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United States (2)

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NOTE: At the time of publication, the author was affiliated with Yeshiva University. Currently, February 2008, he is a faculty member of the Annenberg School for Communication at the University of Pennsylvania.

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Abstract
For the first 50 years of the history of broadcasting and telecommunications in the United States, two models, not one, governed ownership and regulation in the telephone and radio industry. United States regulators oversaw a monopoly in telecommunications (though not a state monopoly, as in Europe). By contrast, US law provided for competition in broadcasting. While AT&T, the monopoly telephone carrier, controlled nearly all telephone traffic, US regulators established a system of competing private broadcast stations.

Comments
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United States (2)

By Monroe E. Price and Jonathan Weinberg

For the first 50 years of the history of broadcasting and telecommunications in the United States, two models, not one, governed ownership and regulation in the telephone and radio industry. United States regulators oversaw a monopoly in telecommunications (though not a state monopoly, as in Europe). By contrast, US law provided for competition in broadcasting. While AT&T, the monopoly telephone carrier, controlled nearly all telephone traffic, US regulators established a system of competing private broadcast stations.

This system began to break down as technology weakened its underlying categories. In broadcasting, the entry of cable television caused the traditional model of competition among local broadcast stations to lose much of its meaning. Increasingly, video programming came to be distributed through natural-monopoly cable systems, rather than through local broadcast stations. At the same time, the monopoly model for telephony came under technological and legal attack. The federal courts in the 1970s opened the door for competition in long-distance
services; the possibility of competition in the local loop came not long after.

By the late 1980s, regulators were contemplating the possibility that telephone companies could compete with cable and that cable could compete in providing local exchange services. The cable industry began to relax its opposition to telephone company entry into cable, as cable saw a powerful business opportunity for itself in the markets formerly reserved for telephone companies. Industry negotiators began exploring the possibility of legislation to lift the prohibitions keeping each industry out of the other’s territory. The federal courts began to gainsay the constitutionality of rules forbidding telephone companies from providing video programming, or owning cable television systems, in their telephone service areas. It became clear that the traditional prohibitions segregating cable television from telephone service would not long survive.

In this chapter, we examine traditional US thinking concerning mass media ownership and then review recent developments. Those developments include the 1995 communications regulation reform bills before Congress, still under negotiation as this publication goes to press. Changes in laws of ownership are a window into changed conceptions of the role of media policy in the United States.

Under traditional United States policy, newspapers have not been able to own television stations in their markets (and vice versa), telephone companies and cable companies have been kept at arms length, the law has required television stations and cable systems in common viewing areas to be separately owned, and there have been carefully calibrated limitations on the number of radio or television stations any one entity could hold. All of that may soon be swept away.

**The traditional policy framework**

Traditional United States thinking regarding mass media ownership and control has rested on two assumptions. The first is descriptive: it predicts that a speaker's identity will strongly influence the social narrative his speech conveys. The second is normative: it prescribes that the owner of the physical communications resources — printing press, broadcast

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2 The leading decision is Chesapeake and Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), cert. granted, 63 USLW 3906 (US 26 June 1995).
station or whatever — used to disseminate speech should control that speech.

The first assumption posits a link between the identity of a speaker and the content of its speech. Speakers, the theory runs, tell stories reflecting their own backgrounds, identities, and views.3 Government policies affecting the makeup of speakers will affect the content of their speech.

The second assumption derives from the central role of private autonomy, and property rights, in United States constitutional thinking. A fundamental theme of United States free-speech philosophy has been that government’s role in the market-place of ideas is presumptively limited to the enforcement of property rights in communications resources, and other common-law support for private ordering. A crucial role of free speech, the theory runs, is to serve as a check on overreaching government:4 free speech is best protected from government interference, and is best able to fulfil that role, when the private owner of communications resources controls their use.5

Consistently with that vision, the drafters of the 1934 Communications Act took pains to specify that a broadcast licensee ‘shall not... be deemed a common carrier,’6 required by law to carry programming provided by others. Indeed, the FCC for many years deemed it an abdication of a broadcaster’s public-interest duty for it to relinquish legal control over the programming it broadcast.7

Beginning in the 1940s, US policy makers built up a set of ragged, not always articulated, understandings flowing from these two assumptions. Different media owners would provide different media voices. More owners would mean more voices. A range of owners would lead to a

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6 47 USC § 153(h). The Communications Act itself provides some exceptions to this rule; the most important is 47 USC § 312(a)(7), requiring broadcasters to sell reasonable amounts of time to candidates for federal elective office for political advertising. See Columbia Broadcasting System v. FCC, 453 US 367 (1981). The Supreme Court relied on section 153(h) when, in 1979, it struck down FCC rules requiring cable systems to offer channels for public, educational and governmental use. Those rules, the Court explained, impermissibly imposed common-carrier obligations. FCC v. Midwest Video Corp., 440 US 689 (1979). Congress later revisited that issue in the Cable Communications Policy Act of 1984; see infra text accompanying note 35.
range of views or social narratives, rendering the community of listeners more content with the responsiveness of the system. A multiplicity of owners would lead to competition; competition would lead to robust, open discussion. Access by speakers would be more equal, in part because media outlets would be sympathetic to a wider variety of views.

The Federal Communications Commission drew on this vision in developing its concentration policies; it sought to achieve ‘diversification of programme and service viewpoints,’ and ‘thus’ the preconditions for democratic discourse, by encouraging diversity in ownership. Rather than seeking to regulate speech content directly, it promulgated rules establishing what might be called an ‘ownership access’ policy.

The Commission began in 1938 by adopting a strong presumption against allowing more than one AM radio station under common ownership in a single community. Within a short time, the Commission had rules in place barring the ownership in a single market of more than one station in any given broadcast service — AM, FM, or television. Until 1970, though, FCC rules still allowed a person to own an AM, an FM, and a television station in the same community. The FCC partially plugged that gap in 1970 and 1971, banning the acquisition by a single entity, in a single market, of both a radio and a VHF television station.

The agency explained:

A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximised. It might be the 51st licensee that would become the communication channel to a severe social crisis.

The FCC relaxed its ‘one-to-a-market’ rules in 1989, and again in 1992. Under current law, licensees may own up to three or four radio stations in a given market, and the Commission will look favourably on

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9 Genessee Radio Corp., 5 FCC 183 (1938).
10 Multiple Ownership of Standard, FM and TV Broadcast Stations, 28 FCC2d 662 (1971) (reconsidering Multiple Ownership, 22 FCC2d 306 (1970)).
12 Licensees in markets with fewer than 15 radio stations may own up to three, or long as they own fewer than half of the stations in the market. Licensees in markets with 15 or more stations may own up to four. No entity may own stations whose combined audience share, as of the filing date of an
requests for waiver, in large markets, of the bar on radio-VHF combinations.\textsuperscript{13}

The FCC began in 1940 to limit the number of broadcast outlets that could be owned by a single entity in different geographical markets. Under rules promulgated in 1953 and 1954, no entity could own more than seven AM, seven FM, and seven television stations (of which no more than five could be VHF) nationwide.\textsuperscript{14} This approach, the Commission explained, would promote 'diversification of program services' without 'governmental encroachment on... the prime responsibility of the broadcast licensee.'\textsuperscript{15} The Commission later relaxed these rules too, in 1984 and again in 1992. Under current law, one may own 20 AM and 20 FM radio stations nationwide.\textsuperscript{16} One may own up to 12 television stations, provided that their aggregate reach is no more than 25 per cent of the national audience.\textsuperscript{17}

The most full-blown FCC articulation of the relationship of ownership to public discourse came in the context of newspaper-broadcast cross-ownership. The agency first addressed this question in 1970. In almost 100 cities, newspapers and television stations were under common control. In a few communities, the daily newspaper was under common ownership with the only radio or television station. The FCC determined that this concentration of ownership was inconsistent with its assumptions about democratic discourse. It banned the formation of new newspaper-broadcast combinations, and required divestiture where the owner of the sole newspaper in a community was also the owner of the sole television station, or of the sole radio station in a community that

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\textsuperscript{15} 18 FCC at 293.

\textsuperscript{16} Radio Multiple Ownership Rules, 7 FCC Rcd. 6387 (1992), on reconsideration, 9 FCC Rcd. 7183 (1994). A minority owner may hold up to five additional stations in each service; a non-minority holder may hold non-controlling interests in up to five additional minority or small-business controlled stations.

\textsuperscript{17} Amendment of Multiple Ownership Rules, 100 FCC 2d 17 (1984), on reconsideration, 100 FCC 2d 74 (1988). UHF stations are counted at only one-half of their theoretical reach, because of the physical limitations of their signals. Minority owners can hold up to 14 stations, and non-minority owners can acquire non-controlling interests in two additional minority-controlled stations. Aggregate audience reach can be as high as 30 per cent, provided that five per cent of that reach is contributed by minority-controlled stations.
had no television station.\(^{18}\) It was intolerable, said the Commission, to allow such an entity an 'effective monopoly' in the local marketplace of ideas. The Supreme Court affirmed; it upheld as rational the Commission's finding that 'diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints.'\(^{19}\)

Congress and the FCC have imposed cross-ownership restrictions in other areas. It is illegal for a person to control a television broadcast station and a cable system in the same market.\(^{20}\) It is illegal for a person to control a telephone company and a cable system in the same area.\(^{21}\) That prohibition, though, is hotly contested; the Supreme Court is now debating its constitutionality.

The link between ownership and content

Much of United States broadcast regulation since 1934 has been based on, and has sought to reinforce, the link between ownership and content. That connection was crucial if the Commission was to pursue a policy of ownership access — if it was to bring about diversity of speech through ownership regulation.

The emergence of radio networks provided one early threat to that link. The Commission initiated extensive inquiries in 1938 into the new 'chain broadcasting,' reflecting its concern that binding contractual relationships made national networks the true owners rather than local licensees. Those contractual relationships threatened the Commission's ideal of discourse driven by independent, competitive local voices. The FCC announced regulation intended to ensure the 'independence' of the local outlets, emphasising the local broadcaster's ability to replace network offerings with programming more idiosyncratically responsive to the local community.\(^{22}\)


\(^{20}\) 47 USC § 533(a).

\(^{21}\) Ibid. § 533(b). The FCC has taken the position that it can waive this prohibition for telephone companies complying with its video dialtone rules. Telephone Company — Cable Television Cross-Ownership Rule, 10 FCC Rcd. 7887 (1995).

Later on, the Commission sought to address the link between ownership and content from a different perspective: It provided that it would grant a preference, in comparative licensing hearings, to owners who promised that they would participate in station management on a full-time basis. An ownership access policy, after all, would make rather less sense if owners did not involve themselves in station management and programming decisions.

Probably the clearest example of FCC reliance on assumptions about the relationship of ownership to narrative, in attempting to achieve the conditions for democratic discourse, was the agency's effort to encourage ownership of radio and television stations by minority group members. The FCC gave minority group members special, privileged opportunities to become owners, granting those groups enhanced opportunities to compete in the market for loyalties. The Commission gave an advantage in comparative hearings to minority would-be licensees, so long as they promised to participate actively in station management; it gave other licensees facing possible revocation or non-renewal an incentive to transfer their licenses to minority owners; and it established a tax certificate programme granting favourable tax treatment to any broadcaster selling its station to a minority owner.

The Commission designed these programmes with the goal of altering the social narrative and defended them in the Supreme Court on precisely that basis: expanded minority ownership, the Commission argued, would produce more diversity in broadcast speech. In 1990, a majority of the Supreme Court agreed. The Court gave weight to FCC and congressional statements findings a link between expanded minority

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24 In 1994, the DC Circuit declared the FCC's focus on owner participation in station management to be arbitrary, and hence impermissible. Bechtel v. FCC, 10 F.3d 875 (DC Cir. 1994).
ownership and greater broadcast diversity. It cited evidence that "an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities," and that "a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies." A 1995 Supreme Court decision disfavouring any sort of racially-defined government preference, though, left the programme moribund; the Commission is now reconsidering all of its licensing preferences.

Evaluation of traditional approach

The FCC's ownership access policy had a mechanical truth to it. If one is seeking to achieve diversity in speech, a system with more owners seems better than one with fewer. The policy's assumptions, however, were incomplete. Its descriptive predicate — that a speaker's identity strongly determines the content of its speech — underestimated the flattening and homogenising effect of the commercial market-place.

In broadcast television, where the numbers of speakers in each local market have been few and each licensee has sought to attract a lowest-common-denominator mass market, broadcast offerings have been largely homogenous notwithstanding the Commission's diversity efforts. For the most part, network affiliates have simply adopted or 'cleared' network programming during prime time. Even non-network offerings have tended to vary little, in significant respect, from one speaker to the next. Broadcast television licensees, no matter how diverse, tend to choose their programming with an eye to maximising audiences and advertising revenues. In radio, the market is more segmented, but the likelihood is still small that any speaker speaks with a genuinely distinctive voice.

Nor has the slight racial diversity in ownership achieved by the FCC led to the kind of programme diversity with overtones important in furthering pluralist goals. At the margin, stations owned by minority groups are somewhat more sensitive to minority issues; perhaps they

29 497 US at 569.
30 Id. at 580-581.
have better affirmative action records. But there has not been a convincing showing that, where a broadcast owner is interested in maximising profit, the nature of the speech varies substantially with the nature of the owner.

The impact of the new media
Cable brought a different perspective to the video market. In the vast majority of US markets, the cable operator is a local monopolist. While cable television has brought many more channels to each household — 50 or 70 or 500 — each cable operator more or less controls its entire system, choosing each of the programmers that the system will carry.

On the other hand, a profit-maximising cable operator will likely seek to carry diverse programme channels in order to increase subscribers. Cable operators have no day-to-day control over those programming services once they make the initial choice to carry them. (The strategy is reminiscent of the argument, long made by PTT advocates in the context of European broadcasting but ill-tolerated at the FCC, that a single manager of frequencies will maximise audience by purposely and rationally diversifying, playing to small segments, in the way that only a monopolist can do.)

Cable’s programming structure, thus, achieves greater diversity in programme offerings at the cost of tearing a small hole in the central assumption of United States concentration rules: the link between ownership of communications facilities, and meaningful control over the messages conveyed by speech distributed using those facilities.

Perhaps recognising that shift, federal cable television regulation has incorporated significant common-carrier aspects since 1984. The 1984 Cable Communications Policy Act requires larger cable systems to make leased-access channels available to unaffiliated programmers; without regard to the content of the programming the outside programmers provide. The same act authorises local franchising authorities to require cable operators to provide public access channels, and channels reserved

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34 47 USC § 532. The efficacy of this provision is unclear; battles continue to rage over the rates that programmers must pay for leased access. In 1992, Congress amended the statute to allow cable operators to decline to carry leased-access programming 'that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.' Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(a), 106 Stat. 1460, 1486 (1992) (codified at 47 USC § 532(h)); see Alliance for Community Media v. FCC, 56 F.3d 105 (DC Cir. 1995), cert. granted, 64 USLW 3347 (US 14 Nov. 1995).
for educational or governmental use; the cable operator is forbidden to exercise editorial control over those channels. 35

The FCC, in its video dialtone proceedings, allows telephone companies to distribute video programming only if they establish common-carrier platforms accommodating multiple outside programmers on a non-discriminatory basis. 36 Cable's position in the video market has paved the way for a new approach to access and diversity issues, one with a role for common carrier regulation. Even the most passionate critics of FCC regulation of broadcasting concede the legal permissibility — if not desirability — of common carrier regulation of the old and the new media. 37

The new media policy

Today, the old approach to ownership regulation lies in ruins. It is no longer possible to think about regulation in terms of separated categories — broadcasting and telecommunications — for the transmission of information. In the new global economy, many US legislators see more need to support huge media entities that can compete internationally and contribute to a more favourable balance of payments, than to ensure that minorities within the borders of the United States have their say. In the eyes of many, the new abundance of channels of communication means that government need no longer seek to ensure diverse and competing speakers.

The FCC, spurred by huge increases in the number of broadcast outlets, has dismantled much of its ownership regulation, and has proposed to dismantle more. At the start of 1995, the FCC solicited comment on whether it should relax its rule forbidding ownership of two television stations in a single market, whether it should relax or even eliminate its bar on radio-TV combinations in a single market, and whether it should eliminate its numerical station limit on ownership of television stations in

35 47 USC § 531. Congress in 1992 directed the FCC to promulgate regulations enabling cable operators to prohibit, on such channels, programming that contains 'sexually explicit conduct, or material soliciting or promoting unlawful conduct.' Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992); see Alliance for Community Media, supra note 34.


different markets, perhaps raising the aggregate audience reach cap as high as 50 per cent.\textsuperscript{38}

The telecommunications reform bills, still being negotiated in Congress at the time of writing, provide hints of the new ownership law. They embody no rigorously worked out vision; instead, they are based on vaguely sketched and optimistic hopes. They may not be enacted at all, for President Clinton has threatened a veto. Whether or not they are enacted, though, and regardless of their precise details, they show the spirit of the age.

What is most striking about the bills, from the perspective of this volume, is their near-elimination of broadcast ownership rules. The House bill would allow a person to own two VHF television stations in a single market, subject to FCC oversight; indeed, with FCC permission, a person could own more than two. It would eliminate the radio-VHF and newspaper-broadcast cross-ownership bans, allowing the FCC to impose restrictions on the cross-ownership of broadcast and non-broadcast media only on a case-by-case basis, where a particular instance of cross-ownership would lead to undue concentration of media voices. Both bills would eliminate any numerical limit on radio station ownership, either local or national.\textsuperscript{39} Both bills would eliminate any national limit on television ownership other than a 35 per cent aggregate audience reach cap.

What philosophy and structure do the new bills supply, as the old rules are swept away? Their goals are sweeping: the Senate bill speaks of bringing into being a world in which all Americans have access to ‘high-speed, switched, broadband telecommunications capability’ enabling users to ‘originate and receive high-quality... graphics and video telecommunications.’ How do their drafters expect to achieve that end? The answers the new bills supply is an uneasy mix of competition — the product of radical deregulation — and new common carrier thinking.

The bills start by imposing a duty on local telephone companies to provide full interconnection, and non-discriminatory access, to other entities seeking to provide local telephone or information services. By requiring interconnection, the drafters plan to subject local telephone companies to competition from cable companies and new local


\textsuperscript{39} The Senate bill would allow the FCC to refuse to approve particular transfers of radio licenses where the transferee would ‘obtain an undue concentration of control or would thereby harm competition.’
telecommunications providers. The bills pre-empt local-government barriers to cable companies’ provision of telecommunications services.

In return for interconnection, the bills grant the telephone companies a variety of boons. First, with FCC permission, they can provide long-distance service. Under the House bill, indeed, the FCC may approve a telephone company’s entry into the long-distance market, carrying calls originating in its local service area, even if the company is not in fact subject to competition in its local service area. It is enough that the company has filed, and the FCC and state authorities have approved, a statement of the terms pursuant to which it would offer interconnection if it received a bona fide request.

The bills promise telephone companies flexibility in FCC rate regulation, eliminating that regulation entirely for services subject to effective competition. They include only weak provisions designed to ensure continuation of service to poor and rural users. They authorise telephone companies to offer ‘electronic publishing’ and other information services.

Most importantly for our purposes, the bills authorise telephone companies to provide video programming. Under both bills, telephone companies have the option of acting as traditional cable operators, subject to local franchising requirements and other regulation. Under the House bill, a local telephone company can buy up to a one-half share in an existing cable company in its service area, and can buy the company outright if the area is rural.40

The bills, though, give telephone companies another option: they are freed entirely from local franchising and regulation if they choose to offer video programming over a common-carrier video ‘platform’.41 Under the House bill (the Senate’s is similar), a telephone company establishing a video platform must establish channel capacity sufficient to cover all bona fide requests for carriage, and must construct new capacity as necessary to meet demand.

The telephone company may not discriminate against unaffiliated providers with regard to the terms of carriage, or with regard to the quality of service, transmission or interconnection. It may not unreasonably discriminate in its own favour with regard to information provided to subscribers for purposes of selecting programming, although it may negotiate contracts with unaffiliated providers ‘to allow consumer access to their signals on any level or screen of any gateway, menu or

40 Under the Senate bill, purchase limitations are more restrictive.
41 Video platform providers may be required to pay local fees in lieu of franchise fees.
program guide.' It is subject to rules, to be prescribed by the FCC, ensuring that it offers public and leased access, and carries the signals of local broadcast stations, on terms similar to those governing conventional cable systems. In return for shouldering common-carrier obligations, in short, the bill offers nationally-oriented telecommunications megafirms the opportunity to provide video services subject only to FCC oversight, free from any need to answer to state and local government.

The bills follow up by removing most cable rate regulation. The House bill provides that 270 days after the FCC completes its new video platform regulations, all cable and video dialtone systems will be deemed subject to effective competition, and freed from rate regulation except on the tier of service including local broadcast signals. As for those signals, the FCC can review a rate increase only if three per cent of a system's subscribers complain, individually, within 90 days after a rate increase. The Senate bill, for its part, provides that the FCC may declare a cable rate unreasonable only if it substantially exceeds the national average for comparable programming (to be redetermined every two years).

A shifting philosophy

These proposals, it is plain, reflect a marked shift in philosophy. The old rules were based on the assumption that diversity of ownership, both in terms of the number of owners and the kinds of owners, would mean diversity of views. They presupposed a government role in ensuring a large and diverse set of speakers. The proposed new rules experiment with a breakdown of the link between content and conduit; they suggest a role for some sort of common carrier regulation. They otherwise seek to replace regulation with competition as the engine of diversity.

A variety of different changes have come together here. In part, the shift in federal law derives from changes in ideology. Over the last 20 years, a fervour for the workings of the market has overtaken a commitment to federal intervention. Aside from regulation of sexually explicit speech (where intrusive regulation is increasingly in vogue), policy makers now impose a far heavier burden of proof on those who would justify regulatory controls.

The FCC has so favoured deregulation that none of the traditional restrictions, including those on cross-ownership, have seemed secure. The idea that there should be special efforts to encourage minority voices in the media now is relegated to the dustbin of history. Worries that no media company should be too large have given way to ideas that being big is important. Scholars who long argued that vertical integration was
not so important as horizontal integration have prevailed, and even horizontal integration is no longer out of the question.

This deregulatory fervour has been matched by a shift in First Amendment thinking, emphasising limits on government's ability to prescribe market barriers and market structure. By the mid-1990s, it was common for judges to hold that the First Amendment right to speak protected not only individuals and newspapers, not only broadcasters, but also cable systems and telephone companies. Laws that precluded telephone companies from providing video service suddenly were cast into constitutional doubt.

Ideology and constitutional law aside, the obvious source of regulatory change was change in technology. Technological changes brought about the so-called 'end of scarcity': the creation of seeming abundance in channels of distribution. Beyond that, they made regulatory market segmentation increasingly artificial and increasingly inefficient. Vertical integration of distribution services and programming services had proceeded rapidly in the 1980s. Broadcast and cable properties came under common ownership (though, by law, not in the same market). Because of these new styles of building businesses, federally-enforced cartelisation — separating telephony, cable, broadcast and newspapers — no longer enjoyed private support. The large players wanted to acquire or be acquired; they saw federal restrictions as obsolete.

The technological changes also mean that the United States cannot make policy for the electronic media in isolation from the rest of the world. We have seen global shifts in the structure of telecommunications carriers and video providers.

Conclusion

Dissolving federal regulation is now seen as a method of increasing the power of one of America's major contributors to a favourable balance of payments. Entertainment is so important an export, in terms of economics and international politics, that the Congress and the Government are inordinately inclined to help the industry position itself to dominate the world market.

More generally, the increasingly global nature of the communications market-place is forcing a global harmonisation of communications rules. It would be impossible, over time, to maintain an equilibrium in which companies with global pretensions have markedly different structures in America and throughout the world.