Reflections on the FCC'S Recent Approach to Structural Regulation of the Electronic Mass Media

Lili Levi*

* Professor of Law, University of Miami School of Law. This Essay is based on remarks delivered on January 8, 2000 during the Mass Communication Law Section panel on *Structural Media Issues and a Democratic Society* at the Association of American Law Schools Annual Meeting in Washington, D.C. I am very grateful to Mary Coombs, Tom Krattenmaker, Steve Schnably, and Ralph Shalom for their excellent suggestions in connection with the original remarks, and to Tom Krattenmaker and Ralph Shalom for help beyond the call of duty in reviewing this Essay. None of these commenters necessarily agrees with my positions and, needless to say, none is responsible for my mistakes.

I. INTRODUCTION

Today's media marketplace showcases the rapid development of the new medium of the Internet, the consolidation of old, established mass media, and the combination of the two. The merger of CBS and Viacom represents the latest and biggest in a series of "old media" combinations. These consolidations would not have been possible without the deregulatory turn in mass media policy that began with the Fowler Commission in the Reagan era and was codified in the Telecommunications Act of 1996.

This deregulatory turn and the consolidations it has permitted have led to a public debate about the Federal Communications Commission's (FCC's or Commission's) role in industry structure. Starting with the shared premise that the FCC is taking an increasingly market-facilitative role, commentators have applauded or criticized the impact of that approach on the mass media. This Essay seeks to put the Commission's current structural approach in fuller perspective. It contends that instead of taking a single, deregulatory course, the Commission is engaged in a multipronged approach to structural regulation of the mass media. This multivalent design has a deregulatory component, a regulatory counterweight, and a spectrum policy aspect. The regulatory counterweight in turn has two elements. One is explicit FCC rules that limit deregulation. The other element is voluntary public interest commitments by the regulated industries in response to FCC-articulated concerns. This Essay identifies the hard questions that face both sides of the existing regulatory debate and, having provided an alternative account of the FCC's strategy, also addresses the viability of the Commission's multipronged approach itself.

II. THE FCC'S STRUCTURAL REGULATIONS

The FCC operates under the extremely broad statutory mandate of regulating broadcasting in the public interest, convenience, and necessity.[1] While the agency has imposed some direct content regulations from time to time,[2] it has been primarily active in adopting structural regulations.[3] Over

1. *See* 47 U.S.C. §§ 303, 309(a) (Supp. III 1997).

2. *See, e.g.*, Editorializing by Brdcst. Licensees, *Report of the Commission*, 13 F.C.C. 1246, 1258 (1949) (adopting the now repudiated fairness doctrine for broadcasters); New Indecency Enforcement Standards to be Applied to All Brdcst. & Amateur Radio Licensees, *Public Notice*, 2 F.C.C.R. 2726, 62 Rad. Reg.2d (P & F) 1218 (1987); Enforcement of Prohibitions Against Brdcst. Indecency in 18 U.S.C.A. § 1464, *Memorandum Opinion and Order*, 10 F.C.C.R. 10,558, 78 Rad. Reg.2d (P & F) 1290 (1995) (adopting regulations prohibiting the broadcast of indecency during daytime hours). The Commission's forays into direct content regulation have sparked strong criticism, on both constitutional and

its regulatory history, the Commission has endorsed ownership prohibitions both within and across traditionally distinct media.

Within broadcasting, for example, the FCC adopted local anticoncentration rules limiting multiple station ownership in individual markets[4] and national multiple ownership rules limiting the total number of stations allowed for any single entity.[5] The Commission also adopted a

---

policy grounds. For powerful indictments of the Commission's content regulations in practice, see THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 103-174, 237-275 (1994); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987).

3. "Structural regulations" as used here refers to rules calculated to diversify control over and enhance competition in the mass media industry. Prime examples, as will be discussed in text, are limitations on consolidated ownership. This Essay does not discuss the Commission's behavioral regulations designed to enhance competition. *See, e.g.*, Review of the Prime Time Access Rule, Section 73.658(k) of the Comm'n's Rule, *Report and Order*, 11 F.C.C.R. 546, 78 Rad. Reg.2d (P & F) 1468 (1995) (describing PTAR in the context of repealing rule); 47 C.F.R. § 73.659 (1994) (financial interest and syndication—"fin-syn"—rule), *repealed by* Review of Syndication and Financial Interest Rules, Sections 73.659-73.663 of the Comm'n's Rules, *Report and Order*, 10 F.C.C.R. 12,165 (1995).

4. For a short history of the FCC's broadcast ownership rules, see Review of the Comm'n's Regulations Governing TV Brdcst., *Further Notice of Proposed Rulemaking*, 10 F.C.C.R. 3524, 3526-29, 17 Comm. Reg. (P & F) 2005 (1995). The FCC's one-to-a-market rule prohibited the common ownership of a radio and a television station serving substantial areas in common. *See* 47 C.F.R. § 73.3555(c) (1996); *see also* Multiple Ownership of Standard, FM and TV Brdcst. Stations, 45 F.C.C. 1467 (1964) (adopting the rule); Amendment of Sections 73.35, 73.240 & 73.636 of the Comm'n's Rules Relating to Multiple Ownership of Standard, FM & TV Brdcst. Stations, *Memorandum Opinion and Order*, 28 F.C.C.2d 662, 21 Rad. Reg.2d (P & F) 1551 (1971) (permitting AM-FM combinations and adopting case-by-case review for UHF-radio combinations). The Commission amended the rule in 1989 to clarify that it would "look favorably" on waiver requests in the top 25 markets so long as the merger involved a failed station or left 30 independently owned broadcast voices. *See* 1998 Biennial Regulatory Review—Review of the Comm'n's Brdcst. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Inquiry*, 13 F.C.C.R. 11,276, para. 9 (1998) [hereinafter *Biennial Regulatory Review NOI*]. The Telecommunications Act in section 202(d) directed the Commission to extend its presumptive waiver policy to the top 50 television markets if it finds that doing so would be in the public interest. *See id.* The Commission's television duopoly rule traditionally prohibited licensees with overlapping Grade B signal contours from owning more than one station. *See* 47 C.F.R. § 73.3555(b) (1994).

5. Since 1953, the FCC has had a series of multiple ownership rules. *See* Amendment of Sections 3.35, 3.240, & 3.636 of Rules and Regulations of Multiple Ownership of AM, FM, and TV Brdcst. Stations, *Report & Order*, 18 F.C.C. 288, 291 (1953). Until 1985, the "seven-seven-seven" rule prohibited a broadcaster from owning more than seven AM, FM, and television stations nationally. The Commission subsequently revised its multiple ownership rules—extending the radio and television limits to 12 stations in each service. *See* Amendment to Sections 73.3555 of the Comm'n's Rules Relating to Multiple Ownership of AM, FM, and TV Brdcst. Stations, *Report and Order (Proceedings Terminated)*, 100 F.C.C.2d 17, 56 Rad. Reg.2d (P & F) 859 (1984) (stating that the number of commonly owned television stations could go up to 14 if at least two of the stations were minority controlled or small businesses). Immediately prior to the elimination of all national

broadcast licensing approach in which comparative hearings among mutually exclusive broadcast license applicants would be resolved by reference, among other things, to the diversity in the various applicants' ownership of other media interests.[6]

In a parallel to its structural regulations for broadcasting, the FCC also adopted horizontal ownership restrictions in the cable context. As a result of its findings of increasing cable concentration in 1990[7] and pursuant to the requirements of the Telecommunications Act of 1996 (1996 Act),[8] the Commission adopted rules prohibiting any one entity from having an attributable interest in cable systems reaching more than thirty percent of cable homes passed nationwide.[9]

The Commission justified these ownership-regarding regulations as principally designed to prevent concentration, enhance competition, and promote diversity of voices.[10] On the Commission's view, diversity of

numerical limits on radio station ownership by the Telecommunications Act of 1996, the FCC had adopted an 18 AM-18 FM rule (with the limit increasing to 20 after 1994). As for television, the numerical cap on ownership was supplemented by the Commission's adoption of a national cap on audience reach of 25%. *See* Amendment of Section 73.3555 of the Comm'n's Rules Relating to Multiple Ownership of AM, FM, and TV Brdcst. Stations, *Memorandum Opinion and Order*, 100 F.C.C.2d 74, 57 Rad. Reg.2d (P & F) 966 (1985) (12-12-12 Reconsideration). The Telecommunications Act of 1996 eliminated the numerical limits on television station ownership but retained the national audience cap (although increasing it to 35% of the national audience). *See* Telcommunications Act of 1996, Pub. L. No. 104-104 § 202(c).

6. *See* Policy Statement on Comparative Brdcst. Hearings, *Public Notice*, 1 F.C.C.2d 393, 5 Rad. Reg.2d (P & F) 1901 (1965). The Commission has now replaced its comparative licensing process with an auction approach. *See* 47 C.F.R. §§ 73.5000-73.5009 (1998). This change came in response to: (1) the D.C. Circuit's opinions in *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992); *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), which rejected one of the central factors under the FCC's traditional comparative licensing approach; (2) the Telecommunications Act of 1996 (47 U.S.C. §§ 309(j) (Supp. III 1997)); and (3) the competitive bidding authority granted the Commission for commercial broadcast licenses by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). *See also infra* note 17.

7. *See* Competition, Rate Deregulation & the Comm'n's Policies Relating to the Provision of Cable TV Serv., 5 F.C.C.R. 4962, 5004, 5006, 67 Rad. Reg.2d (P & F) 1771 (1990).

8. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 613(f).

9. *See* Implementation of Sections 11 and 13 of the Cable TV Consumer Protection & Competition Act of 1992, *Second Report and Order*, 8 F.C.C.R. 8565, 8576-77, 73 Rad. Reg. 2d (P & F) 1401 (1993). The Commission has stayed the effective date of its horizontal ownership rules pending a judicial decision regarding the constitutionality of section 613(f)(1)(a) of the Communications Act. *See* Implementation of Section 11(c) of the Cable TV Consumer Protection & Competition Act of 1992, *Order on Reconsideration*, 2000 WL 35776 (Jan. 19, 2000) (describing history of stay and holding that the horizontal ownership rules will become effective upon the issuance of a decision upholding the statute and that affected parties must come into compliance 180 days after the issuance of the decision).

10. *See, e.g.*, *Biennial Regulatory Review NOI*, 13 F.C.C.R. 11,276, para. 4 (1998);

outlets is in the public interest both because it will prevent the creation and exercise of market power and because it is likely to lead to a diversity of content and views.

The agency also has a history of cross-ownership limitations across industries—restricting or prohibiting common ownership of broadcast networks and cable companies,[11] cable systems and broadcast stations,[12] telephone and cable,[13] and newspapers and broadcast stations.[14]

Genesee Radio Corp., Flint, MI, 5 F.C.C. 183 (1938) (first applying local ownership restrictions to radio and emphasizing intention to promote competition in both the economic marketplace and the marketplace of ideas); Revision of Radio Rules & Policies, *Report and Order*, 7 F.C.C.R. 2755, 70 Rad. Reg.2d 903 (1992).

11. *See* Amendment of Part 74 of the Comm'n's Rules & Regulations Relative to Community Antenna TV Sys., *Second Report and Order*, 23 F.C.C.2d 816, 19 Rad. Reg.2d (P & F) 1775 (1970). The FCC relaxed the network-cable cross-ownership restrictions substantially in 1992 and the 1996 Telecommunications Act eliminated the network cross-ownership rule in section 202(f). *See* 47 C.F.R. § 76.501 (b)(I)-(ii) (1993); *Biennial Regulatory Review NOI*, 13 F.C.C.R. 11,276, para. 45 (1998); Implementation of Sections 202(f), 202(i), and 301(i) of the Telecomms. Act of 1996, *Order*, 11 F.C.C.R. 15,115, 2 Comm. Reg. 293 (1996).

12. *See* 47 C.F.R. § 76.501(a) (FCC rule prohibiting the cross-ownership of a cable system and broadcast station in the same local market). The rule was adopted in 1970 to further diversity in local mass communications media. *See Biennial Regulatory Review NOI*, 13 F.C.C.R. 11,276, para. 44 (1998). While the Telecommunications Act of 1996 repealed the statutory broadcast-cable cross-ownership restrictions in section 202(i), it did not eliminate the FCC's cross-ownership rules. The agency's cable/television cross-ownership rule is currently under consideration in the agency's biennial ownership review. *See id.* at paras. 43-52.

13. *See* Applications of Tel. Co. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna TV Sys., *Final Report and Order*, 21 F.C.C.2d 307, 18 Rad. Reg.2d 1549, *recons. granted in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. of the S.W. v. United States, 449 F.2d 846 (5th Cir. 1971); Communications Act of 1934, 47 U.S.C. § 533(b) (Supp. III 1997) (1984 Cable Act); *see also* Telephone Co.-Cable TV Cross-ownership Rules, Sections 63.54-63.58, *Notice of Inquiry*, 2 F.C.C.R. 5092 (1987) (reviewing cable-telco cross-ownership rules). The Telecommunications Act of 1996 repealed the cross-ownership restrictions of prior cable acts and permitted telephone companies to provide video services. *See* 47 U.S.C. § 571 (Supp. III 1997). The new statute also explicitly stated that franchising authorities may not restrict cable provision of telecommunications services. *See id.* § 254.

14. *See* 47 C.F.R. § 73.3555(e) (1998); *Multiple Ownership Second Report and Order*, 50 F.C.C.2d 1046, 32 Rad. Reg.2d (P & F) 54 (1975) (adopting newspaper-broadcast station cross-ownership prohibition), *aff'd sub nom.* FCC v. National Citizens Comm. for Brdcst., 436 U.S. 775 (1978). The newspaper/broadcast cross-ownership rules are currently under consideration in the FCC's biennial review of its ownership rules. *See Biennial Regulatory Review NOI*, 13 F.C.C.R. 11,276, at paras. 28-42 (1998); *see also* Bill McConnell, *FCC Leans Toward CBS/UPN*, BRDCST. & CABLE, Dec. 13, 1999, at 4 (noting that the Commission's intent on the question is still unclear; that the Democratic Commissioners "apparently do not want to cross the White House and public advocacy groups, both vehemently opposed to letting more newspapers own stations in their markets;" and that the Biennial Review report may ask for more time to consider the issue in order to forestall a legal challenge by the newspaper industry).

However, starting even before the passage of the 1996 Act, but certainly since then, the Commission has taken what appears to be a deregulatory turn in its structural regulations.

Regarding licensing, the 1996 Act extended broadcast license terms[15] and effectively eliminated the Commission's substantive comparative renewal process.[16] In lieu of comparative hearings, the Balanced Budget Act of 1997 amended the Communications Act to authorize the FCC to use competitive bidding procedures to resolve most initial licensing proceedings involving mutually exclusive applications for commercial broadcast licenses.[17]

As for broadcast ownership regulations, the deregulatory trend commenced in the 1980s. Industry arguments persuaded both Congress and the FCC that the relevant market for purposes of electronic media was the local market and that there would be no particular economic harms from allowing geographically dispersed radio and television stations to be owned by the same owners.[18] Accordingly, the Commission has made step-by-step upward adjustments to its national multiple ownership rules. Now, courtesy of the 1996 Act, there are no numerical limits on the number of radio

15. The Act authorized the Commission to change broadcast license terms for radio and television from seven and five years respectively to a term not to exceed eight years for both services. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 203, 110 Stat. 56 (codified at 47 U.S.C. § 307(c) (Supp. III 1997)); *see also* Implementation of Section 203 of the Telecomms. Act of 1996, *Report and Order*, 12 F.C.C.R. 1720, 6 Comm. Reg. (P & F) 23 (1997).

16. The Act eliminated comparative hearings for all renewal applications after May 1, 1995 and replaced the traditional process with a new two-step procedure. *See* Implementation of Sections 204(a) and 204 (c) of the Telecomms. Act of 1996 (Brdcst. License Renewal Procedures), *Order*, 11 F.C.C.R. 6363, 2 Comm. Reg. (P & F) 1238 (1996) [hereinafter *Broadcast License Renewal Procedures*]; 47 U.S.C. § 309(k) (Supp. III 1997); 47 U.S.C. § 309(d) (Supp. III 1997). Now, the FCC must renew an incumbent's license if it finds that the licensee has served the public interest, convenience, and necessity; has not been found to be in serious violation of the Commission's rules; and has not engaged in a pattern of abuse of the Commission's rules or the Communications Act. *See Broadcast License Renewal Procedures*, 11 F.C.C.R. 6363, at paras. 3-5, 2 Comm. Reg. (P & F) 1238 (1996).

17. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997); Communications Act of 1934, 47 U.S.C. § 309(j) (Supp. III 1997); Implementation of Section 309(j) of the Comm. Act—Competitive Bidding for Commercial Brdcst. and Instructional TV Fixed Serv. Licenses, *First Report and Order*, 13 F.C.C.R. 15,920, 13 Comm. Reg. (P & F) 279 (1998); FCC Adopts Auction Procedures for Commercial Broadcast Licenses, *Mass Media Action*, Aug. 7, 1998, *available at* (visited Mar. 25, 2000) <http://www.fcc.gov/Bureaus/Mass_Media/ News_Releases/1998/nrmm8025.txt>.

18. *See supra* note 5 (citing to FCC decisions relaxing national multiple ownership rules).

stations a single entity can own across the country.[19] That has enabled recent development of extremely large radio station groups.[20]

On the local front, the 1996 Act had already relaxed radio multiple ownership rules even in local markets depending on the size of the market and the number of other media voices.[21] The Commission had been issuing waivers of its "one-to-a-market" and "duopoly" rules in the television context.[22] In August 1999, the Commission further revised its local

19. *See id.* However, the Act adopted a national audience cap of 35% for any single owner of multiple television stations—subject to biennial review by the Commission. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(h); *see also Biennial Regulatory Review NOI*, 13 F.C.C.R. 11,276, paras. 14-16 (1998). Recently, the Commission's revision of its national television ownership rule has made clear that owners of a television station with an attributable interest in another television station (or that operate a satellite station) in the same market would not have to include the audience reach of those outlets in determining their compliance with the 35% national audience reach cap. *See* Broadcast TV Nat'l Ownership Rules, *Report and Order*, 17 Comm. Reg. (P & F) 59 (1999). The Commission took the position that including the audience reach of those other stations would be tantamount to double-counting the audience. *See id.* at paras. 1, 10-14, 28. However, station owners with attributable interests in other stations in separate markets (including time-brokered LMAs and satellite stations) would have to count the audience of those stations as part of their national aggregate audience.

20. For example, Clear Channel Communications was recently reported as owning 867 radio stations reaching an aggregate 110 million listeners (in addition to 19 television stations). *See* J.C. Conklin, *Clear Channel Sells Stations to Quell Antitrust Concerns*, WALL ST. J., Mar. 7, 2000, at B14 (reporting on Clear Channel's sale of 72 stations in 27 markets to 13 buyers); Leslie P. Norton, *Fading Signal? After Nine Years of Stunning Growth, Clear Channel May Be Facing Static*, BARRON'S, Mar. 6, 2000, at 31; *see also* Elizabeth A. Rathbun, *Count' em: 830*, BRDCST. & CABLE, Oct. 11, 1999, at 12. Infinity Broadcasting, having purchased 18 Clear Channel stations in major markets, is now reported to have 178 stations nationwide. *See id.*; *see also* John M. Higgins & Steve McClellan, *Ambitious Liaisons*, BRDCST. & CABLE, Feb. 14, 2000, at 28.

21. *See supra* note 4. The Telecommunications Act of 1996 established that in markets with 14 or fewer radio stations, a single owner may acquire up to five stations, so long as no more than three are in the same service (AM or FM). The permitted combinations may not constitute more than 50% of the radio stations in a given market. In markets with 15 to 29 radio stations, a single entity may own six stations, so long as no more than four are in the same service. In larger markets—with 30 to 43 radio stations—a single entity may own seven stations, with no more than four in the same service. And in the largest markets—with over 44 radio stations—a single owner can own up to eight stations, with up to five in the same service. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(b).

22. For example, the FCC waived the one-to-a-market rule in the top 25 markets if after the combination, there remained at least 30 separately owned radio and television stations in the market. *See* 47 CFR § 73.3555 note 7(1) (1998). The Commission waived both application of the duopoly rule in specific cases and generally relaxed its rules in particular markets. *See, e.g.*, Liability of Channel 33, Inc., *Memorandum Opinion and Order*, 7 F.C.C.R. 7917, 71 Rad. Reg.2d (P & F) 1207 (1992); Revision of Radio Rules & Policies, *Report and Order*, 7 F.C.C.R. 2755, 70 Rad. Reg.2d (P & F) 903 (1992); Broadcast TV Nat'l Ownership Rules, *Notice of Proposed Rulemaking*, 11 F.C.C.R. 19,949 (1996); *see also* Review of the Comm'n's Regulations Governing TV Brdcst., *Report and Order*, 14 F.C.C.R. 12,903, 17 Comm. Reg. (P & F) 1 (1999) [hereinafter *Report and Order on Local*

television ownership rules in order to reflect changes in the media marketplace.[23] It relaxed the television duopoly rule—under which one entity could not own two television stations with Grade B signal contour overlap.[24] It also radically modified the one-to-a-market rule, under which

Broadcast Ownership] (describing—while criticizing—waiver approach previously employed by the Commission).

23. *See Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903, 17 Comm. Reg. (P & F) 1 (1999).

24. *See id.* The agency modified the existing duopoly rule as follows. First, it narrowed the geographic scope of the rule by shifting from the current "Grade B contour overlap" standard to a "DMA" test. Thus, a single owner may now own two television stations even if they have Grade B contour signal overlap, so long as they are considered to be in separate Nielsen Designated Market Areas. The Commission chose the DMA test "based on [its] belief that, compared to the current Grade B signal contour standard, DMAs are a better measure of actual television viewing patterns, and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers, and advertisers buy and sell their services and products." *Id.* at para. 47. The Commission made clear, however, that although the modified rule switched focus to the DMA, the rule was not intended to prohibit the common ownership of two stations in the same DMA if their Grade B contours do not overlap. (That type of common ownership was permitted under the traditional duopoly rule.). *See id.* at para. 53.

Having thus shifted focus from signal overlap to a market area standard, the Commission then further modified the duopoly rule to permit common ownership of two television stations within the same DMA so long as eight independently owned and operating commercial and noncommercial television stations will remain in the DMA postmerger, and at least one of the stations is not among the top four-ranked stations in the market, based on audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time the application is filed. *See id.* at para. 51. Thus, two stations could not be commonly owned if one of them is in the top four of the local station rankings and fewer than eight independent stations would be left operating in the market after the two stations' ownership was consolidated. The Commission characterized this change as a "measured relaxation of the television duopoly rule, particularly in the larger television markets," designed to "allow weaker television stations in the market to combine, either with each other or with a larger station, thereby preserving and strengthening these stations and improving their ability to compete" and allowing licensees "to take advantage of efficiencies and cost savings that can benefit the public, such as in allowing the stations to provide more local programming." *Id.* at para. 65.

The Commission took the position that:

> The "top four ranked station" component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition. In addition, our analysis has indicated that the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved. Permitting mergers among these two categories of stations, but not among the top four-ranked stations, will consequently pose less concern over diversity of viewpoints in local news presentation, which is at the heart of our diversity goal. Indeed, by allowing mergers between large and small stations, this prong of our new rule responds to those broadcasters who argued that the best way to improve the ability of small stations to compete is to allow them to combine with the largest stations in the market. According to these broadcasters, large

one entity could not own radio and VHF TV stations in the same market.[25] In place of the old rules, the Commission adopted minimum "voice count"

> stations are better positioned to provide the financial and other assistance required by many small stations to improve their technical facilities and programming to allow them to compete more effectively in the market.

Id. at para. 66.

Although expressing its preference to operate in this area by bright-line rule rather than waiver, the Commission nevertheless adopted three waiver policies in this rulemaking. It modified its rules to permit common ownership of two television stations in the same market where a same-market licensee is the only reasonably available buyer and the station purchased is a "failed" or "failing" station, or when applicants can show that the combination will result in the construction of a previously unbuilt station. The Commission defined failed stations as those either not broadcasting for at least four months prior to the waiver application or involved in involuntary bankruptcy or insolvency proceedings. It defined failing stations as stations having a low audience share and financially struggling during the previous several years. *See id.* at paras. 73-77 (failed stations), 78-81 (failing stations), 83-87 (unbuilt stations).

Finally, the Commission addressed the treatment of existing local marketing agreements (LMAs) pursuant to which a station will contract to have another station in the market control its programming for parts of the broadcast day. (The issue arose because of the Commission's recent decision to attribute time brokerage of another television station to the parties to the transaction for purposes of assessing compliance with the broadcast ownership rules—so long as both stations are in the same market and the amount of time brokered is more than 15% of the brokered station's broadcast week. *See infra* note 81). While the agency stated that many existing LMAs will meet its new television duopoly rules, it acknowledged that some would not. Accordingly, the Commission grandfathered LMAs in existence since before November 5, 1996 for an initial time of five years. Such grandfathered combinations would be subject to FCC review on a case-by-case basis as part of the Commission's 2004 biennial review process. LMA transactions entered into after November 5, 1996 are given two years from the date of the adoption of the Commission's Report and Order to come into compliance with the agency's rules.

25. *See Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903, 17 Comm. Reg. (P & F) 1 (1999). The Commission's modifications of the radio-television cross-ownership rule (the "one-to-a-market" rule) permit a party who owns a television station (or more than one in a market if allowed under the new duopoly policy) to own any of the following radio station combinations in the same market: (a) up to six radio stations (any combination of AM or FM stations to the extent permitted under the local radio ownership rules) in any market where at least 20 independent voices would remain after the merger; (b) up to four radio stations in any market where at least 10 independent voices would remain post-merger; and (c) one radio station (AM or FM) notwithstanding the number of independent voices in the market. *See id.* at para. 100. Thus, combinations of two television stations and one radio station would be permitted regardless of the independent voices in the market. In markets where the revised rule would allow one entity to own eight stations—two television stations and six radio stations—the entity would be permitted to own one television station and seven radio stations. *See id.*

The Commission's definition of "independent voices" for purposes of applying the new cross-ownership provision includes: (1) all independently owned, full-power, operational commercial an noncommercial television stations licensed to a community in the DMA in which the television station at issue is located; (2) all such radio stations licensed to or with a reportable share in the radio metro market; (3) daily newspapers published in the DMA with circulation exceeding five percent in the DMA; and (4) wired cable services (counted as a single voice), provided that cable service is generally available floors in local markets—the only exception to which is a broadcast owner's offer to buy a failing or failed station in the market.[26] The Commission's rationale for this move was that a "rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market."[27]

In sum, the FCC's recent relaxation of its ownership rules has been designed to provide clear, "bright line" tests—"commonsense rules that recognize the dramatic changes [in] . . . the media marketplace" —in order to "provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace . . . [and] help preserve free local broadcast service."[28]

The Commission is still engaged in a biennial review of its remaining ownership rules, pursuant to its statutory mandate. That pending proceeding will address, inter alia, whether the agency should relax its newspaper/broadcast cross-ownership policy and increase its broadcast audience reach cap.[29] And, of particular salience to the current

---

in the DMA.

In a parallel to one of the waivers in the duopoly context, the radio-television cross-ownership rule allows waivers where one station is a failed station. It thus eliminates the five-factor case-by-case waiver standard under which it had operating recently. *See id.* at para. 101.

The Commission provided the following rationale for its one-to-a-market rule modification:

> We believe that the revised rule reflects the changes in the local broadcast media marketplace. The relaxed rule recognizes the growth in the number and types of media outlets, the clustering of cable systems in major population centers, the efficiencies inherent in joint ownership and operation of both television and radio stations in the same market, as well as the public service benefits that can be obtained from joint operation. . . .
>
> The new three-part rule also ensures the application of a clear, reasoned standard. . . . This minimizes the burdens involved in complying with and enforcing our rules. It also promotes greater consistency in our decision-making.

Id. at para. 102-03.

26. *See* discussion *supra* notes 24-25.

27. *Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903, para. 107, 17 Comm. Reg. (P & F) 1 (1999).

28. *Id.* app. c at 1981-82 (Chairman William E. Kennard, Remarks at the August 5, 1999 Meeting on Broadcast Ownership Items).

29. *See Biennial Regulatory Review NOI*, 13 F.C.C.R. 11,276 (1998). As for the audience cap, a relaxation of that rule is not expected, despite strong network pressure. *See* McConnell, *supra* note 14, at 4; *see also* Paige Albiniak, *D.C. Counsels Patience: Broadcasters Point to Pace of Internet Competition in Arguing for Speed*, BRDCST. & CABLE, Jan. 31, 2000, at 16. Industry press accounts attribute this to Chairman Kennard's reluctance "to add fuel to what he views as more diversity-killing consolidation" and to the fact that the industry itself if split on the issue of the cap (with independently-owned affiliates fearing that additional network-owned stations would reduce the independent affiliates' compensation for airing network programming). McConnell, *supra* note 14, at 4.

CBS/Viacom merger proposal,[30] the Commission's biennial review is considering revision of the remaining dual network prohibition.[31] In addition, there will be a de facto deregulatory effect if the Commission accedes to broadcast parties' requests for extensions of time to comply with ownership rules.[32]

With regard to cable horizontal ownership rules, the Commission did not explicitly change the limit from the current rate of 30%. However, in a recent rule, the agency changed the method by which the horizontal ownership cap is to be calculated.[33] Because the new rule focuses only on a

At least one of the networks has argued that the ownership cap must be lifted to at least 49% if the television network business is to remain viable. *See* Joe Schlosser, *King Joins the CBS Court*, BRDCST. & CABLE, Nov. 22, 1999, at 10 (quoting Mel Karmazin of CBS); *see also The Viacom Vision*, BRDCST. & CABLE, Nov. 15, 1999, at 28.

30. *See* discussion *infra* text accompanying notes 52-60.

31. *See Biennial Regulatory Review NOI*, 13 F.C.C.R. 11,276, para. 24 (1998). Prior to the Telecommunications Act, the Commission generally prohibited a party from affiliating with a organization with more than one network. *See id.* Although the Telecommunications Act of 1996 eliminated the total ban on dual network ownership, it nevertheless prohibited entities that were networks on the date of enactment of the Telecommunications Act of 1996—CBS, ABC, NBC, and Fox—from merging with one another or acquiring UPN or WB. *See id.* at para. 24; Implementation of Sections 202(c)(1) and 202(e) of the Telecomms. Act of 1996 (Nat'l Brdcst. TV Ownership & Dual Network Operations), *Order*, 11 F.C.C.R. 12,374 (1996); *see also* Bill McConnell, *Dereg Fatigue: Is This the End of Consolidation as We Know It?*, BRDCST. & CABLE, Feb. 14, 2000, at 30.

32. For example, CBS has asked the Commission to give it a two-year extension to dispose of properties that would put the network above the national ownership cap and to sell its interest in UPN after its merger with Viacom. *See* Schlosser, *supra* note 29, at 10; *see also* Bill McConnell, *Small Cable Group, Belo Fight CBS/Viacom Pact*, BRDCST. & CABLE, Jan. 17, 2000, at 34 (describing Belo's complaint about extension request on the ground that it would be inconsistent with localism policy and network-affiliate relationships).

33. *See* Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, 64 Fed. Reg. 67,198 (1999); *see also* Implementation of Section 11(c) of the Cable TV Consumer Protection & Competition Act of 1992, *Third Report and Order*, 17 Comm. Reg. (P & F) 1158 (1999) [hereinafter *Cable Horizontal Ownership Third Report and Order*]. Under the previous rule, the 30% limit on cable horizontal ownership compared the total number of homes a cable operator was capable of serving with the total number of homes nationwide that could be served by all cable systems. The new rule amends both aspects of that calculation. First, with respect to the numerator of the equation, the traditional calculation method used the "cable homes passed" model and assessed only the cable market itself. The new rule—designed to measure the cable operator's market power more accurately—changes that standard to focus on the number of subscribers actually served by a cable operator. (At the request of consumer advocates, the Commission has recently asked for public comment on the new audience reach measurement method. *See* Bill McConnell & Paige Albiniak, *Washington Watch*, BRDCST. & CABLE, Jan. 31, 2000, at 18). Second, as for the denominator, in order better to recognize competition from satellite providers and others, the Commission's new rule requires that the horizontal ownership cap be calculated as a percentage of the total multichannel video programming market (including all cable and noncable multichannel video programming subscribers). The Commission sees the new method of calculation as "creat[ing] a sliding horizontal scale that will grow as competition to cable grows and

cable operator's actual subscribers as a percentage of the whole multichannel video programming market (rather than just the universe of cable), the actual effect of the calculation method is to raise the allowable audience reach from 30% of current cable subscribers to 36.7% of current cable subscribers.[34] The Commission also repealed the minority control allowance which, under the old rules, had allowed cable operator's to have ownership interests in up to 35% of the cable market so long as 5% of its systems were controlled by minorities.[35]

As for cross-industry entry barriers, the Commission—through Chairman Kennard in particular—has staked much of its structural regulatory policy on the removal of barriers to entry across traditional industries in light of technological convergence.[36] This is in keeping with the 1996 Act, which eliminated network-cable cross-ownership rules, allowing one entity to own both. [37] The 1996 Act also excised rules hampering cable-telephone cross-ownership.[38]

diminish as competition diminishes." Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, 64 Fed. Reg. 67,198, 67,198 (1999). For a critique of the hidden deregulatory effects of these rule changes, see Implementation of Section 11(c) of the Cable TV Consumer Protection & Competition Act of 1992, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, *available at* (visited Apr. 2, 2000) <http://www.fcc.gov/Bureaus/Consumer_Information/Public _Notices/2000/pnci0011.txt>. For the contrary argument—that the FCC's decision was insufficiently deregulatory—see *Cable Horizontal Ownership Third Report and Order*, 17 Comm. Reg. (P & F) 1158 (1999) (dissenting statement of Comm'r Furchtgott-Roth) (arguing that the relevant rate for cable ownership should have been raised "significantly" past 30% because of: (a) increased competition, (b) the expansion of channels due to upgrades, mitigating cable operators' potential for market power, (c) the need for parallelism with the Commission's decision in the broadcast ownership dockets, and (d) the view that the Telecommunications Act of 1996 does not require that new cable networks be given a minimum chance of success in the marketplace, and (e) the applicability of the "video programming" market rather than the cable network or MVPD programming markets as benchmarks for an assessment of competition.).

34. *See* Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, 64 Fed. Reg. 67,198, 67,198 (1999).

35. *See id.* The rationale for the elimination was that no parties had used the allowance or argued that they would do so. *See id.*

36. *See, e.g.*, Chairman Kennard Calls for Change, But Not Chaos, in Outlining FCC's Pro-consumer [sic], Pro-Competition [sic] Agenda at House Reauthorization Hearing, *FCC News Release*, 1999 WL 140567 (Mar. 17, 1999); Chairman Kennard Outlines His Vision for the 21st Century and Updates Congress on Recent FCC Accomplishments, *FCC News Release*, 1999 WL 216052 (April 14, 1999) (announcing release of report entitled "A New Federal Communications Commission for the 21st Century").

37. *See supra* note 11.

38. *See supra* note 13.

III. TWO CLASSIC CRITIQUES FOCUSING ON THE FCC'S DEREGULATORY APPROACH TO INDUSTRY STRUCTURE

The Commission's structural rules—both traditional and revised—have been subjected to two principal models of critique. One model—the "market failure" approach—criticizes the Commission for not having achieved adequate access and diversity of viewpoints through its regulations and for having unduly succumbed to a flawed market ideology in its regulatory philosophy regarding the mass media.[39] Critics from this vantage point decry the deregulatory direction of the Commission on ownership and structure issues.[40] On this view, the agency's approach to mass media mergers accounts neither for market failure nor for the harmful effects of excess consolidation on diversity and free democratic discourse.

By direct contrast to the market failure critique, a number of media theorists (including Commissioner Furchtgott-Roth) mount a market-based, "regulatory failure" challenge to the Commission's structural approach in the mass media context.[41] Some of these critics, like Commissioner

39. *See, e.g.*, BEN H. BAGDIKIAN, THE MEDIA MONOPOLY (1997); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997) (criticizing market-based media policy arguments). Professors Baker, Fiss, and Sunstein—although their views are far from interchangeable—have notably criticized the "negative liberty" theory of First Amendment rights. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981); Stephen Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 396 (1993).

40. Commentators outside the academy as well take the position that the consolidation that is being permitted by structural deregulation is harmful to diversity. *See, e.g.*, Bill McConnell & Steve McClellan, *Sharpton Vows to Make Media Sweat*, BRDCST. & CABLE, Sept. 20, 1999, at 7; Chris McConnell, *Kennard Looks to Restart Minority Push: FCC Chairman, Jesse Jackson Attack Media 'Resegregation,'* BRDCST. & CABLE, Mar. 23, 1998, at 22.

41. *See, e.g*, PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM (1997); KRATTENMAKER & POWE, *supra* note 2, at 35-45, 276-96; Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1419 (1996); Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989); Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker*, 29 CONN. L. REV. 217, 220 (1996) [hereinafter Hazlett, *Explaining the Telecommunications Act*]; Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905 (1997) [hereinafter Hazlett, *Physical Scarcity*]; Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990) [hereinafter Hazlett, *Rationality of U.S. Regulation*]; *see also* Paige Albiniak, *GOP Pushes Ownership Deregulation*, BRDCST. & CABLE, Sept. 20, 1999, at 19 (describing Congressional support of deregulation).

There is also a third model of critique—contending that both FCC prescription and market-based privatization approaches fail and that a more decentralized model (of

Furchtgott-Roth, go so far as to say that the FCC should "not have structural ownership regulation."[42] The market-oriented critics contend that it is bad policy—and potentially unconstitutional to boot—to end-run constitutional limitations on content regulation by using structural proxies designed to achieve indirectly what they could not have permissibly mandated directly.[43] These critics argue that the Commission's structural and ownership regulations have not been more successful achieving their goals than the unregulated market would have been.[44] Instead, the regulatory failure theorists point to a history of industry capture pursuant to which the Commission has consistently stifled innovation in order to protect the economic power of incumbent regulated technologies.[45] They propose that the Commission (or even just the Department of Justice) enforce only competition-enhancing, antitrust-type rules to promote the development of the electronic media.[46]

IV. CHALLENGES TO THE TWO MODELS OF CRITIQUE (THROUGH A CBS/VIACOM LENS)

Both the market failure and the regulatory failure critics agree that the Commission's current structural rules are not quite good enough. Their

multilateral coordination of transmissions among equipment owners) should replace our current fully centralized model. On this view, we need to re-envision the spectrum as a public forum or a commons that should be free to use without either the distorting effects of market determinations based on private ownership of spectrum or the distorting effects of rulemaking by a captured agency. *See, e.g.*, Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287 (1998).

42. Review of the Comm'n's Regulations Governing Attribution of Brdcst. & Cable/MDS Interests, *Report and Order*, 14 F.C.C.R. 12,559, 12,664 (1999) (Statement of Comm'r Furchtgott-Roth, dissenting in part and concurring in part).

43. *See id.*

44. *See* KRATTENMAKER & POWE, *supra* note 2.

45. *See* BRUCE M. OWEN, THE INTERNET CHALLENGE TO TELEVISION 79-87 (1999); Hazlett, *Rationality of U.S. Regulation*, *supra* note 41; Hazlett, *Explaining the Telecommunications Act*, *supra* note 41; Hazlett, *Physical Scarcity*, *supra* note 41; *see also infra* note 91.

46. *See, e.g.*, *Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903, 12,993-13,002, 17 Comm. Reg. (P & F) 1 (1999) (dissenting statement of Comm. Furchtgott-Roth); Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1027 (1996); Chen, *supra* note 41, at 1482-85;. J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1238 (1993) (book review); Emord, *supra* note 41, at 465-69; *see also* KRATTENMAKER & POWE, *supra* note 2, at 86-87, 278-88 (suggesting in the context of broadcasting mergers that the market—disciplined primarily by antitrust rules and an open spectrum policy—would be more likely to achieve the ends sought by the Commission's structural and behavioral prohibitions, although not addressing the question whether industry-specific competition rules might be appropriately in the province of the FCC).

debate is whether the Commission should go even further in the direction of structural deregulation or retrench by returning to a regulatory path. Those promoting mergers and joint operations within and across formerly separate industries claim that the government should cede to the market in the organization of the electronic media industry. The market-oriented critics of the Commission argue that the agency's remaining fidelity to its structural regulations constitutes misplaced loyalty to a legacy system of regulation unnecessary—or even harmful—in today's environment. Whether arguing that they need deregulation to compete against more powerful market actors (particularly in a global arena) or claiming that deregulation will sweep away unnecessary obstacles to the efficient allocation of resources, these critics urge the Commission to do away with its industry-specific ownership rules.

Broadcasters, for example, argue that the days of free over-the-air broadcasting are over if the Commission does not further reduce or eliminate its multiple ownership rules.[47] They contend that the ability to consolidate is their only bulwark against the competitive pressures of cable and the other (increasingly viable) information and entertainment resources available to the public. On this view, it is only the synergies and economies of scale and scope generated by size that will allow for the increasingly beleaguered over-the-air broadcast medium to remain vital. Taking advantage of such synergies should not be seen as harmful, proponents say, especially so long as the combinations are analyzed in the context of the increasingly broad market in which modern media operate.[48]

There is obviously much to be said for efficient operations resulting from economies of scope and scale. Indeed, given the particularities of the electronic media, it is well to remember broadcast economists' prediction that consolidation will at least in some circumstances lead to more rather

47. *See, e.g.*, McConnell, *supra* note 31, at 30 (describing elimination of the "voice" test requirement as "[a] top broadcast industry priority" in order to enable duopolies in small markets "where paltry ad revenues make operating a single station difficult."); McConnell & Albiniak, *supra* note 33, at 18.

48. *See* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming (dissenting statement of Comm'r Furchtgott-Roth) *available at* (visited Mar. 26, 2000) http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/2000/sthfr004.html>; *see also* Chen, *supra* note 41, at 1449 (describing the potential benefits of concentration); Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fifth Annual Report*, 13 F.C.C.R. 24,284 (1998) (dissenting statement of Comm'r Furchtgott-Roth), *available at* (visited Mar. 26, 2000) <http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr867.html>; Commission Adopts Sixth Annual Report on Competition in Video Markets, *FCC News Release*, Jan. 14, 2000, *available at* (visited Mar. 25, 2000) <http://www.fcc.gov/Bureaus/Cable/News_Releases/2000/nrcb0003.html>;

than less diversity in programming.[49] It may be that trying to structure broadcasting along a model of perfect competition among atomistic, independent actors is—as one deregulatory theorist argues—"neither possible nor desirable."[50] Yet the extreme consolidations occurring in the industry raise important questions. In their very ambiguity and complexity, these developments pose challenges for market proponents.[51]

For example, the CBS/Viacom[52] merger (even without consideration of the dual network implications) presents complexities. A merger of this scale creates an opportunity efficiently to promote advertising across multiple media formats under one roof. Doubtless, a combined CBS/Viacom can more efficiently market its news resources across outlets

---

49. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 2, at 40-43; BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS (1992); Brenner, *supra* note 46; Chen, *supra* note 41, at 1448; Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 304-19 (1991); Peter O. Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 219-21 (1952) (contending that monopoly ownership produces greater radio programming diversity than competition); *see also* Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1054-55 (7th Cir 1992) (stating that "[i]t has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity").

50. Chen, *supra* note 41, at 1491. Professor Chen suggests that the only kind of viable competition in the mass media is both imperfect and intermodal, achieved by permitting "open warfare" within the small group of large media players. *See id.* at 1503.

51. *See* Chairman William E. Kennard, Remarks at the Practicing Law Institute/Federal Communications Bar Association Policy and Regulations Conference, *Fostering Competition in a Converging World*, (Dec. 9, 1999), *available at* (visited Mar. 22, 2000) <http://www.fcc.gov/Speeches/Kennard/spwek943.html> (describing potential benefits of consolidation, but contending that "[w]e must greet these claims with a healthy dose of skepticism.").

The development of "co-opetition," pursuant to which industry competitors enter into cooperative agreements regardless of ownership, exacerbates the complexity of the media consolidation issue. *See, e.g.*, Christian Hill & Laura Landro, *Does Everybody Have to Own Everything? Behind the Vast Media Octopus of AOL and Time Warner, There's a Simpler Strategy*, WALL ST. J., Jan. 12, 2000, at B1; Bernard Wysocki, Jr., *Cyberspace Inc.: More Companies Cut Risk by Collaborating with Their "Enemies": Many Internet Operations Co-Invest in Bid to Ensure at Least a Slice of Success*, WALL ST. J., Jan. 31, 2000, at A1. Media watchers predict an increase in such alliances. *See* Bruce Orwall & John Lippman, *High Concepts in Hollywood: More Web Alliances for Hollywood*, WALL ST. J., Jan. 12, 2000, at B1.

52. Viacom's purchase of CBS is an ironic return to the status quo before the Commission's adoption of the financial interest and syndication rules led CBS to spin off its syndication and cable business to Viacom. *See* Motion of Columbia Pictures Indus., Inc. for Declaratory Order, *Memorandum Opinion and Order*, 30 F.C.C.2d 9, 21 Rad. Reg.2d (P & F) 1313 (1971) (reviewing details of proposed spin-off). For descriptions of the effect of the CBS/Viacom merger on the syndication marketplace, see, e.g., Joe Schlossser, *Syndication in the Eye of Justice*, BRDCST. & CABLE, Jan. 3, 2000, at 6. The Department of Justice is currently reviewing the merger with a view to its impact on the syndication business. *See* Joe Flint, *CBS Swings a Profit of $251 Million, Helped by Syndication and Advertising*, WALL ST. J., Feb. 16, 2000, at B11.

that would not be available to CBS alone. The economies of scale captured by this combination can lead to cost savings more productively spent on programming.

On the other hand, an efficient advertising market created by such a merger may crowd out smaller, independent media that lack such advantages to offer advertisers. Moreover, the very scale of advertising opportunities offered by the combined entity may promote a homogenization of programming across disparate media outlets. Consolidation in particular areas—such as newsgathering and production—may undermine independence in the media's press function.[53] The concern for news operations is in turn two-fold. The obvious point is that sharing of newsgathering and production operations is likely to reduce coverage of different events, to downplay differences in judgments about newsworthiness, and to minimize the possibility of different spins on news.[54] Moreover, common news operations for large umbrella media entities with corporate parents may well increase pressures on news divisions to promote—or at least not interfere with—the corporate parent's profit interests.[55]

Finally, the combination of Viacom's Paramount studios with the CBS network may lead not so much toward investment in new, high quality programming as to the development of a series of captive outlets for the entities' existing content.[56] Indeed, the consolidated entity's ability to prefer

53. The recent announcement by ABC, CBS, and Fox that they have entered into a multiyear news sharing arrangement raises this issue as well. *See* Steve McClellan, *Three Nets to Share News*, BRDCST. & CABLE, Jan. 3, 2000, at 12; Editorials, *Homogenized News*, BRDCST. & CABLE, Jan. 3, 2000, at 82. As for the CBS/Viacom merger specifically, CBS and Paramount are reported to have different attitudes to local television news—with Paramount featuring news at only a handful of its stations and paring down news departments at others. *See* Steve McClellan & John M. Higgins, *The Mel-ding of Viacom, CBS*, BRDCST. & CABLE, Sept. 13, 1999, at 14.

54. Admittedly, this happens even with joint agreements among entities that are not mutually owned. *See supra* note 51. With joint agreements, however, the parties are still at bottom competitors and ultimately independent.

55. *See, e.g.*, C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 362 (1998). This issue has been raised in the past, when nonmedia companies purchased media entities and media watchers feared that the corporate owner would attempt to influence the media entity's news judgment to deflects criticism of the parent. *See, e.g.*, Clay Calvert, *Stumbling Down Tobacco Road: Media Self-Censorship and Corporate Capitulation in the War on the Cigarette Industry*, 30 LOY. L.A. L. REV. 139, 175 & n. 61 (and sources cited therein). The potential programming effects of huge, vertically integrated media companies, however, are potentially more insidious yet—providing both the opportunities for cross-media marketing of the entity's products and, potentially, incentives to use news programming as a pawn in nonnews corporate competitions.

56. The CBS/Viacom merger will bring yet another network into the ambit of a major studio (joining Disney's purchase of ABC). Now, only NBC remains as a major broadcaster without a relationship with a Hollywood studio. *See* Brian Lowry, *Company Town: Creating*

its own content may discourage independent investment in content production.[57]

A parallel complexity is associated with the potential for CBS/Viacom to control two separate broadcast networks. Currently, although not evenly matched, CBS and UPN are competitors. Because of Viacom's stake in UPN, an FCC decision to waive its dual network prohibition is necessary to permit the combined entity to own both networks. Industry expectation is that such a waiver is likely to issue. This would reduce the independent voices in the broadcasting marketplace. One could argue in favor of the waiver, however, by adhering to a broader market definition in which the two broadcast networks would constitute a small percentage of available voices. Or, one could seek to justify permitting the dual network ownership on the ground that UPN is a weak sixth network that may well otherwise fail.[58] Even if UPN survived as an independent network, its combination with CBS would provide it with resources to strengthen its participation in the market. On yet the other

a Media Giant, L.A. TIMES, Sept. 8, 1999, at C1. It will be the third largest media combination, following Time Warner and Disney. The deal will bring together a major broadcast network, its 15 stations, a smaller television network (UPN) if divestiture is not required, the largest group of radio stations, very profitable cable channels (such as MTV, Nickelodeon, and VH1), Paramount film studios, and a video rental chain. *CBS Merger's Downside*, L.A. TIMES, Sept. 9, 1999, at B8; William J. Holstein, *MTV, Meet 60 Minutes, The Viacom-CBS Deal Is a Taste of What's to Come*, U.S. NEWS & WORLD REP., Sept. 20, 1999. Ironically, Viacom had been spun off from CBS in 1970 because of the FCC's concerns about network financial interests in programming. *See* Robert W. Crandall, *Who's Afraid of the TV Networks?*, WALL ST. J., Sept. 9, 1999, at A26. *See also supra* note 52. One of the dangers of these relationships is that they result in "sweetheart deals" between the networks and their studio partners, thereby making entry more difficult for other independent program suppliers. *See, e.g.*, Steve McClellan, *FIN-SYN*, BRDCST. & CABLE, Jan. 24, 2000, at 30.

57. *See* Joe Schlosser, *A Mouse In-house*, BRDCST. & CABLE, Nov. 29, 1999, at 22 (describing Disney's attempt to reap vertical integration benefits from Disney/ABC merger through ABC favoring Disney programs and offering ABC "rejects" to other networks). For similar concerns in connection with the AOL/Time Warner merger, see John M. Higgins et al., *Gatekeepers Inc*., BRDCST. & CABLE, Jan. 17, 2000, at 22. *Cf*. Associated Press, *ABC, Time Warner Postpone Deadline*, Mar. 10, 2000 (noting Disney/ABC and Time Warner's agreement to an extension in retransmission consent negotiations that had broken down when Time Warner refused to add some ABC products such as the Disney Channel on basic cable alongside its own similar Time Warner products); McConnell, *supra* note 32, at 34 (detailing independent cable operators' petition to block merger because of combined entity's power to control access to programming and retransmission consent negotiations).

58. *See* McConnell, *supra* note 14, at 4. UPN, a joint venture of Viacom and Chris-Craft Corp, has reputedly lost more than $500 million already. *See id.* This press account reports that although it is "unclear if the FCC will go so far as to let the Big Four nets buy each other," sources said that "the [Commission] is loath to take any action that would lead to the demise of UPN and at least recommend lifting restrictions on who can own smaller nets." *Id.*

hand, refusing a dual network waiver would compel CBS/Viacom to release the UPN network to an independent owner who might increase diversity.[59]

Finally, the sheer size of the merged CBS/Viacom entity could exacerbate consolidation among other media participants by accelerating competitors' perceptions of the need for countervailing size. This in turn worries observers who focus on the media's role in the democratic process. Those who are concerned about the increasing consolidation of ownership in the electronic media ask regulators to look at the changing structure of the industry as a whole (rather than at each merger as a separate and individual event).[60] They also argue for a more traditional definition of the relevant market for the assessment of concentration and market power. They point to the potentially harmful bottleneck effects on diversity of programming of having step-by-step consolidations of distributors and content creators and owners. A concentrated information system is particularly likely to reflect inequality in the distribution of economic power, on this account. Critics of consolidation also suggest that concentrated information systems will likely produce different—more mainstream and dissent-avoiding—information than decentralized systems.[61]

59. Admittedly, however, the industry may conclude that "UPN's deep river of red ink makes finding a viable buyer a difficult task." *Id.* at 4. Yet there has been some indication of interest elsewhere. *See Bob Johnson, Chairman and CEO of REF Holdings, Says He Wants to Buy a Stake in UPN*, BRDCST. & CABLE, Sept. 27, 1999, at 100. And, press reports suggest an improving future for UPN. *See* Bill Carter, *Revitalized UPN Is at Center of a Struggle for Ownership*, N.Y. TIMES, Mar. 13, 2000, at C1; Joe Schlosser, *UPN's Battling Back*, BRDCST. & CABLE, Oct. 18, 1999, at 34.

60. *See, e.g.*, Letter from Deborah A. Lathen, Chief, Cable Services Bureau, to Andew Jay Schwartzman, President and CEO, Media Access Project (Feb. 14, 2000), *available at* (visited Mar. 27, 2000) <http://www.fcc.gov/csb/schwarzfinal.txt> (stating that the Cable Bureau would be "assessing the cumulative impact of the two mergers."); Media Access Project, *Press Release: Consumer & Citizen Groups Blast AT&T Claims that MediaOne Merger Fits Under FCC Rules* (visited Mar. 26, 2000) <http://mediaaccess.org/whats_new/press_2dec15.html>. The Commission's cable horizontal ownership rules would be an obstacle for the AT&T/MediaOne merger (because of MediaOne's interest in Time Warner Entertainment) unless the Commission were to relax its attribution rules. *See* Paige Albiniak, *Washington Watch*, BRDCST. & CABLE, Dec. 20, 1999, at 19; Bill McConnell, *AT&T Wants FCC Rescue*, BRDCST. & CABLE, Sept. 27, 1999, at 12.

Congress also has expressed interest in media agglomerations, with some legislators openly questioning whether mega-mergers like the CBS/Viacom deal would hinder competition in the marketplace of ideas. *See, e.g.*, Paige Albiniak, *Synergy and Suspicion*, BRDCST. & CABLE, Nov. 1, 1999, at 6. And there is continuing speculation in the press regarding what other media consolidations—primarily marrying old and new media—are likely to be in the offing. *See, e.g.*, Kara Swisher, *Boom Town: 'Grumpy' Won't Say What's Next for Yahoo!, But Scenarios Abound*, WALL ST. J., Mar. 6, 2000, at B1.

61. *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints*

Market-oriented theorists respond that the public interest and democratic discourse are more likely to be served by competition as measured under antitrust principles of general application rather than by FCC rules favoring arbitrary ownership percentages designed to achieve the Commission's view of diversity. Arguments that the structure of the mass media should be regulated only by the application of antitrust rules of general application—rather than specific FCC ownership rules—should be addressed carefully. It is particularly difficult to apply antitrust concepts of product markets and cross-elasticity of demand in the context of electronic media. And, apart from the issue of advantages of industry-specific regulations applied by an agency expert in the field,[62] the Commission has always taken the position that its ownership regulations are designed to promote both competition and diversity (rather than competition alone). The degree to which diversity of ideas is fully addressed by antitrust norms of economic competition alone is a disputed question.[63]

---

on Enclosure of the Public Domain, 74 N.Y.U. L. REV. 354, 377-82 (1999) (describing rationales articulated by media theorists such as Jerome Barron, Ed Baker, and Owen Fiss—arguing for a decentralized information production sector). On this view, with respect to the type of information produced, a market consisting of a small number of information producers is likely to exclude important views and information either because the small number of producers will only express their own beliefs or because they will disseminate their guesses about what consumers would prefer. As for the inequality of economic power, these critics worry that concentrated media, by distributing speech resources on the basis of economic resources, reduce the likelihood of effective political challenge and inhibit self-expression and individual self-governance. *See id.*

62. There is something of an irony, here, though. It is precisely here that we must guard against the capture and bureaucratic inertia that might well compromise the advantages of such industry-specific approaches.

63. *See The Telecommunications Merger Act of 2000: Hearings Before the Subcomm. on Telecomms., Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. (2000) [hereinafter *Merger Hearings*] (opening Statement of Michael K. Powell, Comm'r, FCC), *available at* (visited Mar. 23, 2000) <http://www.fcc.gov/Speeches/Powell/Statements/2000/ stmkp005.html> (noting irrelevance of diversity of voices to classic antitrust merger analysis). On the degree to which noneconomic factors should influence antitrust analysis, see, e.g., Baker, *supra* note 39, at 368-373; Michael A. Jacobs, *An Essay on the Normative Foundation of Antitrust Economics*, 74 N.C. L. REV. 219 (1995); Ronald J. Krotoszynski & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, at 71-76 (1999) 2000 ILL. L. REV. (forthcoming publication June 2000); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); H. Peter Nesvold, Note, *Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 781 (1996). On the complexity of substitutability analysis in media, see Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141 (1995). *Cf.* Keith Conrad, Note, *Media Mergers: First Step in a New Shift of Antitrust Analysis*, 49 FED. COMM. L.J. 675, 677 (1997) (asserting that under current antitrust doctrine, analysis of media mergers focuses solely on economic concerns and ignores social and political issues).

Those who mount a market challenge to continuing FCC structural regulation of mass media also rely on the First Amendment. An underlying principle of the market challenge to the Commission's structural regulations is that the agency's underlying viewpoint diversity rationale for regulating industry structure is constitutionally suspect.[64] These critics contend that the agency's attempt to regulate in a content-neutral fashion in order to achieve diversity of viewpoints in the media is nothing short of an end-run around First Amendment-based limits on Commission discretion to regulate content.

However, conclusory First Amendment arguments in support of the free market in media do not deflect the hard questions raised by the rash of mass media agglomerations. Admittedly, an FCC position that two entities cannot merge because the combination would produce a level of diversity or voice that is at odds with the FCC's view of appropriate levels of diversity or voices does raise some expressive freedom concerns. Yet, there is a big difference between regulating/prescribing content and viewpoints on the one hand, and, on the other hand, regulating structure simply with an expectation that it will lead to a diversity of content and even viewpoint. The FCC's structural approach is not designed to predict content, but to promote diversity. In the former situation, government would be weighing in with its view of the particular type of content or viewpoint that it believes should be available to the public. In the latter instance, government is effectively trying to create the structural preconditions for a competitive content and viewpoint market. This distinction should bear constitutional weight.[65]

Proponents of deregulation are not the only participants in the debate to face difficult questions, however. Deregulatory opponents too face serious challenges. The first is about the Commission's prediction that diversity of ownership will lead to diversity of content and viewpoints. Apart from the issue of minority ownership of broadcast stations—where ownership is likely to lead to a diversity of viewpoints[66]—the Commission

64. *See Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903, 12,993-13,002, 17 Comm. Reg. (P & F) 1 (1999) (dissenting statement of Comm'r Furchtgott-Roth).

65. *Cf.* Turner Brdcst. Sys. Inc. v. FCC, 520 U.S. 180 (1997).

66. *See* Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S.C. L. REV. 293 (1991); Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841 (1995) (reading empirical evidence to suggest that more minority ownership of broadcast facilities would increase minority-oriented programming); *see also* FCC Releases Advertising Study Which Reveals a Tale of Two Systems; Study Shows Broadcasters Serving the Minority Community Earn Less Per Listener, *FCC News Release*, (Jan. 13, 1999), *available at* (visited Mar. 21, 2000) <http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/1999/nrmm9001.html>.

While it is beyond the scope of this Essay to argue for any particular structural rule, ownership regulations that promote minority ownership are a desirable policy. They have value both as a way of encouraging diversity of viewpoints and as a way of redressing the market failures that have led to the extremely small percentage of minority ownership of broadcast stations over time. Admittedly, the notion of diversity-grounded ownership rules has been under attack. The Supreme Court in *Adarand Constructors v. Pena*, 515 U.S. 200, 235-37 (1995) rejected the intermediate scrutiny for benign race-conscious measures that it had previously employed in *Metro Broadcast, Inc. v. FCC*, 497 U.S. 547 (1990). (The D.C. Circuit Court of Appeals recently read *Adarand* as rejecting diversity of viewpoints as a compelling governmental interest for purposes of strict scrutiny under the First Amendment. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), *reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998)). Scholars addressing the issue of diversity of ownership have argued that there is not a sufficient nexus between diversity of ownership and diversity of viewpoints in order to justify diversity-based structural regulations. *See, e.g.,* Chen, *supra* note 41; Krotoszynski & Blaiklock, *supra* note 63, at 71-76.

It is beyond the scope of this Essay to provide a full-fledged defense of minority-ownership-enhancing structural rules. Let me sketch out, however, a few ideas that bear further elaboration elsewhere. One line of criticism of minority-enhancing rules is that minority-owned stations are no more likely to provide a diversity of viewpoints in their programming than are nonminority owners attuned to their markets and responsive to the demands of their viewers. Broadcasters, on this view, are rational economic actors, and it would be impermissible racial stereotyping to assume otherwise. *See Metro Brdcst., Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting).

In addition to empirical evidence to the contrary (*see* Spitzer, *supra* note 49), this notion rests on some questionable assumptions. First, to say that minority ownership is likely to lead to some additional diversity in things like the focus of news coverage or the degree of racial stereotyping in entertainment programming is not the same thing as saying that all minorities have a single point of view. Rather, it is simply to say that race is likely to be a significant lens through which people perceive events. News is not just events, but what news organizations choose to cover, how they do so, and what spin they provide. Entertainment programs are cultural artifacts. Without specifying what particular viewpoints would issue as a result of opening the door to minority ownership of media, common sense suggests that race would have *some* effect on the construction of news and entertainment. The recent public attack by members of the minority community on diversity in media indicates that such common sense is well grounded in reflecting the views of minority communities.

Second, relying on broadcast owners to read their viewers' broadcast needs and preferences is problematic. Prediction of consumer news and entertainment preferences is hardly a science. That is particularly true when the issue is diversity of coverage and viewpoints rather than merely diversity of formats; subjectivity is much greater with respect to identifying the former than the latter. Moreover, it is a truism that advertiser-supported media cannot adequately measure the intensity of consumer preferences. And, catering to advertisers means providing programming that will appeal to the consumption patterns of identified demographic groups. These observations suggest that white-owned commercial stations—even if they are rational market actors—will not necessarily provide the news and entertainment that their African-American viewers and listeners would prefer.

Third, the argument assumes that there is negligible market failure. But, opponents of deregulation have strongly claimed that undue concentrations of media power skew the market and thwart democratic deliberation. We could add that recent empirical evidence demonstrates the unfortunate prevalence of continuing racism in aspects of the broadcast marketplace. FCC Releases Advertising Study Which Reveals a Tale of Two Systems; Study Shows Broadcasters Serving the Minority Community Earn Less Per Listener, *FCC* has been challenged on the vagueness of its diversity standard and the closeness of the fit between the goal of diversity and the structural rules it has adopted.[67] Moreover, First Amendment norms are implicated by the Commission's approach in practice.[68]

In any event, a recognition that we wish to have structure-regulating rules that promote a diversity of voices does not answer the question of which specific ownership and market structure regulations should be retained or adopted. Surely the critics of the FCC are right to note that several of the agency's industry structure regulations have really been incumbent-protective mechanisms for various regulated parties.[69] Such incumbent-protection is not attributable only to capture or to industry bargains assuring protected status in exchange for relatively minimal public interest promises. The FCC too had its own bureaucratic investment in its scheme of administrative regulation and industry structure.[70] There is little reason to believe that the Commission's traditional structural regulations are all either perfect in achieving their goals or necessarily better than the

---

News Release, (Jan. 13, 1999), *available at* (visited Mar. 21, 2000) <http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/1999/nrmm9001.html>. Not only the unduly small number of minority broadcast owners, but the Commission's recent evidence of race discrimination in the advertising marketplace undermine the usefulness of a "trust the market" argument in connection with minority representation.

67. *See Biennial Regulatory Review NOI*, 13 F.C.C.R. 11,276, at app. A (1998) (separate statement of Comm'r Powell); KRATTENMAKER & POWE, *supra* note 2. For critical assessments of the diversity goal, see, e.g., *Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903, 12,993, 17 Comm. Reg. (P & F) 1 (1999) (dissenting statement of Comm'r Furchtgott-Roth) (criticizing "amorphously-defined" goal of diversity as based on a "hunch" without any measuring benchmarks); Krotoszynski & Blaiklock, *supra* note 63, at 10.

68. For example, critics charge that the particular minimum voice floors adopted by the Commission to ensure diversity of voices are sufficiently arbitrary as to pose constitutional as well as policy concerns. *See* Review of the Comm'n's Regulations Governing TV Brdcst., *Order on Reconsideration*, 1999 WL 1024091 app. a (1999) (dissenting statement of Comm'r Furchtgott-Roth); *Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903, 12,993-13,002, 17 Comm. Reg. (P & F) 1 (1999) (dissenting statement of Comm'r Furchtgott-Roth). Arguments that the First Amendment is consistent with and may even require regulation to enhance the diversity of views available to the public from the media are controversial. *See, e.g.*, SUNSTEIN, *supra* note 39, at 55-62; Gardbaum, *supra* note 39, at 396; John O. McGinnis, *The Once and Future Property-based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 120-26 (1996).

69. An often invoked example of such incumbent-protective regulation is the early history of cable regulation. *See, e.g.*, Chen, *supra* note 41, at 1459-1464; Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 904-06 (1998). One could make the argument that the Hundt Commission's quantitative children's educational programming requirements were a rather benign and minimal quid pro quo for the "giveaway" of digital spectrum to incumbent broadcasters. *See* Robinson, *supra* note 69, at 918-19, 922-23; *see also supra* text accompanying note 45 and *infra* note 91.

70. *See* Robinson, *supra* note 69, at 904-06.

business arrangements a less regulated industry might achieve by negotiation.

This is particularly so in light of broadcast economists' arguments that in broadcasting, there is no assurance that program diversity will increase with the number of firms in the market and that in some ranges, program diversity is more likely to result from consolidation than atomistic competition among a number of independently owned licensees.[71] It is also likely true because of the revolutionary effects of digital technology on the media marketplace. Changing technology also provokes rapid changes in both the definition of the electronic communications marketplace and in established roles and relationships within that marketplace, however defined. The regulator in such circumstances must be sensitive to the shifts in power of various market players over time in an unstable and transitional communications landscape.

In addition to the questions posed by mass media mergers to both proponents and opponents of regulation, structural rules are no doubt also influenced by pragmatic considerations about what is doable by an administrative agency at a time of rapid technological change. Governmental agencies with little information and time-consuming processes may adopt regulatory models that are hard to change in response to changing circumstances. As noted, there is the continuing danger that institutional factors may lead to the agencies' virtually unself-conscious adoption of rules protecting the interests of regulated entities with which they have entered into regulatory deals over the years. Thus, the FCC should be careful not to craft structural rules that impede innovation. It should recognize that regulatory conservatism may itself skew the development of technology that would in time obviate the need for regulation. At the same time, it should be careful monitor the developments of the industries its deregulatory policies enable. It should deal with the likely exercise of market power where it exists and not unduly rely on the potential competition posed by still-nascent firms.

Thus, both proponents and opponents of FCC structural deregulation face difficult questions. Aggressive promotion of mergers of the size of CBS/Viacom ignores the dangers of a highly consolidated information marketplace. On the other hand, blanket indictments of ownership deregulation themselves ignore the need for principled determinations of which anticoncentration rules are appropriate in a fast-changing media environment. Ultimately, it may even be that our choice of approaches to structural regulation depends as much on our perceptions of the appropriate

71. *See supra* note 49.

roles of the press and the FCC in democratic deliberation as on our recognition of technological change and convergence.[72] At least at the level of setting broad policy, it may be that different theories of democracy lead to different theories of the press—which in turn may lead to different degrees of tolerance for media concentration.[73]

V. WHAT IS REALLY GOING ON? THE FCC'S MULTIVALENT APPROACH

The Commission's approach to structural regulation today functions as a method of avoiding that ultimate question about theories of democracy. Both the market failure and the regulatory failure critiques of structural regulation characterize what the FCC is doing principally by reference to deregulation. The regulatory failure critique attacks the Commission for still remaining highly regulatory in the face of extensive competition in a dynamic and ever-expanding marketplace. The market failure argument criticizes the agency for having gone too far the way of former FCC Chairman Mark Fowler, who described television as no more than a toaster with picture.[74] An assessment of these arguments as a practical matter benefits from determining what the agency is in fact really doing today. In fact, the Commission is attempting to fashion a middle ground.

The Commission in fact appears to have developed a rather nuanced, three-fold strategy for structural regulation of the electronic mass media. The first part of the strategy is deregulatory, as previously described. In enhancing cross-industry competition, the strategy is designed to eliminate FCC-promoted barriers to competition. In allowing the capture of efficiencies when combinations will not cause significant injury to otherwise competitive markets, the approach is designed to enhance flexibility and broadcaster competitiveness in a converging marketplace.[75]

72. Professor C. Edwin Baker, for example, has argued persuasively that different conceptions of democracy will likely lead to different notions about the role of the press. In turn, different images of the role of the press are likely to lead to different sorts of structural regulations. *See* Baker, *supra* 55. If, for example, we think of the press as promoting the norms of either elitist or republican democracy, then our degree of tolerance for consolidation may be much higher than if we hew to liberal pluralist models which would favor dispersal of ownership. *See id.* at 362-63, 370.

73. *See id.* It is unclear, however, to what degree those broad policy choices will ineluctably lead to one or another specific rule. Even if we choose a theory of complex democracy, as does Professor Baker, it is still unclear whether competition or consolidation will in fact best promote such a theory of democracy in any given instance.

74. *See* Caroline E. Mayer, *FCC Chief's Fears: Fowler Sees Threat in Regulation*, WASH. POST, Feb. 6, 1983, at K1.

75. *See, e.g., Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903

FCC Chairman Kennard's public statements reflect the view that the media face a time of technological convergence when the old industries—with their associated industry-based regulations—no longer reflect reality or promote progress.[76] Thus, on this view, government should remove regulatorily-imposed barriers to entry between industries. The agency should also be procompetitive and technology-neutral, refusing to regulate in a fashion that promotes one technology or one industry over another. On this view—also underlying much of the 1996 Act—regulators who wish to provide cheap and plentiful public access to media and information should promote overall competition among all the media industries and technologies.[77] The FCC is thus transformed from industry regulator to market facilitator.[78]

That deregulatory prong of the Commission's approach is counterbalanced by two others, however. The second prong of the agency's strategy seems to be the adoption of some counterweights to balance the deregulatory trend. Those counterweights in turn take two forms. One is the

app. c at 1981-82, 17 Comm. Reg. (P & F) 1 (1999) (Chairman William E. Kennard, Remarks at the Aug. 5, 1999 Meeting on Broadcast Ownership Items).

76. *See supra* text accompanying note 36.

77. Consistent with this approach, the Commission has also refused to mandate open access to the cable broadband for purposes of Internet access. *See, e.g.*, FCC Chairman William E. Kennard's Remarks Supporting Marketplace Solutions for the "Open Access" Debate, *FCC News Release*, Jan. 11, 2000, *available at* (visited Mar. 23, 2000) <http://www.fcc.gov/Daily_Releases/Daily_Business/2000/db0111/nrcb0002.html> (providing links to Chairman Kennard's public speeches promoting marketplace solutions and regulatory neutrality with regard to technology); Chairman William E. Kennard, Remarks at the National Association of Telecommunications Officers and Advisors 19th Annual Conference (Sept. 17, 1999) *available at* (visited Mar. 23, 2000) <http://www.fcc.gov/Speeches/Kennard/spwek931.html>. In fact, the Commission's amicus brief in *AT&T v. City of Portland*, 43 F. Supp.2d 1146 (D. Or. 1999), reflected its position that the market was the proper venue for broadband access negotiations. *See* FCC Court Brief Underscores Consumer Benefits from National Internet Policy of Unregulation; Urges Narrow Judicial Resolution, *FCC News Release*, Aug. 16, 1999, *available at* (visited Mar. 23, 2000) <http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9060.html>. Questions about access bottlenecks have been more pointedly posed since the announcement of AOL's merger with Time-Warner. *See, e.g.*, Kathy Chen, *AOL, Time Warner to Open Cable Lines to Other ISPs in Move to Curb Concerns*, WALL ST. J., Feb. 29, 2000, at A3; Kathy Chen, *AOL Changes Tune in Debate on Cable Access*, WALL ST. J., Feb. 14, 2000, at B1; Alan Murray, *In the New Economy, You've Got Scale*, WALL ST. J., Jan. 17, 2000, at A1.

78. *See* FCC Reshapes for the Future—Establishes New Enforcement and Consumer Information Bureaus to be Effective November 8, 1999, *FCC News Release*, Oct. 26, 1999, *available at* (visited Mar. 23, 2000) <http://www.fcc.gov/Bureaus/Miscellaneous/News_Release/1999/nrmc9072.html> (quoting Chairman Kennard's remarks); Chairman Kennard Delivers to Congress Draft Strategic Plan for 21st Century, Sees Need for New Structure in Era of Converging Technologies; Calls for Faster, Flatter and More Functional Agency, *FCC News Release*, Aug. 12, 1999, *available at* (visited Mar. 23, 2000) <http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9059.htmll>.

Commission's adoption of explicit limits to the deregulatory rules. The second counterweight appears to be the promotion of voluntary self-regulation by industry. Finally, the third part of the Commission's approach relates to the affirmative use of spectrum policy to create community and grass-roots-based alternatives to the commercial mass media.

A. The Regulatory Counterweight

Although the Commission has engaged in structural deregulation, it has simultaneously attempted to preserve some regulatory counterbalances. In its decisions to relax its broadcast ownership regulations, for example, the Commission has been careful to articulate as its goal not simply deregulation, but regulatory "balance."[79] The agency has attempted to accomplish its goal both by positive regulation and by informal attempts to promote industry self-regulation.[80]

1. Explicit FCC Regulations

What the Commission has appeared to deregulate in the broadcast ownership proceeding, for example, is at least to some extent counterbalanced by its decision in recently adopted attribution rules setting out what kinds of ownership interests should count for purposes of applying the ownership rules.[81] Although the Commission in its recent

---

79. *See, e.g.*, Chairman William E. Kennard, Remarks at the Meeting of the National Association of Broadcasters, *From the Vast Wasteland to the Vast Broadband* (Apr. 20, 1999), *available at* (visited Mar. 27, 2000) <http://www.fcc.gov/Speeches/Kennard/spwek914.html> (contending that the Commission and industry should "craft[] common-sense ownership relief" and that the charge is to "find the right balance."); *Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903 app. c at 1981-82, 17 Comm. Reg. (P & F) 1 (1999) (Chairman William E. Kennard, Remarks at the August 5, 1999 Meeting on Broadcast Ownership Items).

> This is not . . . the time to completely deregulate broadcast ownership. Our ownership rules have always reflected core values of competition, diversity and localism. The changes we are making today are tailored to grant broadcasters more flexibility while at the same time ensuring that consolidation will only occur in markets where these core values will not be undermined. Our action today thus strikes an appropriate balance, by relaxing the rules but maintaining a diversity floor.

Id.

80. In addition, the effect of rule changes depends on market response to the changes. For example, a recent report suggests that although the relaxation of the duopoly rule created new opportunities for combinations, the anticipated "big rush" has not yet happened—"largely because sellers want more than buyers are willing to pay." Higgins & McClellan, *supra* note 20, at 24-25, 28.

81. The Commission has described its attribution rules as follows: "The mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions." Review

attribution decisions disclaims any intent to tighten its attribution rules,[82] several aspects of the modifications do seem to make more interests attributable for the purpose of calculating ownership.[83] As Commissioner Furchtgott-Roth has concluded: "Looking outwardly somewhat deregulatory in the broadcast local ownership proceeding, the Commission undoes here much of the relief it provided there."[84]

Similarly, it is important to notice that the Commission did not deregulate fully in the area of local broadcast ownership—as broadcasters had suggested it should.[85] Instead, the agency chose a middle ground—relying on the competition-enhancing effect of a minimum voice count analysis. Moreover, it adopted a rather narrow market definition in connection with its assessment of minimum voice counts. It did not include DBS and the Internet. In only included newspapers with five percent circulation. And it provided that only one cable voice is counted (regardless of whether there are more) for purposes of assessing local common ownership proposals.[86] The agency's approach in the national ownership

of the Comm'n's Regulations Governing Attribution of Brdcst. & Cable/MDS Interests, *Report and Order*, 14 F.C.C.R. 12,559, para. 1 (1999). In that decision, the Commission revised its broadcast attribution rules in order, it said, to enhance their precision and clarity to financial markets, so that capital flow to broadcasting would not be disturbed. Among significant changes made by the modification is the adoption of an "equity/debt plus" attribution rule to complement the existing attribution rules. Under this new rule, holders of more than a 33% financial interest—whether debt or equity—in a licensee's total assets will have an attributable interest in the licensee so long as they are either major program suppliers to the licensee (supplying more than 15% of the station's broadcast week) or if they are media entities in the same market (including broadcasters, cable operators, and newspapers). *See id.* All stock of any kind (including nonvoting stock) will be counted toward the 33% threshold.

Another important change is the adoption of a new attribution rule for television LMAs. Under this new approach, the LMA will be attributed if it involves time brokerage of another television station in the same market for more than 15% of the station's broadcast week. *See id.*

Moreover, the Commission chose not to grandfather preexisting LMA arrangements permanently. Even those dating from before 1996 will be subject to review under the Commission's next statutorily-mandated biennial review in 2004.

82. *See id.* at para. 35.

83. Commissioner Furchtgott-Roth makes this point in his dissent from the new attribution rules. Indeed, he accuses the Commission of "once again [having] tightened underlying or related rules in order to avoid as much deregulation as Congress intended." *Id.* at 12,665 (dissenting statement of Comm'r Furchtgott-Roth). This is because, in his view, "these rules are not simply more precise than the old ones. They work to capture more interests than the old rules, thus making more properties attributable for ownership purposes." *Id.*

84. *Id.* This view is quoted for its descriptive character and not to support Commissioner Furchtgott-Roth's normative conclusions as to these rules.

85. *See, e.g.*, McConnell, *supra* note 31, at 30.

86. *See Report and Order on Local Broadcast Ownership*, 14 F.C.C.R. 12,903, 17

docket is not much different. Retaining the national audience cap in broadcasting (and horizontal cable ownership), despite some deregulatory changes in ways to calculate audience reach, is also some evidence of the compromise position the agency is trying to take.[87]

In addition, the Commission's new low power radio decision inaugurating a new type of community radio[88] is highly and explicitly regulatory. The new service is regulated by a series of rules some of which are more stringent than any applied to commercial broadcasting even in prederegulation days.[89]

Finally, reports of the Commissioners' current orientation about deregulation suggest that Chairman Kennard is currently sated with the degree of structural deregulation the Commission has implemented thus far.[90] Thus, the agency is not simply heading in a fully deregulatory direction. Close analysis of the decisions the Commission has actually made—perhaps even more than its rhetoric of deregulation—evinces a more conservative and deliberate approach to deregulation than many broadcasters and market-favoring media analysts would prefer.

2. Calls for Industry Self-regulation and Voluntary Effort

In addition, this Commission may also be trying to lessen the impact of the deregulatory trend by promoting voluntary self-regulation by the regulated industries. Such self-regulation may be entirely self-generated by the regulated entities in order to curry favor with the Commission. It may also be responsive to informal suggestions by Commissioners. Or it may be part of a settlement negotiation between the industry party and the Commission. Self-regulation may be either an attempt to deflect future regulation or an implicit quid pro quo in direct or indirect exchange for FCC deregulation.

There is a long history of instances in which the industry has voluntarily accepted limitations on media behavior in direct or indirect exchange for certain gains—particular regulatory benefits, FCC protection against competitors, or avoidance of potentially more onerous regulation.[91]

Comm. Reg. (P & F) 1 (1999). *See also supra* note 25.

87. *See supra* text accompanying notes 19 and 33-35.

88. *See* discussion *infra* notes 99-101.

89. *See infra* note 100.

90. *See* Paige Albiniak & Bill McConnell, *Kennard Targeting Merger Rules Midyear*, BRDCST. & CABLE, Jan. 24, 2000, at 27 (quoting Chairman Kennard's reluctance to "overreact and sweep away our regulations in one fell swoop."); McConnell, *supra* note 31, at 30; Schlosser, *supra* note 29, at 10.

91. Indeed, media historians have claimed that established commercial stations at the inception of radio voluntarily adopted public interest obligations in order to receive FRC

(Even *Broadcasting & Cable* magazine—the industry's magazine of record—has recognized that broadcasters trade their First Amendment interests in exchange for FCC rule changes that would grant them more immediate financial benefits.[92]). A regulatory rationale based on a contractarian, quid pro quo approach was explicitly articulated under the chairmanship of Reed Hundt, Chairman Kennard's immediate predecessor.[93]

protection from others. *See generally* ROBERT MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR CONTROL OF U.S. BROADCASTING, 1928-1935 (1993); *see also* Chen, *supra* note 41, at 1437-43, 1458-59; Hazlett, *Rationality of U.S. Regulation*, *supra* note 41; Hazlett, *Explaining the Telecommunications Act, supra* note 41; Hazlett, *Physical Scarcity*, *supra* note 41. "Topless radio" stations immediately changed their formats in response to a speech by the FCC Chairman bemoaning the development. *See* PETER FORNATALE & JOSHUA E. MILLS, RADIO IN THE TELEVISION AGE 84-85 (1980). The networks and NAB adopted the short-lived family viewing hour in response to exhortation by the Chairman of the FCC. *See* Robinson, *supra* note 69, at 919-20 and sources cited therein (describing First Amendment challenge to FCC Chairman's 'jawboning'). Press accounts suggest that broadcasters accepted the children's educational television rules pushed by FCC Chairman Reed Hundt to mollify critics of the "giveaway" of digital channels to incumbent broadcasters as a result of jawboning by Hundt and the White House. *See* Robinson, *supra* note 69, at 918-19 and sources cited therein. A recent example of press cooperation with government in the content context is the recent disclosure of networks allowing a White House anti-drug agency to pre-screen shows before airing. *See, e.g.*, Elizabeth A. Rathbun, *Shows Were Vetted*, BRDCST. & CABLE, Feb. 14, 2000, at 12. More generally, former FCC Chairman Reed Hundt's counsel, Gretchen Craft Rubin, has described the persistence of the quid pro quo rationale for broadcast regulation as resting at least in part on the fact that "broadcasters themselves welcome the quid pro quo deal they have struck." Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want* (reviewing RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Corn-Revere ed., 1997)), 66 GEO. WASH. L. REV. 686, 691 (1998). (Professor and former Commissioner Robinson does take the position, however, that apart from a few examples—like the family viewing hour and the children's educational programming deal—"concrete examples of attempted influence turn out to be very few, certainly far fewer than are imagined." Robinson, *supra* note 69, at 923.).

92. *See, e.g.*, Harry A. Jessell, *The Fall of the First*, BRDCST. & CABLE, Aug. 12, 1996, at 12-13 (quoted in Corn-Revere, *supra* note 91, at 207); *see also* Rubin, *supra* note 91, at 692; Commissioner Chong Challenges Radio Broadcasters to Fight for First Amendment Freedom, *FCC News Release*, 1997 WL 580834 (Sept. 19, 1997) (chiding broadcasters for trading free speech for "business reasons.").

93. *See generally* Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089 (1996); Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11 (1996); *see also* Rubin, *supra* note 91. Of course, this does not mean that Chairman Hundt's "social compact" or quid pro quo regulatory justification was a justification for individualized bargaining for public interest obligations. Some critics did, however, so interpret Chairman Hundt's regulatory approach. For example, members of his own Commission criticized the Chairman for having accepted "social contracts" and regulatory quid pro quos pursuant to which Commission regulations would be waived in specific cases in exchange for voluntary public interest commitments by affected broadcast entities. *See* Chris McConnell, *Quello*

Observers point to different types of voluntary concessions in today's media environment. There are recent examples of media entities attempting to blunt the potentially anticompetitive effects of proposed telecommunications mergers with self-imposed competition-enhancing conditions in response to FCC concerns.[94] In the broadcast context, structural deregulation has also led to expressions of concern—both by civil rights leaders and by Chairman Kennard—about the effect of consolidation on minority voices.[95] In response, the broadcast industry late last year announced an investment fund to increase minority ownership of broadcast outlets in light of complaints about the effects of major mergers on minority ownership.[96] Similarly, station groups required to divest stations as a condition of their merger approvals have expressed their intentions to sell to minority buyers.[97] In the context of broadband Internet

Levels Charges over Social Contracts, BRDCST. & CABLE, Oct. 2, 1995, at 23. For a description and analysis of claims that social compact and quid pro quo rationales are not acceptable bases for media content regulation (and assertions that voluntary assent to social compact regulations is inherently coercive), see Lili Levi, Review Essay, *On the Mixed Cultures of Regulation and Deregulation* (reviewing RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere, ed. 1997), 38 JURIMETRICS J. 515, 517-29 (1998).

94. *See* Application of Ameritech Corp., Transferor, and SBC Comm., Inc., Transferee, for Consent to Transfer Control of Corp. Holding Comm'n Licenses & Lines Pursuant to Sections 214 and 310(d) of the Comm. Act, *Memorandum Opinion and Order*, 14 F.C.C.R. 14,712 (1999). The Commission approved the SBC/Ameritech merger subject to a set of conditions that the parties had proposed. *See Merger Hearings*, 106th Cong. (2000) (testimony of FCC Comm'r Harold W. Furchtgott-Roth), *available at* (visited Mar. 26, 2000) <http://www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr004.html> (criticizing conditional approval of license transfer applications in merger cases); *Merger Hearings*, 106th Cong. (2000) (opening Statement of Michael K. Powell, Comm'r, FCC), *available at* (visited Mar. 23, 2000) <http://www.fcc.gov/Speeches/Powell/Statements/2000/stmkp005.html>.

95. *See, e.g.*, William E. Kennard, *Equality in the Information Age*, 51 FED. COMM. L.J. 553, 556 (1999) (describing his encouragement of private industry efforts); McConnell, *supra* note 40, at 22; Bill McConnell, *Few and Far Between*, BRDCST. & CABLE, Oct. 5, 1998, at 28.

96. *See* Paige Albiniak, *NAB Creates Diversity Programs*, BRDCST. & CABLE, Jan. 17, 1999, at 149; Ira Teinowitz, *Broadcasters Start Minority Fund: Investment Pool Aims to Boost Minority Ownership of Media Outlets*, ADVERT. AGE, Nov. 8, 1999, at 120; *see also* Paige Albiniak, *Industry Seeds Prism Fund*, BRDCST. & CABLE, Nov. 8, 1999, at 10 (quoting CBS and Clear Channel spokesmen as denying suggestions that Prism Fund was created to "appease" Chairman Kennard in light of the companies' pending mergers); Paige Albiniak & Bill McConnell, *Strange Bedfellows*, BRDCST. & CABLE, Aug. 16, 1999, at 6 (describing Commission's retrenchment from initial LMA proposal as possibly a pragmatic compromise by Chairman Kennard in exchange for broadcaster efforts to enhance minority ownership and involvement in broadcasting).

97. *See* Elizabeth A. Rathbun, *A Radio Record*, BRDCST. & CABLE, Oct. 25, 1999, at 6 ("Clear Channel has said that it intends to sell some stations to minority buyers. That is politically prudent given that FCC Chairman William E. Kennard has made that a priority of

access, cable companies are apparently entering into access contracts with ISPs —perhaps in response to Chairman Kennard's signal that although the Commission would not at this time mandate open access, it would watch private access negotiation developments closely.[98]

B. Opportunity-enhancing Spectrum Policies

A third aspect of the FCC's regulatory agenda involves the agency's role in spectrum policy. Beyond the notion of efficient use of the spectrum, this Commission has committed itself to the development of alternative types of broadcast licenses. For example, the Commission has recently acted to expand low power radio in order to provide new opportunities for "locally focused community-oriented radio broadcasting" and to promote additional diversity in radio voices and program services.[99] The agency has characterized its low power radio approach as a low-cost means of serving very localized communities—urban areas, small towns and communities or neighborhoods—or underrepresented groups within communities.[100] It is

his tenure.").

98. *See supra* note 77.

99. Creation of Low Power Radio Service, *Report and Order*, 2000 WL 85304, paras. 3, 4 (Jan. 27, 2000) [hereinafter *Low Power Report and Order*]. The point of the new service is to enhance community-oriented broadcasting. It is thus a noncommercial service. *See id.* at para. 17.

> We believe that noncommercial licensees, which are not subject to commercial imperatives to maximize audience size, are more likely than commercial licensees to serve small, local groups with particular shared needs and interests, such as linguistic and cultural minorities or groups with shared civic or educational interests that may now be underserved by advertiser-supported commercial radio and higher powered noncommercial radio stations.

Id. Low power radio is also designed to foster local ownership and diversity, and thus prohibits existing broadcasters or other media entities from any ownership interest in LPFM stations. *See id.* at paras. 29-30. This is a national and absolute prohibition, unlike the agency's other cross-media ownership rules. *See id.* at 29. The low power radio decision also prohibits any operating agreements, including LMAs or local marketing or management agreements, even between two low power licensees. *See id.* at para. 30. The rules also limit licensees to local entities and prohibit multiple ownership of LPFM stations for the first two years of LPFM license eligibility. *See id.* at paras. 33-36, 39-41. The decision also creates a local ownership limitation which prohibits any entity from owning or having an attributable interest in two or more LPFM stations located within seven miles of each other. *See id.* at para. 44-46. The licenses are not transferable. *See id.* at para. 163.

100. *See Low Power Report and Order*, 2000 WL 85304, para. 4 (2000). The Commission's low power FM service is quite controversial. While Chairman Kennard has described strong grass-roots support for the service, current broadcasters are opposed. *See* Chairman William E. Kennard, Remarks at Roundtable Discussion on Low Power FM, *FCC News Release*, May 13, 1999, *available at* (visited Mar. 21, 2000) <http://www.fcc.gov/Bureaus/Miscellaneous/ News_Releases/1999/nrmc9028.html>. They have spurred Congressional hearings on whether the new low power stations will unduly interfere with existing broadcast service. *See, e.g.*, Paige Albiniak, *LPFM Battle Lines*

noteworthy that the Commission's limitations on low power radio ownership are even more stringent than its traditional ownership regulations in the full-power context.[101] Thus, the LPFM service is not merely the creation of an alternative and diversity-enhancing use of spectrum. More generally, it is the creation of a countervailing set of extremely stringent ownership regulations in counterpoint to the agency's otherwise deregulatory tendency. Thus, while implementing the deregulatory approach of the 1996 Act, the Commission is also attempting to explore affirmative regulatory opportunities to meet its traditional regulatory goals of diversity and localism by creating alternative services. It is doing so in order to create a bipolar media industry—where extremely local interests stand in counterpoint to highly consolidated global market players.

VI. THREATS TO THE FCC'S MULTIVALENT APPROACH

The Commission's multivalent approach to industry structure at least in part may reflect its attempt to implement multiple regulatory goals.[102] On the one hand, the agency seeks to promote the diversity of viewpoints on the air. On the other hand, it increasingly fears First Amendment difficulties with direct regulation designed to promote such viewpoint diversity. It may even recognize its own bureaucratic limitations. And its discretion is constrained by the deregulatory spirit and requirements of the Telecommunications Act of 1996. On a less reactive interpretation, the agency may also accept the economists' view that quality can sometimes be enhanced by consolidation in the peculiar economic reality of broadcasting.[103] Finally, it may believe that a true "mass" medium, counterbalanced by a truly local medium, may best reflect reality and promote technological progress today.

The Commission's multivalent approach raises its own host of problems, however (separate and apart from the question whether the agency is attempting to achieve potentially inconsistent goals). The first issue is, of course, whether the multiple aspects of the approach in fact lead

Drawn, BRDCST. & CABLE, Feb. 21, 2000, at 7. The NAB has recently challenged the new LPFM service in the D.C. Circuit as well. *See id.* At the Commission itself, Commissioner Furchtgott-Roth has dissented and Comissioner Powell has dissented in part from the new service. *See Low Power Report and Order*, 2000 WL 85304 (2000). Commissioner Powell expressed concern in his statement that LPFM could threaten small, independent commercial broadcasters (often owned by women and minorities). *See id.*

101. *See supra* note 99.

102. *See* Chen, *supra* note 41, at 1419 (*inter alia*, recognizing "two distinct and contradictory philosophies expressed in federal mass communication law.").

103. *See supra* note 49.

to the proper balance sought by the Commission.[104] Presumably, each prong of the Commission's multipart approach is designed to ameliorate the potential dangers posed by the other prongs. We should inquire whether the agency's approach will in fact, as a practical matter, lead to the kind of equipoise it seeks. Recent developments suggest threats to that project.

For example, the Commission's creation of the low power radio alternative and its call for voluntary industry measures are doubtless designed to compensate to some degree for potential harms threatened by the increasing consolidation of the commercial mass media permitted by FCC structural deregulation. But the effectiveness of these measures must be assessed not in principle, but in real life.

The Commission's attempt to create a spectrum access mechanism for those without significant resources is currently under attack.[105] The agency's new low power radio service rules have been challenged in court recently by the NAB.[106] The broadcast lobby has been arguing strongly against the new service in Congress as well—apparently successfully, given the two bills introduced to reverse the FCC's decision.[107] The issue has been characterized also more broadly as a power struggle between Congress and the FCC.[108] The outcomes of these developments may retard the goal of providing an alternative to increasingly consolidated commercial broadcasting. This would mean that the Commission could not necessarily rely on this type of spectrum allocation policy as a way of creating an alternative to the behemoths of the commercial mass media.[109]

Similar questions can be raised about any FCC reliance on industry self-regulation or voluntary action to achieve the agency's goals. The Commission's concerns about the potentially harmful effects of deregulated markets are not necessarily alleviated by voluntary industry measures encouraged by the Commission. At the simplest level, there is the

104. This Essay does not attempt to address that question in the abstract.

105. This Essay does not address the desirability and workability of a low power radio alternative on its own terms; it simply focuses on LPFM as Chairman Kennard's partial counterweight to the power and inaccessibility of existing commercial media.

106. *See supra* note 100.

107. *See* Albiniak, *supra* note 100, at 7 (noting that the Oxley bill "has nearly 120 cosponsors").

108. House Telecommunications Subcommittee Chairman Billy Tauzin is quoted as saying in the recent hearing on the subject of LPFM that "[t]he FCC appears to have made a substantial public policy decision without seeking the counsel of Congress." *Id.* Even more explicitly, Congressman Tauzin said that "[w]e want to send a clear message to the FCC that they work for us, we don't work for them." *Id.*

109. This does not even address the wisdom of creating a "second class" type of service subject to even more stringent structural regulations (for its own protection) than the traditional full-power media.

question of whether the voluntary measures are themselves sufficient to achieve the Commission's asserted goals.[110] Analysts of the FCC's approach will naturally ask whether the broadcast industry's voluntary diversity efforts, or the concessions to which merging parties in telecommunications unions agree in order to obtain FCC clearance, are adequate.[111] (That inquiry itself begs underlying questions: compared to what? How do we define the goals or determine whether either voluntary or regulatory action is sufficient to achieve them?)

Of more current political significance, the "voluntary concessions" approach brings to the fore questions regarding the propriety of FCC signals to industry. For example, questions have been raised by legislators about the appropriateness of the FCC's "conditions" approach in the telephone merger context.[112] Even a sitting Commissioner has complained more generally that regulated industries should never be deemed to have engaged in truly voluntary self-regulation if the regulating entity signals its desire for such self-regulation.[113] Under this view, such "voluntary" action

110. Former Commissioner Glen Robinson has argued that even the FCC-imposed public interest responsibilities of broadcasters "have always been lightly enforced even when they were publicly proclaimed." Robinson, *supra* note 69, at 912. How much less would a negotiated compromise likely yield?

111. This would involve an assessment, for example, of the adequacy of voluntary industry efforts to enhance diversity. *See, e.g.*, Bill McConnell, *BET's Johnson Hits Proposed Tax Break*, BRDCST. & CABLE, Nov. 22, 1999, at 19; *Show Us the Money*, BRDCST. & CABLE, Sept. 13, 1999, at 12; *supra* note 97. Is the amount of money contributed into the fund for minority ownership sufficient to enhance minority ownership in any significant degree? Could the minority ownership fund be left to wither once the industry no longer needs approval for pending mergers?

Some have questioned the effectiveness and sufficiency of industry self-regulation altogether. On media self-regulation generally, see Angela Campbell, *Self-regulation and the Media*, 51 FED. COMM. L.J. 711 (1999). In the context of violence, see, e.g., James T. Hamilton, *Private Interest in "Public Interest" Programming: An Economic Assessment of Broadcaster Incentives*, 45 DUKE L.J. 1177 (1996); Mark M. McCarthy, *Broadcast Self-regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 CARDOZO ARTS & ENT. L.J. 667 (1995); Kevin W. Saunders, *Media Self-regulation of Depictions of Violence: A Last Opportunity*, 47 OKLA. L. REV. 445 (1994).

112. *See, e.g.*, Bill McConnell, *Kennard vs. Tauzin*, BRDCST. & CABLE, Feb. 21, 2000, at 20.

113. *See* Review of the Comm'n's Regulations for TV Brdcst., *Report and Order*, 14 F.C.C.R. 12,903, 12,993-13,002 (1999) (dissenting statement of Comm'r Furchtgott-Roth); *see also* Commissioner Harold Furchtgott-Roth, Remarks before the Media Institute (Nov. 17, 1998), *available in* (Mar. 26, 2000) <http://www.fcc.gov/Speeches/Furchtgott_Roth/sphfr817.html>; Robert Corn-Revere, *"Voluntary" Self-Regulation and the Triumph of Euphemism*, *in* RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA 183 (Corn-Revere, ed. 1997). For a description and analysis of claims that social compact and quid pro quo rationales are not acceptable bases for media content regulation (and that voluntary assent to social compact regulations is inherently coercive), see Levi, *supra* note 93, at 517-29.

is always suspect as effectively coerced. From a contrasting ideological standpoint, media activists might wonder whether such negotiations between the FCC and its regulated entities might not create a skew so that the industry's voluntary concessions will short-change the broader public interest in the longer term.

This Essay does not substantively assess the possibility of true voluntariness in responsive self-regulation by regulated entities. (Nor, for that matter, does it address the coherence of the "voluntariness versus coercion" paradigm in the media regulation context or constitutional questions about industry voluntary agreements.[114]) Suffice it to say that tolerance for FCC signaling must to some extent depend on one's vision of the FCC's appropriate role in industry structure. The issue also benefits from being addressed concretely and not simply in the abstract.[115] Agency signaling takes place in different sorts of contexts and can vary in intensity. How such signaling is interpreted by the industry—to what extent it is seen as a strong threat or roadblock to a desired end—also depends on a variety of particular circumstances at the particular time.

In any event, however, the brouhaha about at least some of the FCC's indirect attempts to guide industry developments suggests that yet another aspect of the Commission's multipart structural strategy will be subject to attack and thereby potentially cabined in its effectiveness.

In sum, many of the critics of the FCC in the area of industry structure regulation make generalized, abstract criticisms of the agency's

---

This is not a new issue. It is a corollary to the famous notion about administrative regulation by lifted eyebrow. It has sparked discussion and legal doctrine about the appropriateness of agency "jawboning." *See* Writers Guild of Am., West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated and remanded by* 609 F.2d 355 (9th Cir. 1979). It poses questions about the extent to which a governmental agency can pressure private parties to adopt voluntarily regulations that the agency might not have the clear power to adopt formally. It raises intractable issues that have bedeviled both lawyers and moral philosophers about how we define voluntariness and coercion, not to mention the notion of unconstitutional conditions. *See generally* Robinson, *supra* note 69, at 917-24.

114. For a fuller exposition of the question—and a criticism of the claim that agency 'jawboning' necessarily constitutes unconstitutional conditions—see Levi, *supra* note 93, at 525-29; *see also* Robinson, *supra* note 69, at 919-925, 922 (suggesting that the question to ask about government bargains for valuable resources is "whether the bargain is reasonably related to a legitimate government activity and whether the individual, and others similarly situated, are made better off by the bargain").

115. One type of situation involving voluntary concessions is one in which the agency charged with regulatory review proposes particular conditions in return for regulatory clearance. An example currently in the news is the claim that FCC staffers stall merger reviews until companies acquiesce to the conditions they require. *See* McConnell, *supra* note 112, at 20. There are other types of signaling, however. One other type of situation involves voluntary industry measures prompted by Commission statements that the agency itself might not clearly have been empowered to impose officially.

approach. They seem to agree on a descriptive starting point—that the Commission has been increasingly deregulatory in its approach to media structure. It is from there that they diverge prescriptively, however.[116] Yet, the Commission today is not bent on a hell-for-leather foray into deregulation. Rather, the agency is engaged in a multipart strategy. One prong of the strategy, structural deregulation, operates in balance with the second prong, consisting of regulatory counterweights. The Commission then supplements this approach with opportunity-enhancing spectrum policies.

The all-or-nothing approaches to the issue of structural media regulation do not adequately address the real questions presented by the Commission's multipart strategy. One of those questions arises out of the contending values served by structural deregulation in a converging media environment. But another is whether a multipart strategy such as the one the Commission appears to be following can adequately neutralize the concerns posed by media consolidation. Questions as to the viability of such an approach are raised both in principle and in the context of concrete attacks on the particular strategies chosen by the Commission to achieve its goal of regulatory balance. Only time will permit us to assess the success of the Kennard Commission's ambitious strategy to marry deregulation and technological neutrality with subtle regulatory backstops, industry self-discipline, private diversity initiatives, and the generation of government-protected communicative alternatives.

116. The free market theorists argue that the FCC should simply get out of the way of market ordering constrained at most by antitrust review. The regulatory theorists push for across-the-board ownership regulations and affirmative FCC review of the public benefits of consolidation and convergence.