1. ***Scientific Background***

Big businesses obtain power to influence the nature of markets, the political and regulatory environment, and even public opinion in the course of their commercial activities. How this power has been acquired and wielded to affect competition has traditionally been the focus of antitrust laws, first introduced in 1890 with the enactment of the Sherman Act in the United States.. But the power exercised by big businesses may also be utilized to influence *political* processes (Salamon & Siegfried, 1977). Over the past few decades, the nature and scale of big businesses have changed dramatically, and their acquisition and use of power for political purposes has posed new and troubling challenges to democracy (Lessig, 2015; Drutman, 2020), and their activity has been considered beyond the purview of antitrust laws, at least as they have been interpreted over the past sixty years. In fact, even outright coordination among business entities, which would be a clear violation of antitrust laws and thus illegal per se in the commercial context, is permitted in the political context under the Noerr-Pennington doctrine as a good faith attempt to seek government action (*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 1961; *United Mine Workers v. Pennington*, 1965).

Recently, there have been calls by scholars, commentators, practitioners and even politicians to expand the scope of antitrust laws to address the political power amassed and exercised by the new super-sized big businesses, such as Google, Apple, Facebook, Amazon, and more. In scholarly circles, these proposals have been dubbed “Movement Antitrust,” “the Neo-Brandeis”” or the “New Antitrust” Movement (Teachout & Khan, 2014: Khan, 2016; Rahman & Khan, 2016; Stucke & Ezrachi, 2017; Khan, 2018; Wu, 2018).

Many leading antitrust scholars have objected to “Movement Antitrust,” arguing that it represents an “undisciplined set of goals that provide no guidance and could do serious harm to the economy” (Shapiro, 2018; Hovenkamp, 2019 at 636). But even among those opposing “Movement Antitrust,” many agree that some extension of the scope of antitrust is called for. Two recent antitrust suits brought by the Federal Trade Commission and various states against Facebook were summarily dismissed because the respective plaintiffs could not provide prima facieevidence of Facebook’s market power in a properly-defined market, as required under current antitrust doctrine (*FTC v. Facebook, Inc.; State of New York, et al. v. Facebook, Inc*.). Following the rulings, Herbert Hovenkamp, a leading antitrust scholar, stated that “this sends a signal that the antitrust laws are not good enough…it’s going to pour pretty cold water on the idea that the existing antitrust laws can do the job.” (*Wall Street Journal*, June 29, 2021). Since this statement was made, a case against Apple has failed for reasons very similar to those of the failure of the cases against Facebook: existing antitrust doctrines are inadequate to meet the challenges posed by today’s super-sized businesses when traditional market concentration cannot be proven (*Epic Games v. Apple, Inc*.). The desirable scope and breadth of any expansion of antitrust law is not always clear. But the core idea that antitrust must somehow adapt to meet the current challenges associated with today’s new massive business entities enjoys a rare coalition of support from both the political right and the political left (Crane, 2018; Crews, 2020).

Those subscribing to this near-consensus of opinion that antitrust law requires adaptation, however, do not necessarily suggest that it should be utilized to address the issue of *political* power. For those familiar with the goals of antitrust law as they have been understood since the ascendancy of the Chicago School of thought, which prefers relaying on the efficiency of markets and is skeptical about the merits of judicial intervention for correcting anticompetitive practices, the idea of actually expanding antitrust law to deal with business’s political power may seem anomalous. (For a survey of the different approaches to antitrust law in different periods see Stucke & Ezrachi, 2017). But expanding antitrust law to cover political activity is not, in fact, a new idea. As the name “Neo-Brandeis” implies, an understanding of antitrust as an area of law focused on political power echoes the original antitrust intent of the Sherman Act and its interpretation by courts in the 1920s and 1930s by the Brandeis court. When the Sherman Act was enacted, Senator John Sherman explained that the law was aimed primarily at curtailing antidemocratic pressures from business, and at eliminating the phenomenon whereby the private preferences of a few controls the welfare of all (Pitofsky, 1979). Justice Louis Brandeis interpreted the antitrust laws in this spirit, his belief in “regulated competition” reflecting his argument that big firms should be restricted even when they do not necessarily possess excessive market power and do not control the market price of goods (Brandeis, 1934).

Therefore, applying antitrust provisions to combat political power is not an unprecedented idea. In taking a fresh look at the functions of antitrust law, a review, one that most agree is warranted, it may be helpful to look beyond the traditional effects of market power on price and quantity (Hovenkamp, 2019). It is arguable, then, that if antitrust law, or specific antitrust law doctrines, can be utilized to address a problem associated with big business, without imposing ambiguous goals lacking specific guidelines, there is no reason not to do so; in fact, there may be very good reason to move in this direction. However, practical suggestions for such uses have yet to be made. Normative arguments that antitrust *should* serve additional goals are abundant (e.g., Ayal, 2013; Khan, 2018) and suggestions for doctrinal modifications that would allow antitrust to attain its traditional goals in modern markets have also been made (Gal, 2018; Khan, 2018; Lundqvist & Gal, 2019, 29–70; Hovenkamp, 2021). But practical applications of *existing* antitrust law doctrines to combat the *political* power of today’s big business have yet to be raised in legal, political, or academic circles. This project seeks to fill this void by providing guidance and practical tools for expanding specific antitrust doctrines to curtail the power big businesses wield in the political domain. We do not advocate a full-fledged shift in the goals or focus of antitrust law. Rather, we propose a more modest modification; that is, a modification of antitrust law’s Herfindahl-Hirschman Index (HHI), a common measure of market concentration used to determine market competitiveness, that will enable the use of this index to identify when the control of media outlets by big business poses a danger to the functioning of democratic institutions. Specifically, we intend to develop a Business-Media Influence Index (BMII), and explore possible regulatory regimes to govern the acquisition of media outlets by big businesses.

Today, giant businesses influence political processes in many ways. In cases where the businesses in question are social networks that control politicians’ channels of communication, their effect on politics is direct (Balkin, 2018; Klonick, 2018). For example, Twitter banned political advertisements in October 2019, and in 2020 it assigned fact check labels to what it considered to be misleading tweets from then-President Donald Trump (Conger, 2021). Facebook quickly joined Twitter and adopted the practice of assigning fact-check notes to posts on political accounts. Facebook and Twitter suspended then-President Trump’s accounts after the storming of the U.S. Capitol Building on January 6th, 2021 (Byers, 2021), and Google suspended his YouTube channel (Elias, 2021). In Europe too, social networks providers have intervened to either publish or remove content posted on these networks. For example, Twitter geo-blocked Greek accounts in Turkey that insulted Ataturk (Hamilton, 2021). There are other cases when big businesses may exert pressure on politicians indirectly. In addition, big businesses may obtain control over media outlets and use these to influence politicians. Media coverage is a currency that is extremely valuable to politicians, often more than monetary considerations (Rowbottom, 2013). If a big business controls a media outlet, it can use coverage to exert pressure on politicians to secure a favorable outcome of political processes. Desirable outcomes from the business’s perspective will result in positive coverage, and undesired outcomes or actions will be met with negative coverage. This is extremely problematic, because these skewed outcomes of political processes come at the public’s expense. Equally troubling are the implications of such biased coverage for public opinion. The media has enormous power over public discourse, and a great impact on public perception (McCombs & Shaw, 1972; Baker, 2009). So much so, that some even argue that media outlets have fiduciary duties to the public (Barak, 2002). If big business abuses its power to influence and skew the way the media outlets present issues, this will impair the crucial diversity and independence of the media (Stiglitz, 2008).

Traditionally, antitrust tools have not been employed to regulate channels of influence in the political sphere. The reason is that market power is not necessarily associated with either the desire or the ability to influence political processes, although it is clear that a firm still may benefit from a grateful (or intimidated) politician, regardless of the size of that firm. This problematic nexus between business and politics was traditionally dealt with in other legal fields: criminal law (in the case of bribery or gifts to officials, 18 U.S.§201, and the Foreign Corrupt Practices Act of 1977); administrative law (limitations on lobbying activities, Lobbying Disclosure Act of 1955 and Foreign Registration Act of 1938); and, to some extent, even by corporate law (limitations on corporate spending on political contributions and limitations on corporate lobbying, e.g., Bebchuk & Jackson, 2010; Bebchuk & Jackson, 2012).

However, unlike other channels of influence, media coverage is a channel that democratic countries are extremely reluctant to regulate (Caneub, 2008; Samples, 2019), and for good reason. Regulation of media coverage is problematic both ideologically and practically, because of three unique features of media coverage. First, government regulation of media coverage poses serious dangers to democracy. The proper functioning of a democracy is highly dependent on the free flow of information and on the uninhibited exchange of ideas (Beetham, 1998; Stiglitz, 2008). Regulation of media coverage and limitations on the freedom of expression thus endanger the very bedrock of democratic institutions. (For a survey of arguments and counter-arguments on this issue see Balkin, 2004.) Second, the motivation or intention behind a specific angle taken by the media on an issue or event is all but impossible to ascertain, let alone prove. Clear proof of an explicit quid pro quo agreement with a politician is seldom obtainable. Moreover, such an agreement may not exist at all. The quid pro quo may be *implicit*. Without even setting an overt policy, big businesses, through their media outlets or influence, may unilaterally act in a manner that tarnishes politicians’ reputation when their actions displease the businesses, and, conversely, can highlight positive stories of more accommodating politicians. Even in the absence of an explicit agreement between the businesses and the politicians, the covert message or “threat” may be received, and politicians’ actions may be influenced in favor of the business. Without any proof of an explicit quid pro quo, an innocent rationale can always be found for media coverage – the importance of the occurrence reported, the sensational nature of the events (which will draw patronage or advertisements to the media outlet), the publicist’s views, the outlet’s agenda, and the like may always be cited as reasons for the coverage. It is extremely difficult to separate media coverage that is purely journalism from media coverage that is motivated by a quid pro quo arrangement, even unspoken, with a politician. The motivation for bribes, gifts, donations, even the employment of lobbyists, is blatantly obvious. Some of these reasons may be legitimate, and other may fall outside the permissible boundaries, as in the case of outright bribery. But there is no question regarding why these measures have been taken. Media coverage is far less clear in this respect. Beyond the ideological and practical problems in regulating business’s relationships with the media, is the issue of what may be considered a reasonable quid pro quo arrangementwith politicians. Not all media coverage that deliberately benefits political agents is undesirable from a social perspective, even if there is an explicit quid pro quo with the politician. Media outlets often obtain information from politicians or from sources with a political agenda (Örebro, 2002). Naturally, the sources provide the information to further their own interests. They may condition the provision of information on demands regarding the publication, such as publication during primetime, before or after a specific event, a specific placement within the outlet (e.g., on the front page of a newspaper), and so on. A blanket prohibition on such arrangements would deliver a fatal blow to the free flow of information and to the freedom of speech and expression.

The reluctance to regulate media coverage is thus clearly justifiable, but the result of this reluctance is that a potentially dangerous and extremely powerful channel of influence lacks any legal oversight. Unless an explicit quid pro quo arrangement for the provision of regulatory favors in return for media coverage can be proven, politicians and media outlets are free to engage in the uninhibited provision of favorable coverage in return for political favors, which, in essence, can be considered the equivalent of an outright bribe, although no money or goods trade hands. In fact, this is the case even if no explicit agreement has been made. Nonetheless, outright bribery is completely illegal, while influencing the media carries no legal sanctions. Few would find it problematic to prosecute anyone who transferred a substantial amount of money to a politician who then made a decision favoring the payor, nor would there be any hesitation about prosecuting the politician. This would be the case even if there was never an explicit agreement between the two (Gold, 2011). But if the currency used for the payment is media coverage, the “bribery,” so to speak, is shielded from any legal penalty. In fact, we know of only one case in which parties to an alleged (implicit) quid pro quoagreement between a politician and a media outlet has faced legal prosecution: Israel’s former Prime Minister, Benjamin Netanyahu, was indicted (along with others) for bribery arising from an alleged agreement with a media outlet to supply political favors in return for positive coverage, although this case has yet to be adjudicated (Libson, 2021).

The problem becomes most acute when the media outlet is controlled by a business entity that also holds additional independent profit engines. When the controller of a media outlet profits only from the outlet, it is inevitably more sensitive to the costs of skewed coverage, as damage to the outlet’s credibility from obviously biased coverage could result in reduced demand for the outlet, patrons turning to other media sources, and reduced advertising revenues. In the long run, the outlet will lose from its compromised integrity, as it will from any choice to provide a product of inferior quality. The outlet may even be in danger of losing its ability to continue operating. It should be borne in mind that biased coverage may also be desirable, for example, when the outlet is committed to a specific political party or point of view (as is the case with countless journals and certain specific media outlets), but the skewed coverage we discuss here is coverage that is skewed *not* because of the outlet’s ideologically-based profitability, but only in order to have an impact on political outcomes. However, when the business entity that controls the media outlet owns other commercial enterprises, it may be advantageous to sacrifice profits from the media outlet in return for the implementation of regulation that benefits other enterprises owned by the business entity. This is the primary reason why a media outlet controlled by a business that owns other commercial enterprises is more likely to be (ab)used and provide skewed media coverage. In addition, when the owner of the media outlet owns other commercial enterprises, the quid pro quo becomes far less apparent to both the public and regulators. Simply put, the media outlet may be used to advance an implicit but unofficial type of bribery. As monetary bribes are actionable but positive coverage is not, this creates potential for a quid pro quo that is essentially immune from legal action. Big businesses may purchase control over media outlets with the intention of exerting pressure on politicians, as some have suggested (Spencer-Soper, 2018). Business moguls may also purchase media outlets for other reasons, and then find themselves in an advantageous position vis-à-vis politicians who, without even being asked directly, give the businesses favorable treatment out of fear of retaliation or in hope of positive coverage. In either case, the outcome is the same – the control over media outlets is abused to influence political and regulatory processes. Moreover, the very fact that a business entity controls a media outlet may bestow “soft power” on the business, completely obviating the need for an explicit quid pro quo agreement. Politicians and legislators know that the owner of a media outlet may easily retaliate against them (or provide positive coverage), *and* that the media outlet owner has a strong interest in specific decisions, due to its holdings in commercial firms (that is, any for-profit firm besides the media outlet, including firms that are active in the financial sector). Politicians will thus be more attentive and sensitive to the owners’ interests, thus rendering an explicit quid pro quo agreement completely unnecessary. Cross-ownership of media outlets by big businesses should thus be of great concern for policymakers.

To date, the literature has not considered the *structural* aspect of the problem, and has therefore suggested no solution. To be sure, payments for positive coverage are a well-known phenomenon (Kruckeberg & Tsetsura, 2003; Ristow, 2010), as are bribes (Pasculli & Ryder, 2019). And as mentioned, various areas of law attempt to address the problem of big business’s political influence. But the structural problems associated with cross ownership of media outlets and commercial firms by big businesses have yet to be researched.

It is here, we contend, that antitrust law doctrines can be modified and directed to address the problem. Importantly, adapting antitrust law doctrine to address this issue can enable policymakers to prevent the problem from even arising. At present, policymakers face a difficult dilemma – they can take action against media outlets for biases observed in their coverage (although there is no clear basis for doing so, with the specific exception of the fairness doctrine rules for television and radio outlets, which are very liberally applied), which runs the risk of impinging on freedom of the press, or they can ignore the skewed coverage resulting from business interests, thereby perhaps impinging on the rights of the public to free and open access to information. We intend to offer a structural solution that can be used to prevent this problem from arising. This solution is a first step towards utilizing antitrust doctrine to address the problem of big business’s political power. Specifically, we intend to develop a modification of the well-known HHI, used in the merger-control context to assess concentration in specific markets, in the context of control of media outlets by big business. We now turn to explain the expected significance of the index we intend to develop, and detail its specifics.

1. ***Research Objectives and Expected Significance***

As mentioned, at present, there are no practical tools for addressing the influence of big business over the political arena through the domain of public discourse. Nor has the literature provided any guidance on the matter, or even a comprehensive analysis of the phenomenon (Hovenkamp, 2018). The purpose of the proposed research is to take a first step towards filling this void. We propose an index that will allow policymakers and regulators to assess the ex-ante likelihood that the owner of a media outlet will use the outlet to promote its other interests vis-à-vis politicians and regulators. The importance of the proposed index lies in its ability to offer a comprehensive understanding of, and a practical tool for addressing, a phenomenon that poses a danger to democratic institutions. The logic underlying the index is similar to that of the HHI, one of the major tools employed by antitrust authorities and courts when analyzing whether a merger or an acquisition is likely to pose a threat to competition. The tool we suggest thus draws upon antitrust law, an area of law not normally associated with issues such as freedom of expression, to address a phenomenon that has little to do with market concentration, the traditional focus of antitrust law (for similar suggestions regarding the implementation of doctrines from seemingly unrelated legal fields to achieve goals associated with free speech see, e.g., Benkler, 2003; Bell & Parchomovsky, 2016). The index is one step toward a structural solution to the problem of political power amassed by big business and the context of its exercise through media platforms.

The problem we address is not merely an academic curiosity. There are quite a few instances of media outlets that are controlled by big businesses (or by owners of such businesses), and that seem to be utilized to serve the interests of these businesses. For example, in 2013, Jeff Bezos, whose financial stakes in Amazon are well known, purchased *The Washington Post*, a leading media outlet, for $250 million. There were various speculations regarding the motivation behind the purchase. Bezos himself claimed that the driving force behind the purchase was his sense of civic responsibility: “Democracy dies in darkness. Certain institutions have a very important role in making sure there is light, and I think the Washington Post has a seat, an important seat, to do that because we happen to be located here in the capital city of the Unites States of America” (Shephard, 2018). Former President Donald Trump dubbed *The Washington Post* “The Amazon Washington Post” and claimed that it is “nothing more than an expensive lobbyist for Amazon” (Salinas, 2018). Commentators have observed that the purchase of *The Washington Post* complements Amazon’s strategy of enhanced investment in lobbyists and increased presence in the nation’s capital (Spencer-Soper, 2018). Professor Scott Galloway of New York University notes: “I don’t doubt that he [Bezos] loves journalism and thinks that ‘Democracy Dies in the Dark,’ but boy, it’s convenient to have the Post and a home in Washington. These are incredibly powerful prophylactics” (Spencer-Soper, 2018).

Sheldon Adelson, the owner of Sands Casino in Las Vegas, the basis of his gambling empire, purchased the *Las Vegas Review Journal* at a time when legislation aimed at permitting online gambling was on the Nevada ballot (Somaiya, 2016). Obviously, the bill would have adversely affected Adelson’s casino empire, and claims were raised that the motivation behind the purchase was to influence legislators (Somaiya, 2016).

Another example is that of Mortimer Zuckerman, the owner of Boston Properties – one of the largest real estate trusts in the United States, who famously purchased *U.S. News and World Report* as well as the *New York Daily News*. The *New York Daily News* subsequently endorsed two then-candidates for mayor of New York City – Rudolph Giuliani and Michael Bloomberg (the *New York Daily News* was the only outlet to endorse Bloomberg at the time; Paumgarten, 2007). The value of a mayor’s gratitude for a developer in New York City is clear.

Obviously, the problem is not confined to the case of a business that owns an enterprise engaged in commercial activities and subsequently acquires control of media outlets. It is present in the opposite scenario as well, that is, when the controller of a media outlet ventures into other commercial activities. A prominent example is when big-tech businesses, whose primary area of expertise is social networking or media, venture into additional commercial areas. Facebook’s entry into virtual reality products is one illustration of such a setting. Clearly, Facebook may utilize its control over a very influential media platform to receive special treatment from regulators and politicians who oversee virtual reality activities (Gallagher, 2018). Similarly, Google may utilize its control over its news-dissemination platform to obtain favorable treatment from regulators and legislators in its entry into the automated vehicles sector (Shepardson, 2016).

In Israel, Shaul Elovitch, the former owner of both Bezeq, the largest Israeli telecom company, and Walla News, an online news platform, has been indicted for allegedly skewing media coverage in favor of then-Prime Minister Benjamin Netanyahu, in return for regulatory benefits to Bezeq (CC 627104-01-20; see above). Similarly, there have been allegations (although not criminal charges) that Nochi Dankner, the former controlling shareholder of IDB Investments, a major Israeli holding company, which also owned Cellcom, the leading telecom company Cellcom, purchased *Ma’ariv*, the third largest Israeli newspaper, with a view to blocking reforms that would have harmed Cellcom (Libson, 2021).

Thus, the issue of the nexus between big business influencing politics through media ownership has already proven problematic on a practical level, but, as mentioned, it remains unresolved on a theoretical level. It is here that we hope to make our main contribution. We intend to develop a framework for identifying structural settings in which harm to the freedom of the press is most likely. We will then propose a practical tool – an easy-to-employ index – that can be used to decide whether (and when) acquisitions of media outlets should be allowed. Our proposal regarding the precise regulatory regime to be established has yet to be developed. We may propose an outright prohibition on controlling a media outlet, a requirement for ex-ante regulatory approval of acquisition of media outlets, ex-post divestiture orders, or other options. This will depend on various factors, to be explored and researched within the framework of our project. Nonetheless, any legal, regulatory or political authoroity will benefit greatly from our analysis and will be able to utilize the index developed.

1. ***Detailed Description of the Proposed Research***

The key observation underlying our proposed index is that the danger to the integrity of a media outlet increases as a function of two elements: the *value* of the owner’s holdings in other commercial firms, and the *distribution* of these holdings among industries and commercial firms. The first of these determinants is obvious. The larger the value of a business’ holdings in other commercial firms, the more it profits from any regulatory benefit bestowed on those firms. Consequently, there is a greater likelihood that it will tilt coverage by a media outlet under its control. If, for example, a political agent eases regulatory requirements that apply to a commercial firm, and the value of the firm consequently rises by 5%, an investor who has a $1 billion stake in the firm will have “received” $50 million, whereas an investor who has a $5 billion stake in the firm will have “received” five times that amount —$250 million. Therefore, the greater the dollar value of the owner’s holdings in other commercial firms, the greater the profits from the media outlet the owner will be willing to forego in return for political favors that benefit the commercial firm or firms. The danger to the integrity of the media outlet is thus clearly connected to the absolute value of the controller’s holdings in other commercial firms (for a similar analysis of the problems brought about by cross ownership of two commercial firms see Gilo, 2000). The second important determinant, which is less obvious, is the *distribution* of these holdings. The more dispersed these holdings are, the more difficult it is to grant the owner a given value in covert regulatory favors. The reason for this is that as the owner’s level of holdings in a specific commercial firm fall, its private value from a benefit to the firm decreases. If the media outlet’s owner’s holdings in other firms are dispersed, the political agent will have to grant a great number of favors in numerous sectors in order to justify tilted coverage and any concomitant loss to the media outlet. Suppose, for example, that the cost to a media outlet of skewing coverage is $100 million. Clearly, the owner of the outlet will deliver this biased coverage only if the owner receives more than this amount in regulatory and political outcomes that benefit other businesses in which the owner has a stake. If the total value of the owner’s holdings in commercial firms are, as in the previous example, $5 billion dollars, and these are distributed among five commercial firms ($1 billion in each), the politician must either provide a regulatory favor increasing the value of one of these firms by 10% (so that the value to the owner is $100 million), or design five different regulatory schemes that increase each of the firms’ respective value by 2% (for a total benefit to the investor of $100 million). By contrast, if the full $5 billion are invested in one firm, a single regulatory change increasing the value of the firm by 2% will suffice to motivate skewed coverage. Thus, the more concentrated the holdings of the owner are in other commercial firms, the greater the concern for political misconduct and potential harm to the free flow of information to the public. The index proposed must account for both the value of the holdings in other commercial firms, and the distribution of these holdings.

The index we suggest, which, as mentioned, we tentatively dub the Business-Media Influence Index (BMII) will be adapted from the HHI. The HHI measures a very similar factor: the distribution of market shares among the sellers (or buyers) in a specific market. The HHI sums the *squares* of the individual sellers’ market shares, thereby giving proportionately greater weight to larger market shares (Horizontal Merger Guidelines, 2010, 5.3). The BMII will be similar in this sense. For the reasons explained, it will give proportionately greater weight to ownership that is not dispersed; that is, to larger *shares* of ownership of individual firms. The BMII will differ from the HHI, however, in that it will be sensitive to the *value* of the holdings, not only to their distribution. It will give greater weight to higher values of the business’ holdings in commercial firms. The BMII will also be different from the HHI in that it will be insensitive to market power or to a firm’s market share in any specific market, as these are not the determinants of the value of a regulatory benefit. A regulatory benefit may be valuable to a business irrespective of its market power.

We propose an index of the following configuration: the *share* of ownership in each of the companies in a business’s portfolio (excluding holdings in media outlets) and the *cap value* of each of the respective firms are multiplied by each other. The product is squared. The sum of these squares is the business’s BMII. Technically, the BMII can be expressed as:

2,

where *N* is the number of firms on the business’ portfolio, is its share in each of the firms, and is the value of the holdings in each of the firms. Both the cap value and the share of the holdings are squared to reflect their non-linear effect, i.e. the fact that as they increase, it becomes exponentially easier to bestow a given benefit on the owner. For practical reasons and ease of use, we suggest expressing *V* in units of millions. As we expect the index to be relevant to firms valued at millions of dollars, squaring *V* would otherwise produce unmanageable numbers.

Thus, for example, if a business’s portfolio is comprised of two firms, the business owns 30% of each of the firms’ outstanding shares, and the cap value of each of the firms is $5 million, its BMII will be **4.5** If the business holds a portfolio of similar total value, but its holdings are concentrated in a single firm with a cap value of $10 million, its BMII will be **9** ((. The different BMII values reflect the fact that it is much easier for a politician to grant the owner a specific amount in regulatory benefits in the latter case, because the amount can be granted via a single regulatory change that affects the firm; whereas in the former case, granting the same value to the owner requires two regulatory changes, or a regulatory change that grants a benefit twice as large to one of the firms.

The index, once fully developed and adjusted to account for additional factors (see below), can be used as an easy tool to gauge the risk of the business using its media outlet to influence politicians and regulators. The higher the BMII value, the greater the likelihood that the business will find it profitable to use the media as a means of facilitating a covert form of bribery. When the holdings meet a specific BMII threshold, structural limitations on control over media outlets may be adopted. Various regulatory schemes may be put in place utilizing the BMII: acquisition of a controlling stake in a media outlet may be disallowed when a business or its owner exceed a predetermined BMII threshold. Such a prohibition on ownership of media outlets may be implemented through legislation. Alternatively, acquisition of control over media outlets may require some form of pre-merger regulatory approval, in the course of which the proposed transaction is scrutinized based on the BMII. If the business already controls a media outlet and then increases its holdings in other commercial firms, divestiture of either the media outlet or of some of the commercial operations may be mandated. Other regulatory schemes are also conceivable. We have yet to analyze the advantages and shortcomings of different potential regulatory schemes, a task we intend to undertake in the course of our research. But the key point is that any regulatory regime can make use of the BMII, which is an easy-to-employ tool. And regardless of the specific thresholds and the regulatory regime ultimately recommended, the index will aid regulators and provide predictability and certainty to the market. Given the impracticability and perils of regulating media coverage ex-post, a structural approach to the problem that strikes at the very incentive to skew media coverage is likely a preferable solution. In this respect, the prevention of harm to democratic institutions is similar to merger control. It is intended to curb the problem in its incipiency (Horizontal Merger Guidelines, 2010, at 1; *Brown Shoe v. United States*, 1962; Carstensen & Lande, 2018).

The idea of limiting ownership and control of a specific kind of business activity (media outlets, in our case) is not foreign to regulatory regimes. A similar limitation is imposed on the banking system in the United States by the Bank Holding Company Act (1956), that prohibits bank holding companies from holding five percent or more of the voting rights of commercial non-financial companies. There are several reasons for the imposition of these restrictions on banks. Among them are the stabilization of the banking system, achieved by decreasing banks’ exposure to market fluctuations and the amelioration of the conflict of interests that may arise when a bank makes credit-rationing decisions that impact its subsidiaries and their competitors. Yet, as some scholars have noted, the Bank Holding Act was originally designed as an antitrust measure to prevent the concentration of economic power, even when this power does not translate directly into market power in relevant financial sectors (Omarova, 2013). At the time of the enactment of the Act, there was particular concern regarding the power financial institutions held over the market and the political system. The threat that powerful financial institutions pose to democracy in the United States was famously expressed by Justice Brandeis (Brandeis, 1933), and was the background for the enactment of the Bank Holding Company Act. Our proposal adopts aspects of these restrictions on banking institutions, and is based on similar assumptions regarding the strong impact specific sectors have on democratic systems.

Importantly, all the elements of the proposed method are easy to apply, and require no convoluted formulae or sophisticated calculations. The method requires the identification of three elements: control over a media outlet, the value of the business’s holdings in commercial firms, and the share of ownership of these firms. All three are easily quantifiable based on data that are readily available. With respect to control, the definition of control adopted by the Bank Holding Act may be used: possession or control of over 25% of a class of voting securities automatically classifies the owner of the securities as a controller. Control of less than 5% of the voting rights determines categorically that the owner does not control the firm. The determination of whether voting rights of between 5% and 25% meets the legal definition of control depends on a substantive test of whether the owner can effectively control the election of a majority of the directors (Bank Holding Act, 1956).

Once control over the media outlet has been established, the only data required are the value of the big business’ holdings in other commercial firms, and the share of each firm owned by the business. These are either publicly available (when the ownership in question is ownership of publicly-traded companies), or easily verifiable. The index is thus based exclusively on data that regulators can obtain quickly and inexpensively. Another advantage associated with the index, closely related to the previous one, is that the outcome of its application is easily predictable, thereby providing certainty to the market. A business that intends to acquire a media outlet can know with certainty whether the transaction is likely to survive scrutiny or not.

The index is not yet fully developed, and still requires calibration. Specifically, it may need to be adjusted to fit specific industries or to address other considerations. For example, some sectors, such as energy, telecom, and real estate are more heavily regulated than others. This may potentially make political gratitude (or fear) more valuable to an owner of firms in these industries than to owners of firms in other industries. Thus, the risk that the owner of a media outlet will find a quid pro quo – explicit or implicit – of the kind envisaged here beneficial may be greater in such industries. The BMII threshold triggering an objection to the acquisition of control (or the prohibition of such an acquisition) may therefore be set lower for investors in such industries or sectors. Conversely, if there are industries that are less sensitive to regulation, BMII thresholds triggering a prohibition of the acquisition of control of a media outlet may be set at higher levels.

Similarly, market share and market power in the commercial sectors, as well as in the relevant media market, may also be of some importance. Specifically, the market shares of both the media outlet in question and the firms or sectors in the business’ portfolio may also need to be considered. These are not formally incorporated into the index, because they may have conflicting effects. On the one hand, if a firm in a business’ portfolio has a large market share in its industry, the benefits of a regulatory easement accrue to it in larger part (or solely, in the case of a perfect monopoly). But at the same time, such a firm and its industry may be subject to greater public scrutiny. And regulatory benefits bestowed on the industry may be perceived as a direct benefit to the firm rather than as a legitimate regulatory scheme that benefits a large number of firms. Therefore, we tentatively believe that market share should play no role in a regulatory regime making use of the BMII. A firm’s large market share may constitute an a priori justification for a harsher regulatory regime (lower BMII thresholds). But it may also justify a more lenient one. This is an issue we will revisit in the course of our research. BMII thresholds may need to be adjusted to account for specific characteristics, such as market share or market power in individual industries.

Finally, BMII thresholds may be calibrated to account for differences between national markets and local ones. Application of the BMII to a business that is active in commerce on a national scale may justify different thresholds from those used when it is applied to a business that is active in a specific state, or even in a smaller geographic area. The power a local media outlet may exert on a state governor or on a mayor of a municipality may be extreme. The commercial activities of local businesses controlling local media outlets may typically be of smaller scope or breadth than those of their national counterparts. When regulators are concerned with the influence the business may have in the local arena, different BMII values may be justified. Similarly, when the business in question operates on a national scale, but is affected largely by local regulation (local taxes, local rules governing employees’ rights, etc.), for example, due to the location of its main manufacturing plants or to the state in which it is incorporated, different BMII values may be justified.

1. *Working hypotheses*

We have two central hypotheses:

1. Control over media outlets may provide large businesses with an extremely powerful, yet largely unactionable, channel of influence on the political arena.
2. The risk that a media outlet will skew coverage increases as the owner’s holdings in independent commercial firms increases.
   1. The risk that a media outlet will skew coverage increases exponentially as the cap value of the firms on its owner’s portfolio increases.
   2. The risk that a media outlet will skew coverage increases exponentially as the share of the controller’s ownership in each firms increases.
3. *Research design and methods*

Our research is primarily theoretical. The first step of our research will be to map the scope of the phenomenon of businesses that control media outlets. Our examination will focus on the United States, but will include the EU, Australia, and the United Kingdom. After mapping the universe of cases in which businesses (or their owners) control media outlets, we will proceed to identify examples in which there is good reason to think that the media outlet is being used as a means to intimidate or reward politicians or regulators. We will do this by reviewing the timing of the purchase of the media outlet and investigating whether this coincided with other occurrences and regulatory developments that impacted the business’ commercial activities. We will also search for commentaries and other sources to examine whether there were allegations of ill-motivated acquisitions of media outlets or biased coverage designed for the benefit of a regulator or politician (naturally, we will critically analyze such allegations to see whether or not they are well founded).

The second step of our research will be to explain the problem, propose our index, and consider necessary adjustments based on industry characteristics and market power. We will also analyze the advantages and disadvantages of possible regulatory regimes making use of the index. Based on the first step, we will hopefully be able to suggest thresholds for the application of our index. We also intend to answer the following questions: what are the thresholds (considering the value of the holdings, the share of ownership of commercial firms, and the degree of control over the media outlet) that justify intervening in ownership of media outlets? Should there be a requirement for an ex-ante approval or ex-post intervention (Givati, 2016)? Should regulation take the form of private regulation (via the court system) or public regulation, and should public regulation – if and when desirable – be exercised by courts or by regulatory bodies? Which regulatory body should be vested with the task of overseeing acquisition of control of media outlets (e.g., in the United Sates, the Federal Communication Commission, the Federal Trade Commission, the Department of Justice, or a different regulatory agency)?

We expect the first two stages to culminate in the publication of two articles: one focusing on the development of the BMII itself, and the second focusing on the institutional design of the regulatory scheme through which it may be implemented, to be published in peer reviewed journals or law reviews.

The third step of our research will be to identify settings in which quid pro quo arrangements for media coverage in return for regulatory favors, explicit or implicit, are relatively frequent. We hope to be able to offer a typology of the cases we find. Specifically, we hope to identify certain sectors that are especially prone to the utilization of media ownership as a means to discipline and influence legislators and regulators. We also hope to identify specific media outlets that are more likely to be used as channels of influence (online platforms vs. newspapers, local media outlets vs. national outlets, etc.), as well as identify certain occurrences that often trigger the purchase of media outlets (e.g., elections, debates over significant regulatory reforms, political changes, etc.).

We are confident that the answers to these questions will enable us to propose different permutations of the BMII: should the BMII be applied differently for the acquisition of specific kinds of media outlets? Should the regulation of such acquisitions be more stringent in the context of specific political events? Should the index be tailored to fit specific sectors? And so on.

We expect the third stage to culminate in a third paper, to be published in a law review or peer-reviewed journal.

1. *Preliminary results*

We have already conducted a preliminary search of relevant instances. We have found quite a few cases, noted above, that fit our hypotheses (Jeff Bezos’s purchase of *The Washington Post*; Sheldon Adelson’s purchase of the *Las Vegas Review Journal*; Mortimer Zuckerman’s purchase of *U.S. News and World Report* and the *New York Daily News*, and his subsequent endorsement of candidates for mayor of New York City; Facebook’s venturing into virtual reality products; Google’s entrance into autonomous vehicles; Elovitch’s alleged use of Walla to obtain regulatory favors for Bezeq; and Cellcom’s controlling shareholder’s purchase of *Ma’ariv*).

On a theoretical level, we have developed the basic index, which accounts for the relevant factors and their exponential effect. The index may require some modifications, and thresholds for its implementation may require further research. But the index seems to be supported by the theoretical analysis, and to conform with its fundamental principles.

The primary resources for this project are legal databases, publicly available resources concerning the ownership of firms and control of media outlets, communications’ databases, and research assistance. Most of our analysis is not quantitative, so it does not require a specific skill set, unless we find an exceptionally large array of relevant cases that merit a quantitative analysis. While a quantitative analysis is beyond the scope of the proposed research, if we do find a large dataset that can be analyzed, we hope to be able to collaborate with an empiricist. We both have research assistants who can work on this project— five students enrolled in our LLB programs that are already working for us as research assistants and two students enrolled in our LLM programs who are already working with us. We have two Ph.D. students whose work is indirectly related to the topic of our proposal and we hope to collaborate with a third Ph.D. student (currently not involved in the project), working on concentration and political influence, possibly as a post-doctoral fellow upon completion of her Ph.D., with a view to developing additional tools for addressing the problem of big business’s political clout, thereby expanding our project to fit within the contours of a larger framework.

1. *Expected results and pitfalls*

We expect to find numerous cases that lend support to our theory, i.e. that businesses indeed acquire control over media outlets for the purpose of influencing the outcome of political processes, or at least use media outlets under their control to affect these processes. We hope to find at least a few dozen examples of such acquisitions that can be reliably associated with a specific political or regulatory process, or with the political sphere in general. The identification of a large number of such cases will enable us to conduct a systematic analysis and understand when and under what circumstances the problem is most likely appear. As mentioned, if the dataset is large enough, we intend to conduct an empirical analysis (with the assistance of a data scientist). If the dataset contains a more modest number of cases, we will then attempt to deduce when and under what circumstances the problem is most likely to present itself, but the outcome of this analysis may not be as robust as we would like. This will not undermine the theoretical aspects of the project, but it may impact the third stage of the project, in which we attempt to calibrate the BMII to different settings. If this is the case, we will rely on literature from communication sciences for this part of the project. If this is not a viable option, the analysis will take the form of a case study and not of a comprehensive analysis culminating in a clear typology and precise thresholds for different industries.

Another issue we will need to address is the relationship between the cap value of the firms in the business’ portfolio (*V*), and the share of ownership (*S*). In our proposed index, both are squared (because the product of multiplying one by the other is squared). This is perfectly justifiable when the cap value of the firm impacts the dollar value of the regulatory benefit. Or, put differently, when the value of the benefit is a function, inter alia, of the cap value of the firm. This is common in cases such as tax exemptions or environmental regulation that is dependent on the scope of the firm’s activity, for example capping oil wells (Rossenfos, 2013)). However, if regulatory benefits confer a *fixed* amount on a firm, the cap value of the firm is of lesser importance. The benefit to the owner of the firm will simply be the value of the benefit multiplied by the share of ownership. If this is the case, it may be justified to reduce the exponential weight given in our index to larger cap values; that is, it may be justified to square only *S* and not *V* in the index (that is, define 2). Tentatively, we think the squaring both *V* and *S* is justified. To begin with, as explained, in many instances, the probability that the power of a media outlet will be abused increases exponentially as the cap value of the owned firm increases. Second, even if there are instances in which the cap value is, prima facie, of lesser importance than the share of ownership, a regulatory framework that uses an index that does not square the cap value may be subject to abuse. Politicians will simply opt to grant regulatory favors that *are* dependent on the cap value of the relevant firms, and owners of media outlets will purchase shares of large firms so that they can more easily receive regulatory consideration in a manner that is not captured by the BMII. This may defeat the purpose of the index. But in determining whether or not to calibrate the index in this manner, we will need to consider how common, likely and feasible these kinds of regulatory benefits are.

A final issue we need to consider is the possibility that businesses hold “soft power” over media outlets due to the volume of their business transactions with media outlets as advertisers or customers. This power may translate into a channel of influence over politicians, even though the businesses do not directly control the outlets in any legal sense. A media outlet may be willing to serve a large advertiser by tilting coverage in favor of a politician whom the advertiser favors. Tentatively, we think that such “soft power” is never as problematic as outright control over media outlets. While an outlet may be sensitive to the interests of a large advertiser, or attentive to requests from a large customer, this is not equivalent to full control of the media outlet. The media outlet will always retain discretion; it will always be more sensitive to losses emanating from skewed coverage, and the business will never dominate as strongly as when it controls the outlet. Additionally, even to the extent that the business can influence editorial decisions and the like, when the business does not directly control the outlet, this will entail transaction costs. The need to interact with an external entity increases the probability that the campaign will be detected by the public and regulators, increasing its price and decreasing its efficacy. Thus, we believe that this kind of “soft power” is inferior to direct control over a media outlet as a mechanism of influence, and is thus much less of a concern. Nevertheless, this too is an issue we will need to address.