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978-0-521-86832-7 - Media Concentration and Democracy: Why Ownership Matters

C. Edwin Baker

Excerpt

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## Introduction

On June 2, 2003, the Republican-dominated Federal Communications Commission took a predictable step in its seemingly unstoppable movement toward media deregulation. It announced a major relaxation of its already relaxed rules restricting media concentration.<sup>1</sup> The communications sector, the FCC found, is rife with competition. Ownership concentration presents little threat. More surprisingly, reducing restrictions on media mergers produced a storm of protest, from both the left and right, involving more vocalized public opposition than any FCC action ever. The FCC basically ignored nearly two million people of all political persuasions who registered their opposition.<sup>2</sup> William Safire argued that “concentration of [media] power . . . should be anathema to conservatives.”<sup>3</sup> Safire credited much of the effectiveness of “the growing grass roots” movement “against giantism” in the media to “right-wing outfits,” although he also noted the role of progressives including Bill Moyers.<sup>4</sup> Opposition was not without at least temporary effect. Congress partially reversed the FCC action.<sup>5</sup> Then the Third Circuit Court of Appeals found most of the remainder unjustified, sending the relaxed rules back to the FCC for reconsideration.<sup>6</sup>

The primary causal explanation for the FCC’s ill-starred action may lie in the power and economic self-interest of major media companies. Political causal explanation, however, is not my subject. Policies require justifications. This book defends the merits of restricting ownership concentration. It then evaluates the intellectual and policy arguments offered for the FCC’s hardening view that media concentration is now not a real problem and that ownership restrictions can thwart the public interest. And the book presents, as clearly as I can, an explanation for why these arguments are wrong – for why media ownership concentration is objectionable.

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## MEDIA CONCENTRATION AND DEMOCRACY

The journalist and press critic A. J. Liebling long ago opined: “Freedom of the press belongs to those who own one.”<sup>7</sup> Liebling’s cynical quip makes ownership central. This book explores his view, considering among other things whether ownership is in fact central, and concluding that it is. As the twentieth century progressed, virtually all Western democracies saw growing media concentration as a threat to press freedom and to democracy. Most democracies adopted policies designed to support press diversity, whether through competition laws (both antitrust- and media-specific) or subsidy arrangements (often specifically targeted to support weaker media competing with the dominant players).<sup>8</sup>

Fear of media concentration and the goal of more robust diversity have been strong themes in the United States too, although actual legal responses have been somewhat different and often weaker than in Europe. Here, policies embodying these values probably originated with the beginnings of the American Republic. In the eighteenth and nineteenth centuries, postal subsidies supported, as intended, a growing number of newspapers.<sup>9</sup> Governmental policies promoting a diverse media environment continued. Over a hundred years ago, New York law required local governments to place their ads equally in at least two local papers of different parties, thereby subsidizing competition and diversity.<sup>10</sup> As early as 1938 and reaching a policy-justifying peak in the 1970s, the FCC found that the public interest required severe restrictions on ownership concentration in broadcast stations and required outlawing most local cross-ownership of different types of media entities. In 1945, the Supreme Court explained that application of the antitrust laws to newspapers served the goals of the First Amendment.<sup>11</sup> In 1949, Representative Emanuel Celler, Democrat of New York and a co-sponsor of crucial antitrust law amendments, asserted that these amendments could and should be interpreted generally to preclude the merger of a community’s only two newspapers.<sup>12</sup> In 1970, Congress adopted the Newspaper Preservation Act<sup>13</sup> in an effort to keep independent, competing editorial voices alive even though the resulting Joint Operating Agreement maintained editorial competition only by sacrificing commercial competition between the two newspapers.

The most important, semi-official, policy-oriented study of the mass media in U.S. history, the Hutchins Commission Report of 1947, saw the problem of media concentration – as it described it, the “decreased proportion of the people who can express their opinions and ideas through the press” – as one of three factors threatening freedom of

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the press.<sup>14</sup> (This problem of concentration, the commission said, combined with the other two problems: that these owners did not provide adequately for the needs of society and that they sometimes engaged in practices that society condemns.) The Hutchins Commission, however, accepted the reality that modern economic forces drive inexorably toward media concentration.<sup>15</sup> Most American cities already in 1947 faced daily newspaper monopolies. In 1910, some 689 American cities or towns had competing daily newspapers. By 1940, despite many more newspaper readers and many more towns and cities, the number of places with competing dailies had fallen to 181 – a decline that has continued steadily. In 2002, only fourteen cities had separately owned and operated daily papers.<sup>16</sup> One interpretation of the Hutchins Commission's central recommendations, which emphasized the need for a "socially responsible press,"<sup>17</sup> is that it aimed to make the best of a bad situation, namely, the existence of media concentration.

Today's media critics continue to sound the alarm. But often they argue as if simply pointing to the overwhelming facts of concentration – the list of media outlets owned by major firms or the size of the latest mergers – can end the discussion. Mark Crispin Miller presented a center-fold diagram of media ownership that he seemed to think graphically made the argument against media concentration.<sup>18</sup> Ben Bagdikian, the most readable critic of media concentration, a Pulitzer Prize-winning journalist and dean emeritus of Berkeley's graduate school of journalism, is more analytic in his objections to concentration. Still, Bagdikian is most cited either for his purely descriptive 1983 claim in the original edition of his book, *The Media Monopoly*, that the majority of the media in the United States were owned by fifty companies,<sup>19</sup> or his subsequent assertions that the situation is worsening, with the 2004 edition reporting that five multinational conglomerates provide the majority of what Americans see, hear, and read.<sup>20</sup>

Critics of concentration rightly view the media as a huge, nondemocratically organized force that has major power over politics, public discourse, and culture. Unsurprisingly, media ownership concentration receives great attention. In Europe, pressure for governmental responses came mostly from left and centrist political parties, trade unions, journalists' associations, and consumer groups, though often a political consensus of the left and right existed on the issue.<sup>21</sup> Many in America, too, especially on the left and center but many conservatives as well, see media concentration as a problem and believe that dispersed ownership is crucial for democracy.<sup>22</sup> However, as the recent FCC attempt to relax

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limits on media concentration implies, the step in the argument that jumps from the press's vital democratic role to solid objections to existing levels of media concentration has not gone unchallenged. Not only profit-hungry corporations but serious scholars, FCC commissioners, and some courts have found existing restrictions on media concentration much stricter than need be. Much of the public seems instinctively to believe the opposite, but often they provide no or weak explanations for their view. To fill this gap, chapter 1 presents a statement of the primary reasons that the popular view is right: concentration is a problem and the legal order should respond. The next three chapters evaluate the quite serious objections to the argument of chapter 1. Finally, chapter 5 analyzes possible policy responses to media concentration.

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## ONE

## Democracy at the Crossroads: Why Ownership Matters

Authoritarian regimes regularly try to censor or control the mass media's provision of vision and information. The health of democracies, in contrast, depends on having a free press. Edmund Burke reportedly observed that "there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all."<sup>1</sup> Among many others, Supreme Court Justice Potter Stewart saw the democratic role of this Fourth Estate as central to the rationale for constitutional protection of the press.<sup>2</sup> Of course, much more must be said about the idea of democracy before fully understanding its implications for the ideal of a free press. Questions include: What is the best conception of democracy? How do alternative conceptions of democracy suggest different ideals – and different constitutional interpretations – of "press freedom"? Even the notion of "fourth estate" requires unpacking. (I often use this term and the idea of the press's watchdog role interchangeably, but more precisely the watchdog role consists in being a "check" against abuse by government, while the fourth estate role may include that plus a more active involvement in governing and in influencing which political possibilities prevail.) Though these questions require investigation,<sup>3</sup> the initial point is simple: *democratic* concerns should be central in formulating legal policy relating to the press. Legal rules that inevitably structure the press as an institution should embody, to a substantial degree, democratic values or ideals.

Consequently, this chapter emphasizes the democratic role of the press as the chapter considers three major reasons to favor the widest possible dispersal of media ownership. It then discusses four additional, more pragmatic points. To begin, the single most fundamental reason to resist concentration of media ownership derives directly from dominant visions of democracy.

## MEDIA CONCENTRATION AND DEMOCRACY

THE THREE MAIN REASONS FOR OPPOSING  
OWNERSHIP CONCENTRATION1. A MORE DEMOCRATIC DISTRIBUTION OF COMMUNICATIVE  
POWER

Rationales for and interpretations of democracy vary. Some theories of democracy, especially pluralist and elitist theories, are in major ways empirical: they predict that democratic governments (maybe of a certain type) will lead to better results for society than available alternatives.<sup>4</sup> Normative theories of democracy, however, typically share the premise of people's equal right to participate in collective self-determination. The egalitarian premise, as well as the autonomy or "self-determination" premise, is crucial. This normative view values democracy as an end, not merely a means, because it embodies these values of equality and autonomy. Thus, democracy is widely understood as respecting the view that each person equally should have a say, at least a formally equal right to have a say, in choosing at least its officials and, ultimately, its laws and policies and maybe its culture.

The one-person/one-vote institutional principle interprets the politically egalitarian normative value, and in this country is widely (and constitutionally) seen as fundamental to the idea of a self-governing people.<sup>5</sup> Of course, a one-person/one-vote principle for an electoral districting rule turns out not to provide actual equal political power, but that was not its point. Rather, a normative conception of democracy requires that the structure itself embody or at least be consistent with respect for citizens' equal claim to be recognized as part of the self-determination process. Despite this fundamental egalitarian structural distributive principle, the actual distribution of political power depends on people's political preferences as they act within the structure. Many factors, including the boundaries of voting districts as drawn normally by state legislatures, unequal wealth as produced by people's (hopefully) legal practices within a fair legal order – even if limited by the most stringent campaign finance reform legislation – and each person's individual political perspective inevitably affect her effective influence on elections. Thus, actual power does not and could not meet an egalitarian standard. Still, the rationale for formal equality of voice in elections, manifest in the one-person/one-vote principle, both is basic to democracy and applies to the broader arena of voice in a democratic public sphere. Two later arguments for opposing media concentration – that dispersion creates democratic or political safeguards and gets media into

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the hands of owners more likely to favor quality over profits – have a more pragmatic logic. This first claim, however, is that this more constitutive egalitarian principle is a central, possibly the most fundamental, reason to oppose media concentration. Still, more argument for and, in the end, important caveats to this normative claim are necessary. The complexities of the idea of equality in respect to the relatively simple institution of an electorate are multiplied when policy attempts to translate this egalitarian commitment into a guide for the more complex structure of the public sphere generally – the communication order – and of media ownership in particular.

More must be – and will be – said about the notion of democracy implicit in the above claim. Still, the basic claim bears repeating. The same egalitarian value that is embodied in people’s equal right to be self-governing and that requires “one-person/one-unit-of-formal-political-power” applied to the ballot box also applies to the public sphere. The public sphere influences how people choose to exercise their vote. Equally important, through the creation of public opinion,<sup>6</sup> the public sphere should and often does influence how elected and appointed public officials actually exercise their formal decision-making power. In any large society, the mass media constitute probably the most crucial institutional structure of the public sphere. To be self-governing, people require the capacity to form public opinion and then to have that public opinion influence and ultimately control public “will formation” – that is, government laws and policies.<sup>7</sup> For these purposes, a country requires various institutional structures. The media, like elections, constitute a crucial sluice between public opinion formation and state “will formation.” The mass media, like elections, serve to mediate between the public and the government. For this reason, a country is democratic only to the extent that the media, as well as elections, are structurally egalitarian and politically salient.

The best institutional interpretation of this democratic vision of the public sphere is, I suggest, an egalitarian distribution of control, most obviously meaning ownership, of the mass media. The basic standard for democracy would then be a very wide and fair dispersal of power and ubiquitous opportunities to present preferences, views, visions. This is a *democratic distribution principle* for communicative power – a claim that democracy implies as wide as practical a dispersal of power within public discourse. As applied to media ownership, this principle can be plausibly interpreted structurally as requiring, possibly among other things, a maximum dispersal of media ownership. An older Federal Communications

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Commission adopted this view when it stated that “a proper objective is the maximum diversity of ownership”<sup>8</sup> or “maximum diffusion of control of the media of mass communications,”<sup>9</sup> a view echoed by the Supreme Court when it emphasized the relation between the First Amendment and “diverse and antagonistic sources.”<sup>10</sup>

The democratic distribution principle is an end in itself, not a means predicted to lead empirically to some desirable result. It structurally embodies a “pure process” value.<sup>11</sup> The distributional principle partially constitutes a normatively defensible conception of democracy. Normative appeal, not empirical evidence, provides its justification. Nevertheless, this principle needs further explication and, it turns out, some significant modification from this initial elaboration of maximum ownership dispersal. Two issues, two caveats, stand out, the first relating to the interpretation of democracy that the current elaboration seems to embody and the second involving a refinement given the nature of mass media as compared with individual speech.

Chapter 4 discusses in more detail different normative theories of democracy and their relation to theories of the First Amendment.<sup>12</sup> The most appealing theory I label “complex democracy.” A democratic political order involves, *in part*, a struggle among different groups, each with its own projects and interests, its own needs, and its own conception of a desirable social world. In relation to this struggle, democracy aims at a fair bargain or fair settlement among these different groups or interests. Fairness here refers roughly to an egalitarian weighting of different people’s interests and visions and an egalitarian opportunity to formulate these visions. Achieving this “pluralist” or “liberal” notion of fairness is the primary value embodied in the democratic distribution principle described above. Each group needs its fair share of the media to participate in political (or cultural) struggle.

Democracy, however, also purports to be about recognizing and pursuing a republican or Rousseauian “common good.” To find or formulate, whenever possible, such a “good of the whole” requires an *inclusive* discourse involving the whole society. How such a discourse could exist is not entirely clear. As an approximation, media that reach and appeal to all elements of the public and that fairly include the voice of all could embody this “republican” vision. Such media are consistent with, and may be most likely to exist under, largely monopolistic conditions. Elihu Katz described television performing that inclusive discourse role in Israel at a time when (and because) it was a public monopoly.<sup>13</sup> Though disagreeing with Katz on many points,<sup>14</sup> British scholar James Curran



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proposes that providing this inclusive discourse should be the democratic remit of the BBC. Obviously, this vision of a single inclusive discourse is in at least potential tension with the democratic distribution ownership principle. From this republican perspective, not only is widest possible dispersal of ownership not needed, but it could undermine this common discourse by segmenting audiences.

Complex democracy asserts that both egalitarian dispersal and an inclusive common discourse are real requirements of democracy, and that both are absolutely fundamental despite the tension between them. In practice, acceptance of both requirements means that neither premise determines all issues but also that neither should be abandoned. The democratic distribution principle is always an adequate reason, without more, to oppose any move toward concentration and to favor a maximum dispersal of media ownership or control. Nevertheless, other reasons, especially the simultaneous existence of the other democratic discursive requirement – to have a common discourse – can always justify compromise with this principle.

I leave consideration of appropriate compromises mostly to chapter 5. Still, note the possibility of different policies according primary weight to each principle. Inclusive public discourse might thrive best within media not compromised by inherently partial interests of private owners but that instead operate under rules of fair public discourse. This consideration is possibly the reason Katz and Curran both identified public broadcasting as the ideal location for performing this inclusionary role.<sup>15</sup> This institutional structure leaves open the possibility of requiring maximum possible dispersal of media power as the goal for *privately* owned media. Or, contrarily, maybe some private media could succeed at growing into this common discourse role, a view imperfectly suggested by the casual description of the *New York Times* as the “paper of record” in this country. Arguably, the legal order should allow any media entity to seek to play this role, a view that provides an objection to any government policy limiting the reach of an individual media entity.

Note, however, the difference between media “entity” or outlet – that is, a specific content provider – and a media “firm,” which may include many media entities. The inclusive discourse value has no logical, certainly no necessary, relation to a single firm owning multiple “media voices.” Under this understanding, while there might be no objection to immensely large media entities arising – a newspaper or network reaching as large a portion of the public as possible – this inclusive discourse value is not inconsistent with a policy, informed by the democratic

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distribution principle, of preventing any media firm from owning more than one media entity or outlet, more than one media voice. The wisest adjustments between these two democratic principles require inevitably contested and properly contextual judgments. Rather than further pursue here the possibility of compromise between or adjustments to the reach of these two democratic principles, this chapter asserts only the fundamental nature and explores the implications of the democratic distribution principle. That is, I want to emphasize the point made above: the democratic distribution principle is always a proper, whether or not a conclusive, reason to oppose concentration and favor media ownership dispersal.

This leads to the second caveat. *Mass* media involve a move from the individual, which was the fundamental unit in voting, to a concern with aggregates. (In this sense, it might have some analogies with the outcome of voting in a proportional representation system.) The original analogy to the vote suggests an individualistic interpretation of the ideal distribution of power within the public sphere. Each person equally gets one voice. Even in voting, realities make the notion of one-person/one-vote more an egalitarian slogan (or a formal implication of equality of respect) than a grant of equality of voting power. The departure from individualist equality is even more overt in the public sphere. An egalitarian distribution of actual communicative power is inconsistent with the very idea of a “*mass* media,” which almost inevitably contemplates a limited number of entities, a limited number of speakers, communicating to many.

The technical possibility that each person could own a limited “*mass* media,” with which she communicates occasionally to a large group, may motivate some policy initiatives related to the Internet or unlicensed wireless communications, but such communications could hardly duplicate the roles and functions that are now generally attributed to the mass media. Complete equality of actual communicative power is not only not possible, but it is probably not appropriate even as a goal.<sup>16</sup> Even in a purely oral community unaided by technology and without mass media, doing without opinion leaders – people, maybe elders, who because of skill, desire, and respect from others specialize in communication about issues of public moment – is hardly desirable or required by any appealing conception of democracy. Hopefully, people want to receive and assimilate informed and thoughtful communications. Having information “specialists” or opinion leaders can serve individuals and their society well. Moreover, people vary greatly in the extent that they desire to make – or are talented at making – discursive or informational contributions to