What the Sioux Should Do: Lanham Act Challenges in the Post-*Harjo* Era
*Jason Finkelstein* 301

# ALL THE NEWS THAT'S FIT TO SPLIT: NEWSPAPER MERGERS, ANTITRUST LAWS AND THE FIRST AMENDMENT

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At a time when newspapers are hemorrhaging readers to broadcast and online competitors, recent actions taken by the Department of Justice seeking to prohibit certain newspaper mergers may violate the First Amendment rights of newspaper owners who wish to speak to as large an audience as possible. This paper argues that while the Supreme Court has rejected First Amendment claims brought by media companies subject to antitrust regulations in the past, such First Amendment arguments should be afforded greater weight and attention, and should often prevail in the context of newspaper mergers. Recent federal circuit court decisions—finding that certain Federal Communications Commission ("FCC") structural ownership restrictions imposed on media companies violate their First Amendment speech and press rights—may be a harbinger that a more business-friendly and conservative Supreme Court will also accept such arguments in an antitrust context. The Supreme Court has had several opportunities to apply antitrust laws to newspapers, and the Court has held in each of those cases that newspapers are subject to generally-applicable antitrust laws just like any other business. In those cases, however, the Court was construing antitrust laws as applied to media organizations using predatory and exclusionary business tactics which harmed competition and did not significantly implicate First Amendment interests. When newspapers are merging, and the merger is non-predatory in that it is designed to preserve and strengthen a media organization, First Amendment considerations must inform the interpretation of antitrust law.

This paper recognizes both the importance of a diversity of viewpoints in media and that media companies do not have a First Amendment right to monopolize the advertising and information markets. However, when applying structural ownership statutes such as antitrust laws to newspaper mergers, courts should scrutinize whether application of those statutes is justified and take into account considerations regarding the First Amendment and the unique economic realities affecting newspapers, which struggle to compete with new forms of media while performing a valuable public service.



## I. A HISTORY OF FIRST AMENDMENT ISSUES IN ANTITRUST ENFORCEMENT

Antitrust laws do not exist to promote diversity of viewpoints in media, but rather to promote competition and efficiencies in the marketplace to benefit consumers. Since federal antitrust laws have been interpreted to regulate solely commercial transactions, and because the antitrust laws are not directed at speech, courts have been reluctant to entertain First Amendment arguments made by newspaper defendants subject to antitrust regulation. Two cases, *Associated Press v. United States* and *Lorain Journal Co. v. United States*, are polestars in this area.[1] In both, the Supreme Court held that antitrust laws, which are generally applicable commercial statutes that are not content-based, can be applied to media companies in the same manner as they would to any other business. Historically, the view has been that application of antitrust laws to newspapers raised few, if any, First Amendment concerns.

### A. *Associated Press and Lorain Journal: Early Newspaper Antitrust Cases*

Probably the most notable instance of the Supreme Court rejecting a First Amendment claim from a media entity subject to antitrust regulation is Justice Black's 1945 opinion in *Associated Press v. United States*.[2] The Associated Press, an entity formed by and serving over 1,000 newspaper members, used pooled resources to produce a news feed. The news feed was thought by many publishers to be indispensable to running a competitive newspaper.[3] The bylaws of the Associated Press gave members an effective veto over admission of new members, a provision used by local newspapers to stop local competitors, who were willing to pay for the newsfeed, from being able to receive the service.[4] The Supreme Court held that this arrangement violated the Sherman

1 Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1 (1945).
2 *Associated Press*, 326 U.S. 1.
3 *See id.* at 18-19 (discussing whether the AP wire service is in, fact, indispensable).
4 *Id.* at 10-12 (discussing the Associated Press bylaw provisions).

Act because of the bylaw's anticompetitive effects.[5] In reaching its conclusion, the Court emphasized that newspapers are money-making entities subject to generally applicable commercial restrictions, such as antitrust law. Justice Black wrote: "The fact that the publisher handles news while the others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."[6]

Justice Black's opinion rejected the Associated Press' claim that application of the Sherman Act to its newsgathering operation violated freedom of the press guarantees provided in the First Amendment.[7] Instead, Justice Black held that protecting competition among newspapers, and in the process providing for a larger number of voices in media, was more consistent with the goals of the First Amendment than allowing media organizations to avoid antitrust regulation.[8] Justice Black wrote:

> Freedom to publish means freedom for all and not for some. 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. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[9]

A similar sentiment to that expressed in *Associated Press* was advanced by the Supreme Court in *Lorain Journal Co. v. United States*, a 1951 case in which antitrust regulations were applied to a newspaper defendant.[10] In that case, the Lorain Journal Company's newspaper, the Journal, the only daily newspaper in Lorain, Ohio, refused to run advertisements by businesses that had advertised on a local radio station, which was the only other important media outlet in Lorain.[11] Because the Journal reached a larger audience than the radio station, the overwhelming majority of advertisers agreed not to advertise by radio so they would be able to access the Journal's larger audience, thus depriving the radio station of advertising clients.[12] In holding that the Journal's actions were an attempt to monopolize the local

5 *Id.* at 21-23.
6 *Id.* at 7.
7 *Id.* at 20.
8 *Id.*
9 *Id.*
10 *Lorain Journal Co.*, 342 U.S. 143.
11 *Id.* at 147-49.
12 *Id.*



advertising market in violation of section 2 of the Sherman Act, the Court flatly rejected the newspaper's First Amendment claim that it had a right to publish advertisements from whomever it wanted.[13] The Court first held that while the newspaper had a "general right" to "refuse to accept advertisements from whomever it pleases," the newspaper could not exercise that right "as a purposeful means of monopolizing interstate commerce."[14] The Court further held that the regulation did not violate the newspaper's guarantee to freedom of the press by imposing prior restraint on what advertisements it could publish.[15] In essence, the Court said that newspapers may have certain speech rights, but when it comes to their commercial activities, newspapers will be treated the same as any other business. "The injunction applies to a publisher what the law applies to others," the opinion concluded.[16]

This paper will later discuss the *Lorain Journal* decision further in the context of newspaper mergers. However, at the outset, it should be noted that the *Lorain Journal* court recognized that newspapers do not only compete with other newspapers, but also with other media, including radio. This recognition that news outlets compete across media is important for purposes of thinking about antitrust in an era when a single media market will include Internet, broadcast television, cable, billboards and, of course, radio.

### B. *Noerr-Pennington and Claiborne Doctrines: Situations Where First Amendment Concerns Trump Antitrust Policy*

A line of cases beginning in the 1960s formed what became known as the *Noerr-Pennington* Doctrine, providing a First Amendment exception to antitrust enforcement even when the activity in question was anticompetitive. Even though these cases do not involve newspapers, they are relevant when thinking about the application of antitrust laws to newspaper mergers. They show that when First Amendment concerns are sufficiently present, such concerns may trump application of the antitrust laws and their commercial considerations. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*,[17] the Supreme Court held that a railroad industry association formed to aggressively lobby for

13 *Id.* at 155.
14 *Id.*
15 *Id.*
16 *Id.* at 155-56.
17 E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

government restrictions on trucking was anticompetitive and would be a violation of the Sherman Act, but that the Act did not apply to such an activity protected by the First Amendment right to petition. In essence, the Court held that when the anticompetitive activity was otherwise violative of the Sherman Act but was being done to lobby the government, such activity could not be regulated by the antitrust laws.[18] Next, in *United Mine Workers of America v. Pennington*, the Supreme Court held that an association formed by the union and several employers seeking to have government officials manipulate minimum wages in such a way as to harm competitors was also protected by the First Amendment.[19] Similarly, in *NAACP v. Claiborne Hardware Co.*, the Supreme Court held that a politically motivated boycott of white merchants was not subject to any antitrust laws because of the First Amendment.[20]

The *Noerr-Pennington* and *Claiborne* doctrines proved limited in the scope of the exception which they provided. For example, First Amendment arguments were rejected in 1990 when the Supreme Court held that trial lawyers violated the Sherman Act when the lawyers engaged in a boycott, refusing to take on indigent defendants unless they were paid $30 per hour.[21] The Court distinguished the trial lawyers from the boycotters in *Claiborne* by finding that the lawyers joined the boycott to seek "special advantage for themselves."[22] The case impliedly reaffirmed the *Associated Press* and *Lorain Journal* reasoning that activity that was more commercial in nature could be regulated under the antitrust laws, while activity dominated by speech could not. Drawing the line between speech and commerce in these cases is difficult, but such a distinction is critical in analyzing the application of antitrust laws to newspaper transactions, as discussed below.

### C. *Citizens Publishing Company and the Newspaper Preservation Act: Congress Acknowledges Newspapers Face Unique Economic Realities*

Despite the unique economic pressures faced by the newspaper industry, antitrust law has generally prohibited joint operating agreements between newspapers as being

18 *See also* James S. Wrona, *A Clash of Titans: The First Amendment Right to Petition vs. The Antitrust Laws*, 28 NEW ENG. L. REV. 637 (1994). *See generally* Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965 (2003).

19 United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

20 NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

21 FTC v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411 (1990).

22 *Id.* at 426.



anticompetitive. In *Citizen Publishing Company v. United States*, the 1969 Supreme Court held that a joint operating agreement between Tucson, Arizona's two newspapers, *The Citizen* and *The Star*, violated the Sherman and Clayton Acts.[23] That agreement had been entered in 1940 at a time when *The Citizen* operated at a profit with 50 percent more advertisements than the money-losing *Star*. Under the agreement, each newspaper maintained its own corporate identity, newsroom and editorial staffs, but shared other administrative functions, pooled resources, and agreed not to compete on advertising prices.[24] The Court held that the price fixing and other elements of the agreement (and ultimate merger) were illegal, and rejected the newspapers' "failing company"[25] and First Amendment defenses. The Court held that First Amendment considerations are not applicable because the antitrust restriction "deals only with restraints on certain business or commercial practices," and does not seek to regulate newsgathering.[26]

Congress reacted to the *Citizen Publishing* decision, which threatened hundreds of similar existing joint operating agreements (JOA's), in 1970 by passing the Newspaper Preservation Act.[27] The Newspaper Preservation Act gives the Attorney General authority to give prior consent to newspapers to be party to a joint operating agreement that would otherwise violate antitrust rules so long as those newspapers maintain editorial independence and "not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper."[28] The Newspaper Preservation Act essentially reversed the policy effect of *Citizen Publishing* by expanding the scope of the "failing company" defense in the context of newspaper joint operating agreements, and provided an easier standard for newspapers to meet.[29] Currently, it appears that the Newspaper Preservation Act may be not be enough to save newspapers from the grim economic realities they face; certainly since 1970 newspaper circulation has continued to decline along with the number of cities with two newspapers. The Act's

23 Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969).

24 *Id.* at 133-34.

25 *Id.* at 137 (failing company defense requires defendant to show that one of the merging entities faced a grave possibility of a business failure and that there existed no other prospective purchaser).

26 *Id.* at 139-40 (citing *Associated Press*, 326 U.S. at 20).

27 15 U.S.C. §§ 1801 et seq. (2006).

28 15 U.S.C. § 1803(b) (2006) (antitrust exemptions).

29 Eric J. Gertler, Comment: Michigan Citizens for an Independent Press v. Attorney General: *Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers?*, 39 AM. U. L. REV. 123, 167-68 (1989).

requirement that a newspaper be "failing" before its protections can be enjoyed means that in order to take advantage of the Act, a newspaper must already be in a "downward spiral."[30] At that point, the healthier newspaper in a two-newspaper market may have little interest in rescuing its competitor by entering a joint operating agreement, and would rather wait for the competitor's failure to enjoy monopoly.[31]

The passage of the Newspaper Preservation Act does not universally exempt newspapers from antitrust enforcement, but does serve as a signal that regulators should be mindful of the unique economic realities which newspapers face when applying antitrust laws to them.

## II. Cross-Media Ownership Rules and Related FCC Regulation: Scarcity Doctrine, Media Regulation and the First Amendment

The FCC's cross-media structural ownership regulations are similar to antitrust laws in that they have both been invoked to prevent media companies from merging. They differ, of course, in their underlying rationales: the FCC cross-media ownership limits aim to promote diversity in broadcast media, while antitrust laws aim to promote competition in business more generally. Nevertheless, it is valuable to see how courts have dealt with conflicts between FCC structural ownership regulations, including cross-ownership and total viewer limits, and the First Amendment interests of media owners who wish to speak to as large an audience as possible.[32] In these cases, government policy which has the effect of preventing media consolidation is met with arguments that the media companies are merging in order to

30 *Id.* at 167-68.

31 *But see id.* (arguing that the NPA may provide an unhealthy newspaper with an opportunity to negotiate a joint operating agreement before its doom is certain while the "failing company" doctrine of antitrust law would be unavailable to a newspaper because by the time such a doctrine is applicable, the dying newspaper cannot be saved or even resurrected).

32 *See generally* Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 418 (2006). Professor Shelanski's article, which is critical of recent scaling back of FCC cross-ownership restrictions, considers whether antitrust laws can serve to maintain media diversity even as FCC cross-ownership limits are reduced. A strong proponent of media diversity as a free speech interest in and of itself, Professor Shelanski would probably disagree with the conclusion of this paper that application of antitrust laws to prevent a newspaper merger could violate the First Amendment rights of newspaper owners. Indeed, Professor Shelanski was particularly critical of recent circuit court decisions finding FCC restrictions to have violated the First Amendment rights of media company owners, cases which are the model for the argument advanced in this paper that application of antitrust laws to prohibit a newspaper merger can violate a newspaper owner's First Amendment rights. Professor Shelanski warns that increasingly pro-business courts may soon use the First Amendment as a pretext to allow for further media industry consolidation.



compete with competitors in other media, to survive in an increasingly competitive and unique business environment.

Congress has long authorized the FCC to license and regulate broadcast media in the United States. While antitrust rules are generally applicable to all businesses, whether they are newspapers, supermarkets or investment banks,[33] FCC regulations focus on entities that are traditionally considered speakers under the First Amendment.[34] Several courts have seized upon this fact that FCC rules apply almost exclusively to speakers to find that such regulations are especially vulnerable to government abuse and should thus be given higher scrutiny.[35] On the other hand, there are a line of cases which find that because the FCC is regulating and licensing the use of broadcast bandwidth, a finite and scarce resource, the FCC has greater latitude to develop viewpoint-neutral regulations that advance the "public interest," an interest that can include diversity of voices.[36] These two considerations—that the FCC has more leeway to develop broadcast regulations because they involve a scarce public resource combined with concern that FCC rules mainly regulate speakers—pull in different directions in the application of structural ownership rules to media companies.

### A. *National Citizens Committee for Broadcasting: Should Scarcity and Diversity Rationales for Media Regulation be Limited to Broadcast Media and Licensing?*

In *FCC v. National Citizens Committee for Broadcasting*, the 1978 Supreme Court upheld cross-ownership rules which prohibited the FCC, under most circumstances, from granting broadcast licenses to companies which owned newspapers in the same market.[37] The Court found that the FCC's policy followed a rational[38] congressional mandate to assign licenses in such as way as to advance the "public interest" and the Court held that diversity of voices, and even antitrust policies, fell within the legitimate governmental interests which the FCC could pursue. Indeed, the Court determined that the cross-ownership rules were grounded in First Amendment concerns that encouraged the "widest possible dissemination of information from diverse and

33 *Associated Press*, 326 U.S. at 7.

34 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640-41 (1994).

35 *See id.*

36 *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978).

37 *Id.*

38 *Id.* at 808 (applying rational basis scrutiny).

antagonistic sources."[39] But while the cross-ownership rules advanced a First Amendment-grounded policy agenda seeking to enhance diversity in media, the Court acknowledged that such an agenda could ultimately come into conflict with the First Amendment rights of the companies whose ability to reach as large an audience as possible is being regulated. Justice Marshall's opinion says:

> [National Association of Broadcasters] contend[s] that it is inconsistent with the First Amendment to promote diversification by barring a newspaper owner from owning certain broadcasting stations. In support, they point to our statement in *Buckley v. Valeo*, 424 U.S. 1 (1976), to the effect that "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others." As *Buckley* also recognized, however, "'the broadcast media pose unique and special problems not present in the traditional free speech case.'" . . . Thus efforts to "'enhanc[e] the volume and quality of coverage' of public issues" through regulation of broadcasting may be permissible where similar efforts to regulate print media may not be.[40]

The broadcast regulation cases such as *National Citizens Committee for Broadcasting* suggest that in the context of deciding whether to grant a license, the FCC can take into account the diversity of voices as legitimate criteria, because broadcast bandwidth is a scarce resource.[41] Presumably a corollary to that statement is that when federal agencies regulate non-broadcast media, such as print, Congress and federal agencies must provide a different justification other than diversity, since the scarcity rationale relevant to broadcast is not applicable. When applying antitrust statutes to newspaper mergers, then, only competition and market rationales should be valid justifications, and diversity and scarcity rationales should not be invoked.

### B. *Turner Broadcasting Dicta: Even Generally-Applicable Laws Could Be Subject to Heightened First Amendment Scrutiny When Applied to Media Companies*

*Turner Broadcasting System, Inc. v. FCC* has been cited for the proposition that "economic regulation of media ownership should be subject to intermediate scrutiny under the First Amendment so long as the regulations are content-neutral and do not have the purpose of restraining speech."[42] In that case, the 1994 Supreme Court applied intermediate scrutiny in its consideration of a statute and an FCC rule requiring cable companies to carry the transmissions of local broadcasters.[43] Professor Howard Shelanski, a proponent of media diversity, has warned that this intermediate level of scrutiny, or perhaps something even more rigorous, could similarly apply to limits on media ownership imposed under pure antitrust laws.[44]

In *Turner Broadcasting*, the Court found that FCC regulations tend to single out the media, and should thus be more often subject to heightened First Amendment scrutiny.[45] Dicta from *Turner Broadcasting* would suggest that if the Court were to consider an antitrust enforcement action against a media company, heightened First Amendment scrutiny could be applied depending on the circumstances, even though antitrust laws are generally-applicable.[46] In the case, the government argued that rational basis scrutiny should apply to the FCC "must-carry" regulation, a contention the Supreme Court rejected.[47] Here is what Justice Kennedy's opinion said with respect to the differences between FCC actions and antitrust:

> [T]he Government and some appellees maintain that the must-carry provisions are nothing more than industry-specific antitrust legislation, and thus warrant rational-basis scrutiny under this Court's "precedents governing legislative efforts to correct market failure in a market whose commodity is speech," such as *Associated Press v. United States*, 326 U.S. 1 (1945) and *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). This contention is unavailing. *Associated Press* and *Lorain Journal* both involved actions against members of the press brought under the Sherman Antitrust Act, a law of general application. But while the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment, compare *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), laws that single out the press, or certain elements thereof, for special treatment "pose a particular danger of abuse by the

39 *Id.* at 785 (quoting *Associated Press*, 326 U.S. at 20).
40 *Id.* at 799-800 (internal citations omitted).
41 *See id.*

42 Shelanski, *supra* note 32, at 418; *see also Turner Broad. Sys., Inc.*, 512 U.S. 622.
43 *Turner Broad. Sys., Inc.*, 512 U.S. at 662.
44 Shelanski, *supra* note 32, at 418 Professor Shelanski writes that intermediate scrutiny is more likely to be applied in the context of antitrust regulation of media ownership than in FCC regulation because:

> [T]he antitrust agencies are in an even weaker position for pursuing media diversity and competition than the FCC . . . [because they] . Unlike the FCC, they have no specific authorization from Congress to limit media ownership to further statutory public interest policies.

45 *Turner Broad. Sys., Inc.*, 512 U.S. at 640-41.
46 *Id.*
47 *Id.*

State," *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), and so are always subject to at least some degree of heightened First Amendment scrutiny.[48]

It remains to be seen what Justice Kennedy meant when writing that enforcement of a generally applicable law "may or may not" be subject to heightened scrutiny, and how that qualification would play out in the context of a simple newspaper merger where no predatory practices are alleged.[49] *Associated Press* and *Lorain Journal* were cases that both involved predatory and cartel-like behavior; First Amendment scrutiny might be heightened when antitrust laws are applied to transactions involving media where such anticompetitive conduct is not present, especially if trends in recent lower courts hold.[50]

## III. Recent Lower Court Cases Suggest Structural Ownership Laws Applied to Media Companies Should Receive Intermediate First Amendment Scrutiny

Recent lower court decisions may signal that courts are more willing to see merit in the claim that application of antitrust laws to the press implicates free speech concerns. Several lower federal courts have begun to conclude that First Amendment rights of media owners have been violated by applying FCC structural ownership restrictions when those restrictions were found to be unjustified in respect to the public interest goals they profess to achieve.[51] The rationales followed by these courts are likely to carry over into the print media and antitrust context. These courts distinguish cable operators from broadcasters, finding that the government may promote media diversity when it is licensing and regulating broadcast bandwidth, a limited resource, but may not promote media diversity when the subject of the regulation is not a broadcaster. If the government is unable to invoke the scarcity rationale, its media regulations must be justified instead by general commercial concerns such as promoting competition between media outlets, the same justification underpinning antitrust laws. In recent cases, those competition justifications

48 *Turner Broad. Sys., Inc.*, 512 U.S. at 640-41.

49 *See id.*

50 Shelanski, *supra* note 32, at 417-20.

51 Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002); Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994); U.S. West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994); *see generally* Shelanski, *supra* note 32 (Professor Shelanski's article identifies these cases and the trend towards greater recognition of such First Amendment claims by media owners, but argues that courts should not recognize such claims.).



were rejected as insufficient in light of the First Amendment issues at stake.

In *Time Warner Entertainment v. FCC*, the United States Court of Appeals for the District of Columbia considered challenges to a number of FCC regulations, including one requiring cable companies to reserve 60 percent of their programming for channels produced by non-affiliated firms and another imposing a 30 percent limit on the number of subscribers a cable company can reach.[52] The Court of Appeals held that Time Warner's speech rights were implicated because their operation of the cable companies enabled them to exercise editorial control over the content carried by their service.[53] The Court applied an intermediate scrutiny analysis in determining whether the regulation violated Time Warner's First Amendment rights.[54] The Court held that the FCC's justifications for the limits it chose were lacking in "substantial evidence."[55] With respect to the 30 percent limit on the number of subscribers a cable company could reach, the court found that FCC's only justification was that "all other things being equal, collusion is less likely when there are more" competitors in a market.[56] The Court of Appeals held that when speech rights were implicated, such a conjectural justification for a regulation was insufficient and that the FCC was required to identify a "non-conjectural harm."[57] The Court of Appeals ultimately found that the FCC lacked sufficient justification for its regulations to withstand intermediate scrutiny, and that therefore the regulation violated Time Warner's First Amendment rights.[58] In reaching its conclusion, the Court of Appeals agreed that encouraging diversity in media was an important governmental objective, but ruled that governmental agencies bear a heavy burden in proving that the value of more diversity justifies any limitation on the speaking rights of corporate media owners. In doing so, the Court made an analogy to an important First Amendment "right of access" case:

> Everything else being equal, each additional "voice" may be said to enhance diversity. And in this special context, every

52 *Time Warner Entm't Co.*, 240 F.3d at 1128.

53 *Id.* at 1140.

54 *Id.* at 1130 ("[A] regulation subject to intermediate scrutiny will be upheld if it 'advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'"); *see also Turner Broad. Sys., Inc.*, 512 U.S. at 662 ("[I]ntermediate level of scrutiny [is] applicable to content-neutral restrictions that impose an incidental burden on speech.").

55 *Id.* at 1133.

56 *Id.* at 1132.

57 *Id.* at 1134.

58 *Time Warner Entm't Co.*, 240 F.3d at 1128.

additional splintering of the cable industry increases the number of combinations of companies whose acceptance would in the aggregate lay the foundations for a programmer's viability. But at some point, surely, the marginal value of such an increment in "diversity" would not qualify as an "important" governmental interest. Is moving from 100 possible combinations to 101 "important"? It is not clear to us how a court could determine the point where gaining such an increment is no longer important. And it would be odd to discover that although a newspaper that is the only general daily in a metropolitan area cannot be subjected to a right of reply, see *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), it could in the name of diversity be forced to self-divide. Certainly the Supreme Court has not gone so far.[59]

The Court of Appeals in effect concluded that it is nearly impossible in the context of FCC density restrictions applied to cable operators to show exactly at what point the value of diversity of voices in media becomes a legitimate governmental interest sufficient to override First Amendment concerns. It is unclear if this higher evidentiary bar would be similarly applicable to antitrust enforcement against newspaper industry consolidation. But it is significant that the Court of Appeals is less willing to accept the related scarcity and diversity rationales for structural ownership regulation in the context of cable ownership, where scarcity is less applicable.

In *Fox Television Stations, Inc. v. FCC*, the United States Court of Appeals for the District of Columbia Circuit considered an FCC decision in 1998 to maintain its national television station ownership rule, which prohibited any single owner from potentially reaching more than 35 percent of national households.[60] The Court also considered the FCC's cable/broadcast cross-ownership rule, which prohibited a cable television company from owning a broadcast television station in the same market.[61] Under the Telecommunications Act of 1996,

59 *Id.* at 1135.

60 *Fox Television Stations, Inc.*, 280 F.3d at 1034; 47 C.F.R. § 73.3555(e) (1998); *see also* Shelanski, *supra* note 32, at 419:

> There is no reason to think the DOJ or FTC will receive any greater deference than that extended to the FCC. . . . [A]pplication of [DOJ] Merger Guidelines to limit media ownership appears likely to face at least the same "intermediate" scrutiny under the First Amendment faced by the FCC's content-neutral regulations, in which case courts will require the enforcement agencies to provide strong evidence of real harms to justify blocking a merger. How far the Supreme Court's Associated Press dictum would extend to merger review focusing on specific media content is therefore an open question.

*Id.*

61 *Fox Television Stations, Inc.*, 280 F.3d at 1033; 47 C.F.R. § 76.501(a) (1998) (rule effectively prohibiting a cable television company from owning a broadcast television



the FCC was required to conduct a biennial review of its structural ownership regulations to determine whether "such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest."[62]

With respect to the national television station ownership rule, in 1984, the FCC issued a report which concluded that the national television station ownership rule should be repealed because the need for the rule had been undermined by existing competition.[63] The Court held that because the FCC did not even attempt to rebut its 1984 conclusions when it decided to retain the national television station ownership rule in 1998, that decision was "arbitrary and capricious and contrary to § 202(h) of the 1996 Act."[64] Because the FCC failed sufficiently to justify its decision to keep the rule during its biennial review, the Court remanded to the FCC for further deliberation.[65] Notably, the Court rejected the broadcasters' claims that the 35 percent ownership limit violated the broadcaster's First Amendment claims, distinguishing this case from the previous year's *Time Warner Entertainment* decision, in which the same court held that a 30 percent limit on the number of households served by cable operators violated the cable provider's First Amendment rights.[66] The Court reasoned that because broadcast bandwidth was a scarce resource, and because diversity of voices was a legitimate governmental interest, Congress and the FCC could constitutionally limit broadcasters to reaching 35 percent of the national audience.[67]

With respect to the cable/broadcast cross-ownership rule, the Court of Appeals also held that because the FCC failed to provide adequate justification to keep the rule, such a decision was "arbitrary and capricious" and "contrary to § 202(h)" of the Telecommunications Act of 1996.[68] Indeed, the Court of Appeals found that there was a "low" probability that the FCC could justify its decision on remand, and simply vacated the rule.[69] The Court did not reach the First Amendment claims brought with respect to the cross-ownership rule.[70]

station in the same market).

62 Telecommunications Act of 1996 § 202(h) (codified at 47 U.S.C. § 161 (2006)).

63 *Fox Television Stations, Inc.*, 280 F.3d at 1044.

64 *Id.* at 1045.

65 *Id.* at 1049.

66 *Id.* at 1040-42, 1045-47.

67 *Id.* at 1045-47 (limits on broadcast rights implicate "scarcity" rationale, citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) and *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943)).

68 *Id.* at 1049.

69 *Id.* at 1053.

70 *Id.* at 1049.

In light of these decisions, government regulation prohibiting a merger between two newspapers, which are non-broadcast entities, must be justified in terms of general commercial policy rather than promoting media diversity. Because a newspaper merger presents future hypothetical and conjectural threats to competition,[71] rather than actual predatory conduct harming competition,[72] justifications prohibiting such a merger could be similarly found insufficient when weighed against the First Amendment interest of newspaper owners to speak to as large an audience as possible.

## IV. The Unique Economic Realities Faced by Newspapers

The arguments articulated in these recent lower court cases are even more applicable in the context of newspaper mergers; as such mergers are arguably necessary for newspapers to remain vital community voices. Justifications for application of structural ownership statutes in the context of newspaper mergers—that such mergers will harm newspaper readers and advertisers—are diminished in light of new media competition and the harsh economic realities faced by established newspapers.

Newspapers face economic realities which are much different from other traditional profit-making entities. A newspaper's financial health is directly tied to the amount of advertising it carries, which in turn is directly tied to its circulation. If a newspaper's circulation declines, fewer advertisers will choose to pay to advertise in that newspaper, causing the newspaper to have less resources to produce content that will attract readers, which will cause circulation to decline further. A 1989 article by Eric Gertler in the American University Law Review explains how this interdependence between circulation and advertising can cause an unhealthy newspaper into a "downward spiral" from which it is difficult if not impossible to recover.[73] The effect of such a "downward spiral" is exacerbated for newspapers which compete with another newspaper in the same city or with other media, such as broadcast, Gertler explains.[74] In those situations, advertisers are likely to abandon the newspaper with lower circulation to advertise in the media entity with a larger market share in order to reach a larger audience. This migration has the effect of hastening the death of the weaker newspaper in a competitive

71 *See generally Time Warner Entm't Co.*, 240 F.3d 1126.
72 *See generally Associated Press*, 326 U.S. 1.
73 Gertler, *supra* note 28, at 129-35.
74 *Id.*



marketplace.[75] Furthermore, producing a newspaper entails high fixed costs including the costs of printing presses, delivery trucks and editorial staff, while marginal costs (the printing and delivery of each additional copy of the newspaper) are relatively low. These economies of scale combined with the "downward spiral" risk suffered by weaker newspapers may explain why fewer and fewer cities have more than one major daily newspaper.[76]

## V. The McClatchy-Knight Ridder Merger

This paper will now consider the recent merger between the McClatchy and Knight Ridder newspaper chains, and the subsequent regulatory actions by the Department of Justice Antitrust Division which led McClatchy to sell the *St. Paul Pioneer Press*, one of the newspapers it had acquired from Knight Ridder. This paper will then hypothesize, applying rationales developed in recent First Amendment case law, whether McClatchy could have litigated to avoid selling the *St. Paul Pioneer Press.*

### *A. The Merger*

In March of 2006, the McClatchy chain of twelve daily newspapers announced that it had agreed to purchase its much larger rival Knight Ridder and its thirty-two daily newspapers for over $4 billion in cash and stock.[77] The sale came as Knight Ridder, like many companies in the newspaper industry, struggled with circulation declines and competition from cable and the Internet. The sale was demanded by disgruntled Knight Ridder shareholders unhappy with years of below-market returns.[78] McClatchy, on the other hand, was one of the few newspaper companies with a recent positive track record in the business, having a reputation for producing strong if not Pulitzer-winning journalism while maintaining healthy profits. Editorial employees at several Knight Ridder newspapers, among them *The Miami Herald*, who anguished about the possibility of major newsroom cutbacks under an unknown new owner, cheered McClatchy's victory in the auction as the best result for journalism under difficult circumstances.

But the relief felt by *The Herald's* reporters was not shared by

75 *Id.*
76 *See id.* at 129-31 (explaining how most cities, even medium-sized and large ones which used to have several newspapers, now circulate only one metropolitan newspaper).
77 Katharine Q. Seelye & Andrew Ross Sorkin, *Newspaper Chain Agrees to a Sale for $4.5 Billion*, N.Y. Times, March 13, 2006, at A1.
78 *Id.*

their counterparts at *The St. Paul Pioneer Press*, another Knight Ridder newspaper which had been until then locked in a daily circulation battle with the McClatchy-owned *Minneapolis Star-Tribune*. For them, the McClatchy takeover simply meant more uncertainty. The deal would put both of the Minneapolis area's major newspapers under control of a single corporate owner.

### B. *The Justice Department's Complaint*

On June 27, 2006, to nobody's surprise, the Department of Justice filed a complaint with the United States District Court for the District of Columbia alleging that the proposed merger would lessen competition and create a monopoly in the publication and distribution of newspapers in the Minneapolis market, thus violating section 7 of the Clayton Act, 15 U.S.C. § 18.[79] The Department of Justice complaint identified the relevant market as the market for "local daily newspapers" in the Minneapolis/St. Paul metropolitan area, a market definition which excluded weekly newspapers, radio news, television news and Internet news.[80] The Complaint alleged that the combination of the *St. Paul Pioneer Press* with the *Star Tribune* would give McClatchy control of 100 percent of the relevant market, along with the power to profitably increase prices for subscriptions and advertising.[81] The Complaint further alleged that the head-to-head competition, which had until then existed between the two newspapers, gave readers higher quality news coverage, better service and lower prices, and that the creation of a newspaper monopoly would cause deterioration in such services and also harm advertisers.[82] It continued to allege that high barriers to entry prevented new entrants from lessening these anti-competitive effects of the proposed merger.[83]

### C. *McClatchy Consents to Sale of the St. Paul Pioneer Press*

Even before the complaint was filed, McClatchy and the Justice Department agreed to a settlement that would "preserve[] competition," under which McClatchy would divest itself of the *Pioneer Press* within a certain time period.[84] The agreement was cemented with the entry on July 21, 2006 of a hold separate stipulation and order requiring McClatchy to preserve and operate the *Pioneer Press* as an entity independent from the *Star-Tribune* until such a sale was finalized.[85] On August 2, 2006, McClatchy sold the *Pioneer Press* to the Hearst Corporation, which promptly sold it to MediaNews Group.[86]

### D. *Application of Recent Case Law to the McClatchy Antitrust Complaint*

Consider the following hypothetical. Had McClatchy decided that it wanted to own *both* the *Star-Tribune* and the *Pioneer Press*, McClatchy might have simply refused to enter into a consent decree with the Department of Justice requiring it to sell the *Pioneer Press* upon completion of the merger. The District Court would probably have then granted a Justice Department request for an injunction preventing the Knight Ridder and McClatchy merger. Litigation over such an injunction would have likely focused on whether such an injunction violated the first amendment, a question to which we now turn.

#### 1. Distinguishing Associated Press and Lorain Journal

While straight application of the rule of *Associated Press* and *Lorain Journal* would seem to require that the McClatchy newspaper company be subject to generally-applicable antitrust laws in the same manner as any other business, the Supreme Court's decisions in *Noerr Motor Freight* and *Pennington* provide precedent for the argument that McClatchy's First Amendment interests can trump antitrust regulation. It could be argued that McClatchy, as a newspaper publisher and speaker, has a strong First Amendment interest in speaking to as large an audience as possible. This reasoning was the basis of a successful argument made by Time Warner against FCC regulations limiting the number of cable channels it could own.[87] If Time Warner has a recognized First Amendment interest in being able to speak to as large an audience as possible, it could hardly be argued that McClatchy does not also have that same First Amendment interest.

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79 Complaint at 1-2, United States v. McClatchy Co., 2006 U.S. Dist. LEXIS 97133 (D.D.C. Nov. 6, 2006) (No. 06 1175) [hereinafter Complaint].
80 *Id.* at 3-4.
81 *Id.* at 3-6.
82 *Id.*
83 *Id.* at 8-9.
84 Competitive Impact Statement at 2-3, United States v. McClatchy Co., 2006 U.S. Dist. LEXIS 97133 (D.D.C. Nov. 6, 2006) (No. 06 1175) [hereinafter Competitive Impact Statement].
85 Hold Separate Stipulation and Order at 5, United States v. McClatchy Co. , 2006 U.S. Dist. LEXIS 97133 (D.D.C. Nov. 6, 2006) (No. 06 1175) [hereinafter Hold Separate Stipulation and Order].
86 John Welbes, *Pioneer Press Deal Done*, ST. PAUL PIONEER PRESS, Aug. 3, 2006, *available at* http://tribunewatch.org/news.php?ID=2541.
87 *See Time Warner Entm't Co.*, 240 F.3d 1126.

Moreover, McClatchy's First Amendment interest in speaking to a large audience is not lessened by the type of regulation that impinges upon it, whether it is a generally-applicable antitrust structural ownership limit or an FCC structural ownership limit.

Most importantly, both *Associated Press* and *Lorain Journal* involved situations where the newsgathering entity was engaging in predatory and exclusionary behavior intended to harm competitors rather than to expand their own audiences. Not only did the anticompetitive behavior provide a compelling government justification for enforcement of antitrust laws, but the behavior was also purely commercial in nature, having very little to do with exercise of editorial control or otherwise speaking. For those reasons, both the Associated Press and the Lorain Journal Company had less compelling First Amendment interests in the anticompetitive behavior in which they were engaged, and their activities presented a heightened justification for enforcement of the antitrust laws.

McClatchy, by comparison, could argue that it is not engaged in predation or exclusion, and is instead engaged in combination and expansion, a behavior that is also regulated by antitrust laws but which in the context of a media merger also very much implicates the First Amendment.

Further distinguishing *Associated Press* and *Lorain Journal*, McClatchy could argue that a newspaper merger presents a mere conjectural threat that a combined entity could exercise market power to harm competition, whereas predation and exclusion are conduct offenses that actually harm competition. This argument parries the government's justification for enforcement of the antitrust laws in the McClatchy context.

### 2. Prohibiting a *Pioneer Press* and *Star Tribune* Merger is Unjustified in Light of the First Amendment Concerns Implicated

Assuming that a court finds that antitrust regulation prohibiting the parent companies of the *Pioneer Press* and the *Star Tribune* from merging implicates their First Amendment interests, such a court would then likely examine whether the governmental interest advanced by that antitrust enforcement is sufficiently justified. In the *Turner Broadcasting, Time Warner, Sinclair* and *Fox Television* cases, courts have required regulators to justify limitations imposed on a company's ability to own media entities.

Since a media merger implicates a company's First Amendment interest in speaking to as large an audience as possible, antitrust laws that interfere with a company's ability to



reach such a large audience should be subject to intermediate scrutiny.[88] Both the *Associated Press* and *Lorain Journal* cases, where rational basis scrutiny was applied, dealt with antitrust laws that prohibit predatory and exclusionary tactics which do not seriously implicate First Amendment guarantees of freedom of speech and of the press. Because antitrust laws that regulate mergers can be distinguished from antitrust laws that prohibit predatory and exclusionary behavior, and because media mergers are more likely to implicate First Amendment concerns, it would be appropriate to use intermediate scrutiny when considering First Amendment challenges to regulation of media mergers and rational scrutiny when considering media predation.

A court applying intermediate scrutiny in considering a First Amendment challenge to an injunction preventing a merger between the *Pioneer Press* and the *Star Tribune* must determine whether preventing the merger "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[89] Consider the reasons listed by the Justice Department in its complaint and accompanying documents explaining why a merger between the parent corporations of the Star Tribune and the Pioneer Press would be "anticompetitive."[90]

1. <u>Harms to Readers</u>. The Department of Justice's complaint and simultaneously-filed Competitive Impact Statement explained that a merger between the parent corporations of the *Star Tribune* and *Pioneer Press* would reduce the "quality of news coverage" and "service" provided to readers in the Minneapolis/St. Paul market.[91] The complaint did not specifically address how a

88 *Id.* at 1130 ("[A] . . . regulation subject to intermediate scrutiny will be upheld if it 'advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'" (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997))); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) ("[I]ntermediate level of scrutiny [is] applicable to content-neutral restrictions that impose an incidental burden on speech").

89 *See Time Warner Entm't Co.*, 240 F.3d at 1130.

90 Complaint, *supra* note 79, at 9

> This transaction will have the following effects . . . in violation of Section 7 of the Clayton Act, 15 U.S.C. 18: (a) competition in the sale of local daily newspapers to readers in the Minneapolis/St. Paul metropolitan area will be substantially lessened or eliminated; (b) prices for local daily newspapers in the Minneapolis/St. Paul metropolitan area would likely increase to levels above those that would prevail absent the merger; (c) competition in the sale of advertising in local daily newspapers in the Minneapolis/St. Paul metropolitan area will be substantially lessened or eliminated; and (d) prices for advertising in local daily newspapers in the Minneapolis/St. Paul metropolitan area would likely increase to levels above those that would prevail absent the merger..

91 Competitive Impact Statement, *supra* note 84, at 7.

merger between these newspapers would reduce media diversity,[92] but the harms which are cited, especially reduced "quality of news coverage," do sound very much like euphemisms for the diversity rationale raised by the FCC to support its own regulations. As we have discussed above, and as Justice Marshall's opinion in *National Citizens Committee for Broadcasting* underscores, the diversity rationale should only be available to justify media regulations when the subject of such regulation is a scarce resource and public good like broadcast bandwidth.[93] When ownership of non-broadcast media such as newspapers is being regulated, other justifications must be put forth.[94] Otherwise, the government runs the risk of "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others."[95] Thus, any justification for regulating who may own non-broadcast media which rests on the benefits of diversity in the media marketplace should fail.

2. Harms to Advertisers. The Department of Justice's complaint and simultaneously-filed Competitive Impact Statement also explained that the merger would create a monopoly in the market for advertising in local daily newspapers in Minneapolis/St. Paul, and thereby "substantially reduce or eliminate that competition" for advertisers.[96] The major flaw in this concern is that it rests on the questionable premise that a single newspaper would not continue to face substantial competition for advertisers from other media businesses including, among others, radio, television, cable, billboards and the Internet. By defining the relevant market in which the *Pioneer Press* and the *Star Tribune* compete as being limited to "local daily newspapers,"[97] the Department of Justice ignored the economic realities faced by newspapers, which are hemorrhaging readers and advertisers to competing media, as well as important antitrust case law. Indeed, *Lorain Journal* may be invoked to argue that newspapers compete with other types of media such as broadcast, cable and the Internet.[98] In *Lorain Journal*, the Supreme Court recognized that a newspaper competed directly with radio stations for advertisers, a recognition that undermines the Department of Justice view which treats the relevant market in newspaper mergers

92 *See generally* Complaint, *supra* note 79.
93 *See Nat'l Citizens Comm. for Broad.*, 436 U.S. at 799-800.
94 *See id.*
95 *See id.* at 799 (quoting Buckley v. Valeo, 424 U.S. 1 (1976)).
96 Competitive Impact Statement, *supra* note 84, at 8.
97 *Id.*
98 *See generally Lorain Journal Co.*, 342 U.S. 143.



as being limited to local daily newspapers.[99] Such a view has been out of touch with economic reality at least since when *Lorain Journal* was decided and is probably even less justified today.

A court considering the Department of Justice's effort to prohibit a merger between the parent corporations of the *Star Tribune* and *Pioneer Press* may find that the Department of Justice's decision to limit the market to local daily newspapers was unjustified, especially in light of the free speech interest which is burdened by the antitrust enforcement.

## VI. CONCLUSION.

The effort by the Department of Justice to prohibit a merger between McClatchy and Knight Ridder newspapers unless McClatchy agreed to sell the *Pioneer Press* may have been successfully litigated against by McClatchy. McClatchy would have been able to argue that it had a First Amendment interest in speaking to as large an audience as possible, and that the regulation preventing McClatchy from achieving that goal was unjustified. The Supreme Court has rejected First Amendment claims brought by media companies subject to antitrust regulations, but those cases did not involve mergers and instead involved predatory and exclusionary behavior which only implicated minor First Amendment interests. In the context of McClatchy's merger with Knight Ridder, McClatchy's First Amendment interest is much stronger and the justifications for regulation are less convincing, especially in light the unique economic realities affecting newspapers.

99 *See generally id.*