upheld the anti-trust action against the AP, but on a different grounds than Hand. Writing for the majority, Hugo Black stopped short of Hand’s broad reformulation of the purpose of the First Amendment. Hand had thought that the AP restraint on trade did not, of itself, rise to the level of an anti-trust violation – the AP was not, he thought, a “a monopoly in the sense that membership is necessary to build up, or support even a great newspaper. Such papers have been founded and have thriven without it."[xliv] It was for this reason that he had introduced a broader criterion of public interest in diversity to justify the anti-trust action. Black, by contrast, upheld the anti-trust action on strictly economic grounds, arguing that the by-laws were straightforward violations of the Sherman Act because their effect was to "seriously limit the opportunity of any new paper to enter those cities" where a rival newspaper held a subscription: "trade restraints of this character aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system."[xlv] There was no need to consider the broader public interest in diverse flows of information; considering the newspaper industry as an economic industry like any other provided sufficient grounds to justify anti-trust action.

Felix Frankfurter was more enamored of Hand's approach, and issued a concurring opinion that justified the anti-trust action against the AP because the public interest in diversity trumped the private speech rights of the newspaper industry – "the interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional privilege….a public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship."[xlvi] That logic was in keeping with Frankfurter's broader jurisprudence, in which he routinely favored public interests over private rights. And it was in keeping with his majority opinion in the NBC chain broadcasting decision two years earlier, in which he had upheld the FCC's regulations on the grounds that the FCC had been issued sweeping powers to regulate the radio in the "public interest" – understood to be the "the interest of the listening public in 'the larger and more effective use of radio.'"[xlvii]

But it was telling that Frankfurter did not draw on his earlier NBC decision to help justify his similar ruling in the AP case. On one level, both cases reflected the same concerns – they were about the relationship between information producers and wholesalers, on the one hand, and information retailers, on the other; by regulating that relationship, anti-trust action sought to have a downstream impact by diversifying the information available to members of the public. But Frankfurter famously grounded public interest regulation of the radio in the technical limitations of the spectrum – laissez-faire was inappropriate in that medium, he argued, because the spectrum was scarce. ("Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[xlviii]) It was a successful argument, one that did much to buttress public regulation of the radio for decades. But such technological arguments were also neat way to avoid frontally confronting the relationship between the private First Amendment interests of media barons, and the public interest in a diverse media landscape. One can't help but wonder whether that decision was shaped, indirectly, by the deployment of anti-statist media claims of free speech. Whatever the motivation, the introduction of the technological argument isolated the jurisprudence of radio from the jurisprudence of the press.

On the press side of the emerging bifurcation in media jurisprudence, Black's decision did similar limiting work. It also justified anti-trust action while stopping short of a full articulation of the public interest in media diversity. For Black, anti-trust action in the press was justified on strictly economic grounds, because the AP membership laws violated the rights of rival publishers to compete fairly. Because he did not need to consider the rights of readers to access diverse sources of news, Black could therefore sidestep, rather than directly reject, the First Amendment issues raised by the newspaper publishers. "Surely," he asserted, "a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom….Freedom to publish is guaranteed by the constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[xlix] As in Frankfurter's technological argument for radio regulation, this was a neat distinction – one that allowed Black to preserve his absolutist commitments to both private speech rights and to anti-monopolistic economics. (In this sense, Black was a consistent liberal, favoring competitive economics in the free market of both goods and ideas.[l]) But this form of the argument also allowed him to avoid engaging with the consumer-oriented vision of media diversity that Hand had articulated. In Black's view, the interests of the reader in diverse information would be protected by competition between publishers; anti-trust action was taken on behalf of the publishers, not the public.

So while the AP and NBC decisions were technically victories for the Justice Department, they fell far short of representing a new philosophy of public-interest regulation of media monopoly. Instead, they established narrow and technical justifications for diversification. Radio was to be regulated broadly, but as an exception to the general rule of laissez-faire media economics that was justified on grounds of technological necessity as much as public interest – a thin reed upon which to construct a robust program of media diversification (and one left vulnerable to later technological developments). Newspaper monopoly, on the other hand, was a problem to be dealt with by anti-trust action to ensure competition between publishers – as a field of state activity it would be defined by economistic criteria, not questions of public interest.

It remains unclear what a broader, consumer-oriented anti-monopoly media policy might have looked like if it had been left free to flourish in the late New Deal. Its contours were never developed. While the media industries were unsuccessful in making legal claims that anti-monopoly activity was unconstitutional – the AP and NBC decisions showed that it was not – accusations that media reform posed a dictatorial threat to democratic governance were made routinely in public political confrontations. For instance, when a federal appellate court ultimately ordered publisher James Stahlman to abide by his subpoena and appear before the FCC, it added in dicta that would not have upheld a prohibition of newspaper ownership of radio stations, for that power lay beyond the authority of the FCC.[li] Meanwhile, the FCC became the target of early red-baiting, as conservative congressmen opened investigations into allegations of disloyalty and communism at the Commission. Congress launched five separate investigations of the FCC during Fly's term. In the most famous of them, segregationist senator Eugene Cox charged that the FCC was turning into an American gestapo. (Cox's investigation came to a desultory close when it was revealed that he had taken money from a Georgian radio station seeking help with a license application.)[lii]

The arguments of the media industry were more successful in the political culture than the courts. Public accusations that the anti-trust actions in the media field violated First Amendment freedoms sapped reformers of their will; confronted with accusations of statist interference with civil liberties, they blinked. The FCC delayed issuing any final decision based on its investigation into instituting a ban on cross-media ownership, and then avoided adopting a "categorical rule barring newspaper owners." Citing the "grave legal and policy questions involved" in the matter – a clear concession to the political flak it had received from newspaper publishers – the FCC instead decided to adopt an ad-hoc approach to the question rather than issue a firmer ruling. As it made licensing decisions, it would simply consider "newspaper ownership as one element of the public interest."[liii]

That (non-)policy had been recommended to the committee by noted civil-libertarian legal theorist Zechariah Chafee Jr; as he consulted with the FCC he was simultaneously serving as a member of the Hutchins Commission on Freedom of the Press – a multi-year investigation into the philosophical and policy problems the media posed to democratic life in the U.S., staffed by some of the liberal luminaries of the period. If a philosophical defense of a more robust policy response to the challenge of media monopoly was going to emerge in the 1940s, it would have emerged from the Hutchins Commission.[liv]

At first, in fact, the Commission was concerned with media monopoly and so embraced the AP anti-trust action as a way to re-democratize the press. Chafee initially shared in this "general feeling" that the Commission's "recommendations would have to rely heavily on the anti-trust laws." Early versions of its report, written by Archibald MacLeish in early 1946, argued for widespread anti-trust activity to democratize the media: "I would like to see absentee ownership of the press made impossible. I would like to see chains substantially broken down."[lv] "Yet during the long ensuing discussions [of the Commission]," Chafee later reflected, "this comprehensive program faded away." The deliberations of the Commission thus provide a way to trace the broader retreat of New Deal liberals from enthusiasm for public-interest regulation of media economics.[lvi]

As they talked about the problem of media monopoly, the Commissioners became concerned that anti-trust action risked violating the First Amendment. Whether or not robust public-interest regulation of media diversity would necessarily have opened the door to illiberal forms of content regulation remains unclear. It is certainly the case that some of those invested in public-interest regulation of the media, like Frankfurter, were less invested in absolutist free speech claims. But others, like MacLeish or James Fly (who went on to serve as director of the ACLU) were simultaneously committed civil libertarians – working out whether and how commitments to statist economic regulation can be reconciled with anti-statist commitments to free speech is a normative problem worth further investigation. And while it is true that the public-interest frameworks that legitimized FCC regulation of broadcast economics also legitimized content regulations, we need a finer grained mapping of the impact of content regulation on civil liberties (and the cultural ecosystem at large) before we can meaningfully weigh the costs and benefits of content regulation on the one hand, against the costs and benefits of media diversification on the other. How specific content regulations work in mass media ecosystems is a complex subject – FCC content regulations on broadcast media didn't cause the collapse of American democracy, of course, but they were also offset or checked by the lack of public interest regulation in the newspaper industry. The tendency to frame this argument in the hyperbolic terms of democracy and dictatorship doesn't help; the real question is one of balancing between competing requirements of democracy.

However one might think about the best way to reconcile commitments to freedom and diversity in the abstract, liberals in the 1940s, worried about totalitarianism, thought that pro-diversity state action in the media industries posed a threat to civil liberties, and hence an existential challenge to democracy. Chafee realized that the AP case only protected the rights of the publisher, not the consumer. (It worked to "protect the retailer against the power of the manufacturing wholesaler" – it did not protect the consumer-reader against the power of the publisher-retailer.) But to go further and protect the reader, Chafee thought, would have required government intervention in the "contents, performance, and personal attitudes" of papers, journalists and publishers, posing a clear threat to press freedom. Given the sweeping power of anti-trust consent decrees – Chafee felt them "far more drastic in their potentialities than the sporadic prosecutions of eighteenth-century England" – he retreated from his brief flirtation with anti-trust law in order to protect classical speech rights. John Dickinson, former head of the anti-trust division, agreed, arguing that relying on consent decrees in the media would create "a field day for government interference." In all, as Chafee explained in a private letter to Morris Ernst, "we cannot expect the government to employ the anti-trust laws extensively and at the same time to be very sparing in legal actions about sedition and obscenity."[lvii]

And so this commission of leading liberals internalized the argument previously made by media industry advocates: state action to promote diversity threatened First Amendment rights. "Government ownership, government control or government action to break up the greater agencies of mass communication might cure the ills of freedom of the press," the Commission declared in its final report, "but only at the risk of killing the freedom in the process." The Commission concluded that anti-trust laws should be used "sparingly" to "maintain competition among large units and to prevent the exclusion of any unit from facilities which ought to be open to all; their use to force the breaking-up of large units seems to us undesirable." The Commission's reform program instead focused on the ethical and professional responsibilities of monopoly publishers to act in the public interest. "At last," Robert Hutchins concluded privately, "we have come a long way from the Sherman anti-trust act neurosis that we had at the beginning."[lviii]

Yet however much adversarial politics and fears of statist tyranny had limited the interests of liberals in anti-monopoly activity in the media industries, the AP and NBC precedents did suggest that the state had the legal right to intervene in media markets to encourage diversity. The question for the postwar period was what forms such intervention would take.

PART 3 – The Limits of Postwar Diversity Policy

During the hey-day of the post-WWII boom, from 1945 until the early 1960s, efforts to confront media monopoly were anemic. As a result of the political clashes of the late New Deal, there was no serious effort to diversify a media landscape that continued its long-term trend to increasing concentration. The FCC, which had the authority to promote diversity in both the radio industry and the new medium of television, entered a period of somnolence and inadequacy – when James Landis reported on the state of the administrative agencies to the incoming Kennedy administration in 1960, he concluded that the FCC was a "somewhat extraordinary spectacle" that had "drifted, vacillated, and stalled in almost every major area."[lix] As a result, little effort was made to encourage diversity in any holistic sense. The main hope for the diversification of television, for instance, was the development of the Ultra High Frequency portion of the spectrum, and in 1952 the FCC opened up 70 new UHF channels – but it didn't mandate that television sets be able to receive UHF signals until 1964, which meant that there was no advertising market to support the new channels and so they withered on the vine. (In 1957, Emanuel Celler blamed the situation on "regulatory uncertainty, vacillation, and lack of leadership."[lx])

In the newspaper industry, there wasn't even a regulatory agency with the nominal capacity to develop industry-wide policies. Instead, the post-war years witnessed a resignation to the ongoing decline of newspaper diversity. As early as 1950, press critic A. J. Liebling complained that "the end-of-a-newspaper story has become one of the commonplaces of our time, and schools of journalism are probably giving courses in how to write one."[lxi] In 1947, democratic senator James Murray, chairman of the U.S. Senate Small Business Committee issued a report entitled *The Small Newspaper: Democracy's Grass Roots* that called for hearings on newspaper economics to confront the fact that the "competitive press is dying" – the hearings never happened.[lxii] Rather than imagine policy solutions to the economic trends, press commentators followed the Hutchins Commission and instead focused on the ethical obligations of monopoly publishers, on their "social responsibility" to the readers and communities.

In the absence of a broad commitment to diversity, reformers in both the broadcast and print industries dealt with the problem of media concentration through narrow, economistic criteria, focused particularly on trying to prevent monopolistic or anti-competitive economic behavior. Even if they stopped short of imagining policies to protect the public interest in diversity, such economistic regulations could have done a great deal to preserve diversity in these industries – after all, the main trends to consolidation were themselves economic. But in both the newspaper and broadcast industries, anti-monopoly regulations were applied in a piecemeal and ambivalent fashion. More precisely, limitations in the way that the relevant market for monopoly regulation was determined, as well as a narrowed understanding of anti-competitive behavior in the field, served to delimit anti-monopoly activity in the media field.

The first problem was the way that regulators conceptualized the scale of the media market in which competition had to be preserved. In the newspaper field, anti-trust laws were applied only to the local market – the competition between two newspapers in the same city. At first, this had been a way to strengthen the applicability of anti-trust laws in the newspaper field. In 1928, when a group of seven rural Indiana newspapers were charged with conspiring to starve a rival of advertising revenue, they had argued that they could not be guilty of anti-competitive practices because they did not exercise control of the national market in advertising or news media – the Supreme Court had dismissed the argument.[lxiii] But by focusing only on competition within local newspaper markets, anti-trust law avoided thinking about growing concentration at the national level – particularly the rise of chains which owned papers across multiple markets, and which could take advantage of their economies of scale and deep financial resources to run independent competitors into the ground. By 1960, 32% of all daily papers in the country were owned by newspaper groups; in 1930, it had been only 15%.[lxiv] But this form of concentration was invisible to post-war anti-trust regulation, and went unchallenged.

In the broadcast media, by contrast, the FCC did recognize the challenge of chain ownership. In 1953 it established caps on the number of stations that any one company could own – 7 am stations, 7 fm radio station, and 5 television stations (raised to 7 the following year, so long as two of the stations were in the UHF spectrum). The FCC explained that the "fundamental purpose…of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest" and the Supreme Court upheld its authority to issue them.[lxv] The problem was that a hard-numerical cap didn't take into account the relative size of those stations, and hence left the door open to individual station owners establishing dominant market share. By 1957, for instance, NBC could reach 27% of the population of the country by virtue of the seven television stations it owned – it had stations in the plum markets of New York, Chicago, Los Angeles, Philadelphia and D.C.[lxvi]

Meanwhile, the way that regulation of the media industry had been divided between broadcast and print media interfered with efforts to grapple with the rise of cross-media enterprises. Newspapers facing charges of monopoly would argue that the relevant market in any locality was not the newspaper market, but the full range of paid advertising media – an argument that had mixed success, but was one way of diluting the appearance of monopoly control in the newspaper field.[lxvii] And the FCC, which had given up on developing a serious policy on cross-media ownership in 1944, now handled the issuance of radio and television licenses on an ad-hoc basis. In some cases it granted licenses to newspapers, in others it opted not to. Michael Stamm, who has written the best work on the subject, concluded that FCC policy was marked by "drift and incoherence." In the absence of clear policy, economic advantage lay with existing media owners. By 1953, newspapers owned 88 of the 138 television stations in operation in the nation.[lxviii] Three years later, less than one station in ten was independently owned in the top twenty-five television markets in the country – 70.7% were parts of chains, and 20% were owned by a local newspaper publisher.[lxix]

Because of the disjointed ways that regulatory approaches to media concentration had developed, such overall trends to concentration slipped through the cracks. The place to confront them would have been in local markets, where chain owners had, in the form of deep financial resources and economies of scale, competitive advantages over independent rivals. Rigorous efforts to enforce fair trade practices and anti-monopoly regulations may have contained the trend to concentration. But in neither industry was this effort made.

In the case of broadcast media, the problem lay in the power of the networks. The chain broadcasting rules had had little impact in dislodging the networks from the radio – six years after their introduction, 97% of radio stations were affiliated with a network.[lxx] The same problems were transferred to the new medium of television - by 1957, 417 of the 455 television stations were affiliated with one of the three major networks. In that year, Emanuel Celler's anti-trust committee considered the television industry, and the FCC commissioned a Broadcast Network Study. Both found multiple ways that the networks encouraged concentration of control and undermined diverse approaches to station management and the production of diverse forms of content. Because the networks themselves owned stations in lucrative markets, they began with a sizeable market share to sell to advertisers. They also implemented "must-buy" agreements, in which they insisted that advertisers that wanted to buy on some parts of their network had to buy space on a set list of stations – this made it difficult for independent stations to attract advertising revenue, difficulties only exacerbated by the fact that the networks could also offer bulk discounts on advertising space. Meanwhile, on the content side, the networks imposed "option-time" agreements on their affiliates, in which the affiliates agreed to show network programs in prime-time hours. For the network, this provided the key mechanism to allow them to sell national advertising, because it meant they could guarantee that their programs (and hence ads) would reach the widest market. But for rival program producers, it meant that they were squeezed out of the most lucrative hours in the schedule – problems that only seemed more unfair when the networks themselves began producing programs, which they then had the capacity to place into the key prime-time slots. Victor Hansen, assistant-attorney general in charge of anti-trust, concluded that the power of the networks over the tv stations "dwarfs" the power that the major film studios had had over theaters in the movie industry. But despite proposals from the Senate and the FCC that regulatory action needed to be taken to allow for freer competition between television stations, nothing was done.[lxxi]

In the press, too, larger organizations had the capacity to undermine their competitors by monopolizing advertising revenue. Seemingly far-removed from the interests of the public in receiving diverse forms of information from a diverse newspaper market, this was precisely the sort of issue in which a narrow focus on anti-competitive business practices may have helped produce downstream benefits for the news-reading public, just as Black had suggested in his AP decision. And there was reason to think there were real abuses in this part of the market. An internal National Recovery Administration memo in the early 1930s had concluded that "the newspaper publishing business for many years, and particularly since the war, has been the victim of as many unfair competitive methods as any industry in the country" – such as "the development of a large number of newspaper monopolies, discrimination between advertisers, secret rebates of various kinds to advertisers and news dealers."[lxxii]

But efforts to prevent unfair trade practices in the newspaper field were lackluster after World War II. In a few cases, when newspapers made egregious efforts to monopolize local advertising markets, the Anti-trust division had some success. In the late 1940s, for instance, the tiny *Lorain Journal*, with a circulation of 20,000, reaching 99% of the population, had applied for a radio license, but had been rebuffed by the FCC, on the grounds that it had a poor record of public service. In response, the *Journal* refused to sell advertising space to businesses who advertised on the new local radio station – an effort to squeeze it out of business. Such practices were a clear violation of the anti-trust laws, and even though the *Journal* claimed a First Amendment right to control who had access to its white space, the Supreme Court unanimously upheld the anti-trust conviction against the paper, ruling that the "purpose and intent of this procedure was to destroy the broadcasting company."[lxxiii] And in the early 1950s, the Department of Justice successfully brought anti-trust charges against the *Kansas City Star*, which had required advertisers to purchase ads in both its morning and afternoon editions together, and refused to sell advertising space in its papers or radio or television stations to advertisers who took out ads with a rival newspaper. But the penalties for these practices were mild, involving consent decrees to ban future discrimination, and small fines. The *Kansas City Star*, for instance, was fined $5,000, and forced to sell its radio and television stations – the sale brought in 7.5 million dollars.[lxxiv]

And those were the rare successes. More telling were the failed anti-trust cases. In 1949, The Times-Picayune Company, which operated the only morning paper in New Orleans as well as one of two afternoon papers, introduced what was known as a unit rate – advertisers who wanted access to readers of the city's only morning paper would have to buy advertising in both of the Times-Picayune papers. The Anti-Trust Division charged that this was an illegal tying arrangement, and an attempt by the Times-Picayune to drive its only competitor (the afternoon *Item*) out of business. It was an important case, for such practices were widespread in the 1950s – 168 of 175 morning-evening combinations had introduced such a rule. But although the District Court ruled that the unit rate violated the anti-trust laws, the Supreme Court reversed in a five-four decision. The majority opinion found that there could only be violation of the anti-trust laws if the *Times-Picayune* held a monopoly in one market which it was exploiting in another, or if it introduced the combination rate with the intent to drive the *Item* out of business. It thought neither condition existed here – it argued that the morning and afternoon newspaper markets were not separate markets, but one market of "fungible customer potential" which meant that the *Times-Picayune* was not exploiting a monopoly position in the morning market, but was simply competing with a rival in the overall advertising market (the logic reflected both the real commodity relations at the heart of the newspaper industry, as well as the ambiguities of the "market" in advertising space). And it argued that there was neither intent to harm the *Item,* nor any necessary evidence that the combination rate did harm the *Item*. The pitiless economics of newspaper consolidation soon made a mockery of the Supreme Court's judgement that the *Item* was thriving. By 1958, having held the threat of the *Item* at bay with its combination rate, the *Times-Picayune* had established a dominant position in the advertising market, and bought the *Item* out. New Orleans became a monopoly newspaper town; the *Times-Picayune* immediately raised its advertising rates by thirty percent. The purchase was approved by the Department of Justice on the condition that *Times-Picayune* provided a 60 day window in which a rival could purchase the *Item* at a set price – no-one came forward – and that it sold its radio station.[lxxv]

The *Times-Picayune* decision thus served to delimit the applicability of the anti-trust laws to the newspaper market. In finding even a *forced* combination rate lawful, it scuttled any chance that voluntary combination rates would be found to be unlawful. Yet these widespread rates – in which a publisher would sell advertising in two of its papers at a rate only marginally above the price of advertising in a single paper – were widespread and served to deprive rival papers of advertising revenue. In the early 1960s, small publishers told congress that such combined rates were "deadly" to competition."[lxxvi] But *Times-Picayune* closed the door on any effort to stop them.

Indeed, the kind of economies of scale that led to consolidation in the New Orleans newspaper market were increasingly treated as natural, inevitable features of the newspaper industry. Justice Tom Clark's majority decision in *Times-Picayune* had observed, with an air of fatalism, that "the daily newspaper, though essential to the effective functioning of our political system, has in recent years suffered a drastic economic decline." In 1958, when the Department of Justice charged a Texas newspaper chain with monopolistic behavior for buying out its only rival in Greenville, the District Court for the Northern District of Texas swiftly acquitted. It found no "planned design to destroy competition to the detriment of the advertising public" just bare-knuckled competition and a clear winner in a newspaper economy in which competition was no longer possible. "Our attention," observed the District Court, "is called to the fact that the day of the old hand-press with a few sheets of local news when a paper could be operated on a plant of little cost has gone by….the trend of events and commercial activity has seemingly limited it to one paper in most cities."[lxxvii] Such assumptions had become commonplace. By 1961, when only 51 cities still had competing dailies, one industry observer noted that "the daily newspaper industry, primarily as a result of the communications revolution and its basic price and market structure seems hardly capable of being restructured to provide either a free, a workably competitive, or a publicly accountable, responsible press."[lxxviii] Three years later, another observer concluded that in a city below 650,000 people, "newspaper competition is so rare as to be regarded as accidental or the product of unique forces."[lxxix] And those monopoly newspapers were increasingly bound together in chains. In 1962, one of a new breed of managerial publishers, Samuel Newhouse, had purchased the Times-Picayune company, to add the paper's monopoly profits to his growing portfolio of media assets.[lxxx]

And yet little was done. Anti-trust action, which might have followed Black's lead in the AP case and sought to preserve economic competition in the newspaper market, had become so narrowed in its application that it was essentially abandoned. In 1962 the Chandlers and Hearsts came to an agreement to end competition in the Los Angeles newspaper market – Hearst would shut its morning paper, ceding a monopoly to the Chandler's *Los Angeles Times*; the Chandlers would shut their afternoon paper, leaving Hearst's *Herald Examiner* sole owner of the afternoon market. But although members of the antitrust division thought the deal a "blatant…case of willful violation of the antitrust laws" they took no action – a Hearst representative had cleared the deal with higher ups in the Justice Department, and been given assurances there would be no prosecution.[lxxxi] And there was no broader effort to promote diversity in the interests of the news-reading public. In 1963, the House Antitrust Subcommittee held a few days of hearings into newspaper concentration, but they were quickly suspended and had no impact – the hearings were not even published.[lxxxii]

PART 4: The Last Stand of Anti-Monopoly in the Media Industries

The 1960s did witness one last flourish of anti-monopoly activity in the media industries. The FCC experimented with new regulations designed to promote diversity, the Department of Justice brought anti-trust cases to block new forms of merger in the media field, and these state actions were upheld in the courts in the face of constitutional challenges. But as had happened in the late New Deal, these efforts ran into considerable opposition from the media lobby – and as had been the case in the 1940s, the arguments of the media industry found great purchase in politics. Beginning in the late 1960s, Congress and regulatory agencies began to turn away from efforts to promote media diversity through state regulatory activity. Instead, they embraced a laissez-faire approach to media economics, presuming that unregulated competition and technological developments were the best methods to produce a diversified public sphere.

State action to reform media concentration took various forms in the 1960s. The FCC, for instance, began trying to promote diversity primarily by adding to existing networks. These efforts began under the short-lived chairmanship of Newton Minow, who is famous for his declaration that television was a "vast wasteland" – it is less remembered that he thought that "most of television's problems stem from a lack of competition."[lxxxiii] In 1962, in an effort to create more television stations, FCC pressure led to the passage of the All-Channel Receiver act, which mandated that all televisions be capable of receiving UHF signal. (Historian David Potter captured the enthusiasm of UHF as a diversification policy when he speculated in 1964 that UHF television "might even destroy the monolithic bulk of the mass audience and lead to a situation where the viewing public, like the reading public, forms a variety of audiences, and chooses from a considerable range of offerings that are really different."[lxxxiv]) In 1964, in a similar effort to diversify the use of the spectrum, the FCC ruled that AM station owners could not replicate more than half of their programming on their FM stations in cities larger than 100,000 people – one consequence of this technocratic rule was the emergence of FM rock stations, and the rise of the soundtrack to the counterculture.[lxxxv] The next year, the FCC introduced a new rule that no one could own more than three television stations in the top fifty markets.[lxxxvi] And in 1967, Congress created the Public Broadcasting Service to add a belated public broadcaster to the U.S. media ecosystem – albeit, a financially precarious one.

The Department of Justice, too, took a new interest in anti-monopoly action in the media industries in the mid-1960s. In the newspaper field, the Anti-Trust Division tried to maintain economic competition in a field trending toward consolidation. In 1964, it won anti-trust cases against two newspapers in Ohio that had bought-out rival local newspapers.[lxxxvii] In 1966, when the collapsing New York newspaper market saw a mega-merger of a number of failing papers (including the *Herald Tribune* and the *World Telegram*), the Department of Justice succeeded in forcing the new paper to sign a consent decree waiving exclusivity to a number of the feature contracts it inherited from its predecessors – as a result, rival newspapers in the New York area could purchase Walter Lippmann or Joseph Alsop columns.[lxxxviii] Allowing more papers access to syndicated features was of a piece with a broader hope that the rise of new suburban newspapers would provide what Donald F. Turner, head of the anti-trust division, called a "counter-trend" to the "decline in newspaper competition." Turner thought that the emergence of new suburban papers "holds considerable hope for a revival of competition in many parts of the country" provided that they could be protected from city dailies which sought to acquire their new rivals – for this reason, the Justice Department successfully prevented the *Los Angeles Times* from acquiring the *San Bernardino Sun-Telegram*.[lxxxix] The logic of these interventions was strictly economistic – the Justice Department acted to allow for at least a modicum of competition in a consolidating marketplace, and did not consider broader questions of public interest, presuming these would be protected as downstream consequences of a more competitive marketplace.

The same considerations were also at work in what turned out to be the most significant area of anti-trust activity in the newspaper field in the 1960s – the effort to bar what were called Joint Operating Agreements (JOAs). JOAs were a form of merger between rival newspapers in the same city – while both companies kept separate newsrooms and continued to print separate newspapers, they combined their production, distribution, and (occasionally) their advertising and circulation departments. The first JOA had been formed in 1933, and by the mid-1960s they existed in almost 25 cities. The Justice Department had been troubled by JOAs at various points in the past, but although its staff had recommended filing complaints against them at earlier moments, no action had ever been taken. But in 1964, amid a new round of mergers (including in the important San Francisco newspaper market), the Anti-Trust division undertook a large-scale investigation of all JOAs. It concluded that such agreements undermined competitive economics in the newspaper field, particularly when advertising and circulation departments were combined. "Probably the most offensive feature of a joint publishing agreement," observed Donald Turner, "is profit pooling, since by its nature it eliminates all incentive for either party to the agreement to increase its circulation and advertising revenues at the expense of the other." In 1965, the Justice Department charged two Tucson newspapers with antitrust violations. It was considered a strong test-case – the two newspapers had entered into a JOA in 1940, were turning good profits, and one had also recently bought out the other, creating traditional monopoly questions to be pursued alongside the JOA matter. Members of the Antitrust Division hoped that the Tucson case would produce a precedent that "could result in the widespread renewal of newspaper competition by the elimination of clear violations of the antitrust laws."[xc] In 1968, the Justice Department won the case, and a District Court judge ordered the two papers to sever their advertising and circulation departments. But in a sign of how narrowly the Justice Department was conceiving of economic competition by this point, the two Tucson papers were allowed to maintain joint printing and distribution facilities, and even allowed to print a joint Sunday edition. Such economies of scale posed a bar to any further entrant to the Tucson newspaper market; anti-monopoly policy now boiled down to a desire to ensure that two papers were competing with each other, not colluding.[xci]

In the same year as its success in the Tucson case, the Justice Department also sent the FCC a memo urging it to introduce new bans on newspaper ownership of broadcast stations and threatened to take action itself if the FCC did not. The memo prompted a long period of deliberation, and in 1975 the FCC adopted new rules barring newspaper-broadcasting combinations in the future. But the FCC grandfathered in all existing combinations, except for 16 cases where the city had only one newspaper and one station both under monopoly control.[xcii] The grandfather clause suggested the limits of the FCC's commitment to an active policy of diversification, but the broader rule nevertheless suggested a new interest in promoting economic competition in the broadcast field. In 1970, for instance, the FCC introduced financial interest and syndication rules that were intended to reduce the power of the networks over the production and distribution of content. And in 1972, the Department of Justice brought an anti-trust suit against the three national networks in an effort to force them to separate their production wings from their distribution wings.[xciii]

Unsurprisingly, the media industries challenged the legality of these anti-monopoly policies. But as had been the case in the New Deal, the courts were surprisingly tolerant of state action in the field. The Tucson newspapers claimed that they should be exempt from anti-trust law because they were "failing companies," asserting that their merged operations were the only way to avoid a one-newspaper town. Citing the Associated Press precedent, as well as the profit margins of the Tucson papers, the Supreme Court easily dismissed the challenge in 1969 (only one judge dissented.)[xciv] Similarly, when newspapers claimed that the new FCC rule preventing them from owning broadcasting stations were a statist interference with their First Amendment rights, the Supreme Court unanimously upheld the authority of the FCC to issue the rules. (An appeals court had actually gone further, arguing that the FCC should have ordered the divestiture of all newspaper-broadcasting combinations in the same city.[xcv]) And although the courts first dismissed the Justice Department's anti-trust suit against the networks because of fears that Nixon was using the anti-trust laws to punish the media for its handling of Watergate, the Justice Department soon refiled, and the courts did not interfere in the long denouement of the suit, which ultimately led to consent decrees, albeit unsatisfying ones. ("The guts of it," concluded one industry insider in 1980, "is that they [the Justice Department] haven't accomplished anything.")[xcvi]

Although the media industries could not defeat anti-monopoly policies in the courts, their political power provided numerous other opportunities to blunt reform. Take, for instance, the case of Newton Minow, who was hounded during his short stint at the FCC as a potential censor of the press. Minow reacted to the charges, just as James Fly had done two decades earlier, by trying to claim a public interest in media freedom that could be mobilized against the free speech arguments of the media industries. "Those broadcasters who clothe themselves with the arguments of John Milton," he asserted, "should also be prepared to serve the public interest." But such arguments had little impact on a Congress that was subject to intense lobbying by media enterprises (upon whom members relied for political coverage) and was also itself deeply committed to a classically liberal attitude to media freedom. As James Wright, a moderate Democrat from Texas, put it, "Congress instinctively and rightly reacts with extreme caution against anything which even remotely smacks of increased power which could conceivably result in even the subtlest censorship."[xcvii] And so Congressional opposition served to stymie Minow's program of reform and he resigned in frustration in June 1963. "Despite all his talk," observed *Business Week*, "Minow hasn't done much to alter the structure of broadcasting."[xcviii]

Minow was replaced on the FCC by Lee Loevinger, whose background in the anti-trust division obscured a hostility to public-interest regulation of the broadcast industry. "We are not the moral proctor of the public," he announced – he preferred to let the broadcast market and consumer demand develop the contours of the industry. He was soon heading a conservative faction on the FCC, because LBJ, whose wife owned broadcasting stations and who himself generally favored collaborative relations with big business, was not interested in appointing reformers. Neither was Richard Nixon.[xcix] As a result, the FCC retreated from its pro-diversity policies. When the FCC barred anyone from owning more than three stations in a top-fifty market, the broadcasting industry had rushed to argue that there was no real threat to media diversity, that group ownership encouraged competition, and that there were numerous instances in which such ownership models provided the only way to provide adequate service to consumers – a newly formed Council for Television Development, representing 42 group owners, funded a 443 page report to prove the point. And the FCC was convinced by these arguments. It immediately began waiving the ban in certain situations, and then, in a 4-3 vote, abandoned the rule just two-and-half years after introducing it (having granted all nine waivers requested while the rule was in place).[c] Similarly, after 1975, the FCC often waived its cross-ownership rule, arguing that divestiture from cross-ownership was only required when it could be shown that there was detriment to the public interest.[ci]

The process of retreat from anti-monopoly media activity can be seen most cleanly in the newspaper field. In reaction to the Tucson anti-trust action, the newspaper industry went to Congress to lobby for a formal exemption from anti-trust law. In 1967, Carl Hayden from Arizona introduced a bill to protect "failing" newspapers from prosecution if they merged – it had a broad definition of 'failure' and grandfathered in all existing joint operating agreements. Newspapers lobbied hard for the bill, and after the Supreme Court upheld the Tucson decision, Emanuel Celler observed that there was an "avalanche of opinion in favor of the bill." In 1970, Nixon signed into law what was now known as the Newspaper Preservation Act. Twenty-five years after the AP decision, newspapers had finally been granted an anti-trust exemption. Very few newspapers actually took advantage of the provisions of the law and formed JOAs – there were increasingly few cities with rival newspapers, let alone rivals that were willing to bind themselves together in a long-term contract.[cii] But the law was important for ending the U.S. flirtation with anti-trust law in the newspaper field. The Newspaper Preservation Act, observed one federal court, "merely looses the same shady market forces which existed before the passage of the Sherman, Clayton and other antitrust laws."[ciii]

And the passage of the Newspaper Preservation Act was the opening gambit of a long period of retreat from anti-monopoly activity in all the media industries. Even though the Newspaper Preservation Act provided a sanction for new forms of media merger, it was presented by its champions as a way to preserve press diversity by allowing media owners flexibility to experiment with new business models free from the regulatory hand of the state. Barry Goldwater, for instance, repurposed the anti-monopoly language of Learned Hand and Hugo Black when he argued that the bill was necessary because "the First Amendment rests on the assumption that the widest possible dissemination of information diverse and antagonistic sources is essential to the public welfare."[civ] As was typical of the broader libertarian vision of political economy in the later decades of the twentieth century, unregulated markets were being embraced as fonts of diversification – however poorly the theory fit the particulars of a newspaper market trending toward local monopoly.

This laissez-faire vision of media policy came first to the newspaper industry, because the case for government regulation had always been weakest there. But as broadcasting media underwent technological revolutions, old arguments that broadcast media were in exceptional need of regulation because of the scarcity of the spectrum began to lose their purchase.[cv] The apparent abundance of cable and satellite upset the entire framework that had developed in the New Deal. In a 1978 symposium on media concentration, First Amendment scholar Thomas Emerson summed up an emerging consensus – "technological change is coming along pretty fast and the coming problem will really be quite different with the advent of cable tv. When we have cablecasting and other increases in facilities, the electronic media should be treated, and will have to be treated under the First Amendment, almost the same as the press."[cvi] Reagan's appointees to the FCC embraced these arguments, which accorded well with their broader governing philosophy. In 1982, Mark Fowler promised a "Marketplace Approach to Broadcast Regulation;" his successor, Dennis Patrick, made plain the ways that laissez-faire attitudes to media regulation were spilling over from the newspaper industry: "We seek to extend to the electronic press the same First Amendment guarantees that the print media have enjoyed since our country's inception."[cvii]

The result was a relaxation of media regulations that had been designed to promote diversity in the broadcast industry. In 1984, Fowler loosened the old caps on broadcast station ownership. Where once you could own no more than 7(fm)-7(am)-7(tv) stations; now you could own 12 of each. In 1992, the cap rose to 18; two years later it rose again to 20. And then in 1996, in reaction to the impact of the internet, the Telecommunications Act removed the numeric caps on ownership altogether, replacing them with a new rule that no one entity could own a portfolio of stations that reached more than 35% of U.S. households – that limit was raised to 39% in 2003. Meanwhile, other forms of media regulation were also quietly abolished. In 1993, the FCC discarded its 1970s financial interest and syndication rules. The Telecommunications Act extended licenses from five to eight years and removed the bar on joint radio-television ownership in the same market.[cviii]

The logic of this shifting regulatory approach to broadcast media has been turned into a straightforward and simple story. Once upon a time, back when Frankfurter upheld the constitutionality of the Chain Broadcasting Report, the limitations of the spectrum meant that stations were scarce, and so regulations to maintain diversity were essential. Today, the story continues, there is no longer a need to promote diversity through state regulation – now that cable, satellite, and internet technologies provide limitless outlets, the market can do so itself. The problem with this story is that it treats monopoly as a problem of technology rather than a problem of political economy. Putting the history of newspapers alongside the history of broadcast media reminds us that even in a medium in which there was no technological scarcity, the twentieth century witnessed a collapse of diversity. By the early 1990s, at a time when broadcast media policy was being deregulated on the grounds that it needed to be brought into alignment with the ostensibly already-diversified landscape of the newspaper industry, the press of the nation was actually shrinking. By then, in fact, there were more broadcasting stations (13,000) in the country than there were daily newspapers (1700).[cix]

Indeed, the late twentieth and early twenty-first century experienced a period of increasing consolidation in the media industries. The six years after the passage of the Telecommunications Act saw the number of commercial radio station owners decline by 25%, and a 40% decline in the number of tv station owners. Vast new chains emerged, such as Clear Channel with its 1200 radio stations, or the Sinclair Broadcasting Group, which by 2018 owned 193 television stations.[cx] Similar trends were at work in the newspaper field, in which profitable monopoly newspapers were increasingly traded publicly and merged in ever-larger groups. By 1980, 75% of the newspapers in the country were part of chains, which meant they had to return high rates of profit to service corporate debt and fund new waves of expansion. Even before the Internet decimated the advertising revenues of the press, there were pressures to cut costs to maintain these profit rates. And then as advertising revenue collapsed between 2004 and 2018, 1,800 local papers were forced to close or merge. Those papers that continued to survive existed on skeletal budgets and slashed costs – the number of journalists employed in the nation fell by 40%.[cxi] Amid the wreckage, consolidation continued – a handful of prominent newspapers, such as the *New York Times* and the *Washington Post*, emerged as national brands; less prominent papers were bought up by chains. In 2019, after the Justice Department approved the merger of the Gannett and Gatehouse chains, that new mega-chain owned 1 in 5 newspapers in the country.[cxii] And then, of course, there were the new cross-media empires – most notably that of Rupert Murdoch, with vast and influential holdings in entertainment, television, and print.

Conclusion

In the 1930s, earlier trends to consolidation had produced deep anxieties in the political culture, as reformers had worried whether Hearst and McCormick exercised more power than was safe in a democracy, and feared that they could influence the flow of news to the public in light of their own political interests. Many are concerned about precisely these problems today; and for understandable reasons. And yet criticism of media consolidation has never again won the prominence in the political culture that it had in the New Deal. It is hard to imagine a member of the Clinton or Obama administrations drawing on the work of Noam Chomksy to criticize the press in the way that Ickes had drawn on George Seldes. In fact, from Edith Efron and Spiro Agnew through to Donald Trump, the critique of media monopoly today has tended to come from the right, in the form of accusations of snobbishly liberal bias – a critique of consolidation that obviously brackets economic questions.[cxiii] The political economy of the media has come to seem a naturalized feature of life.

Was consolidation inevitable? The unhappy story of the twentieth century may seem, at first blush, to confirm old fears that the media are natural monopolies – that given a zero-sum game for audience attention and limited advertising revenue, advantage will always pool to the larger entities. On this view, diversity in one part of the media economy will only lead to concentration at a different point – most notably, concentration at the level of content production, where the economies of scale are most real. Take, for instance, efforts to require local station ownership in broadcast media which led to the emergence of networks.[cxiv] Or consider one unanticipated outcome of the Associated Press anti-trust case, which obviously did little to slow the rise of newspaper monopolies, and which may have actually undermined the diversity of news the public received – once all papers could buy the AP service, more papers came to rely on it, which reduced the diversity of news presented in different papers in the country.[cxv] By 1960, in his tellingly titled *The Fading American Newspaper*, Carl Lindstrom was already observing "one reason why more and more newspapers are being created in each other's image is that the Associated Press is rivalled only by death as the great leveler."[cxvi]

The arrival of the Internet seems to provide another angle onto this problem – massive diversity of outlets has spread advertising revenue so thinly that production of new content has collapsed. In the collapse of investigative journalism, and the spread of clickbait, reaction stories, and endless political commentary, we perhaps see the result of "ruinous competition" in the media marketplace. For some, the ability to monopolize revenue at a point of concentration now appears to be essential to underwrite the production of quality content. The AP provides a fascinating case-study of this problem. In the late 1990s, the AP made a decision to sell its stories to all online news sites, including sites such as *Yahoo* that provided their content for free. This made perfect sense for the AP as an organization; it simply wanted to maximize its revenues. The decision was also a downstream result of the anti-trust action of the 1940s – the AP was, as instructed, simply providing to all comers. But that policy decision undermined the efforts of newspapers to place news behind paywalls, and thus maintain the economics that had supported the production of new information. The AP's willingness to sell to all had become what one commentator called "the business equivalent of an autoimmune disease" – it couldn't stop selling even to organizations that were robbing its member newspapers of their lifeblood.[cxvii] For this reason, newspapers are now arguing that they need exemptions from anti-trust laws to allow them to combine to sell their content to websites.[cxviii]

A clearer history of the monopoly problem in the media industries suggests the limitations of these approaches, and not just because newspaper publishers made similar arguments for anti-trust exemptions in both the 1940s and the 1960s. In the first place, a fuller history reminds us that U.S. efforts to confront media monopoly have only ever been partial. A public interest standard for media policy, one that sought to maximize the flow of diverse voices to the public, was never adopted. Even the narrower, economistic approach to preserving competition among media enterprises was applied in highly partial ways. We simply don't know whether a more holistic policy would have sustained diversity throughout the media ecosystem. We don't know what newspaper economics would look like if anti-trust action in the newspaper field had been applied not just to the AP, but also to combination advertising rates, just as we don't know how FCC regulation of the networks might have complemented efforts to preserve local ownership. Partial policies of diversification undoubtedly drove media concentration to other points in media economics; but that doesn't mean that more holistic policies would have been ineffective.

Secondly, mapping the incomplete and uneven efforts to diversify media in the past reminds us of the need to confront the complex, triangular economic relationships at the heart of media economics. Any effort to imagine a media policy of diversification will require thinking not only about the relationship of the media to the citizen-consumer, but also the relationship between the media and the advertiser. For this reason, arguments that the internet has rendered anti-monopoly activity obsolete make little sense in the media context – any productive anti-monopoly policy in the media will need to look past the apparent diversity of content confronting the citizen-consumer, and address the fact that Google and Facebook are monopolizing digital ad revenues.[cxix]

The history of anti-monopoly in the media industries also reminds us that any effort to develop policy solutions to the problem of media concentration will be controversial. We require the institutions of the media to play a vital role in our political process – in theory, they are neutral conduits for conversations within the polity and for the flow of information to inform the public. But in practice, they are also economic institutions motivated by the need for profit. The relationship between these two functions has been a source of friction in the past – from reformers who accused wealthy publishers of undermining the common weal for personal gain, to publishers who used their economic clout to lobby and litigate against efforts to reform their industries. Any effort to diversify the media in the future will produce similar conflict; a clearer history of the ideological struggle over the legitimacy of media reform will help us better navigate these ructions.

None of this is to suggest that a program of diversification is a panacea to the problems that plague our media, let alone our democracy. Advocates of media diversity normally hope that diversity will take several forms, and they often assume that diversity of ownership will have downstream effects on the diversity of content produced, and the diversity of content received by citizen-consumers. In practice, these are difficult assumptions to justify empirically – we simply don't really know how a more diversified media landscape could work.[cxx] At the end of the day, perhaps that is the ultimate lesson that history can teach us. The U.S. has never really tried to produce a diverse media market; across the twentieth century, Americans resigned themselves to an increasingly consolidated media market as an inherent feature of a modern, capitalist democracy. The challenge now is to try to imagine what kind of media landscape a modern democracy truly requires – a task that has only barely been begun.

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