How FCC Transaction Reviews Threaten Rule of Law and the First Amendment

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Abstract

Since its creation in 1934, the Federal Communications Commission (FCC) has had authority to approve or deny the consummation of transactions by wireless and wired communications firms under a public interest standard. Despite the passage of decades, neither the FCC nor the courts have put meaningful limits on what the FCC can pursue under this authority. Today, regulated companies—including broadcast TV and radio, satellite TV and radio, cable TV, and Internet service providers—need FCC permission to transfer licensed assets. Moreover, the FCC increasingly uses license transfer proceedings as an opportunity for an ad hoc merger review that substitutes for rulemaking. We model the FCC's decisions to extract concessions from firms under the empire-building model. The FCC's subjective determinations of the public interest during transaction reviews and the impracticability of judicial review have pernicious effects on modern media and the rule of law. Consistent with the model, the FCC increasingly extracts nominally voluntary concessions from firms—including programming decisions, hiring practices, and net neutrality compliance—in the transaction approvals that the agency is legally barred from or unwilling to pursue through the normal regulatory process. We argue that the FCC's unpredictable and coercive transaction reviews violate rule of law norms and pose significant First Amendment problems. We urge the FCC or Congress to limit what the agency can accomplish during transaction reviews.

JEL codes: D63, D72, D73, D78, D79, D81

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How FCC Transaction Reviews Threaten Rule of Law and the First Amendment

Brent Skorup and Christopher Koopman

In the run-up to the 2004 presidential election, Carleton Sherwood (a journalist who has won Pulitzer and Peabody awards) made a film that featured Vietnam prisoners of war and that cast Senator John Kerry (the Democratic presidential nominee) in an unfavorable light.[1] The Sinclair Broadcast Group, which owns TV stations scattered around the country, announced plans to air the 40-minute film but received significant criticism because of the timing before an election. Democratic politicians complained to the Federal Communications Commission (FCC) about the film's lack of balance, and advocacy groups vowed a multiyear regulatory challenge to Sinclair's airwave license renewals.[2]

The *Boston Globe* and *New York Times* editorial pages requested that the FCC investigate Sinclair for countenancing the airing of the film.[3] An MSNBC television host, Deborah Norville, captured the mood and asked a Sinclair vice president on air, "Why would Sinclair Broadcasting, which has a license from the FCC, risk that very, very precious license by going forward with a program like this?"[4] Reed Hundt, former FCC chairman, similarly

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[1] STOLEN HONOR: WOUNDS THAT NEVER HEAL (Red, White, and Blue Productions 2004). This production should not be confused with the advocacy organization titled Swift Boat Veterans for Truth, a different 2004 controversy involving certain veterans' criticism of Senator Kerry.

[2] Bill Carter, *Risks Seen for TV Chain Showing Film about Kerry*, N.Y. TIMES, Oct. 18, 2004, *available at* http://www.nytimes.com/2004/10/18/business/media/risks-seen-for-tv-chain-showing-film-about-kerry.html.

[3] *Sinclair's Slander*, BOSTON GLOBE, Oct. 15, 2004, *available at* http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2004/10/15/sinclairs_slander/; *Dangerous Territory*, N.Y. TIMES, Oct. 15, 2004, http://www.nytimes.com/2004/10/15/opinion/dangerous-territory.html?_r=0.

[4] *Deborah Norville Tonight: Sinclair Controversy* (MSNBC television broadcast, Oct. 21, 2004), *available at* http://www.nbcnews.com/video/msnbc-news/6303047#6303047.

asked Sinclair executives, "Why should a broadcaster keep its licenses if it behaves in this manner?"[5]

Sinclair got the message. Financial analysts and FCC staff members predicted that the controversy posed political and financial risks to Sinclair and other FCC-licensed stations[6]—what one analyst report called "the Sinclair payback provision"—and Sinclair stock value quickly dipped 17 percent.[7] Within days, Sinclair abruptly backed off and chose to broadcast only four minutes of the film.[8]

The Sinclair episode illustrates the power that the FCC holds over some media outlets and gives a glimpse into how political actors and activists are able to channel the FCC's regulatory process to chill unwanted speech. Quite simply, many US firms that carry and distribute speech, such as Sinclair, must remain in the FCC's good graces—through license renewals and approvals of license transfers—to operate. Over the past 20 years, the FCC has increasingly used its leverage during licensing proceedings as an opportunity to engage in an ad hoc merger review that substitutes for formal rulemaking. Through license renewals and through—the focus of this article—transaction approvals, the agency allows constituencies to influence media content, business models, and operations.

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[5] Josh Marshall, *Yesterday Former FCC Chairman*, TPM (Oct. 11, 2004, 6:30 PM), http://talkingpointsmemo.com/edblog/--97479 (reproducing Reed Hundt's letter).

[6] Carter, *supra* note 2.

[7] *Sinclair Revises Anti-Kerry Broadcast*, CNN MONEY (Oct. 20, 2004, 3:02 PM), http://money.cnn.com/2004/10/19/news/midcaps/sinclair/.

[8] Bill Carter & Scott Shane, *Viewers Get Only a Peek of a Movie Chiding Kerry*, N.Y. TIMES, Oct. 23, 2004, *available at* http://www.nytimes.com/2004/10/23/politics/campaign/viewers-get-only-a-peek-of-a-movie-chiding-kerry.html?_r=0. The Republican FCC chairman at the time, Michael Powell, refused to intervene or to exercise prior restraint, citing agency precedent and First Amendment concerns. *FCC Won't Block Airing of Anti-Kerry Film*, NBC NEWS (Oct. 14, 2004, 3:02 PM), http://www.nbcnews.com/id/6249909/ns/politics/t/fcc-wont-block-airing-anti-kerry-film/#.VqvISrerSzc. Nevertheless, the possibility of Kerry's winning the close election and nominating a new FCC chairman a few months later contributed to Sinclair's stock decline. As one major Sinclair shareholder noted, "Those guys at Sinclair better watch out if Kerry is elected." Bill Carter, *supra* note 2.

Neither the FCC nor the courts have put meaningful limits on what the FCC can extract during license transfers, thereby leading to arbitrary and unpredictable results.[9] Today, regulated companies—including broadcast TV and radio, satellite TV and radio, cable TV, and Internet service providers (ISPs)—are the primary producers and distributors of mass media and publications. Increasingly, the FCC extracts nominally voluntary concessions from those firms—including programming decisions, hiring practices, and net neutrality compliance—through coercive conditions to transaction approvals. In many cases, the FCC is legally barred from enforcing or is unwilling to enforce such policies through the normal regulatory process.[10]

Not much has changed in the 15 years since Bryan Tramont, then legal advisor to FCC Commissioner Harold Furchtgott-Roth, wrote that "procedural loopholes and circumstance create opportunities for the Commission to operate free of the discipline imposed by the statute and administrative procedure" during license transfer approvals and consent decrees.[11] If anything, the problem may be becoming more severe and getting far worse.[12] Scholars criticize lawmakers for the *jawboning*—a term for informal regulation and threats using dubious legal authority—of Internet and media companies outside of transparent regulation.[13]

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[9] *Novel Procedures in FCC License Transfer Proceedings: Hearing Before the Subcomm. on Commercial and Administrative Law Oversight of the H. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Harold W. Furchtgott-Roth, FCC Commissioner), *available at* https://transition.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr925.html#N_1_ ("Agency decisions regarding which license transfers to review . . . are entirely *ad hoc* . . . .).

[10] ***Id.*** ("[T]he Commission requires companies to do certain things—things that it could not for lack of statutory authority require outright in a rulemaking—as a quo for the quid of receiving a license.").

[11] Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49, 52 (2000), *available at* http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1260&context=fclj.

[12] Christopher Yoo, *Merger Review by the Federal Communications Commission: Comcast–NBC Universal*, 45 REV. IND. ORGAN. 295, 312 (2014) (noting that since 2004, "conditions have become increasingly common features of [FCC] merger clearances). *See also* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 126 (2015) ("Jawboning of Internet intermediaries is increasingly common, and it operates beneath the notice of both courts and commentators."); T. Randolph Beard et al., *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC* 5 (Phoenix Center, Policy Paper No. 49, 2015), *available at* http://www.phoenix-center.org/pcpp/PCPP49Final.pdf.

[13] The term derives from the biblical story of Samson, who killed a thousand Philistines with a donkey's jawbone.

Derek Bambauer, professor of law at the University of Arizona, notes that "Informal enforcement . . . cloaks what is in reality state action in the guise of private choice," and such "regulation by transaction" has far-reaching legal and constitutional effects.[14]

Once an acquisition or license transfer is before the FCC, the applicants and the FCC engage in a secretive bargaining over what "voluntary" commitments the applicants must make to remain in the agency's good graces.[15] Those negotiated agreements are made either pursuant to a consent decree or as a way to gain transaction approval and are, practically speaking, not appealable.[16]

Such circumstances eviscerate norms of good governance and the rule of law and may also be unconstitutional because of the amount of discretion that the FCC has over speakers. The FCC's transaction practices pose the speech infringement risks that the Supreme Court warned of in a 1988 case, *City of Lakewood v. Plain Dealer Publishing Company*,[17] regarding a city's licensing of newspaper racks: "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."

The FCC continues down its current path at legal peril. The expansion of FCC authority during license transfers, the FCC's ad hoc determinations of the public interest, and the

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[14] Bambauer, *supra* note 12, at 65.
[15] *See* Beard et al., *supra* note 12.
[16] In theory, the transaction applicants could submit to a hearing with an administrative law judge. *See* 47 U.S.C. 309(e) ("If . . . a substantial and material question of fact is presented or the Commission for any reason is unable to make the [public interest, convenience, and necessity] finding . . . it shall formally designate the application for hearing. . . ."). However, scholars such as Daniel Deacon, a lecturer at Harvard law and a former telecommunications law attorney, point out the "adjudication process is considered so onerous that the reference to the ALJ [administrative law judge] (or merely the announcement that the FCC will refer) effectively denies the merger." The idea that the FCC cannot deny a transaction before a hearing before a neutral adjudicator "is largely a fiction." Daniel Deacon, *Some Thoughts on FCC Merger Review Occasioned by the Demise of the Comcast-Time Warner Cable Deal*, NOTICE & COMMENT, Apr. 29, 2015, http://www.yalejreg.com/blog/some-thoughts-on-fcc-merger-review-occasioned-by-the-demise-of-the-comcast-time-warner-cable-deal-by.
[17] City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988).

impracticability of timely judicial review have pernicious effects on modern media and the rule of law. Given the immense discretion over media, the FCC's transaction reviews may be subject to facial challenges to First Amendment rights.[18] If the FCC does not voluntarily abandon its de facto merger review, the agency should at least promulgate guidelines for what its public interest standard requires.

Background on FCC Authority over Communications Transactions and the Public Interest Standard

By statute, the FCC must find that a wireless license transfer serves "the public interest, convenience, and necessity,"[19] and there must be a similar finding for a transfer of common carrier lines.[20] Parties with transactions subject to FCC jurisdiction bear the burden and must prove by a preponderance of the evidence that the transaction affirmatively provides public interest benefits.[21] Notably, the Communications Act provides no general merger authority, but the agency has treated this authority over license transfers as reason to evaluate and approve mergers. As a result, the subsequent transaction analysis frequently makes only incidental mention of the underlying licenses.[22]

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[18] *Id.* at 759 ("Therefore, a facial [First Amendment] challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.").

[19] 47 U.S.C. 310(d) ("No . . . station license . . . shall be transferred . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.").

[20] 47 U.S.C. 214(a) ("No carrier . . . shall acquire or operate any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require the . . . operation of such . . . line.").

[21] *See, e.g.*, FCC, *Re: Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Opinion and Order*, MB Docket No. 14-90, para. 18 (July 28, 2015).

[22] *Novel Procedures in FCC License Transfer Proceeding*, *supra* note 9 ("[M]ost orders involving mergers do not even identify the radio licenses or section 214 authorizations at issue or discuss the consequences of their conveyance, but instead move directly to a discussion of the merger. . . .").

This regulatory power over speakers exists because the FCC's authority predates changes in the market that created more speakers—for instance, traditional telephone companies now provide television. It also predates the expansion in coverage of the First Amendment since the 1970s.[23] The "public interest" was first applied to mass media more than 80 years ago (in 1927), with the creation of the FCC's predecessor, the Federal Radio Commission (FRC), which regulated radio broadcasters.[24]

This vague standard had little meaning even to the members of Congress who promulgated it in the 1920s,[25] but contemporaries believed that courts would give meaning to the standard.[26] Courts had, after all, constrained seemingly discretionary antitrust laws through common law–like development.[27] Despite the passage of decades, however, neither the FCC nor the courts have put meaningful limits on what the FCC can do under the public interest standard.[28]

Since the 1970s, Congress and the FCC have moved away from formal industrial policy in telecommunications and public interest programming mandates in media and have moved

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[23] *See, e.g.*, Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015) (discussing the expansion of the First Amendment to more activities).

[24] Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR. L. REV. 295, 296 (1939).

[25] Louis G. Caldwell, the first general counsel of the FRC, described the standard in 1930 as being akin to instructing a radio czar to "do the best he can." *Id.* ("'Public interest, convenience or necessity' means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.").

[26] Acting Attorney General William Donovan noted that what is necessary to satisfy the FRC's public interest standard "has to be marked out and developed by a line of administrative and judicial decisions." William J. Donovan, *Origin and Development of Radio Law*, 2 AIR L. REV. 107, 118 (1931).

[27] Section 1 of the Sherman Antitrust Act, for instance, bars "contract[s] . . . in restraint of trade or commerce." Taken literally, this provision makes even the most routine commercial agreements illegal. Rather than trust the antitrust agencies with that immense discretion, courts provided common law–like standards to the statute to prevent the exercise of arbitrary power.

[28] *Novel Procedures in FCC License Transfer Proceeding*, *supra* note 9 ("[T]he Commission has failed to place any outer limits whatsoever on [the public interest test], freely reinterpreting the standard in each new case."); John O. Robinson, *Spectrum Management Policy in the United States: An Historical Account* 43 (Office of Plans and Policy, FCC, Working Paper No. 15, 1985), *available at* https://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp15.pdf ("The public interest has become, therefore, whatever the Commission decided it to be.").

toward market competition and free speech norms.[29] Old habits die hard, however. Lacking the legal authority or political will to engage in, for instance, formal broadband rate regulation and cable TV programming mandates, the FCC extracts nominally voluntary commitments from merging firms about rates, programming, and other issues such as net neutrality.[30] Combined with the FCC's pervasive public interest standard,[31] regulation by transaction commitments "may be the [FCC's] primary and most potent form of regulatory control."[32] As communications scholar Randy May explains,[33]

> The Commission merely withholds approval of the merger until the parties come forward to propose conditions which the Commission has telegraphed in closed door negotiations that it would find acceptable to meet whatever public interest concerns that opponents, the FCC, and others have raised.

Because it lacks merger authority, the FCC does not have statutory time limits for transaction reviews, and reviews often take about a year.[34] This delay is much longer than competition reviews at the Federal Trade Commission (FTC) and Department of Justice, which generally take two to four months[35] because of the requirements of the Hart-Scott-Rodino Act.[36]

Because transaction delays are costly to merging firms and because those firms bear the burden of showing public interest benefits, such delays give the agency great leverage over firms and appear designed to extract public interest concessions from firms. Typically, the

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[29] *See, e.g.*, Joseph D. Kearney, *Will the FCC Go the Way of the ICC?*, 71 U. COLO. L. REV. 1153, 1153–54 (2000).
[30] FCC, *supra* note 21, at appendix B (listing conditions for the merging firm, including nondiscrimination rules for online video and price requirements for low-income customers).
[31] Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 429 (2001) (estimating that nearly 100 statutory provisions direct or authorize the FCC to act according to the public interest standard).
[32] Beard et al., *supra* note 12, at 23.
[33] Randolph J. May, *Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 ADMIN. L. REV. 895, 904 (2008).
[34] The FCC has self-imposed guidelines to limit review to 6 months, but typical FCC merger review takes 9 to 12 months. Yoo, *supra* note 12, at 311.
[35] *Id.* at 310.
[36] 15 U.S.C. § 18a.

FCC will challenge license transfers when the underlying value of the transaction is in the billions of dollars. Some firms spend tens or hundreds of millions of dollars on FCC approval–related expenses alone, which presumably are substantially less than the value of the transaction to the firms.[37]

Concerning one of the largest recent merger attempts, reports suggest that Comcast and Time Warner Cable collectively spent more than $500 million on merger-related expenses, a deal that the FCC rejected.[38] Merging firms that disagree with the need for or legality of a merger condition are in no position to challenge the condition.[39]

There are sensible debates about where voluntary action by a private firm ends and where government coercion begins. We do not believe that distinction is relevant here, and we are aware of no scholarship defending the agency's coercive "regulation by transaction." Tim Wu, a law professor from Columbia Law School, wrote perhaps the most prominent defense of informal regulation in fast-moving industries, yet he expressly names the FCC's merger reviews as potentially abusive because legal review is unfeasible.[40]

Therefore, we argue that conditions extracted during the FCC's approval process are coerced and not voluntary because the penalty for not offering concessions is so severe: a rejected merger. Further, as we explain *infra*, when speech interests are at stake, the Supreme Court regards even modest regulatory oversight—even licensure and a requirement to show public interest benefits—as unconstitutional because the risk of government intimidation is too great.

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[37] Bob Fernandez, *How Comcast Sealed the NBCU Deal*, PHILADELPHIA INQUIRER, Jan. 23, 2011, *available at* http://articles.philly.com/2011-01-23/business/27044733_1_nbcu-deal-comcast-shareholder-largest-cable-distributor (reporting that Comcast alone spent nearly $100 million in NBC Universal acquisition expenses).
[38] Kyle Wiggers, *Comcast's Failed Acquisition of TWC Cost a Third of a Billion Dollars*, DIGITAL TRENDS, May 5, 2015, *available at* http://www.digitaltrends.com/home-theater/comcast-spent-$336-million-on-failed-twc-merger/.
[39] The notion that the FCC cannot deny a transaction before a hearing before a neutral adjudicator "is largely a fiction." Deacon, *supra* note 16.
[40] Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1855 (2011).

To provide some context for FCC decision-making in the absence of any clear standards being set by Congress or enforced by courts, we will use part I to outline a basic model of bureaucratic action. That is, if we begin with the premise that officials within the FCC are individuals who respond to incentives, it is important to model what incentives are driving decisions within the agency. By using part II to reveal the legal precariousness of the FCC's current practice, we aim to change the incentives of agency officials so those individuals attempt more modest, defensible transaction reviews.

Part I: A Model of FCC Action, Agency Coercion, and the Rule of Law

Scholars have long recognized that government actors are not selfless, disinterested people seeking to maximize the public interest.[41] Instead, regulators may use their government position as cover to achieve their own goals and objectives. If the public interest is not the chief concern of individuals within the FCC, what then do bureaucrats within the agency seek to maximize? Max Weber, the German political economist, notes that, in general, bureaucrats seek to maximize power.[42] Although this basic idea has laid the foundation for much of the public choice research about bureaucratic action, it nonetheless fails to adequately describe FCC decisions. A more specific description is necessary.

Elaborating on this basic idea that individuals within agencies seek to increase power, William A. Niskanen provided the first systematic analysis of bureaucratic action.[43] The core insights of his initial framework are that individuals within agencies such as the FCC are

[41] *See, e.g.*, MAXWELL STEARNS & TODD ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 340–66 (2009).
[42] Max Weber, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 233–34 (H. H. Gerth & C. Wright Mills eds., trans., 1946); *see also* Stearns & Zywicki, *supra* note 41, at 242.
[43] WILLIAM A. NISKANEN JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

primarily engaged in maximizing their budgets and expanding the overall scope of the agency's jurisdiction. This concept is what scholars have come to recognize as *empire building*, and it has shaped the understanding of agency behavior. It is also central to understanding the FCC's use of its merger review authority.

However, much of Niskanen's initial empire-building model of agency behavior is not universally accepted.[44] One criticism of Niskanen's initial model is that the primary focus, budget maximization, is somewhat disconnected from observed agency behavior.[45] Building on that insight, others have stated that the model is not simply wrong; it may, in fact, predict the precise opposite of what actually occurs at agencies.[46] Niskanen himself noted that although his initial framework was certainly important, it was "conspicuously flawed."[47]

Given the criticisms, the model has been refined over time, and our use of the insights from the empire-building model extends beyond the FCC's budget. Although agencies may seek to enlarge budgets, there are other ways in which an agency such as the FCC may build its empire. In addition to simply seeking a larger discretionary budget, an agency may also seek to build its empire by maximizing, among other variables, its public reputation, patronage, output, ease of rulemaking, and ease of management.[48] For the FCC, this approach can be best understood as seeking to increase a combination of the agency's discretionary

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[44] *See, e.g.*, Daryl J. Levinson, *Empire-Building in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2005). *See also* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY Do It (1989); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2007).
[45] Levinson, *supra* note 44, at 932 (noting that "[e]ven if most bureaucrats were primarily interested in lining their own pockets, the relationship between a larger agency budget and higher salaries or cushier working conditions is empirically tenuous").
[46] Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory States*, 106 COLUMBIA L. REV. 1260, 1294–95 (2006).
[47] William A. Niskanan Jr., *Bureaucracy: A Final Perspective*, *in* REFLECTIONS OF A POLITICAL ECONOMIST: SELECTED ARTICLES ON GOVERNMENT POLICIES AND POLITICAL PROCESSES 194 (2008).
[48] Niskanen, *supra* note 43, at 38.

budget, the scope of its jurisdiction, and its independence from congressional oversight and the courts.[49]

Using this framework as a lens to view FCC behavior, we reject the argument that the agency is simply seeking to pursue the public interest in imperfect ways. Instead, this framework provides a coherent theory that explains why much of the FCC policy making is done on an ad hoc basis and in the form of nominally voluntary concessions extracted from firms in exchange for transaction approvals. If the goal of the agency is to increase its jurisdiction, public reputation, patronage, and output—while balancing a desire for ease of rulemaking and management—then the FCC's reliance on its amorphous public interest standard to create rules through its transaction reviews rather than through its formal rulemaking is the most effective tool at the agency's disposal.

Moreover, if policy changes and agency management were otherwise accomplished through a formal process, such a process would require congressional participation as well as formal notice and comment under the Administrative Procedures Act. However, relying on informal rulemaking through voluntary concessions enables the agency to increase its jurisdictional domain without an act of Congress or a court review. Thus, the FCC will look to novel approaches to expand the agency's jurisdiction while also minimizing congressional oversight and control. As a result, the FCC has a strong incentive to build its empire through ad hoc consent decrees and conditions extracted through transaction reviews.

This analysis, in many ways, describes the FCC's approach to rulemaking since the Telecommunications Act of 1996. Over the past two decades, the FCC's merger review process has become far more active, and the agency has increasingly relied on the use of "voluntary

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[49] *See* Stearns & Zywicki, *supra* note 41, at 343.

commitments" and merger conditions to accomplish its policy goals.[50] This device has been undertaken to achieve—through concessions from merging parties—what would traditionally be achieved through formal, industry-wide rulemakings.[51] In addition, as suggested previously, many of those voluntary concessions would not have been achieved if they had been attempted through the formal process.

Moreover, with the lack of institutional constraints, the FCC can engage in de facto rulemaking through a transaction review that has little external oversight or control. Without a clear objective standard on which merger approvals are granted, the agency can use its amorphous public interest standard to achieve its policy goals without any practical limitations. This ability places the FCC in a unique position when compared to agencies empowered with merger review authority, especially the FTC. As noted earlier, merging parties are forced to establish—to the FCC's satisfaction—how the merger will affirmatively provide public interest benefits.[52] Moreover, unlike other agencies, the FCC has no statutory time limits to review mergers.[53]

This lack of limits places the FCC in a position of power and gives it a strong incentive to achieve extraneous policy goals through merger review. There are several high-profile examples of this scenario playing out. For instance, when News Corp. acquired DirecTV in 2004, the FCC used its transaction review to impose program access conditions.[54] Program access rules are authorized by Congress through formal, industry-wide rulemaking,[55] but they require public notice and comment periods and have the potential for judicial review. When achieved through

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[50] Beard et al., *supra* note 12, at 5.
[51] *Id.*
[52] Yoo, *supra* note 12, at, 298.
[53] It has self-imposed guidelines to limit review to 6 months, but typical FCC merger review takes 9 to 12 months. *Id.* at 311.
[54] *Id.* at 312.
[55] 47 U.S.C. § 548(b)–(c).

merger conditions, however, such access rules avoid notice and comment and cannot be reviewed by the courts.

Moreover, the FCC uses its transaction review to create policies that are beyond the scope of its statutory authority. For example, AT&T Broadband agreed to comply with the FCC's dubious regulations that capped a cable company's market share at 30 percent when AT&T acquired MediaOne in 2000. Those regulations were subsequently struck down in 2001 in *Time Warner Entertainment Co. v. FCC*.[56] Similarly, the agency conditioned the Bell Atlantic–NYNEX merger on the merged firm's agreement to accept a complex price ceiling—total element long run incremental cost (TELRIC)—for allowing competitors to have access to the firm's networks.[57] This agreement remained in force even though the Eighth Circuit had held at that time that TELRIC was impermissible and beyond the agency's jurisdiction.[58]

The result is a clear threat to the rule of law. Merging parties may not know what conditions will be tied to their transaction and, more important, may not be able to escape those conditions even when the underlying policies are beyond the agency's authority. In effect, the FCC is able to create rules that have the force of law but that apply only to specific firms and are practically unreviewable later by courts.

The FCC's extracted conditions increasingly relate to speech and the distribution of speech. For example, the FCC used three large mergers in the mid-2000s—SBC–AT&T, Verizon–MCI, and AT&T–BellSouth—to extract agreements from those firms to abide by the

[56] The FCC agreed not to enforce the condition.
[57] FCC, Bell Atlantic–NYNEX, Memorandum Opinion and Order, FCC 97-286, 12 FCC Rcd 19985, Appendix C (rel. Aug. 14, 1997).
[58] Iowa Utilities Board v. FCC, 135 F. 3d 535 (8th Cir. 1998) (later overturned by the Supreme Court in AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999).

2005 policy statement on network neutrality.[59] In 2010, the FCC's authority to enforce the 2005 policy statement as an official rule was struck down.[60] However, because the voluntary concessions are not recognized as official agency action, they remained in place.[61] Moreover, as a condition for FCC approval of the Comcast–NBC Universal merger, Comcast agreed to abide by the 2010 Open Internet Order for 10 years. Although those rules were substantially struck down in 2014,[62] the parties were still bound by their consent decrees.

By disregarding the formal rulemaking process and by using transaction reviews to enforce policy positions, the FCC has left market participants in a position of knowing the law only after it is applied to them. This situation creates an environment with no ex ante predictability, with no opportunity for notice and comment, and with little ability to challenge the agency's decisions in court.

Part II: Threat to Free Speech

If it persists in extracting public interest benefits from firms that create and distribute speech, the FCC may see its transaction authority limited after a facial challenge to First Amendment rights. When alerted to circumstances where government intimidation of the press is foreseeable and where appeal is difficult, courts typically take a dim view. The Supreme Court noted in a 1994 case that "laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State."[63] Because court scrutiny is higher when government

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[59] Yoo, *supra* note 12, at 313.
[60] Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
[61] Yoo, *supra* note 12, at 313.
[62] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
[63] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 640 (1994) (quotation marks omitted) (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987). However, A "differential burden on speakers is insufficient by itself to raise First Amendment concerns." Leathers v. Medlock, 499 U.S. 439, 452 (1991), citing

action is directed at portions of the press, the FCC's chosen path of empire building—extracting unreviewable concessions from firms during coercive transaction reviews—likely violates the Constitution's protection of the press and free speech.[64]

Speech distributors that the FCC oversees, such as cable and satellite TV companies, are covered by the First Amendment press protections.[65] As Justice Potter Stewart wrote,[66]

> [T]he Free Press guarantee is in essence a structural provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution.

As one federal court said in striking down regulations directed at an ISP, "Not only the message, but also the messenger receive constitutional protection."[67] US courts' sensitivity to state intrusions into the press arise because there is a historic appetite among many lawmakers and regulators to censor undesired speech, to compel desired speech, and to compel speakers to waive their speech rights.[68]

For hundreds of years, governments have targeted speech intermediaries for censorship rather than dispersed speakers and authors, who are more numerous, are difficult to identify, and are more protected by law and social norms.[69] Regulation of nascent distributors of speech throughout history is unfortunately the norm, not the exception. Ever since the spread of the

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Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) and Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

[64] U.S. CONST. amend. I (Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .").

[65] The "press" expands as the modes of information distribution change. Lovell v. City of Griffin, Ga., 303 U.S. 444 (1938) ("The liberty of the press is not confined to newspapers and periodicals."). New forms of media distribution are protected by the First Amendment. *See, e.g.*, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (explaining that cable companies exercise editorial discretion over content that they distribute).

[66] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975).

[67] Comcast v. Broward Co., 124, F. Supp. 2d 685, 693 (S.D. Fla. 2000).

[68] City of Griffin, Ga., 303 U.S. 444 (1938) ("The struggle for the freedom of the press was primarily directed against the power of the licensor.").

[69] Bambauer, *supra* note 12, at 85.

printing press in the 1500s, when "broadcast" media first became economical, governments have initially sought to license and exert control over the producers and distributors—the printing press,[70] the first newspapers,[71] and the motion pictures[72]—of mass communications.

Those illiberal instincts survive today. In the 20th century, US scholars and judges—like the printing press licensors of old—manufactured justifications[73] for why new speech distributors should face license renewals,[74] should be compelled to carry speech,[75] or should be prosecuted for transmitting speech that the government or its constituencies dislike.[76] Though First Amendment jurisprudence since the 1970s has weakened direct FCC regulation of speech, legacy FCC intrusions into a free media exist today. In the United States, then, radio and TV broadcasters, such as Sinclair Broadcasting, can be subjected to programming mandates.[77] Moreover, cable and satellite TV companies are compelled to carry video and speech from those local broadcasters.[78]

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[70] DAVID SCOTT KASTAN, 1 THE OXFORD ENCYCLOPEDIA OF BRITISH LITERATURE 420 (2006). Some present-day governments license printing presses, as in Singapore. *See* Newspaper and Printing Presses Act, chap. 206, part II, *available at* http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=0cb3b405-4401-427b-9858-92f2a603f4bb;page=0;query=DocId%3A%224a71c728-6dbf-4de2-a730-a121b679ffac%22%20Status%3Ainforce%20Depth%3A0;rec=0#pr3-he- (requiring a license to operate a printing press).

[71] Berrin A. Beasley, *History of Journalism: Before 1861*, *in* ENCYCLOPEDIA OF JOURNALISM 695–96 (Christopher H. Sterling, ed.) (2009) (discussing early licensing of printers and newspapers in England and in the American colonies).

[72] *See* Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230, 243–45 (1915) (listing cases that uphold state laws regulating and licensing motion pictures).

[73] The Red Lion case, upholding the FCC's equal time rules because of the scarcity of the airwaves, is particularly criticized. *See* Jim Chen, *Liberating Red Lion from the Glass Menagerie of Free Speech Jurisprudence*, 1 J. TELECOMM. & HIGH TECH. L. 293, 296 (2002) ("Of course, no one besides the Justices actually believes the scarcity rationale.").

[74] 47 U.S.C. 309(k) (providing that the FCC can renew a broadcaster's license if the broadcaster has, inter alia, served the public interest).

[75] Congress requires, for instance, that cable operators carry certain noncommercial educational broadcasters and local commercial broadcast TV channels in the cable market. *See* 47 U.S.C. 534, 535.

[76] For instance, the FCC fined a licensee, a college FM station, for airing an interview with Jerry Garcia of the Grateful Dead that featured profanity. WUHY-FM, Eastern Education Radio, Notice of Apparent Liability, 24 F.C.C. 2d 408 (1970). Federal law prohibits profanity on the airwaves. 18 U.S.C. 1464. Broadcast programming featuring drugs, oral sex, violence, cigarette advertising, and children's advertising has also brought FCC punishment. *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE JR., REGULATING BROADCAST PROGRAMMING 103–40 (1994).

[77] NBC v. United States, 319 U.S. 190, 215–16 (1943) ("[T]he [Communications] Act does not restrict the Commission merely to supervision of the [broadcast] traffic. It puts upon the Commission the burden of determining the composition of that traffic.").

[78] *See* 47 U.S.C. 534, 535.

Therefore, our model of empire building suggests that the FCC's transaction reviews will increasingly violate free speech norms. The appetite to put speech distributors under duress is always present, and transaction reviews give the agency leverage and little risk of judicial review. Alarmingly, governments are increasingly looking to regulate content online even as Internet-delivered media gain constitutional protection in the United States. Legal scholars in the federal courts are concluding that Internet-based media distributors—ISPs,[79] search engines,[80] online video distributors, and social media companies[81]—create and disseminate information and therefore are speakers protected by the First Amendment.[82] Congressional policy is that the Internet should be unregulated,[83] and the Supreme Court applies strict scrutiny to Internet regulation that has a nexus to speech.[84] Thus, regulation is more difficult, but online speech regulations are popping up in the United States and around the world.

The FCC's recent Open Internet regulations, for instance, compel Internet service providers to carry video and other content that they do not wish to carry.[85] In recent years,

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[79] Comcast v. Broward Co., 124, F. Supp. 2d 685, 698 (S.D. Fla. 2000) (applying strict scrutiny to a county's ISP open access requirement for a cable company and finding that the ordinance violated the First Amendment).
[80] Langdon v. Google, 474 F. Supp. 2d 622 (D. Del. 2007) (finding that Google's search results are protected by the First Amendment).
[81] *See* Eugene Volokh & Donald M. Falk, *Google First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL'Y 883 (2012) (explaining why interactive online media are protected by the First Amendment).
[82] Reno v. ACLU, 521 U.S. 844 (1997) (holding that the First Amendment protects communications delivered via the Internet as much as it protects print communications). *See also* Sorrell v. IMS Health, Inc., 131 S. Ct. 2653 (2011) ("[C]reation and dissemination of information are speech within the meaning of the First Amendment."); Leathers v. Medlock, 499 U.S. 439, 444 (1991).
[83] 47 U.S.C. 230(b) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . , unfettered by Federal or State regulation. . . .").
[84] *See* Reno v. ACLU, 521 U.S. 844 (1997).
[85] Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S: J. L. & POL'Y 197, 202 (2007) ("[N]eutrality mandates invariably require ISPs to send or post content which the ISPs might prefer not to send or post . . . [and are] in effect, speech restrictions that infringe the ISPs' constitutional rights."). Some scholars argue that ISPs are not protected by the First Amendment. *See, e.g.*, Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. FORUM 2343 (2014). *But see* Comcast v. Broward Co., 124, F. Supp. 2d 685, 698 (S.D. Fla. 2000) (applying strict scrutiny to a county's ISP open access requirement for a cable company and finding the ordinance violated the First Amendment); Stuart M. Benjamin, *Common Sense and Key Questions*, 127 HARV. L. REV. FORUM 346, 347–48 (2014) ("If an Internet access provider is willing to say, 'We give you an edited Internet—the Internet we think you want,' I think they are engaged in speech under the prevailing

several states and Congress have attempted to deputize ISPs and other online intermediaries to remove indecent material and to prevent copyright infringement.[86] Lawmakers recently requested that the FCC chairman pressure Facebook to prevent terrorist and gang communications.[87] In 2015, the United Nations Broadband Commission went so far as to encourage regulators to "use their licensing prerogative to ensure that only those Telecoms and search engines" that monitor and screen "cyber violence" against women be allowed to operate.[88]

Coverage of the First Amendment has broadened in recent decades, but advocates still call for compelled speech of new speech distributors. In the 1970s, courts began reversing the earlier trends, which permitted expansive regulation of media. The Supreme Court's *Tornillo* decision[89] holds that freedom of speech is not limited to censorship but "extends also to [government] attempts to compel speech."[90]

Today, many legal scholars express frustration that the First Amendment hinders content-based regulation of modern distributors such as the Internet, cable TV, search engines, and algorithms.[91] Scholars are now searching for novel justifications for why search engines and ISPs

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jurisprudence."); Brent Skorup, *ISPs Have a First Amendment Right to Block Offensive Content*, PLAIN TEXT, Nov. 17, 2015, https://readplaintext.com/isps-have-a-first-amendment-right-to-block-content-323ca1ebdf0b#.4vmksnc0v (providing examples of "edited" Internet access).

[86] *See* Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 878–82 (2012). *See* Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

[87] John Eggerton, *FCC's Wheeler Connects with Facebook's Zuckerberg*, BROADCASTING & CABLE (Dec. 8, 2015, 4:00 PM ET), http://www.broadcastingcable.com/news/washington/fccs-wheeler-connects-facebook-s-zuckerberg/146268.

[88] UN BROADBAND COMMISSION FOR DIGITAL DEVELOPMENT, CYBER VIOLENCE AGAINST WOMEN AND GIRLS: A WORLD-WIDE WAKE-UP CALL 48 (2015), *available at* http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf.

[89] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *See also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 570 (1995) (holding that "an edited compilation of speech generated by other persons" is protected under the First Amendment).

[90] Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1646 (2014) ("By extension, this rationale also applies to attempts to dictate the mode of inclusion or prominence given to certain content.") (citation omitted).

[91] Bracha, for instance, warns that First Amendment arguments threaten to upend "the basic structure of post–New Deal constitutional law." *Id.* at 1633. *See also* Jedediah Purdy, *The Roberts Court v. America: How the Roberts Supreme Court Is Using the First Amendment to Craft a Radical, Free-Market Jurisprudence*, 23 DEMOCRACY: J.

lack First Amendment protection and can be compelled to carry speech,[92] though the success of such arguments in court is in doubt.[93] Because most formal regulation of content is precluded but appetite for content regulation persists,[94] the FCC relies on informal methods such as extracting conditions during transaction reviews. In fact, given deregulatory policy and norms, this tool is the most powerful one that the FCC has left.[95]

For the reasons described previously, transaction review serves to achieve what the FCC cannot or refuses to achieve through formal regulation. Under existing law, the FCC can, as noted, require more racial minority, children's, health, and public affairs programming on broadcast TV and radio through rulemaking. It is also permissible for the FCC to promulgate modest regulations about industry composition if they are intended to increase viewpoint diversity in broadcast and cable TV.[96] Yet, today, the FCC is wary of formal mandates because those mandates bring unwanted congressional attention, irritate media companies that are quick to allege free speech violations, and provoke public complaints of censorship. In ways consistent with the empire-building model, the agency uses opaque, coercive pressures that end in

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IDEAS 46 (2012), http://democracyjournal.org/magazine/23/the-roberts-court-v-america/ ("[T]he [Supreme] Court has made the First Amendment a new anti-regulatory hammer."). *See also* Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005).

[92] Bracha, *supra* note 90, at 1651 (asserting that "search engines do not qualify for First Amendment protection given to editors against compelled speech"); Crawford, *supra* note 85 (arguing that ISPs are not speakers protected by the First Amendment).

[93] Skorup, *supra* note 85; Susan Crawford, *Reading Brown v. Entertainment Merchants Ass'n*, SUSAN CRAWFORD BLOG (June 27, 2011), http://scrawford.net/reading-brown-v-entertainment-merchants-assn/ (lamenting "the absolutist approach of the current Supreme Court to protection of speakers of all kinds—including distributors of speech. . . .").

[94] *See* Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005).

[95] Beard et al., *supra* note 12, at 23.

[96] The Supreme Court in *Turner I* concluded that three of the FCC's main policy goals underlying regulation—(a) the preservation of free, local television; (b) the promotion of a diversity of information sources; and (c) the promotion of competition—are unrelated to the content of the message conveyed. Turner I, 512 U.S. at 662. *See also* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 798–801 (1978) (holding that the promotion of diverse views is content-neutral). *See* Christopher Yoo, *Architectural Censorship and the FCC*, 78 SO. CAL. L. REV. 669 (2005). Diversity and localism are types of content, however, and the holding presents a paradox. Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1778 (1995).

ostensibly voluntary commitments, thereby avoiding headline risk while allowing the agency to take credit for any public benefits.

Jawboning and informal pressures on media cannot be eliminated. It is likely beneficial to have government officials joining advocates in encouraging good media norms about, say, offering (a) diverse viewpoints, (b) respectful treatment of controversial issues, and (c) educational programming. The problem of coercion arises when those expectations are paired with the FCC's coercive power in transaction reviews. Hortatory language about diverse viewpoints and local news can transform to something more pernicious for a free media, and media companies are increasingly cooperating to satisfy their regulator's whims, including decisions related to content.[97]

Firms that have been through the FCC transaction process and are likely to have transactions in the future are—for fear of FCC retaliation and poor press—not forthcoming about their motivations for various concessions. Nevertheless, the political activity and advocacy surrounding a transaction suggests which concessions will quiet a powerful transaction opponent and sate the FCC's loudest constituencies.[98] Occasionally, parties' transaction strategies become public information.

The size of the Comcast–NBC Universal merger in 2010 and the nature and amount of the concessions received news and scholarly coverage. The episode reveals what firms are willing to concede to accomplish a merger, and many of Comcast's and NBC Universal's concessions were related to hiring, pricing, and programming decisions. For instance, knowing

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[97] Beard et al., *supra* note 12, at 6 ("[B]argaining in the regulatory sphere is increasing in importance, and this development may be among the most important innovations in regulation in many years."). Bambauer, *supra* note 12, at 87 ("Internet platforms face structural incentives to knuckle under government jawboning over content.").

[98] Beard et al., *supra* note 12, at 10 ("[T]he FCC now routinely expects the merging firms to proffer various 'voluntary commitments' as part of the transaction . . . to sweeten the deal for regulators and public-interest groups.").

Commissioner Mignon Clyburn's desire for more TV programming targeted for racial and ethnic minorities, Comcast promised to add cable channels that were owned by minorities or were aimed at minority audiences.[99] After pressure from smaller cable distributors that feared a vertically integrated competitor, Commissioner Clyburn also requested that Comcast allow small cable providers easier, inexpensive access to NBC Universal content.[100]

Comcast–NBC Universal volunteered many other conditions that the FCC will enforce. The concessions require Comcast to continue providing NBC programming to online distributor Hulu. Hulu is a joint venture of NBC Universal, 21st Century Fox, and Walt Disney Co., but NBC Universal can no longer exercise influence over Hulu operations.[101] The merged firm was required to create a new Spanish-language broadcast channel and to expand its Spanish-language programming choices for video on demand from 35 to 300 within three years.[102]

Comcast–NBC Universal agreed to purchase certain programming content ("a new weekly business news program") from an independent producer and to use a certain business model (syndication) for that program.[103] The content-based conditions included expanding local and public interest programming[104] and entering agreements with local nonprofit news organizations for local reporting.[105] There are similar requirements for children's programming, and the FCC required the company to add 1,500 choices of video-on-demand programming targeted to children and families.[106] Comcast–NBC Universal is also required to spend

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[99] Fernandez, *supra* note 37.
[100] *Id.*
[101] FCC, Comcast–NBC Universal Conditions, appendix A at 125 (2011), http://corporate.comcast.com/images/FCC-11-4-Appendix-A-Conditions.pdf.
[102] *Id.* at 134.
[103] *Id.*
[104] *Id.* at 135.
[105] *Id.* at 136.
[106] *Id.* at 137.

$15 million per year on digital literacy, Food and Drug Administration nutritional guidelines, and childhood obesity on networks targeted to young families.[107] It must also transmit public access, educational, and governmental programming to 85 percent of its cable subscribers, exercise no editorial discretion over those programs, and create additional video-on-demand options.[108] The list goes on, and Comcast-NBC Universal's agreement showed sufficient public interest benefits to gain approval.

The FCC asserts it is preserving Comcast–NBC Universal's editorial discretion with regard to those conditions,[109] but this assertion is a polite fiction. The company has to file a semiannual report with the FCC identifying which parties it is working with, what the nature of its agreements is, and what the quantity of programming produced—down to individual "videos, articles, blog posts, and photos"—will be.[110] The fact that the content required in such programming concessions is prosocial or (more dubiously) relatively easy for the merged company to accomplish serves to distract from the questionable legality of the process. Those circumstances are precisely the ones that the courts would not tolerate—finding them unconstitutional—in similar circumstances for print media.

Suppose the same regulatory process that applies to broadcast, cable, and Internet companies applied for newspaper-related transactions. Anytime major newspapers merged or sold or acquired delivery trucks, printing facilities, or some other necessary input for operation, the newspaper had to first show the FCC that the transaction served the public. Suppose further that in short time the commissioners made it publicly known to newspapers that they would substantially help the likelihood of a transaction if they made certain public interest concessions.

[107] *Id.* at 139.
[108] *Id.* at 139–40.
[109] *Id.* at 136.
[110] *Id.* at 136–37.

The agency does not formalize the guidelines, but in another short time, merging newspapers promise to give a column to an activist, to publish more stories about climate change, to no longer endorse candidates, to publish new Russian-language dailies, and to give free advertising to local churches.

Most readers would likely sense that those circumstances represent a First Amendment violation and that they predictably chill the free exercise of speech. The readers would be correct. This conclusion follows from *City of Lakewood*, where a city ordinance that gave the mayor much more modest regulatory power—the ability to reject and accept applications to install newsracks on public property according to public interest determinations—was found to violate the First Amendment.[111] In that case, the Supreme Court established that a licensing law with a "nexus to expression" to give discretionary power to a governmental official is subject to facial challenge and is presumptively unconstitutional:[112]

> [A] law requiring the licensing of printers has historically been declared the archetypal censorship statute. . . . [W]ithout standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference.[113]

The court noted that "nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application." Recall that this is the very standard the FCC is bound to. In *City of Lakewood*, the court called such a standard an "illusory constraint" on the discretion of the mayor. It stated that absent binding

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[111] *City of Lakewood*, 486 U.S. at 772.
[112] *Id.* at 759–60. *See also* David C. Knieriem, *Diminishing the First Amendment Rights of Newsracks: City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138*, 37 WASH. U. J. URB. & CONTEMP. L. 243, 253 (1990).
[113] *City of Lakewood*, 486 U.S. at 750, 760.

judicial or administrative construction of the public interest or some other explicit limits, the law is impermissible.[114]

The review of mergers by media companies and distributors gives the FCC substantial power to discriminate between speakers.[115] Improper censorial motive is not required for an action to be a violation of the First Amendment.[116] If Congress authorized expressly that the FCC could compel, say, Spanish-language programming and contracts with independent documentary producers, then the law would likely be subject to facial challenge by any party subject to the rules.[117]

Many large cable companies, broadcasters, and ISPs have several financially significant dealings with the FCC and are unlikely to challenge the law even if there is a great possibility of success. The risk of retaliation in other proceedings is too great. Furthermore, some large parties might regard the existence of opaque public interest reviews as a competitive benefit.[118] Any challenge, therefore, would likely need to come from a smaller operator that is not as reliant on the FCC's good graces for competitive survival. Such a challenge, however, might be successful in light of the FCC's more recent transactions that single out certain speech distributors and that solicit "voluntary" programming obligations.

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[114] *Id.* at 770.

[115] It is likely legally irrelevant that the regulator claims to be regulating merely the means of distribution and promises to leave editorial discretion to the firms. Regulating speech distribution can also violate the First Amendment. As the US Supreme Court has said, a law "cannot be saved because it relates to distribution and not to publication. 'Liberty of circulation is as essential to . . . freedom [of the press] as liberty of publishing; indeed without the circulation, the publication would be of little value.'" Lowell v. City of Griffin, 303 U.S. 444, 452 (1938) (citing Ex parte Jackson, 96 U.S. 727, 733 (1877)).

[116] Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the sine qua non of a violation of the First Amendment.").

[117] *City of Lakewood*, 486 U.S. at 759.

[118] Bambauer, *supra* note 12, at 102–3 (explaining that the insider knowledge required to navigate informal enforcement may serve as a helpful barrier to entry).

Proposals for Reform

Creating regulation is the central function of any agency, including the FCC. However, given the potential dangers of an unfettered regulatory agency, several constraining measures have been introduced into the regulatory process. Notice and comment periods, judicial review, and other mechanisms guard against unrestrained agency action.

Those protections, however, are not present when it comes to the FCC's transaction review authority. The FCC, when it uses its transaction review authority in novel ways to condition approval on firms' concessions, is essentially engaged in rulemaking that is free from the safeguards that have been embedded in the formal rulemaking process. Moreover, as we have shown earlier, the FCC may even use its review authority to extract concessions that would be overturned by courts if implemented as an official, industry-wide rule. If the agency does not articulate predictable standards in transaction reviews, it is vulnerable to a facial First Amendment challenge that could limit the FCC's existing authority.[119]

The most straightforward proposal to guard against the problems inherent in the FCC's current approach is removal of the agency's authority to review mergers. This change could be accomplished in one of two ways.

First, the FCC could simply choose to constrain itself. As noted earlier, the Communications Act provides no general merger authority. However, the agency has treated its authority over license transfers as de facto merger review authority.[120] Reversing this position could be achieved by something as simple as the chairman of the FCC stating that the

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[119] *City of Lakewood*, 486 U.S. at 758 ("Only standards limiting the licensor's discretion will eliminate [the danger of speech infringement] by adding an element of certainty fatal to self-censorship.").
[120] FCC, *supra* note 21 (statement of Commissioner Michael O'Rielly, approving in part and concurring in part) (". . . I find the conditions being imposed, albeit less onerous than some of those extracted in past merger approvals, are unrelated to the transaction at hand. . . .").

commission would no longer review mergers because such review is outside its authority under current law. Any effort to resurrect such authority for the FCC should then be explicitly given by Congress. However, it is also unlikely that the FCC would voluntarily give up this authority.

Second, if the FCC is unwilling to constrain itself, Congress could explicitly remove the FCC's authority to review mergers. It is important to note that constraining the FCC's authority to review mergers would not leave the telecommunications industry mergers unreviewed. The Department of Justice (DOJ) currently reviews telecommunications mergers, with overlapping authority with the FCC. Instead of FCC reviews, however, the transaction review could be left with DOJ or given to the FTC, whose scope and jurisdiction already covers mergers in all industries, rather than the FCC's industry-specific focus.

Ending the FCC's merger reviews and leaving the reviews with DOJ and the FTC would achieve two goals. First, it would provide for a transaction review process that has clearly delineated standards. Currently, mergers reviewed by the FTC and DOJ are subject to welfare-based standards and analysis rather than to the FCC's amorphous public interest standard.[121] Second, because the FTC and DOJ both focus almost solely on anticompetitive effects across a number of industries, the incentive to use transaction review as a tool to extract other policies is much lower. The FCC, in its current form, is interested not merely in mergers but also in every facet of the telecommunications industry. This interest creates a strong incentive for the FCC to use its merger review authority to achieve other unrelated policy objectives. Such an incentive does not exist when the FTC and DOJ are reviewing mergers.

Another option, short of removing the FCC's transaction review authority, is to clearly articulate limits to the FCC's ability to condition merger approval. Specifically, the FCC's

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[121] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

statutory authority could be defined to include only those conditions sought to remedy merger-related harm.[122] The FCC could then be required to articulate the merger-related harms it identifies, to describe the remedy it seeks to condition approval on, and to provide some theory about how that particular condition will remedy that specific harm.

However, requiring the FCC to engage in such an analysis is useless unless there is some type of reviewability. In particular, parties should have an easier access to the appeals process for those conditions that a merging party believes to be unduly burdensome. As the process currently stands, parties for all practical purposes are unable to challenge the terms set out by the FCC. Allowing for some ex post judicial review could go a long way toward ensuring that the FCC conditions are not arbitrary, capricious, an abuse of discretion, or otherwise in violation of law.

Given the deference that courts give to agencies in the absence of clear statutory standards, such a review would require some clearly delineated standards. Congress or the FCC should provide some clear guidance on what the term *public interest* means within the context of the Communications Act. At the very least, Congress could define the public interest standard and could begin to place clear limits on the use of this standard for informal rulemaking through a transaction review.

Moreover, if Congress is truly interested in constraining FCC review authority, it should do away with the public interest standard altogether. Instead, a welfare-based standard—similar to that applied by courts in general antitrust cases—ought to be adopted. In that way, transaction reviews would shift away from the current standard, which is a grab bag of economic, social, political, and personal goals of individuals within the agency and in advocacy groups. The review could move toward becoming one that focuses on the actual

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[122] For a further discussion, *see* Beard et al., *supra* note 12. The FCC is empowered to enforce sections of the Clayton Act for common carriers. *See also* 15 U.S.C. 21(a).

competitive effects of a proposed merger. Adopting such a standard would also shift the burden within the FCC with regard to transaction review. Under a welfare-based standard, the agency would bear the burden of showing a merger's harm to competition rather than requiring merging parties to establish its benefit.

Conclusion

Regulatory agencies have natural incentives to engage in empire-building behavior, which is why most agencies have been constrained, in some way, by Congress and the courts. However, the FCC, through its public interest standard, faces few formal legal constraints on growing its power. Continuing to allow the FCC to have broad discretion to approve or deny transactions under a public interest standard violates basic rule of law norms and poses significant First Amendment problems.

As the agency uses its transaction review authority to extract concessions from individual companies, it has created a powerful tool for informal rulemaking that binds parties to policy goals that are otherwise unachievable in the formal rulemaking process. Moreover, it allows the FCC to pursue policy goals that are outside its jurisdiction. Because of such abuses, we propose doing away with the FCC's authority altogether, or, at the very least, reforming the process to better protect transaction reviews from the designs of political actors. Such reforms would be an exercise in good governance and would mitigate the possibility of a successful facial First Amendment threat to FCC transaction review.