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Comments On the FCC's Recent Mass Media Ownership Decision

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Comments On the FCC's Recent Mass Media Ownership Decision

Keywords

Federal Communications Commission (“FCC”), mass media ownership, freedom of speech, Third Circuit

ESSAYS

COMMENTS ON THE FCC'S RECENT MASS MEDIA OWNERSHIP DECISION

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Few, if any, Federal Communications Commission ("FCC") decisions in recent years have stirred up more controversy than the recent vote to eliminate or alter certain of its mass media ownership rules.¹ Taken as a whole these revisions will allow a somewhat increased ownership concentration of electronic mass media and greater cross ownership of electronic mass media and print media.² This determination is described as one of the most important in the FCC's history, and one with enormous implications for the right to

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1. Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73) [hereinafter 2003 Broadcast Ownership Rules].

2. *See id.* (increasing the ownership of television ("TV") stations serving from thirty-five percent to forty-five percent of national viewers and establishing cross ownership media limits for newspapers and broadcasters as well as radio and TV stations within the same markets).

freedom of speech.³ Storms of protest appeared in a variety of public fora, and both houses of Congress made efforts to nullify the FCC's decision.⁴ At present, the legality of the FCC's decision is under review in the Court of Appeals for the Third Circuit.⁵

FORWARD

This paper does not undertake the strictly legal defense of the FCC's decision. My purpose in these remarks is to address issues broader than the narrow legal questions with which the parties and the Third Circuit will wrestle. I will not provide detailed descriptions of the FCC's new policies and extensive citation to the record or to the FCC's decision. Rather, this paper addresses whether the FCC's new rules, which permit somewhat greater concentration of mass media ownership, represent a serious public policy concern. Of course, these narrow legal issues are part of a spectrum of public policy questions that deserve careful review; but I leave that to others.

My perspective is a result of my more than thirty-five years working on communications issues; at the FCC, the National Telecommunications and Information Administration, and in representing many broadcast and non-broadcast clients. As a retired member of the bar, I have no client interests to protect. This does not guarantee that my opinions are correct or beyond criticism, or even entitled to greater weight than those of a commercial or other programmatic advocate. However, it does mean that the views expressed here are purely my own, honestly, if not mistakenly formed.

My principal thesis is that the FCC's decision is entirely appropriate, balanced, consistent with applicable law, and squarely in the public interest. Everyone concerned with this subject can agree that protection of the First Amendment right to free speech is one of the bedrock principles of our society, and that no effort should be spared to protect those rights. In the present context, by statute and precedent, the key protections are the statutory encouragement of

3. Cheryl Leanza and Harold Feld, *More Than "A Toaster With Pictures": Defending Media Ownership Limits*, 21 COMM. L. 12, 19 (2003); Tom Shales, *Michael Powell and the FCC: Giving Away the Marketplace of Ideas*, WASH. POST, June 2, 2003, at C1.

4. See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 1, 97 (2004) (directing the FCC to modify the national television ownership limit to thirty-nine percent).

5. *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003) (granting stay pending full judicial review of the FCC's rules regarding media ownership).

localism, diversity, and competition in the provision of broadcast and broadcast-related newspaper ownership.

Yet, to the extent the FCC's resolution of the issues before it in the consolidated docket countenances some additional concentration of control, it does not weaken First Amendment values, as many critics seem to assume.⁶ As I will argue below, it actually boosts First Amendment protections by assuring that the private sector, which applies free market principles, can create well-resourced, experienced, and knowledgeable organizations better able to balance, or at a minimum to challenge, the overwhelming coercive powers of government. It is also important to balance the public's rights—admittedly the core concerns of the Communications Act⁷—with the practicalities of free market principles. Many of the criticisms seem to be premised on the notion that we should strive for the last humanly achievable degree of analytical and implementable perfection and finality in our analysis and resolution of the mass media concentration issues. I consider this unrealistic, and, if implemented, a serious misallocation of public resources which might better serve other pressing matters. Finally, I think there is a disturbing undercurrent of hostility towards the private sector animating much of the criticism.

I. WHAT THE FCC HAS DONE

As required by Section 161(a), enacted as part of the Telecommunications Act of 1996,⁸ the FCC has conducted biennial reviews of its ownership rules. In its most recent review, taking account of unprecedented developments in the mass media, such as the growth of cable, direct broadcast satellite ("DBS"), and Internet access, as well as recent judicial directives,⁹ the FCC concluded that its six major ownership rules must be revised. Under the twin statutory obligations that seek to (1) foster localism, diversity, and competition

6. See, e.g., Testimony of Dr. Mark N. Cooper, Director of Research on Media Ownership, Before the Senate Commerce Committee, at 3 (Oct. 2, 2003), at www.consumerfed.org/mediatestimony.pdf (arguing that the FCC has adopted a narrow view of the First Amendment, "offensive to the traditions of vibrant civic discourse").

7. Communications Act of 1934, ch. 655, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.* (2000)).

8. Telecommunications Act of 1996, Pub. L. No. 104-104, Title IV, § 402(a), 110 Stat. 129 (codified at 47 U.S.C. § 161(a) (2000)).

9. See, e.g., *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002) (vacating the FCC's decision not to repeal or modify the national television station ownership ("NTSO") rule and remanding it to the FCC for further proceedings); *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 169 (D.C. Cir. 2002) (remanding the local ownership rule to the FCC for further consideration).

in the electronic media, and (2) eliminate any of its existing ownership rules no longer deemed necessary to achieve those objectives, the FCC revised its national television ("TV") ownership rule to raise the ceiling to forty-five percent. The local TV ownership limits were revised to permit a single ownership for up to two stations in a seventeen station market, and up to three stations in a market of eighteen or more stations, but in no event common ownership of any two of the top four stations in a market. The radio-TV cross ownership rule and newspaper-broadcast cross ownership rules were eliminated and replaced by new cross ownership media limits. The local radio ownership rule was altered but the dual network rule remained unchanged.

The FCC's decision is some 250 pages long.¹⁰ It contains detailed legal analysis of the statutory framework, a history of the multiple ownership rules, and extensive policy analysis of the available options. The proceeding was one of the most extensive in the FCC's history, including three separate Notices of Proposed Rulemaking, many public hearings, over fifteen months of comment time and receipt of hundreds of thousands of comments from the public.¹¹ The FCC commissioned a number of media ownership studies to guide its deliberations and invited public comments on those studies. The decision carefully analyzes many proposed revisions as well as their relationships to each other and to the policy goals dictated by the Communications Act and applicable court precedent. It considered the meaning of localism, diversity, and competition in the context of the electronic media, particularly in relation to the vast explosion of relatively recent media outlets which can, in various ways, compete with and provide alternatives for the traditional broadcast and print media. Each of the revised rules was carefully formulated and a rationale for its adoption is provided in the decision.

10. See Federal Communications Commission, Report and Order Setting Limits on Media Concentration (Jul. 2, 2003) (256 pages), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.doc.

11. There appears to be some dispute about the actual number of comments. Commissioner Copps claims there were close to 750,000 public filings. Statement of Commissioner Michael J. Copps, dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, at 2 (June 1, 2003) [hereinafter Statement of Copps], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A9.pdf. In its stay petition in the Court of Appeals for the Third Circuit, Prometheus claims there were two million opposition comments. Brief for Appellant at 11, *Prometheus Radio Project v. FCC*, 2003 WL 22052896 (3d Cir. Sept. 3, 2003) (No. 03-3388). But of course this is a relatively trivial distinction. All parties conceded the massive extent of the public filings and that they were disproportionately opposed to the proposed rule revisions.

II. OBJECTIONS AND CRITICISMS

Despite the FCC's thoroughness in revising the rules, the criticism is widespread and passionate. The gist of that criticism seems to be that the ownership rules, as revised, will permit further concentration of mass media ownership. Critics contend that additional concentration will dilute localism, diversity of viewpoint, and competition. There is also considerable criticism of the rulemaking process itself; including allegations that the inadequacy of the FCC's consideration of the subject matter has led directly to misconceived rules. Perhaps the most vehement and elaborate criticism comes from Commissioner Copps and Commissioner Adelstein, both Democrats on a Republican-controlled five member panel. Commissioner Copps contends that the FCC's decision is substantively wrong because it "empowers America's new Media Elite with unacceptable levels of influence over the media on which our society and our democracy so heavily depend."¹² The FCC, he says, "surrenders to a handful of corporations awesome power over our news, information and entertainment . . . [and] treat[s] the media like any other big business, trusting that in the unforgiving environment of the market, the public interest will somehow magically trump the urge to build power and profit for a privileged few."¹³

I respect Commissioner Copps. He is bright, thoughtful and passionate about his work. But I find the sentiments quoted above from his dissent deeply disturbing. They convey a mind set which is anti-business and hostile to principles that lie at the heart of the free market economy. Modern American capitalism, imperfect as it is, has created the widest diffusion of wealth and the greatest standard of living ever known. Not incidentally, it has also produced a free speech environment unmatched anywhere in the world. The so-called "Media Elite," a description which I believe is intended to be opprobrious, are large, publicly-owned corporations. There is nothing disreputable about them, or their motives, and suggestions to the contrary are mere rhetoric at best and doctrinaire cant at worst.

12. Statement of Copps, *supra* note 11, at l.

13. *Id.*

III. THE COMMISSION'S DECISION IS FULLY JUSTIFIED AND ENTITLED TO SUPPORT

While space does not permit a detailed refutation of Commissioner Copps' dissenting views, at least his major concerns can be briefly addressed. He contends that the majority's decision violates the law because it does not encourage localism, diversity, and competition.¹⁴ But the FCC's decision describes in detail how the new rules can reasonably be expected to accomplish those objectives. The decision notes that the vast profusion of new media outlets, such as 500 channel cable systems, nationwide DBS systems, the Internet, and other new electronic distribution media, have radically altered the landscape.

Commissioner Copps criticizes the FCC's own studies, but provides no detailed analysis of their alleged shortcomings.¹⁵ He repeatedly suggests that a more detailed analysis of various rule changes should have occurred, and implies that such further analysis would have changed the results. A great variety of constituent issues, he says, should have been specifically addressed but were not.¹⁶ He asserts that individual markets should have been subjected to detailed review¹⁷ and further public comments on various aspects of the rules should have been sought and analyzed.¹⁸

There may well be substantive merit to some of his critique. One can always do more, consider more, think longer or deeper, but neither common sense nor the law requires that the FCC, or any administrative agency, is obligated to seek a degree of comprehensiveness or profundity which is unrealistic and would require incremental effort disproportionate to the presumptive improvement in the analysis.¹⁹

To choose one element of the dissent for further discussion, Commissioner Copps notes that the FCC assumes that greater efficiencies will produce more news. While observing that "[t]here is

14. *See id.* at 3 (opining that the majority decision has resulted in centralization, uniformity and monopoly).

15. *See id.* at 5 (condemning the FCC for its failure to subject its studies to public scrutiny and questioning the soundness of its methodology).

16. *See id.* (dismissing the FCC's review as a "meagerly financed inquir[y] that ignored many of the most critical questions").

17. *See id.* at 6 (stating that such individualized review could address displacement of local voices as a result of mergers).

18. *See id.* at 6 (asserting that a sixty to ninety day public comment period would have established "concrete input, analysis, and testing").

19. *See* 47 U.S.C. § 161(a)(2) (2000) ("The [Federal Communications] Commission . . . shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.").

no record to support such a sweeping conclusion,”²⁰ he makes his own sweeping conclusion that “[m]aximizing the number of independent owners increases the likelihood of a wider range of viewpoints.”²¹ Apart from the inconsistency in demanding record support for views he contests while simply asserting what he personally believes to be true, the basic problem is that no one really knows or can know how these complex interactive matters will work themselves out in the real world. The factors involved in the provision of broadcast content surely include distribution technologies, access to capital, return on investment, pursuit of market share, advertising revenues and leverage, program production arrangements and financing, cultural imperatives and limits, protection of intellectual property, and public service obligations. To take a concrete example, the AOL-Time Warner merger, which involved a hideously complex web of corporate and programming relationships,²² was widely touted at the time as the most important in history. It now appears to have failed to produce the benefits to the merger applicants anticipated at the time of its advocacy and approval.²³

I have no difficulty imagining that a smaller number of more professional, better resourced broadcasters or networks will do a better job of providing news and a diversity of viewpoints, than will a larger cadre of impecunious, barely surviving local outlets.²⁴ As Chairman Powell noted in recent Congressional testimony, the record shows that broadcast network owned-and-operated stations better served their local communities with respect to local news production, and TV broadcast-newspaper combinations produced a dramatically better quality and quantity of local broadcast news.²⁵ To

20. Statement of Copps, *supra* note 11, at 15.

21. *Id.* at 16.

22. See Alec Klein, *FCC Clears Way for AOL Time Warner Inc., Vote is 5-0, But Conditions on Messaging Draw Dissents*, WASH. POST, Jan. 12, 2001, at A1 (referring to the combination of print and entertainment media giant Time Warner and AOL, the nations largest e-mail provider, as “the biggest merger in corporate history, a marriage of old- and new-media titans.”).

23. See Tim Burt, et al., *It Has Been Four Years Since the Troubled Merger With AOL*, FIN. TIMES, Dec. 11, 2003, at 23 (calling the merger “one of the worst deals in US corporate history,” and enumerating problems with writeoffs, management turnover, stock price instability, government investigations, management upheaval, and the resignations of the merger’s leaders).

24. Anyone, like me, who has worked at a small local broadcast outlet, knows only too well that “rip and read” is generally the sum total of the news operation.

25. *Broadcast Ownership Biennial Review: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 108th Cong. 10 (2003) (written statement of Michael K. Powell, Chairman, FCC), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235127A1.doc.

put the matter differently, it is not that diversity, localism, or competition are unimportant; quite the contrary, everyone agrees they are crucial. Certainly the Communications Act directs the FCC to give great weight to localism, diversity, and media competition. The real question is how to achieve these goals. Simple reliance on close-to-the-ground local activists sounds mechanistic and even doctrinaire in the sense that it appears to replicate the Jeffersonian notion that democracy can best flourish in a nation of small farmers.²⁶

I do not mean to suggest that all of Commissioner Copp's views lack merit. I agree with him that broadcast licensees have a special duty to serve the public interest and it is quite clear that in many cases they do not. The remedy is to require additional public interest programming at license renewal time or to impose some sort of special purpose tax on the broadcast industry to fund non-commercial programming. Alternatively, if Congress and the public are not happy with the present law and the performance of existing licensees, thought should be given to adoption of an auction or lottery system like those used for cellular telephony, with the revenue used to provide or subsidize programming which is not otherwise available.

Similarly, Commissioner Copps' concern that merger applicants should be required to detail their plans for discharging the merged entity's public interest obligations is well taken.²⁷ One has to assume that when *prima facie* issues of concern about a particular merger are presented, the FCC will examine them conscientiously, regardless of whether the proposed merger would comply on its face with the new ownership rules. The relatively low level of female and minority media ownership was among the most important issues whose discussion was precluded as a practical matter by the sheer weight and complexity of the biennial review. But again those issues are outside the scope of the multiple ownership decision or will be addressed later by the FCC.²⁸

26. See JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* 60 (1988) (noting Jefferson's assertion that "the broad competence of the farmer in all matters relating to his own well-being provides a solid foundation for republican self-government").

27. Statement of Copps, *supra* note 11, at 18.

28. See Press Release, FCC, Chairman Powell Announces Intention to Form a Federal Advisory Committee to Assist the Federal Communications Commission in Addressing Diversity Issues (May 19, 2003) [hereinafter *Advisory Committee*] (discussing the role of the Diversity Committee, which includes advising the FCC on practices to increase diversity in the communications sector and reporting periodically on its progress), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234645A1.pdf (on file with the American University Law Review).

More broadly, we live in an imperfect world. The record before the FCC is massive, and the decision is detailed, thoughtful, and balanced. The additional data gathering and analysis suggested by Commissioner Copps would add to the already bloated record, further delay the decision, and lead to even more refined analysis of what is not really reducible to the degree of certitude he seems to want. The communication industry is very complex,²⁹ involving rapid technological developments and areas where rational decisions cannot go beyond informed judgment. If the FCC has not produced a defensible decision on the basis of the existing record, it is unlikely that an incremental round of yet more comments will shine the light of pure reason on the outcome. Hundreds of thousands of comments should be sufficient to permit a public body to inform itself of the merits, exercise its collective judgment, and move on to the next urgent matter on its agenda.

Searching for the perfect solution drives out good ones and, as Keynes so famously noted, “in the long run we’re all dead.”³⁰ In this context it is noteworthy that the statutory obligation to conduct biennial reviews of the ownership rules imposes enormous logistical and administrative burdens on the FCC. Of course, it also means the issues will be reexamined again in two years. It may be that the Congress’ desire to have constantly updated review of the ownership rules will actually have the effect of weakening any one analytical exercise because of the hangover from the last review or the need to prepare for the next. In sum, it seems to me that Commissioner Copps is looking for a degree of granularity that is unattainable in the real world and that the Congress may simply have outsmarted itself by compelling the FCC to conduct a virtually constant review of its media ownership rules.

And even if it were attainable, would it really lead to a more appropriate decision? We are not, after all, fitting a curve to a series of data points. The core issues are inherently difficult to address in formulaic fashion. While criticism of the FCC’s diversity index is widespread, the fact is that “diversity,” whether it is ownership or viewpoint diversity, is a very difficult concept to address.³¹ The

29. See generally Frank Aherns, *Media Giants Getting Together*, WASH. POST, Nov. 6, 2003, at E1 (describing just a few segments of the industry via a spaghetti diagram which dramatically illustrates the interwoven nature of the broadcast, newspaper, and Internet industries).

30. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923).

31. See *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 796-97 (1978) (noting that “diversity and its effects are . . . elusive concepts, not easily defined let alone measured”) (quoting *Nat’l Citizens Comm. for Broad. v. FCC*, 555 F.2d 938,

multifaceted nature of the subject industries, the public's shifting tastes and preferences, the rapidly evolving technology, and the ever-changing availability of capital, would render a decision with a higher degree of certainty difficult to obtain. One cannot say that the FCC's decision rests neatly and compellingly in perfect conjunction, on the one hand of data gathering and analysis, and on the other of its resources and other obligations. But, one can say that it is hard to show that it rests so far outside those parameters that it is legally suspect. I just cannot work up much anxiety over an increase in the allowed national TV ownership limit to forty-five percent from the prior thirty-five percent when the data show that no one outlet routinely attracts more than a tiny percentage of the national audience. The only real significance of the increase would be to permit certain TV networks to acquire a few additional local outlets to increase the cash flowing to them from clearance of their network programming.

As indicated above, this essay does not purport to provide legal analysis of the sufficiency of the FCC's decision to withstand judicial review. Over many years of appellate advocacy I have learned to my chagrin that the outcomes of such matters are not easily predicted. But by the normal standards of review this decision is easily sustainable for all the reasons alluded to above. The FCC has done a more than credible job gathering and analyzing data and formulating policy based on those data. Section 202(h)'s command to remove any ownership rules not "necessary" in the public interest certainly sounds like a presumption to me. Procedural claims that the Notices issued by the FCC provided inadequate warning under the Administrative Procedure Act, that the FCC failed to adequately consider public comments or to justify its policy choices, are strained and, as in the case of the substantive objections, simply seek to reach an unrealistic level of detail and comprehensiveness. There will be other dockets in the near future dealing with issues such as minority and female ownership.³² The public can always petition for rule making with respect to any particular issue or file petitions to deny any proposed merger or acquisition, and there are many issues that certainly deserve careful scrutiny. Nor should we lose sight of the coordinate jurisdiction of the Department of Justice ("DOJ") and the

961 (D.C. Cir. 1971)). Undoubtedly, the FCC's diversity index, which on its face is an incomplete and inconclusive concept, was prompted by judicial criticism of prior FCC media ownership decisions in which there was no serious effort to quantify diversity in particular markets.

32. See Advisory Committee, *supra* note 28.

Federal Trade Commission (“FTC”) in the application of antitrust law to broadcasters and newspaper publishers. The Communications Act imposes a different standard than do the antitrust laws, but where allegations of undue concentration of control arise, the FCC is not the only arena in which to formally address such matters.³³

Moreover, if there are deficiencies in FCC decisions, petitions for reconsideration are always available to disgruntled parties. Similarly, the suggestion that the FCC will merely rubberstamp any merger applications filed pursuant to its new rules is difficult to accept. It is well known that the FCC is bound to consider petitions to deny meeting a minimal threshold as well as waiver petitions. It is hard to believe that when presented with *prima facie* evidence that one or both merger applicants has a history of abuse of the public interest, whether it is obscenity, violence, or racist or sexist programming, the FCC will simply brush it aside because the proposed merger fits within the existing ownership caps. And if it should do so, the courts stand ready to review that determination.

Those loudly protesting the FCC’s decision seem to fall into three groups: the general public, professional public interest advocates and, of course, the Congress. Interestingly, there appears to be no political dimension to the protests: both the left and right appear unhappy with the FCC’s choices.³⁴ But, let us look briefly at each group. As to the general public, it is commonly known that readership of daily newspapers has been declining for many years, and that most Americans get the bulk of their news from television.³⁵ I find it difficult to believe that there is widespread concern among the public about subtle and abstract issues of media diversity. The great majority of the public comments submitted to the FCC were, to be blunt, canned, and it is likely only a tiny percentage of those putting their names on the comments had a very good grasp on the rule changes adopted in the FCC’s decision. No doubt, as a pure abstraction, the public would prefer diversity of viewpoint and more

33. One should call to mind the major role played by the FTC in the AOL-Time Warner merger, and the careful review of the EchoStar-DirecTV merger last year by the DOJ. See Frank Aherns, *Satellite TV Deal Revised, and Rebuffed*, WASH. POST, Nov. 1, 2002, at E1 (reporting that the DOJ filed suit in U.S. District Court in the District of Columbia to stop this merger valued at \$20 billion); Klein, *supra* note 22, at A1 (reporting the FTC settlement that allowed Time Warner to overcome antitrust issues in its acquisition of AOL by allowing AOL’s internet rivals access to Time Warner’s cable lines).

34. See Statement of Copps, *supra* note 11, at 7 (noting the nonpartisan nature of the opposition stating that the FCC had heard bipartisan concern from more than 150 members of Congress).

35. See Sinclair Broad. Group v. FCC, 284 F.3d 148, 163 (D.C. Cir. 2002) (citing a study indicating that nearly 70 percent of adults get their news from television).

local news. But, abstractions do not take us very far in a web of complex rules or elusive concepts like diversity, localism, and multiple interrelated policy considerations.

The public interest professionals, of course, have a far more sophisticated grasp on the subject matter. Without suggesting that their views are not entitled to careful consideration, or that they do not perform an important public service (perhaps precisely because the general public is almost always poorly informed or too busy to get involved in detailed analysis), we should also keep in mind that the imperatives of such organizations are to mount campaigns, demonstrate their usefulness to their supporters, justify their existence, and seek notoriety.

The most puzzling locus of public criticism resides in the Congress. Since that body itself directed the FCC to look skeptically at the preexisting limits on ownership, one might have thought that the FCC's decision would have found favor on the Hill. Without question, Congress must have been barraged with objections to the FCC's decision. Perhaps the lobbying groups that promoted the hundreds of thousands of public comments also lobbied Congress. It may also be that incumbents deem reelection campaigns less onerous if the media are more localized and therefore more interested in local political issues or more easily persuaded to provide favorable coverage. Perhaps there was concern that too much concentration in mass media ownership would give the media owners too influential a voice in public discourse.

With respect to the wide spectrum of public unhappiness about the decision, we can rely on the overarching discipline of the marketplace. Commissioner Copps says we should "trust in the wisdom of the American people."³⁶ I agree. Unlike the Commissioner, however, I do not think the FCC should be a pollster, and from many years of filing comments and pleadings at the FCC, as noted above, one must be deeply skeptical about the independence and depth of the hundreds of thousands of comments received at the agency. But it is the viewing/listening/reading public which ultimately pays, directly and indirectly, for the mass media. If the public does not like what the "media barons" are producing, it can reduce or withdraw its support. The message will get through, and will do so without undue and inappropriate tinkering, fine-tuning, and value-setting by government officials. Indeed, the less government is involved in establishing, protecting, or advancing the

36. Statement of Copps, *supra* note 11, at 2.

instruments of free speech, the better. Although of course, it is an important and legitimate governmental function to assure freedom of speech, as the Supreme Court and many other courts have held.

If the public wants more local programming, it can support entities that are prepared to provide it. If the public is unwilling to pay for such services, then it is unrealistic to demand their provision by licensees who have stockholders and investors to satisfy. Nor does this approach disregard the law's emphasis on localism and diversity. The FCC is not really in a position to compel the provision of more or better local programming than the public is ready to support.³⁷ Of course, private sector markets are not perfect devices for resource allocation; no social system is perfect. But as Harvard's President Summers noted, in expressing caution about the view that there is something wrong with a system where we are able to buy bread only because of the greed or profit motive of the people who make the bread, we all have only so much altruism. "Far better to conserve it by designing a system in which people's wants will be satisfied by individuals being selfish, and saving that altruism for . . . the many social problems in this world that markets cannot solve."³⁸

I close by coming back to the fundamental importance of diversity of views in a free society. In a modern democratic post-industrial society, the government is crucial for economic and political security. But it is also, and simultaneously, the greatest danger to both, because it possesses massive coercive powers over every one of us. Second only to the separation of powers doctrine, the presence of a free, robust press is the greatest counterbalance that the public possesses. I am far less concerned about large media conglomerates—even if the local news is not locally produced—than I am about the powers of a government which is not meaningfully constrained by a powerful free press. And I do not believe that hundreds or thousands of local media outlets possess such power or can realistically challenge government authority.³⁹ Organizations like

37. To draw again on personal experience, many years ago considerably more emphasis was placed on showings concerning localism and diversity in licensing (especially comparative licensing) proceedings. By and large the proposals considered by the FCC were the shallowest sort of window-dressing and it is to be doubted that the public derived much meaningful value from such exercises.

38. *Economics and Moral Questions*, HARV. MAG., Nov.-Dec. 2003, at 64.

39. The recent flap about CBS' decision not to broadcast a program allegedly critical of President Reagan following political objections from various quarters, merely serves to illustrate that even the largest of the media companies lives in a world of many shifting constraints and that government or its proxies possesses the power to intimidate even without actually taking any specific action. See Lisa de Moraes, *CBS Pulls 'Reagans' Miniseries Network: Show is Not 'Balanced'*, WASH. POST, Nov. 5, 2003, at A1 (reporting that Viacom will air the program on Showtime, a pay

the national networks, cable multiple owners, or the *New York Times* and *Washington Post*, are far more likely to pose a significant counterweight to any government tendency to abuse its powers than are local outlets with limited resources. If we have to choose, or if there is a balance to be struck here—and of course there is—I would rather see strong media with somewhat less “diversity” and less attention to local affairs than more local media each with fewer capabilities to constrain government power.⁴⁰

cable channel instead of CBS because the company believed that “a free broadcast network, available all over the public airwaves, has different standards than media the public must pay to view”).

40. I recognize that local government must also be subject to meaningful constraints. Abusive municipal or county governments should be disciplined by strong local media to the extent feasible. But it is within the larger governments, state and federal, where serious abuse of government power is more likely to arise.