

Let's not overregulate

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WHERE HAS America's faith in free markets gone? America's fierce commitment to free markets proved triumphant in the Cold War and in the ensuing years, and has spurred the American economy to its leadership position.

But now, rather than depend on market forces to produce competition in the media, legislators are proposing broad regulation to reduce the growth of media companies. By restricting media entities from fully using their talent, especially when there is no proof that expanded media growth will lead to high prices or a lack of innovation, America is abandoning its capitalistic creed.

Of course, America's belief in the merits of capitalism was not, and is not, absolute. Well before the Cold War began, it was recognized that there were times when competitive markets could be distorted either by coordinated agreements among businesses or by market dominance. For this reason, the Sherman Act was enacted in 1890, prohibiting conspiracies to restrain trade and the unilateral and improper exercise of market power. In 1914, the Clayton Act was enacted, prohibiting transactions likely to lead to a substantial lessening of competition. Later, the Federal Trade Commission was empowered to sue over antitrust abuses, including unfair business practices. These laws have been relied on by government authorities to protect consumers and by private parties fighting anti-competitive practices.

Yet ensuring competitive markets in the media through antitrust enforcement does not appear to be enough for many legislators. They insist on regulating media markets, even in light of the vast antitrust jurisprudence detailing impermissible business practices.

As debate rages over whether particular media regulations are needed, we should not forget the effect of antitrust laws. Antitrust's treble-damages remedy provision and criminal penalties substantially deter media entities bent on dominating markets other than through their superior skills or business acumen. Those who argue against media regulation should promote this deterrent and corrective effect of antitrust laws.

Unlike regulation, case-by-case antitrust enforcement will prevent consumer harm without unnecessary government interference. Regulation prohibits certain actions merely as a response to the possibility that they could cause consumer harm. The antitrust laws analyze given practices on a case-by-case basis, searching for actual or likely harm. Resources will thus be allocated more efficiently in a regime advancing serious antitrust enforcement of the media as an alternative to regulation.

There are, of course, certain practices that even the antitrust laws condemn per se (such as most price-fixing agreements), based on our historical knowledge of the harms such practices cause.

But with a more sophisticated understanding of economics, the U.S. Supreme Court lately has accorded fewer business practices per se antitrust condemnation.

Wary of deterring precompetitive behavior and government interference, the court has demanded actual proof of consumer harm before finding antitrust liability in most cases.

Bucking this trend, various media regulations have already been condemned as arbitrary governmental exercises that are unnecessarily intrusive. For example, the U.S. Circuit Court for the District of Columbia held that certain bright line prohibitions previously set by the Federal Communications Commission (FCC) concerning media ownership—such as the rule that precluded owners of television stations from reaching more than 35% of viewers—had no nexus to any finding that such bright lines prevented consumer harm. This and other court decisions led the FCC to adopt new, more relaxed media ownership rules, for which it has been roundly criticized. When one considers that antitrust enforcers reserve the right to enjoin media practices that cause consumer harm, the FCC's actions, which followed judicial precedent and our core belief in free markets, should be applauded.

Antitrust enforcement provides government with the flexibility to elicit penalties against those persons who have engaged in practices leading to the distortion of our market economy without causing unnecessary government interference. By using antitrust rather than regulation as the primary tool to ensure competitive markets in the media, our society can be assured that business practices that do not suppress output or raise prices will not be prohibited on an untested assumption that they may do so. While regulation may be or may not be necessary to ensure other goals debated or accepted by our society (such as whether the thousands of cable channels and Internet sites offered to the public allow for sufficient "diversity"), it is not necessary to ensure competition if government officials aggressively enforce antitrust law. **ML**