1. ***Scientific Background***

Big businesses obtain power in the course of the commercial process. The acquisition of this power and its effect on the competitive process are the traditional focus of antitrust laws. But big businesses’ clout may also be utilized to tilt the *political* process. This aspect of big businesses’ power is beyond the realm of traditional antitrust laws, at least as they have been interpreted in the past sixty years.

Recently, there have been calls to expand the scope of antitrust laws so that they may address the political power amassed by big business. Scholars, commentators, practitioners and even politicians have made suggestions along these lines. In the scholarly circles this expansion has been dubbed “Movement Antitrust”, “Neo-Brandies” or “New Antitrust (Teachout & Khan, 2014: Rahman & Khan, 2016; Khan, 2016; Stucke & Ezrachi, 2017; Tim Wu, 2018; Khan, 2018 XXX new article sent by Hovenkamp).

Many leading antitrust scholars have objected to “Movement Antitrust”. They argue that it sets an “undisciplined set of goals that provide no guidance and could do serious harm to the economy” (Hovenkamp, 2019 at 636). But even those opposing “Movement Antitrust” agree that some expansion is called for. Following the recent failures of both the Federal Trade Commission and various states in cases brought against Facebook due to the respective plaintiffs’ inability to provide prima facie evidence of Facebook’s market power in a properly-defined market (XXX), Herbert Hovenkamp 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.” (W.S.J interview, June 29, 2021). Since this statement was made, a case against Apple (Epic Games v. Apple, Inc.) 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 big businesses when these businesses’ traditional market power cannot be proven. The extent and specifics of the required expansion of antitrust law remain controversial. But the core idea that antitrust must be somehow adapted to meet the current challenges associated with big business enjoys a rare coalition comprised of both the political right and the political left (Crane, 2018; Crews, 2020).

The understanding that antitrust law requires adaptation to the modern world does not necessarily imply that it should be utilized to address *political* power. For those who are familiar with antitrust’s goals as they have been understood since the Chicago school of thought became prominent, the idea of expanding antitrust law to deal with political power may seem odd. But this is not, in fact, a new idea. As the name “Neo-Brandies” implies, an understanding of antitrust as an area of law focused on political power echoes the original intent of the Sherman Act and its interpretation by courts in the 1920’s and 1930’s by the Brandeis court. When the Sherman Act was enacted, Senator John Sherman explained that the law was aimed primarily at curtailing the breeding of antidemocratic pressures, and at eliminating the phenomenon whereby the private discretion of a few controls the welfare of all (Pitofsky, 1979). Judge Louis Brandies interpreted the antitrust laws in this spirit, arguing for placing restraints on big firms even when they do not necessarily possess market power and do not control the market price of goods (Brandies, 1934).

The utilization of antitrust to combat political power is thus not an unprecedented idea. In taking a fresh look at antitrust law’s functions—a fresh look that most agree is warranted—it may be helpful to look beyond the traditional effects of market power on price and quantity (XXX). If antitrust law, or specific antitrust law doctrines, can be utilized to address a problem associated with big business, and if this can be done without putting in place “undisciplined set of goals that provide no guidance”, there is no reason not to use it to achieve additional goals. However, practical suggestions of 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 attainment of traditional goals in modern markets have also been made (Hovenkamp, 2021; Gal XXX). But possible applications of antitrust law to attain new goals have yet to be introduced. In this project we will attempt to fill this void. Specifically, we hope to provide guidance and practical tools for the expansion of specific antitrust-law doctrines to curtail the power business have 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—a modification of antitrust law’s concentration-index, that will allow this index to assist in identifying when the control of media outlets by big business poses a danger to the functioning of democratic institutions.

One of the troubling phenomena of our time is the political power that big business wields. Big business influences the political process in many ways. Sometimes, specifically when the businesses are social networks that controls politicians’ channels of communication, the effect is direct (Balkin, 2018; Klonick, 2018). For example, Twitter banned political advertisements in October 2019, and in 2020 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 a practice of assigning fact-check notes to posts in political accounts. All three tech-giants suspended then-President Trump’s account after the storming of the US Capitol on January 6th, 2021. In Europe too, social networks have intervened in context posted on the network, such as a Geo-block of Greek accounts that have insulted Ataturk in Turkey where such insults are illegal (Hamilton, 2021). Sometimes, however, big business may exert pressure on politicians indirectly. Specifically, big businesses may obtain control over media outlets and use these to discipline politicians. Media coverage is a currency that is extremely valuable to politicians, often more than monetary consideration (Rowbottom, 2013). If a big business controls a media outlet, it can use the coverage to exert pressure on politicians, thereby securing a favorable outcome of political processes. Positive media coverage will follow good results (from the business’ perspective), and negative coverage will follow undesired outcomes or actions. This is problematic not only due to the skewed outcome of the political process, clearly a grave issue in its own right. It is also problematic because the media has enormous power over public discourse, and a great impact on the public’s perception (McCombs & Shaw, 1972; Baker, 2009). So much so, that some even hold that media outlets have fiduciary duties to the public (Barak, 2002). If the media’s influence is abused by big business, the crucial diversity and independence of the media are impaired (Stiglitz, 2008).

Traditionally, antitrust has not been employed to regulate such channels of influence. The reason is that neither the desire to influence the political process nor the ability to do so are necessarily correlated with market power—the power over price and quantity in specific markets. Both a firm with market power and a firm without market power may benefit from a grateful (or intimidated) politician. Affecting the political sphere does not require market power. It requires only sufficient resources to make a payment to politicians or regulators in return for a desired political outcome. To be sure, there is a correlation between market dominance and wealth. But at its core, the problem is not one of market power, but rather one of affluence. The issue was thus traditionally dealt with by 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 is very difficult to regulate. This is due to three unique features: first, regulating media coverage is itself extremely dangerous to democracy. The proper functioning of a democracy is greatly 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. Policymakers and enforcement agencies are justifiably reluctant to prohibit or otherwise regulate media content (Samples, 2019, Caneub, 2008). Second, the impetus for media coverage is all but impossible to ascertain, let alone prove. Absent clear proof of an explicit *quid pro quo* agreement with a politician, which is seldom obtainable, an innocuous explanation can always be provided 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 at its best from media coverage that is motivated by a *quid pro quo* arrangement—explicit or implicit—with a politician. The motivation for bribes, gifts, donations, and even the employment of lobbyists, is blatantly obvious. They may be legitimate or fall outside the permissible boundaries. But there is no question regarding the motivation for their use. Media coverage is far less clear in this respect. Finally, not all media coverage that deliberately benefits political agents is undesirable from a social perspective, even if there is an explicit *quid pro quo*. 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 prime time, 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 the media coverage of politicians is thus justifiable. But the result of this reluctance is that a dangerous and extremely powerful channel of influence is completely unactionable. 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 uninhibited trade of coverage for political gratitude. This is the economic equivalent of outright monetary bribes. But from a legal perspective the two are diametrically opposed—one is completely illegal, while the other is completely legal. Few would find it problematic to prosecute anyone who transferred a substantial amount to a politician who then made a decision favoring the payor. And few would hesitate to prosecute 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 is shielded from action. We know of only one case in which there was an alleged implicit *quid pro quo* agreement between a politician and a media outlet—the case of the former Israeli prime minister, Benjamin Netanyahu, who has been indicted of bribery for an agreement that was, in pertinent part, allegedly similar (Libson ,2021). And even this case did not entail an explicit regulatory demand or a specific regulatory favor in return for positive coverage. In any event, even if this is a case of an alleged implicit *quid pro quo*, it is the (unique) exception, not the rule.

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 sensitive to the costs of tilted coverage (tilted coverage may also be desirable, for example when the outlet is committed to a specific political party; but the skewed coverage we discuss here is coverage that is *not* skewed for its idiosyncratic profitability). Demand for the outlet will, presumably, plummet. Patrons will not consider it a trustworthy source, competitors will provide better services, and advertisers’ willingness to purchase adds will also decline. 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. At the extreme, the outlet will lose all patronage. But when the controller of the media outlet owns other commercial enterprises (which we will refer to as ‘commercial firms’, taken to mean any for-profit firm besides the media outlet, including those active in the financial sector), it may be profitable to sacrifice profits from the media outlet in return for regulation that the commercial firms benefit from. Closely related, the *quid pro quo* becomes far less apparent to both the public and regulators. Blatantly put, the media outlet may be used as a bribery-laundering scheme. As monetary bribes are actionable but positive coverage is not, this creates potential for a *quid pro quo* that is essentially immune from action. Big businesses may purchase control over media outlets with the intention of exerting pressure on politicians, as some have suggested (XXX). They may also purchase such outlets for other reasons, and then find themselves in an advantageous position vis-à-vis politicians who fall in line for fear of retaliation (or hope of consideration), resulting in an *implicit* quid pro quo arrangement. In either case, the outcome is the same. Moreover, the very fact that a business entity controls a media outlet may bestow ‘soft power’ on the entity, obviating the very need for a *quid pro quo* agreement: politicians and legislators know both that the owner (or controller) of a media outlet may easily retaliate against them (or provide positive coverage), and that the controller of the media outlet has a strong interest in specific decisions, due to its holdings in other commercial firms. They will thus be more attentive and sensitive to the controller’s interests, which in turn may make a *quid pro quo* agreement completely redundant. Cross-ownership of media outlets by big businesses should thus be a great concern for policymakers.

To date, the literature has not noticed 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’ political influence. But the structural element of control of media outlets and the problem brought about by this structure have yet to be researched.

It is here, we contend, that antitrust law’s doctrines can be modified and implanted to address the problem. Importantly, adapting antitrust law doctrine to this scenario can allow policymakers to nip the problem in the bud. Rather than the cruel choice between two evils—taking action against media outlets for observed coverage, which as explained is a cure that is likely to be more harmful than the problem it is intended to rectify, or leaving the problem entirely unactionable—we intend to offer a structural solution that can be used to preempt the problem. Specifically, we intend to develop a modification of the well-known Herfindahl-Hirschman Index (HHI), used in the merger-control context to assess concentration in specific markets, to fit the setting of control of media outlets by big business. We now turn to explain the importance of the index we intend to develop, and spell out its contours.

1. ***Research Objectives & Expected Significance***

As mentioned, at present there are no practical tools for addressing the influence of big business over the political arena and the domain of public discourse. Nor has the literature provided any guidance on the matter or a comprehensive analysis of the phenomenon (XXX, the article Hovenkamp sent us). The purpose of the proposed research is to fill this void. We will propose an index that will allow policymakers and regulators to assess the likelihood that a controller of a media outlet will use the outlet to promote its other interests vis-à-vis politicians and regulators. The logic underlying the proposed index is similar to that of the Herfindahl-Hirschman Index (HHI), one of the major tools employed by antitrust authorities and courts when analyzing whether a merger or an acquisition poses a threat to competition.

The importance of the proposed research is in its ability to offer a comprehensive understanding of, and a practical too for addressing, a phenomenon that poses a danger to democratic institutions. We will suggest a tool that originates from antitrust law, an area of law not normally associated with issues such as freedom of expression, to deal with this phenomenon, which has little to do with market power, the traditional focal point of antitrust law. This promotion of freedom of expression via tools from legal fields that are conceived as unrelated, is similar to Bell & Parchomovsky’s (2016) utilization of fair use doctrine in the domain of intellectual property for the same purpose.

The problem is not merely an academic curiosity. There are quite few instances of media outlets that took control over big businesses (or by owners of such businesses). The possibility that these controlling stakes were purchased, at least in part, to obtain power in the political sphere for the benefit of other businesses, has not escaped commentators.

For example, Jeff Bezos, whose financial stakes in Amazon are well known, purchased the Washington Post, a leading media outlet, for $250 million in 2013. 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: “Democray 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 Donal 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 blends with Amazon’s strategy of enhanced investment in lobbyists and increased presence in the nation’s capital (Spencer-Soper, 2018). Professor Scot Galloway of New York University noted: “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).

Mortimer Zuckerman, the owner of Boston Properties—one of the largest real estate trusts in the U.S., 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.

Sheldon Adelson, the Owner of Sand Casino (a gambling empire), purchased the Las Vegas Review Journal at a time when legislation aimed at permitting online gambling—which would have adversely affected Sand Casino’s business—was on the ballot (Somaiya, 2016). Claims were raised that the motivation behind the purchase was to influence legislators (Somaiya, 2016).

In Israel, Shaul Alovitch, the former owner of Both Bezeq, the largest Israeli Telecom company, and Walla News, an online new platform, has been indicted for allegedly tilting media coverage in favor of then-Prime Minister Benjamin Netanyahu, in return for regulatory benefits to Bezeq (CC 627104-01-20 ). Similarly, there have been allegations (although not criminal charges) that Nochi Dankner, the former controlling shareholder of IDB Investments that controlled Cellcom, a leading Telecom company, purchased Ma’ariv, the third largest Israeli newspaper, with a view to blocking reforms that would have harmed Cellcom (Libson, 2021).

The issue is thus unresolved on a theoretical level, and extremely problematic as a real-life phenomenon. It is here that we hope to make our main contribution. We intend to develop a framework for analyzing the effects of such cross ownership and for identifying the instances 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. A we subsequently show, the precise regulatory regime to be put in place—an outright prohibition on controlling a media outlet, a requirement for *ex ante* approval of acquisitions of media outlets, *ex post* divestiture orders, or other options—will depend on various factors. But any such regime 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 controller’s holdings in other commercial firms, and the distribution of these holdings among industries and businesses. The first of these determinants is obvious. The larger the value of a media-outlet’s controller’s holdings in other commercial firms, the more it profits from any regulatory benefit bestowed on the other commercial firms. 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’ $250 million. Consequently, the larger the dollar-value of the controller’s holdings in the other commercial firms, the greater the would-be profits from the media outlet it will be willing to sacrifice in return for political favors that benefit the commercial firm or firms. The danger to the integrity of the media outlet is thus positively correlated 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 regulatory favors. The reason for this is that as the controller’s holdings in a specific commercial firm fall, its private value from a benefit to the firm decreases. If the media-outlet’s controller’s holdings in other firm are dispersed, the political agent will have to grant a great number of favors in numerous sectors in order to justify tilted coverage and the concomitant loss to the media outlet. Suppose, for example, that the cost to a media outlet of tilting coverage is $100 million (taking into account all relevant factors, including the loss of patronage, the long run effects on the revenue from advertising, and so on). Clearly, the controller of the outlet will cause it to tilt coverage only if the controller receives more than this amount in regulatory and political outcomes that benefit other businesses. If the total value of the controller’s holdings 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 controller 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 business by 2% will suffice to spur tilted coverage. Thus, the more concentrated the holdings of the controller are in other enterprises, the greater the concern. The index proposed must account for both the value of the holdings in other enterprises, and the diversification of these holdings.

The index we suggest, which we dub the Business-Media Influence Index (BMII) will be adapted from the HHI, which accounts for a very similar factor—the distribution of market shares amongst 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 (HMG, 2010, 5.3). The BMII will be similar in this sense. It will give proportionately greater weight to larger holdings in 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. Additionally, the BMII will be insensitive to market power or to a firm’s market share in a specific market. 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 the following index: both the *share* of ownership in each of the companies in a business’ portfolio (excluding holdings in media outlets) and the cap value of the respective firm are squared, and multiplied by each other. The sum of these is the business’ BMII. Technically, the BMII can be expressed as: 2, where *N* is the number of firms in which the business holds, *S* is its share in each of the firms, and *V* is the value of the holdings in each of the firms. As explained, both the share of ownership in each of the firms and the cap value of each of the firms are important. The share of ownership is important, because for any increase in the value of the firm, the owner’s private benefit will correspond to its share of the holding ($1 granted to the firm is worth 10 Cents to an owner of 10% of the firm). The cap value of the firm is important, because regulatory changes may increase the value of the firm by a given percent (for example, a reduction of the taxes the firm is obligated to pay). When this is the case, the profit is a derivative of the cap value of the firm. 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 in cases of firms valued at millions of dollars, squaring *V* would otherwise produce unmanageable numbers.

Thus, for example, if a business’ 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 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 (single) firm; whereas in the former case, two regulatory changes are needed for the same value-increase to the owner (or a regulatory change that grants a benefit two times larger to one of the firms).

The index can be used as an easy tool to gauge the danger of the business using the media-outlet to influence politicians and regulators (Drutman, 2015). The higher the BMII value, the greater the likelihood that the business will use the media as a “bribery-laundering” channel. When the holdings meet a specific BMII threshold, structural limitations on control over media outlets may be put in place. Acquisition of a controlling stake in a media outlet may be disallowed when a business or its owner meet a specific BMII threshold. If the business already controls a media outlet and then increases its holdings in other enterprises, divestiture of either the media outlet or of some of the commercial activity may be ordered. Naturally, various regulatory schemes may be put in place utilizing the BMII: a prohibition on ownership of a media outlet may be incorporated through legislation. Alternatively, acquisition of control over media outlets may require some pre-acquisition regulatory approval, in the course of which the proposed transaction is scrutinized based on the BMII. Other regulatory schemes may also be put in place. In the course of the research project we intend to provide an analysis of the pros and cons of specific regulatory schemes. But the key point is that any regulatory regime can make use of the BMII, which is an easy-to employ tool that provides predictability to those to whom the regulatory regime applies. Given the impracticability of dealing with the issue of media coverage in return for desired regulatory and political outcomes *ex post* (once a business controls a media outlet), a structural approach to the problem that strikes at the very incentive to tilt media coverage is the only viable solution. In this respect, the prevention of harm to democratic institutions is similar to merger control (XXX-merger control is designed to curb harm to competition in its incipiency).

The idea of limiting ownership and control of a specific kind of business activity (media outlets, in our case) is not foreign to the US regulatory regime. A similar limitation is imposed on the banking system by the Bank Holding Company Act (1956), that disallows Bank Holding Companies to hold five percent or more of the voting shares of commercial non-financial companies. There are several reasons for the imposition of these restrictions on banks. Among these are the stabilization of the banking system by decreasing banks’ exposure to market fluctuations, and the conflict of interests that may arise when making credit-rationing decisions that impact companies that a bank holds and their competitors. Yet, as some scholars have noted, the Bank Holding Act was originally designed as an antitrust measure to prevent 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 special concern with the power financial institutions hold over the market and the political system. The threat that powerful financial institutions pose for the American Democracy was also expressed by Justice Brandies (Brandies, 1933). Our proposal is reminiscent of the restrictions on banking institutions, and is based on similar grounds: the strong impact specific business activities have on democratic systems at large.

Importantly, all elements of the proposed method are easy to apply, and require no convoluted formulae or sophisticated calculations. The method requires identifying two elements: control over a media outlet, and the value and share of the business’ holdings in commercial firms. Both 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 possess control over the firm. The determination of whether a holder of voting rights between 5% and 25% confers 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—actual or sought—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 outlet. 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 deal is likely to survive scrutiny or not.

The index may be calibrated 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 controller 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 acquisition of control (or a prohibition on 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 on acquisition of control of a media outlet (or an objection to such an acquisition, depending on the specific regulatory scheme) may be set at higher levels.

Similarly, although the determinants of the BMII are the magnitude of the controller’s other commercial holdings and its share in the firms on its portfolio, market shares may also be of some importance. Specifically, the market shares of both the media outlet in question and the firms or sectors on the business’ portfolio may also be taken into account. These are not formally incorporated into the index, because they may cut both ways. 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, of which the firm in question is only one. Therefore, it is unclear whether a firm’s large market share constitutes an *a-priori* justification for a harsher regulatory regime (lower BMII thresholds) or for a more lenient one. However, regulators may, depending on their individual regulatory philosophy, adjust BMII thresholds 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 in the relevant arenas in which it may be applied. 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 a smaller geographic area. The power a local media outlet may exert on a State Governor or a mayor of a municipality may be extreme, even though the outlet’s power on a national scale is trivial. When regulators are concerned with the influence the business may have in the local arena, different BMII values may be justified. These values may also be justifiable when the business in question operates on a national scale, but is affected largely by local regulation (*e.g.*, local taxes, local rules governing employees’ rights, etc.), for example due to the location of its main manufacturing plants or its registered domicile (XXX).

But all of these are examples of possible *ad hoc* adjustments to the basic index. The focal point of our proposed research is the analysis of the problem and the index to be developed, as well as possible legal regimes to implement the index (in view of their respective advantages and shortcomings).

1. *working hypothesis*

We have two central hypotheses:

1. Some cases in which large business acquire media outlets are motivated by their desire to influence politicians and regulators. At the very least, control over media outlets may provide the large business with an extremely powerful, yet largely unactionable, channel of influence.
2. The danger that a media outlet will tilt coverage increases the larger the holdings the controller of the outlet has in additional independent business activities. While it is in no way impossible that a media outlet will tilt coverage and incur the associated costs even if its controller does *not* own additional commercial firms, when the controller does, it is more likely that sacrificing the outlet’s profits will be profitable (due to the additional profits accruing to the other commercial firms). The *quid pro quo* with politicians is also far easier to conceal under these circumstances. Thus, this is the setting requiring attention.
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 U.S. but will include the EU, Australia and the UK. After mapping the universe of cases in which businesses (or their owners) control media outlets, we will turn to identify cases in which there is good reason to consider the possibility that the media outlet was obtained with a view to intimidating or rewarding politicians or regulators. We will do this by reviewing the timing of the purchase and checking whether this coincided with other occurrences and regulatory developments that impacted the entity’s business activities. We will also search for commentaries and other sources, to examine whether there were allegations of ill-motivated acquisitions of media outlets or tilted 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 grounded).

The second step of our research will be to explain the problem, and propose our index. Based on the first step, we will hopefully be able to suggest thresholds for the application of our index. Specifically, we intend to answer the following questions: What are the thresholds (considering the value of the holdings, the share of ownership, and commercial holdings and the degree of control over the media outlet) that justify intervening with ownership of media outlets? What additional considerations, besides BMII thresholds, should be taken into account when determining whether to approve a specific level of control? 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?

We expect the first two stages to culminate in two articles, to be published in peer reviewed journals or in law reviews.

The third step of our research will be to identify settings in which *quid pro quo* arrangements—explicit or implicit—of media coverage in return for regulatory favors 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 hope to identify specific media outlets that are more likely to be used as channels of influence (online platforms v. newspapers, local media outlets v. national outlets, etc.); we hope to identify certain occurrences that often trigger the purchase of media outlets (*e.g.*, elections, debates over significant regulatory reforms, political changes, etc.).

The answers to these questions will hopefully allow us to propose different applications of the BMII: should the BMII be applied differently for acquisitions of specific kinds of media outlets? Should regulation of such acquisitions be more stringent in the face of specific political events? Should the index be tailored to fit specific sectors?

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

1. *Preliminary Results*

The primary resources for this project are legal databases, publicly available resources on 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 will hopefully be able to cooperate with an empiricist. We both have research assistants who could work on this project—both students enrolled in our LLB programs and students enrolled in our LLM programs. In addition, we have Ph.D. students whose work is related to the topic of this proposal. We hope to be assisted by these students as well.

We have conducted a preliminary search of relevant instances. We have found quite a few potential cases (see above). We have also found additional cases in which purchases of media outlets seem to have been motivated, at least in part, by a desire to affect the political sphere.

1. *Expected Results and Pitfalls*

We expect to find numerous cases supporting our first working hypothesis, *i.e.* that businesses indeed acquire control over media outlets to affect the outcome of political processes. We hope to find at least a few dozens of such acquisition, that can be reliably associated with a specific political or regulatory process, or with the political sphere at large. A large number of such cases would enable us to conduct a systematic analysis and understand when and under what circumstances the problem is most likely to present itself. As mentioned, if the dataset is large enough, we may be able to conduct a quantitative empirical analysis (currently not within the scope of the project). If the dataset contains a more modest number of cases, we will 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 have liked. 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 theoretical communications’ literature for this part of the project. If this is not a viable option, the analysis will take the form of a case-study analysis and not of a comprehensive analysis culminating in a clear typology and precise thresholds for different industries.

Another issue we will need to finetune is the relationship between the cap value of the firms on the portfolio (*V*), and the share of ownership (*S*). In our proposed index, both are 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 (*e.g.*, tax exemptions, or environmental regulation that is dependent on the scope of the firm’s activity, for example capping oil wells (XXX).). However, if regulatory benefits bestow a *fixed* amount on a firm, the cap value of the firm is of lesser importance. The benefit to the owner will simply be the value of the benefit multiplied by its share of ownership. If this is the case, it may be justified to reduce the weight given in our index to differences in cap values of firms; that is, it may be justified not to square *V* in the index. Tentatively, we think the squaring both *V* and *S* is justified. Otherwise, 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 large firms, so that they can easily receive regulatory consideration in a manner that is not captured by the BMII. This may defeat the purpose of the model. But the precise calibration of the index will need to consider how 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 as advertisers or customers. This power may translate into a channel of influence over politicians, even though the businesses do not control the outlets in any legal sense. Tentatively, we think that such ‘soft power’ is never as troubling 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 tantamount to full control of the media outlet. The media outlet will always retain discretion, and the business will never dominate as strongly as when it owns the outlet. Additionally, even to the extent that the business can impact 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 as a mechanism of influence, and is thus much less of a concern. However, this too is an issue we will need to address.