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

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

Lili Levi*

I. INTRODUCTION.............................................................................................................582
II. THE FCC'S STRUCTURAL REGULATIONS..................................................................582
III. TWO CLASSIC CRITIQUES FOCUSING ON THE FCC'S DEREGULATORY APPROACH TO INDUSTRY STRUCTURE.............593
IV. CHALLENGES TO THE TWO MODELS OF CRITIQUE (THROUGH A CBS/Viacom Lens)........................................................................................................594
V. WHAT IS REALLY GOING ON? THE FCC'S MULTIVALENT APPROACH.................................605
   A. The Regulatory Counterweight.............................................................................607
      1. Explicit FCC Regulations...............................................................................607
      2. Calls for Industry Self-regulation and Voluntary Effort.................................609
   B. Opportunity-enhancing Spectrum Policies.........................................................612
VI. THREATS TO THE FCC'S MULTIVALENT APPROACH.............................................613

* 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. While the agency has imposed some direct content regulations from time to time, it has been primarily active in adopting structural regulations. Over

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 and national multiple ownership rules limiting the total number of stations allowed for any single entity. The Commission also adopted a


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’ns 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’ns Rules, Report and Order, 10 F.C.C.R. 12,165 (1995).


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 Brdct. 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 Brdct. 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.  

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 and pursuant to the requirements of the Telecommunications Act of 1996 (1996 Act), 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.

The Commission justified these ownership-regarding regulations as principally designed to prevent concentration, enhance competition, and promote diversity of voices. 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 Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(c).


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.\(^{14}\)

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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.


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 Brdcast., 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, BDRCST. & 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\(^\text{15}\) and effectively eliminated the Commission's substantive comparative renewal process.\(^\text{16}\) 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.\(^\text{17}\)

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.\(^\text{18}\) 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


\(^{16}\) 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).


\(^{18}\) See supra note 5 (citing to FCC decisions relaxing national multiple ownership rules).
stations a single entity can own across the country. That has enabled recent development of extremely large radio station groups.

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. The Commission had been issuing waivers of its “one-to-a-market” and “duopoly” rules in the television context. In August 1999, the Commission further revised its local

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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).

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

\textit{Broadcast Ownership} (describing—while criticizing—waiver approach previously employed by the Commission).


24. \textit{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.” \textit{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.). \textit{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. \textit{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.” \textit{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. 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. 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.”

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.”

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. And, of particular salience to the current

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 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.
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, the Commission’s biennial review is considering revision of the remaining dual network prohibition. 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.

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. 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.\(^ {38}\)

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\(^{34}\) See 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_Info/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.).

\(^{35}\) See id.


\(^{37}\) 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. Critics from this vantage point decry the deregulatory direction of the Commission on ownership and structure issues. 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. Some of these critics, like Commissioner


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.


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." 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. 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. 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. 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.

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).


43. See id.

44. See 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. 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.

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

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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.

than less diversity in programming.\textsuperscript{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.",'\textsuperscript{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.\textsuperscript{51}

For example, the CBS/Viacom\textsuperscript{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

\textsuperscript{49} See, e.g., \textsc{Krattenmaker & Powe}, supra note 2, at 40-43; \textsc{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); \textit{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").

\textsuperscript{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. \textit{See id.} at 1503.


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. 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. 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.

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. Indeed, the consolidated entity's ability to prefer
its own content may discourage independent investment in content production.\textsuperscript{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.\textsuperscript{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

\textsuperscript{57} See Joe Schlosser, \textit{A Mouse In-house}, \textit{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., \textit{Gatekeepers Inc.}, \textit{BRDCST. \& CABLE}, Jan. 17, 2000, at 22. \textit{Cf.} Associated Press, \textit{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).

\textsuperscript{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. \textit{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.” \textit{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.


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 Albiniaik, 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, 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.

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.

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. 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.

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—the Commission


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.\textsuperscript{66} Moreover, First Amendment norms are implicated by the
Commission's approach in practice.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\langle http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/1999/nrmm9001.html \rangle. 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.

(separate statement of Comm'r Powell); \textit{KRATENMAKER & POWE}, supra note 2. For critical
assessments of the diversity goal, see, e.g., \textit{Report and Order on Local Broadcast
statement of Comm'r Furchtgott-Roth) (criticizing "amorphously-defined" goal of diversity
as based on a "hunch" without any measuring benchmarks); Krotoszynski & Blaiklock,
\textit{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. \textit{See Review of the Comm'n's Regulations Governing TV
Brdcst.}, \textit{Order on Reconsideration}, 1999 WL 1024091 app. a (1999) (dissenting statement
of Comm'r Furchtgott-Roth); \textit{Report and Order on Local Broadcast Ownership}, 14
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. \textit{See, e.g., SUNSTEIN, supra note 39, at 55-62; Gardbaum, \textit{supra}
note 39, at 396; John O. McGinnis, \textit{The Once and Future Property-based Vision of the First

69. An often invoked example of such incumbent-protective regulation is the early
history of cable regulation. \textit{See, e.g., Chen, \textit{supra} note 41, at 1459-1464; Glen O. Robinson,
\textit{The Electronic First Amendment: An Essay for the New Age}, 47 DUKL 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. \textit{See Robinson, \textit{supra} note 69,
at 918-19, 922-23; see also \textit{supra} text accompanying note 45 and \textit{infra} note 91.

70. \textit{See Robinson, \textit{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. 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. 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.

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. 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.

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.


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.\(^7^6\) 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.\(^7^7\) The FCC is thus transformed from industry regulator to market facilitator.\(^7^8\)

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

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76. See supra text accompanying note 36.


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." The agency has attempted to accomplish its goal both by positive regulation and by informal attempts to promote industry self-regulation.

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. Although the Commission in its recent re...

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) <ht...
attribution decisions disclaims any intent to tighten its attribution rules, several aspects of the modifications do seem to make more interests attributable for the purpose of calculating ownership. 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." 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. 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. 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.
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. In addition, the Commission’s new low power radio decision inaugurating a new type of community radio 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.

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. 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.
(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.\textsuperscript{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.\textsuperscript{93}
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. 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. 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. Similarly, station groups required to divest stations as a condition of their merger approvals have expressed their intentions to sell to minority buyers. In the context of broadband Internet


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

98. See supra note 77.


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.

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. 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. 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. 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

\[\text{Drawn, BRDST. & CABLE, Feb. 21, 2000, at 7. The NAB has recently challenged the new
LPFM service in the D.C. Circuit as well. See id. At the Commission itself, Commissioner
Furchtgott-Roth has dissented and Commissioner Powell has dissented in part from the new
expressed concern in his statement that LPFM could threaten small, independent
commercial broadcasters (often owned by women and minorities). See id.}
\]

101. \text{See supra note 99.}

102. \text{See Chen, supra note 41, at 1419 (\textit{inter alia}, recognizing “two distinct and
contradictory philosophies expressed in federal mass communication law.”).}

103. \text{See supra note 49.}
to the proper balance sought by the Commission. 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. The agency's new low power radio service rules have been challenged in court recently by the NAB. 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. The issue has been characterized also more broadly as a power struggle between Congress and the FCC. 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.

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 Albinick, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{113} Under this view, such “voluntary” action

\textsuperscript{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, \textit{supra} note 69, at 912. How much less would a negotiated compromise likely yield?

\textsuperscript{111} This would involve an assessment, for example, of the adequacy of voluntary industry efforts to enhance diversity. \textit{See, e.g.}, Bill McConnell, \textit{BET's Johnson Hits Proposed Tax Break}, \textit{BRDCTST. \& CABLE}, Nov. 22, 1999, at 19; \textit{Show Us the Money}, \textit{BRDST. \& CABLE}, Sept. 13, 1999, at 12; \textit{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?


\textsuperscript{112} \textit{See, e.g.}, Bill McConnell, \textit{Kennard vs. Tauzin}, \textit{BRDCTST. \& CABLE}, Feb. 21, 2000, at 20.

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...
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. 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.