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## The Politics And Policy Of Media Ownership

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# The Politics And Policy Of Media Ownership

**Keywords**

Media Ownership, Media Concentration, Federal Communications Commission (“FCC”), Congress, media legislation, media policy

# THE POLITICS AND POLICY OF MEDIA OWNERSHIP

BEN SCOTT\*

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## INTRODUCTION

History will look back at June 2, 2003 as an important moment in American media policy making. On that day, the Federal Communications Commission (“FCC”) voted controversially to relax broadcast ownership limits after completing a mandatory review of its regulations.<sup>1</sup> It was not a routine set of rule changes, but a striking change in the structure of the media system. The decision opened up cross-media ownership in the same market, inviting newspapers and broadcasters to operate under one roof in every major city. It also permitted a substantially increased media concentration in local

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Much of the information provided in this essay was the result of Mr. Scott's first-hand knowledge of events acquired while working with Congressman Sanders. The Congressman played a leadership role in the debate over media ownership in 2003, a role which placed his staff in the midst of a highly detailed and lengthy legislative process. As a result, Mr. Scott was a participant in many internal staff meetings, briefing sessions, and inter-office communications which tracked and influenced the various legislative vehicles as they advanced through the Congress.

1. See Stephen Labaton, *Regulators Ease Rules Governing Media Ownership*, N.Y. TIMES, June 3, 2003, at A1 (reporting a split, party-line vote in which the three Republican members of the FCC voted in favor of the changes and the two Democratic commissioners dissented).

and national television markets, tilting market conditions to favor larger firms and conglomerates. The new rules would permit one company in one city to own three television ("TV") stations, eight radio stations, the daily newspaper, and the cable system. In his dissenting statement, Commissioner Michael Copps called it "the granddaddy of all reviews. It sets the direction for how the next review will get done and for how the media will look for many years to come."<sup>2</sup>

Public response to the new rules was overwhelmingly negative,<sup>3</sup> and, in turn, congressional response<sup>4</sup> was swift and vocal. Through the final six months of 2003, in one of the most bitterly divided congressional sessions in recent memory,<sup>4</sup> a campaign was waged to reverse the rule changes made by the FCC.<sup>5</sup> Remarkably, the policies and regulations which shape the media system became political issues for the American people.<sup>6</sup> Arguably, this had not happened for seventy years since the FCC was formed and the modern system of broadcast governance was established by the Communications Act of 1934.<sup>7</sup> Even more remarkably, it was not a partisan effort. From Senator Trent Lott (R-MS)<sup>8</sup> and the National Rifle Association ("NRA")<sup>9</sup> to Representative Bernie Sanders (I-VT)<sup>10</sup> and

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2. Statement of Commissioner Michael J. Copps, dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, at 4 (June 1, 2003) [hereinafter Statement of Copps], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A9.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A9.pdf).

3. See Tom Shales, *Michael Powell and the FCC: Giving Away the Marketplace of Ideas*, WASH. POST, June 2, 2003, at C01 (describing the extensive opposition to the rule changes by a wide-ranging number of individuals and organizations).

4. See Helan Dewar, *Democrats Forced to Work on Margins*, WASH. POST, Dec. 22, 2003, at A06 (discussing the absence of partisanship in Congress as setting the stage for an even more bitter session in 2004).

5. See generally ROBERT W. MCCHESENEY, *THE PROBLEM OF THE MEDIA* 252-295 (2004) (discussing the uprising of 2003 in opposition to the ownership rules).

6. John Nichols, *Congress Rebuffs the FCC*, THE NATION, Aug. 18, 2003, at 36 (describing the organization of grassroots campaigns in opposition to the FCC rule change).

7. See 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-615 (2000)). See generally ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935* (1993) (describing the contest between the early broadcasting corporations, the government, the public, and a coalition of public interest advocates over how the broadcast spectrum would be regulated by the government in the early days of radio).

8. See John Nichols & Robert W. McChesney, *Standing Up to the FCC*, THE NATION, June 23, 2003, at 5 (reporting Senator Lott's statement that "[a] lot of Republicans, in fact, probably most of the Republicans in Congress, would not agree with this decision.").

9. See Thane Peterson, *Why the FCC Needs a New Chief*, BUS. WK. ONLINE, Sept. 8, 2003, at [http://www.businessweek.com/bwdaily/dnflash/sep2003/nf2003098\\_6743\\_db028.htm](http://www.businessweek.com/bwdaily/dnflash/sep2003/nf2003098_6743_db028.htm) (noting the NRA's opposition to the rule changes) (on file with the

MoveOn.org,<sup>11</sup> the entire political spectrum was represented in a strange-bedfellows coalition of opposition.

But, from a longer term perspective of media policy making, the second of June was not a wildly aberrant moment in U.S. media regulation, though it was an abrupt change of pace. Nor did the ruling necessarily have to become the political catalyst that it did, knocking over a row of dominoes that awakened the American public and its Congress in dramatic fashion. In retrospect, it appears, the day of the vote was a flashpoint where the political objectives of media policy most recently reaffirmed by the architects of the Telecommunications Act of 1996<sup>12</sup> collided with the sensibilities (political and otherwise) of the American public. Simply put, the direction of communications policy was leading steadily to the concentration of media control in the hands of a few large corporations. The American people and a majority of their representatives concluded that it was not such a good idea. The conflict produced the most notable congressional battle over media policy in generations.

Why did it happen in 2003? How and why was the congressional move to reverse the rule changes sustained? How and why did it ultimately stall? Will the issue return to the fray in the future? These are the questions at issue in the comments that follow. In distilled form, the primary arguments that will seek to offer some answers are: (1) the 2003 debate over media ownership marks an important publicizing of media regulation as a political issue; (2) the power politics of the federal regulatory process and policies that favor deregulation and corporate interests are now opposed by legitimate counter-forces, serious scrutiny of the process, and a policy agenda of public service and accountability; (3) the political story in this contest is not exclusively the emergence of grassroots pressure which leveled the playing field in media policy-making, but also the politics of a powerful minority that denied public and congressional majorities; and (4) despite failing to achieve legislative results, public interest media policy has captured public momentum and congressional

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American University Law Review).

10. See John Nichols & Robert W. McChesney, *FCC: Public Be Damned*, THE NATION, June 2, 2003, at 5 (noting that Representative Saunders and others circulated a letter to Democratic congressmen asking the FCC to postpone the vote on the rule changes and seek additional public comment).

11. See *id.* (describing that this web based advocacy organization is urging its "media corps" to protest the FCC's vote on the rule changes).

12. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C. and 47 U.S.C.).

attention to such a remarkable degree that legislators will certainly continue to pursue a populist agenda on ownership as well as other media issues.

#### I. FRAMING THE MEDIA OWNERSHIP DEBATE

As in most legislative clashes, the media ownership debate was about conflicting policy objectives. Quite typically, this policy conflict was played out through a series of political maneuvers as members of Congress jockeyed for position in the legislative process, worked to attract and shape media attention, curried favor with interest groups, negotiated pressures within their party structures, and marshaled public pressure to bring support to their side of the cause. All of this was done in hopes of winning a legislative result. Because the 108th Congress is marked by extreme partisanship, it is tempting to suggest (as some have) that this debate was *only* about politics, that there were no policy ideas beneath the opposition's attack and that it was purely a counter-factual campaign against the FCC that happened to serve political purposes.<sup>13</sup> It is true that the political climate dictated the manner in which Congress reacted to the June 2 decision. It confused and shrouded the matter in partisan acrimony on Capitol Hill, and it ultimately led to an outlandish compromise worked out by Republicans. But, it would be a mistake to conclude this was the primary meaning of the contest. In fact, it would miss the most significant development in media policy making in generations: the genesis of a new set of policy ideas to serve public interest media objectives supported by a bipartisan coalition of lawmakers and citizens.

The emergence of these new principles of policy making to challenge the status quo stands in contrast to the scant opposition of the past.<sup>14</sup> For decades, there has been one dominant set of policies driving governance of the media system: gradual deregulation, free market economics, and the reduction of direct public accountability. The prevailing idea has been to use the FCC's regulatory powers to set and reset market conditions over time to favor large, vertically integrated firms.<sup>15</sup> Producing market efficiencies has been conflated

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13. See Jube Shriver, Jr., et al., *FCC Ruling Puts Rivals on the Same Wavelength; Public Opinion, Political Self-Interest Spur Many in Congress to Unite Against New Media Rules*, L.A. TIMES, June 9, 2003, at A1 (suggesting that special interest groups such as the NRA and NOW influenced the political approach).

14. See generally HUGH R. SLOTTEN, *RADIO AND TELEVISION REGULATION* (2000) (tracing the role of the federal government as the guardian of public interest during the developmental periods of the broadcast industry).

15. Although it may appear that deregulation cedes public control to the forces

with the goal of serving the public interest. Other policy solutions have been basically off the legislative table, just as the entire issue has been off the public radar. This issue has rarely been judged politically significant by the usual conveners of public discussion—the news media, political parties, and educators—and most people are unaware of even the basic facts of media regulation. A June 2002 survey demonstrated that only thirty-one percent of Americans were aware that the broadcast airwaves are owned by the public, and eighty-nine percent were unaware that broadcasters receive their station licenses for free in exchange for public service.<sup>16</sup>

Yet, when the FCC opened its biennial review of the broadcast ownership rules in the fall of 2002, the political climate on the issue changed. The standard deregulatory agenda met with stiff resistance. Further, a set of ideas long advocated by only a handful of public interest groups and academics percolated to the surface across the political spectrum. This opposition put forward three simple claims: (1) control over the media system was already in the hands of too few; (2) the FCC should not permit further concentration of ownership; and (3) Congress should reevaluate how the public regulates its media system to find ways to better serve the interests of the people.<sup>17</sup> These concepts had enormous resonance for millions of Americans for a broad assortment of reasons, and became the foundation of what may become a new congressional policy platform. Remarkably, all three would hold together and retain bipartisan support throughout the hotly contested political fight.

Precisely why this happened at this moment in time is unknown, but a few contributing factors can be identified. First, it was the

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of the market, it is worthwhile to point out that this is a misnomer. The broadcasting industry is built on public grants of monopoly spectrum rights. Licenses are administered strictly or loosely, in ways that favor some industry players over others. Loose regulation is not deregulation; it chooses winners and losers just as surely as strict regulation. It unleashes market forces that have very predictable results: consolidation and conglomeration. Deregulation, when used in this essay, should be interpreted to mean regulation that favors players with natural market advantages such as size, capital, and vertical integration of production and distribution facilities. *See generally* ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY* 146-59 (2000) (clarifying the nature of the current media deregulation as favoring existing large media corporations rather than promoting competition).

16. *See* ALLIANCE FOR BETTER CAMPAIGNS, POLITICAL STANDARD—NATIONWIDE SURVEY FINDS THAT MOST AMERICANS SUPPORT FREE AIR TIME, DON'T REALIZE THE PUBLIC OWNS THE AIRWAVES (June 2002), at <http://www.bettercampaigns.org/standard/display.php?StoryID=238> (last visited Jan. 22, 2004) (on file with the American University Law Review) (providing the results of a poll conducted by the Pew Research Foundation).

17. *See* Statement of Copps, *supra* note 2, at 9 (illustrating the potential problems of the FCC's decision, and noting the problems that have already occurred in radio ownership since the enactment of the Telecommunications Act of 1996).

initial review conducted during the George W. Bush administration. The White House made plain its desire for the accelerated dismantling of government controls in the media marketplace.<sup>18</sup> Consequently, the review which opened in September 2002 seemed likely to be a departure from the beaten path of gradual deregulation. Several large media companies filed comments with the FCC arguing that ownership rules should be totally eliminated.<sup>19</sup>

Second, some of the regulations made during the previous review had been vacated or remanded by the courts.<sup>20</sup> This led many to believe that radical change was necessary to satisfy new legal requirements.

Third, the FCC's Chairman, Michael Powell, held only a single public hearing on the matter.<sup>21</sup> This prompted the minority commissioners, led by Michael Copps, to begin touring the country to speak at a series of highly publicized, well attended, and unofficial hearings.<sup>22</sup>

Fourth, the American media system was experiencing a crisis in confidence directly linked to deregulatory economics. The deregulation of the radio industry in 1996 seemed to have gone wrong thus permitting Clear Channel to explode from forty stations to more than 1200, and precipitating a decline in local control over programming.<sup>23</sup> FCC Chairman Powell, testifying before the Senate Commerce Committee, conceded that he was "concerned about

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18. See Nichols & McChesney, *supra* note 10, at 5 (noting that the Bush administration applauded Chairman Powell's decision to hold the June 2, 2003 vote).

19. See Yochi J. Dreazen, *Media Seek to End Ownership Rules*, WALL ST. J., Jan. 3, 2003, at A8 (identifying the commenting companies as Viacom, General Electric, and Fox Entertainment Group).

20. See *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002) (finding that the local ownership rule is overall constitutional; however, the definition of "voices" is "arbitrary and capricious," thus remanding the rule to the FCC); see also *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002) (vacating the FCC's decision not to rescind or amend the National Television Station Ownership ("NTSO") Rule or the Cable/Broadcast Cross-Ownership ("CBSO") Rule, remanding the retainment of the NTSO to the FCC, and repealing the CBSO). Notably, the court did not rule that the ownership regulations *could* not be justified. It ruled that they *had* not been justified. *Id.* at 1051. This is not surprising, given that the FCC, as mandated by the 1996 Act, was instructed to thoroughly review and justify its ownership rules every two years. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (2003). This pace of study is arguably unsustainable by any federal agency and is considered by many lawmakers to be a mistake.

21. See Nichols & McChesney, *supra* note 10, at 5 (noting that Chairman Powell declined to participate in several other unofficial hearings that other FCC commissioners attended).

22. Peterson, *supra* note 9.

23. Statement of Copps, *supra* note 2, at 9.



media concentration, particularly in radio.”<sup>24</sup> Perhaps more visible, high profile journalists were publicly expressing their alarm that economic pressures were reducing the quality of the American news media and degrading the quality of the public debate.<sup>25</sup>

Finally, in the early months of 2003, the country prepared and began a controversial war in Iraq, an event which sparked criticism over the quality and diversity of media coverage.<sup>26</sup> As a result, there was a great deal more than the usual inside-the-Beltway hue and cry when the June 2003 ruling began to loom on the horizon. Perennial public interest advocates like Consumers Union, Center for Digital Democracy, and the Consumer Federation of America were no longer alone in contesting the FCC. Beside them stood unlikely partners such as the NRA, Parents Television Council, and the National Council of Churches. These organizations launched a highly successful effort to educate concerned citizens and direct attention to the FCC proceeding. By June 2, over 750,000 individual petitions reached the FCC, asking the Commissioners to eschew further media concentration.<sup>27</sup>

Despite the opposition’s visibility, the central message conveyed by that media attention was limited to stopping the FCC from loosening ownership limits. The purpose of advocating this position and the expanded outlook of their policy objectives remained murky. The unified call for public service was blurred by the various priorities of the different groups.

Consequently, when the June ruling prompted a further intensification of the outcry and a boiling congressional backlash, but not a clear policy alternative, some interpreted the contest as a political attack by an embattled minority, not a legitimate policy challenge. For example, *The Christian Science Monitor* suggested that basically this fight was about lawmakers protecting local media voices because they could exert more influence on them during elections.<sup>28</sup> Additionally, a *Wall Street Journal* editorial portrayed the ownership

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24. Robert W. McChesney & John Nichols, *Media Democracy’s Moment*, THE NATION, Feb. 24, 2003, at 17.

25. See generally LEONARD DOWNIE JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL (2002) (book-length media critique by two Washington Post editors); INTO THE BUZZSAW: LEADING JOURNALISTS EXPOSE THE MYTH OF A FREE PRESS (Kristina Borjesson, ed. 2002).

26. See, e.g., Robert S. Pritchard, *The Pentagon is Fighting—and Winning—the Public Relations War*, USA TODAY MAG., July 1, 2003, at 12 (describing the criticism that the Pentagon only allowed a positive portrayal of the war through embedding journalists with soldiers).

27. Statement of Copps, *supra* note 2, at 7.

28. *Tuning Out the FCC*, CHRISTIAN SCI. MONITOR, July 25, 2003, at 10.

debate as a covert effort by Democrats to suppress conservative radio talk shows.<sup>29</sup> Critics heightened misperceptions throughout the debate claiming that the public simply did not understand the technical and legal details of media regulation, and that members of Congress saw a political opportunity to champion a popular issue by manipulating public viewpoints. Viacom chief Mel Karmazin said this about the backlash: "We're troubled by it, it's political, it's not motivated by fact."<sup>30</sup> Chairman Powell commented in June that critics had a "dramatic misunderstanding of the substance of what was at issue,"<sup>31</sup> and he concluded later in the fall that "people ran an outside political campaign against the commission," a campaign which ignored the facts.<sup>32</sup>

This set of claims, purporting that the ownership debate had more to do with political chicanery than a good-faith response to the facts of policy making, are misguided. There are two central factors which support this point; an unshakeable bipartisanship, and the serious congressional scrutiny of the policy objectives.

Undeniably, the coalition began bipartisan and remains bipartisan. It is not a creation of the Democrats, nor is it motivated by ideological rancor. The perceived likelihood of a reduction in localism, diversity, and public control over the media system is unpopular across the political spectrum. If this was a political campaign against the Republican administration and the FCC, it would be hard to explain why so many Republicans remained supportive of proposals to roll back the FCC's decision.

The politics to which they are responding belong to their constituents. Columnist William Safire summed it up in the days before the decision: "The *concentration* of power—political, corporate, media, cultural—should be anathema to conservatives. The *diffusion* of power through local control, thereby encouraging individual participation, is the essence of federalism and the greatest expression of democracy."<sup>33</sup> Former Senator Jesse Helms of North Carolina seconded these sentiments in a letter to Senator Trent Lott on the eve of a key vote. He wrote, "I can think of no reason to allow

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29. *The Stop Rush Campaign*, WALL ST. J., Sept. 12, 2003, at A10.

30. Todd Shields, *Nets Try to Regain Ground*, MEDIAWEEK.com, July 28, 2003, at [http://www.mediaweek.com/mediaweek/headlines/article\\_display.jsp?vnu\\_content\\_id=1942827](http://www.mediaweek.com/mediaweek/headlines/article_display.jsp?vnu_content_id=1942827) (on file with the American University Law Review).

31. Stephen Labaton, *F.C.C. Chief Talks of Frustration and Surprise*, N.Y. TIMES, Sept. 22, 2003, at C1.

32. *Id.*

33. William Safire, *The Great Media Gulp*, N.Y. TIMES, May 22, 2003, at A24 (emphasis added).

fewer companies to own more and more of the media! Media ownership is a bipartisan issue that commands a close review by Democrats and Republicans.”<sup>34</sup>

Senator Lott took this message to the Senate floor to dispel any notion that reevaluating media deregulation was politically motivated. In his remarks on September 11, 2003 he emphasized the two most significant elements of the bipartisan coalition as evidenced by comments made by both the AFL-CIO and the NRA. “Here is an interesting thing about this alliance. This is a diverse group, and they generally represent people, individuals.”<sup>35</sup> If indeed there was a political campaign involved in the ownership debate, it was engineered by conservatives and liberals making up a broad cross-section of the American polity.

The idea that the campaign was without a basis in fact or without policy counterproposals is betrayed by the sentiments and actions of its congressional leaders. The rejection of the FCC’s rules makes little sense without a clear intent to revisit the principles and methods of public media regulation. This conflict marks the reversal of a consistent policy trend toward deregulation and the point of departure for new thinking on public service controls in the marketplace. Any rollback of the FCC rules which was not followed by further legislative inquiry would amount merely to resetting the clock to June 1 and resuming the policy directives that produced June 2. Moreover, it would leave the FCC in a serious mess, faced with legal remands, review deadlines, and an uncertain directive from Congress. The baseline conclusion is clear; the effort to reverse the rule changes was aimed at scrutinizing the method *and* changing the policy which produced the changes.

Members of Congress have already begun the process of studying and shaping the contours of a new, bipartisan media policy platform of local media control, ownership limits, and public accountability. The desire to roll back the rule changes was not based on longing for the pre-June 2 world. Instead, it was based on the understanding that deregulation policies were failing and needed principled reconsideration with new policy goals. Senator McCain, in the September 11 debate on media ownership, stated that, “[w]hether we agree with them or not, the FCC’s actions are a direct result of the

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34. See Letter from former Senator Jesse Helms to Senator Trent Lott (Sept. 15, 2003), at <http://www.mediareform.net/multimedia/Helms.pdf> (on file with the American University Law Review). Senator Helms’ to Senator Lott was widely circulated among Congressional offices.

35. 149 CONG. REC. S11,389 (daily ed. Sept. 11, 2003) (statement of Sen. Lott).

direction given to it by Congress in the Telecommunications Act of 1996, which should have been called 'Leave No Lobbyist Behind Act of 1996.'"<sup>36</sup> Senator McCain concluded that, "[i]n short, if the Congress is unsatisfied with the result of the FCC review, it should step in to provide new direction."<sup>37</sup> Senator Lott agreed, replying in the same debate; "I share a lot of [Senator McCain's] concerns and questions. I know from my discussions with him, and he knows, we need to do more in this area. . . ."<sup>38</sup> Representative Bernie Sanders was even more specific, arguing that "[r]olling back the national TV ownership cap is the first step in this fight. . . . [It] should be considered a first step in the larger movement to reform the media system and set the FCC on a regulatory course that serves the public interest not big media companies."<sup>39</sup>

These sentiments explain why Senator McCain's Commerce Committee held *eight* full committee hearings on the topic of media ownership in 2003.<sup>40</sup> Senator McCain later referenced the development of his thinking over the course of the year by saying, "[a]s a result, I have come to believe that stringent, but reasonable, limits on media ownership may very well be appropriate."<sup>41</sup> The record demonstrates that Congress intends to revisit the issue and craft new policies. This interest explains the growth of the Public Broadcasting Caucus to 100 members and the formation of the Sex & Violence in the Media Caucus—both bipartisan working groups on media issues in the House of Representatives. In addition, members of Congress are planning to conduct town meetings in their districts in states like Vermont, California, and New York.

Congress was not preparing to render the FCC powerless and without direction. The legislative move to reject the June 2003 changes to the media ownership rules was indicative of the first steps in the formation of a new policy agenda. More work was forthcoming, as by no means did Congress write or debate a

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36. 149 CONG. REC. S11,385 (daily ed. Sept. 11, 2003) (statement of Sen. McCain).

37. *Id.*

38. 149 CONG. REC. S11,387 (daily ed. Sept. 11, 2003) (statement of Sen. Lott).

39. Press Release, Representative Bernie Sanders, Sanders Calls Rollback of FCC Rules "First Step in Larger Movement" (July 23, 2003), at <http://bernie.house.gov/documents/releases/20030723184339.asp> (on file with the American University Law Review) (quotations omitted).

40. See U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, HEARINGS, at <http://www.commerce.senate.gov/hearings/index.cfm?cong=108&sessn=1&subc=58> (last visited Mar. 14, 2004) (listing subject matter and dates of all full committee hearings).

41. 149 CONG. REC. S11,385 (daily ed. Sept. 11, 2003) (statement of Sen. McCain).

comprehensive policy proposal. But, it legitimately placed on the table the idea that public service regulation was not equivalent to market efficiencies, and might well be in conflict with them. This idea alone marks a turning point as Congress is now inclined to pursue untried methods of media regulation by seeking new policies and a better balance between market forces and public rights. It is quite fair to state that the contest over whether a rule rejection would succeed marked a clash between two oppositional policy priorities; not a policy-less political attack on the status quo.

It is then also fair to ask, if politics did not constitute the driving force behind the opposition, what role did they play? The role of politics was indeed a powerful one, but it was primarily involved in guiding the process, not the substance, of the debate. Opponents of the FCC sought to keep legislative vehicles for rejecting the rule changes alive for as long as possible, a difficult task in a Congress led by FCC supporters and the policies of deregulation. They used the political advantages of broad public support, an unlikely bipartisan coalition, and the attractive simplicity of the message of the “public versus big media.” Conversely, supporters of the rules used the political power of leadership to block legislation and to leverage targeted industry lobbying. In addition, GOP leaders pressured conservative members to withdraw from the coalition, and they worked to whittle down the winnable objectives of the reformers to only one of the rule changes.

There is a good case to be made that the most impressive political power demonstrated in the media ownership debate was not the force which brought the issue to public attention and onto the congressional agenda. The most impressive political power was the force which defeated the rollback—overcoming the weaknesses in the ruling, repelling the major elements of reform in every shape they took (despite majority support), engineering a compromise, and ultimately denying a move toward new policy interests. The short-term success of the FCC’s defenders was very near total as a result of their aggressive political tactics.

I suggest there is a great deal of evidence to support this contention. For example, the FCC and its supporters defended a record containing substantial flaws in its process and method. Though Congress performed much of the review with a great deal of care, there are central elements that are intellectually indefensible. No matter which policy approach Congress preferred, methodological problems in the production of data sets and studies shaping the rules are difficult to ignore. At the very least, they call for

further review and correction; a process wholly consistent with the objectives of the reformers and not inconsistent with the arguments supporting the ruling more generally. Even if the Chairman's primary arguments are conceded in their entirety (which they have not been),<sup>42</sup> the presence of serious flaws in the logic, procedure, and analytical models used by the FCC would pose considerable problems for opponents of a rule reversal.

The two dissenting commissioners issued lengthy reports articulating many of the rules' problems.<sup>43</sup> Consumer advocacy groups and public interest attorneys brought to light other problems.<sup>44</sup> They later took these arguments before the Court of Appeals for the Third Circuit where they won a stay on the implementation of the rules.<sup>45</sup> The most troublesome problems included inadequate public hearings, constrained periods of public review, contradictions in the logic of the ruling, faulty assumptions, inconsistent application of principles, dubious interpretation of statistical results, and a disregard for critical comment and data in the evidentiary record.

The present study does not purport to conduct a systematic review of the quality of the ruling, but it does seek to provide a few examples of the most egregious problems demonstrating the weaknesses that might reasonably justify Congress's intervention. Commissioner Copps wrote in his dissent: "Good, sustainable rules are the result of an open administrative process and a serious attempt to gather all the relevant facts. Bad rules and legal vulnerability result from an

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42. See Statement of Chairman Michael K. Powell, Regarding the 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620 (2003) (claiming that: (1) Congress and the courts essentially mandated deregulatory rule changes; (2) digital media resulted in a dramatic expansion of media choices and eased the problems of scarcity and diversity; and (3) over-the-air broadcasting would not long survive without government granted market advantages).

43. Statement of Commissioner Jonathan Adelstein, dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (June 1, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A8.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A8.pdf); Statement of Copps, *supra* note 2.

44. See MARK COOPER, CONSUMER FED'N OF AM., ABRACADABRA! HOCUS-POCUS! MAKING MEDIA MARKET POWER DISAPPEAR WITH THE FCC'S DIVERSITY INDEX (2003) (discussing several problems with the FCC decision, including its flawed reasoning, faulty reliance on the diversity index and inconsistent logic), at <http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf> (on file with the American University Law Review).

45. See *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896, at \*1 (3d Cir. Sept. 3, 2003) (finding that the proposed broadcast rules would cause irreparable harm and granting petitioner's motion to stay the effective date).

opaque regulatory process and inadequate data. Unfortunately, today's rules fall into the latter camp."<sup>46</sup> Data sets were predominantly proprietary and secretive.<sup>47</sup> The FCC did not release the information to the public in a timely manner, despite a letter from fifteen senators requesting more transparency.<sup>48</sup> Moreover, the FCC relied on discredited studies to make critical decisions.<sup>49</sup> The FCC's central arguments were flawed and contradictory. Specifically, Copps notes that the FCC prevented two of the top four TV stations in a market from merging on the grounds of guarding against undue concentration. The FCC, however, permitted the merger of the top TV station and the monopoly newspaper, a consolidation far more likely to centralize control over news and information.<sup>50</sup>

A July report issued by Consumers Union and the Consumer Federation of America noted serious flaws in the FCC's "diversity index," a tool used to analyze media markets.<sup>51</sup> The report found that by applying this tool, which very oddly does not account for market share in New York City, the Shop at Home Incorporated TV and Dutchess Community College TV were considered more influential news sources than the *New York Times*.<sup>52</sup> The report discovered similarly troubling anomalies in other markets. The report judged the ruling harshly:

The Media Ownership Order is riddled with contradictions, misstatements of empirical fact and unrealistic or unsupported

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46. Statement of Copps, *supra* note 2, at 5.

47. See John Dunbar, *A Penchant for Secrecy: Why is the FCC So Determined to Keep Key Data from the Public?*, WELL CONNECTED, May 22, 2003, at <http://www.openairwaves.org/telecom/report.aspx?aid=18> (on file with the American University Law Review) (criticizing the government's reliance on private data and invocation of a protection order to keep the data secret).

48. See Press Release, Consumer's Union, Two Important Developments in Debate Over the FCC's Media Ownership Review: Bipartisan Group of Key Senators Ask FCC for Full Disclosure Before Revising Media Rules—Small Business Administration's Office of Advocacy Faults FCC for Not Properly Considering Impact on Small Businesses (Apr. 10, 2003) [hereinafter Two Important Developments] (reporting that Senators Snowe, Dorgan, Hollings, Lott, Hutchison, Inouye, Wyden, Boxer, Nelson, Cantwell, Lautenberg, Collins, Murray, and Allard signed the letter sent to Chairman Powell on April 10, 2003), at <http://www.consumersunion.org/telecom/media2-403.htm> (on file with the American University Law Review).

49. See generally DEAN BAKER, AFL-CIO DEP'T FOR PROF'L EMPLOYEES, DEMOCRACY UNHINGED: MORE MEDIA CONCENTRATION MEANS LESS PUBLIC DISCOURSE: A CRITIQUE OF THE FCC STUDIES ON MEDIA OWNERSHIP (2002) (cataloguing the studies' specific flaws, including failure to address the issue of bias in news broadcasts, failure to examine trends in news quality over time, and adoption of faulty assumptions), at [http://www.dpeaflcio.org/pdf/FCC\\_Critique.pdf](http://www.dpeaflcio.org/pdf/FCC_Critique.pdf) (on file with the American University Law Review).

50. Statement of Copps, *supra* note 2, at 13.

51. COOPER, *supra* note 44, at 4.

52. *Id.*

assumptions about market conditions. The inconsistencies occur within the discussions of each rule, as well as between the arguments presented for each of the rules. These inconsistencies and flaws result in an analytic framework that produces absurd results.<sup>53</sup>

Public interest advocates elaborated on many of the problems in a brief filed with the Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*.<sup>54</sup>

Political backers of the ruling faced an even greater hurdle. Quite simply, the effort to reverse the FCC ruling had majority support in Congress, as demonstrated on the record. Both the House and the Senate passed rollback provisions in committee and in full roll call votes. In each case, the vast majority of the Democrats lined up with a significant minority of the Republicans to secure passage, often by a wide margin. Each highly publicized victory evidenced a rebuke of the FCC and a step toward a new media policy. Nonetheless, through a series of procedural maneuvers and political tactics, each of the legislative vehicles which might have reversed some or part of the June decision was blocked. In the end, all that remained was a compromise between Republicans that essentially ignored public outcry to reverse the entire FCC order, choosing instead to slightly modify one of the several rule changes. Despite a Congressional majority, all that stands in the way of the rules going into effect is the Court of Appeals for the Third Circuit.<sup>55</sup>

This is the most important story of the political and policy debates surrounding media ownership, though it is little told. The White House and the congressional leaders of the Republican Party succeeded in deflecting the stated will of the Congress. This is a remarkable state of affairs. Only a small number of issues saw Congressional majorities and overwhelming public opinion fail to produce public law. Arguably, this occurs only with critical issues with strong ideological divisions. In the first session of the 108th Congress, this happened with efforts to rescind portions of the Patriot Act, efforts to legalize the reimportation of prescription drugs from Canada, and efforts to prevent the alteration of overtime wage rules. Few issues garnered as much attention and support as these during the legislative year. That they did not pass into law is an unfortunate statement about the democratic process in the Congress.

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53. *Id.* at 7.

54. Brief for Citizen Petitioners and Intervenors, *Prometheus Radio Project v. FCC*, 2003 WL 22052896 (3d Cir. Oct. 21, 2003) (No. 03-3388), available at <http://www.mediaaccess.org/CitizenPetitionersandIntervenorsBrief.pdf>.

55. *Prometheus Radio Project*, 2003 WL 22052896, at \*1.



But, it is also an indication of how media has become an important political issue.

In summary, I reassert the following claims. First, far more than politics motivated the opponents of the June rules. The opponents had a clear policy objective to reverse the rules and pursue public interest media policy to guide future review and rule making in the direction of more substantial public service requirements and protections. Second, far more than policy arguments lay behind the relatively successful defense of the FCC's ruling in Congress. As the following account will demonstrate, given the majority strength of the opposition and the deep flaws in the FCC's ruling, it was the politics behind the FCC's policies which allowed them to survive.

## II. THE POLITICAL BATTLE IN THE LEGISLATIVE PROCESS

Congress's response to June 2 played out in three tracks. The first was the standard route of legislative consideration, moving bills through the committee system. When that was blocked, amendments were added to appropriations bills to attempt to achieve a rollback by preventing the FCC from using its funding to implement the rules.<sup>56</sup> Finally, members attempted to use a rare measure amounting to a congressional veto of the agency ruling. This is permitted under the terms of a "resolution of disapproval," a part of the Congressional Review Act of 1996 ("CRA").<sup>57</sup> Should it pass, it would nullify the June ruling entirely.

There was both bipartisan and public support for each of these measures. On two of the three legislative tracks, the House and Senate voted for passage, despite opposition from congressional leadership and the White House.<sup>58</sup> The soundness of the policy of reversal and reconsideration of the FCC rules was not in question in the public. A July survey conducted by the Pew Research Center demonstrated that the more people learned about the FCC's new rules, the less they liked them. Forty percent of those who knew nothing about the issue had a negative impression of the ruling. Fifty-seven percent of those who had some knowledge were displeased. Of those who said they knew a lot about the FCC ruling,

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56. See Joseph C. Anselmo, *Senate Committee Toughens Media Ownership Restrictions in Second Swipe at FCC*, CQ WKLY., June 28, 2003, at 1627 (noting a strategy proposed by Senate leaders opposed to the new rules that would defeat the FCC authorization bill by attaching amendments unpopular with the broadcasting industry).

57. Congressional Review Act of 1996, Pub. L. No. 104-121, 110 Stat. 868 (codified as 5 U.S.C. § 801 (2000)).

58. Jacques Steinberg, *House Panel Adds Voice to Opponents Of Media Rule*, N.Y. TIMES, July 17, 2003, at C1.

seventy percent felt negatively about it as compared to six percent who saw it as positive.<sup>59</sup>

With this kind of public support, it was no surprise that on the occasions when Congress voted on these rules, the results endorsed a rollback by a wide margin. That is not to say it ever had a good chance of becoming law. This issue depended less on building majority support for a rule reversal than it did on whether Congress's politics and procedures, which places huge power in the hands of the majority leadership, would allow such a policy to be realized. The different legislative strategies and the extensive posturing were all political responses attempting to determine how to advance a policy that had majority support but lacked leadership consent.

The first legislative response began in early April, before the FCC even issued its order.<sup>60</sup> Initially, Congress focused its attention exclusively on the national broadcast ownership limits. The old rule, set in the Telecommunications Act of 1996, stated that one TV network could own and operate stations that reached no more than thirty-five percent of the nation's TV households.<sup>61</sup> The proposed new rule would raise that cap to forty-five percent. This increase permitted large broadcast networks, particularly NBC, ABC, CBS, and FOX, to purchase stations run by affiliates. It also legalized the acquisitions of Viacom and News Corp, both of whom exceeded the thirty-five percent limit in anticipation of a rule change.

Two important groups opposed this rule change. The first was the general public, evidenced by its 750,000 notices of disapproval. The second group was smaller, but more influential, the National Association of Broadcasters ("NAB"). NAB, largely representing regional and local broadcast chains, was generally pleased with the idea of loosening ownership caps.<sup>62</sup> This organization felt, however, that a forty-five percent cap would tip the balance of power in the industry toward the networks and away from its primary

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59. PEW RESEARCH CENTER, STRONG OPPOSITION TO MEDIA CROSS-OWNERSHIP EMERGES: PUBLIC WANTS NEUTRALITY AND PRO-AMERICAN POINT OF VIEW (2003), at <http://people-press.org/reports/display.php3?ReportID=188> (on file with the American University Law Review).

60. See Two Important Developments, *supra* note 48 (describing the letter sent by senators to Chairman Powell criticizing lack of proper notice and comment period for the FCC's proposed ownership rules).

61. Telecommunications Act of 1996, § 202(c)(1)(B), Pub. L. No. 104-104, 110 Stat. 56.

62. See, e.g., Neal Hickey, *Power Shift*, COLUM. JOURNALISM REV., Mar.-Apr. 2003, at 29-30 (noting that most ownership caps restricted the ability of local broadcast companies to cross-own television stations with radio stations or newspapers, or limited the number of radio or television stations that a company could own in a given market).

constituents.<sup>63</sup> If the networks owned more stations outright, it would be easier for them to exert influence over advertising rates and programming decisions for non-owned affiliates.<sup>64</sup> NAB leaned on lawmakers to keep the national cap at thirty-five percent to avoid that outcome; even as they pressed Congress to endorse the FCC's removal of the cross-ownership ban.<sup>65</sup>

The House and Senate introduced companion bills with bipartisan support.<sup>66</sup> Each kept the national broadcast cap at thirty-five percent, though the FCC had yet to change it. In the House, Representative Richard Burr (R-NC), the Energy Commerce Committee's Vice-Chairman, and Representative John Dingell (D-MI), the ranking Democrat on the committee, introduced H.R. 2052, the Burr-Dingell bill, on May 9.<sup>67</sup> Senator Ted Stevens (R-AK), Chairman of the Appropriations Committee, and Senator Fritz Hollings (D-SC), the ranking Democrat on the Commerce Committee, introduced the Stevens-Hollings bill on May 13.<sup>68</sup> Both bills rapidly picked up cosponsors. By the time the FCC actually raised the broadcast cap to forty-five percent, a tenth of the House and Senate was on record in support of bills to roll it back. Directly after the ruling, over a dozen senators sponsored a resolution asking that the rules be rescinded on the grounds that both the process and the conclusions were badly flawed and contrary to the public interest.<sup>69</sup>

On June 12, Representative Bernie Sanders (I-VT) introduced a more comprehensive bill, H.R. 2462, which amounted to a legislative reversal of the entire FCC decision, not just the forty-five percent broadcast cap.<sup>70</sup> This bill was designed to move beyond a debate over the broadcast cap. Its supporters emphasized that the lifting of the cross-media ownership ban would have a much bigger impact on the character of the American media system than an increase in the broadcast ownership cap. Supporters of H.R. 2052 argued that the expansion of network power in the television sector would result in

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63. *See id.* at 29 (reporting that NAB opposition to the lifting of this cap resulted in the defection from that organization of large media companies NBC, CBS, and Fox).

64. *See id.* (citing a number of examples of networks using their power to force programming decisions on local affiliates).

65. *See id.* (quoting NAB's vice-president Dennis Wharton as opining that "the thirty-five-percent cap has been good for localism").

66. H.R. 2052, 108th Cong. (2003); S. 1046, 108th Cong. (2003).

67. H.R. 2052, 108th Cong. (amending the Communications Act of 1934 to preserve localism and diversity in television programming, prevent monopolies, and promote competition).

68. S. 1046, 108th Cong.

69. S.J. Res. 17, 108th Cong. (2003).

70. H.R. 2462, 108th Cong. (2003).

the decline of localism and diversity as national conglomerates took over programming decisions from local and regional owners. H.R. 2462 supported and extended that position. If conglomerate ownership of the local television station was harmful to localism and diversity, certainly the conglomerate ownership of a local television station *and* a local newspaper *and* several local radio stations should be looked upon as even more harmful. By the end of June, Representative Sanders had more than sixty cosponsors on his legislation, about half the number held by Burr-Dingell.<sup>71</sup> Both bills had bipartisan support, though the more limited bill enjoyed a more balanced following of Republicans and Democrats. At this point, it was widely thought that the GOP supporters favoring reversal of the FCC ruling would not look beyond the broadcast cap in their reform efforts.

In short order, however, this assumption was disproved, and the debate took on a decidedly new cast. Unlike his counterpart, Representative Billy Tauzin in the House, Senate Commerce Chairman John McCain determined that legislation on the media ownership rules deserved consideration in his committee. He demonstrated that resolve by holding three hearings on media ownership before the full committee in May.<sup>72</sup> He called all of the FCC commissioners before his committee on June 4 to explain their decision, where they were "greeted with lengthy and occasionally hostile questions."<sup>73</sup> Evidently he was dissatisfied with the answers. On June 19, Senator McCain held a markup on the Stevens-Hollings bill, even though he opposed it at that time. Various senators amended the bill on a number of occasions. Senator Dorgan offered the most important of these amendments; one that reinstated the ban on cross-ownership, with a provision exempting firms in small markets which could present evidence of financial hardship.<sup>74</sup> Senator McCain suggested another significant amendment; one that changed the language in section 202(h) of the Telecommunications Act of 1996.<sup>75</sup> It clarified that section 202(h) was not a mandate for

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71. *Patriotic Reading*, BANGOR DAILY NEWS, Apr. 9, 2003, at A8.

72. Mike Sunnucks, *Murdoch Makes Case Before McCain Committee*, BUS. J., May 22, 2003, available at <http://www.bizjournals.com/phoenix/stories/2003/05/19/daily52.html>.

73. Ted Leventhal, *Telecommunications—Senate Panel Weighs Media Ownership Limits*, CONGRESS DAILYAM, June 16, 2003, at <http://nationaljournal.com/cgi-bin/iffetch4?ENG+CONGRESS+7-cd0097+1091444-REVERSE+0+0+32520+F+1+1+1+Leventhal+AND+PDF06f16f2003de06f16f2003> (on file with the American University Law Review).

74. *Id.*

75. S. 1264, 108th Cong. (2003).

deregulation, as the courts ruled and Chairman Powell maintained, but rather a statement of congressional intent that the FCC was to loosen *or tighten* ownership rules as deemed necessary to serve the public interest.<sup>76</sup> The bill was reported out of committee.<sup>77</sup> This committee vote transformed the Stevens-Hollings bill.<sup>78</sup> It now resembled the Sanders bill more than Burr-Dingell. After the committee vote, Commissioner Copps called on Chairman Powell to stay the implementation of the rule changes in light of the Senate's action.<sup>79</sup>

This proved a pivotal turn of events. It was one thing for Representative Sanders to introduce a comprehensive rollback bill in the House and pick up a handful of Republican cosponsors. It was quite another for a similar bill to pass out of Senator McCain's Commerce Committee with the support of Senators Ted Stevens, Trent Lott, Elizabeth Dole, and Olympia Snowe. The congressional response to the June 2 ruling was no longer a targeted attack on the broadcast cap at the behest of the NAB. It was a bipartisan reaction to public outrage that spoke to a much more sweeping agenda aimed not only at reversing ownership rules, but visiting deep inquiry upon the nature of media regulation in general.

Public participants applauded the senators for the move to broaden the debate. Tens of thousands of citizens were now contacting members of Congress on a regular basis, phoning in support for particular bills and instructions on particular votes. On some occasions, offices received dozens of calls on the topic in a given day, an enormous number for most congressional offices; particularly on an issue that had never before resonated in popular politics.

The NAB responded to the amending of Stevens-Hollings by reversing its position in the debate.<sup>80</sup> They now endorsed the FCC ruling and began lobbying against any rule changes. This reversal seemed to preclude any chance that the House Energy and Commerce Committee would mark up any media ownership legislation. A spokesman for Representative Tauzin made the

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76. *Id.* § 4.

77. S. Rep. No. 108-140 (2003).

78. The committee vote was thirteen yeas to ten nays. *Id.*

79. Press Release, FCC, FCC Commissioner Copps Calls on FCC to Stay Media Ownership Decision Pending Congressional Deliberation (June 19, 2003), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235628A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235628A1.pdf).

80. See Joseph C. Anselmo, *Focus on Media Ownership Issue Takes Lawmakers by Surprise*, CQ WKLY., July 12, 2003, at 1742-43 (noting the NAB's disappointment at the retreat from a rule that would allow cross-ownership of newspapers and television stations in the same market, a rule that the NAB endorsed).

committee's position clear in June: "The media ownership issue has become a political soap opera. Given the chance, Chairman Tauzin plans to cancel its run."<sup>81</sup> He was backed up in his intent to bottle the issue in committee by powerful House Majority Leader Tom DeLay. On July 9, Representative Delay said, "I do not think the FCC went far enough . . . . We should be unregulating instead of regulating people's right to own property and business."<sup>82</sup> Nonetheless, the departure of the NAB and the denunciation from Representatives Tauzin and DeLay did not cause the storm to blow over. It intensified. The public interest groups won a victory in the Senate Commerce Committee, and they redoubled organizing efforts.

On July 15, Senators Dorgan and Lott, a most unlikely pairing, opened a second front by introducing a new measure; a congressional veto.<sup>83</sup> Under the provisions of the Congressional Review Act (CRA), Congress could pass a "resolution of disapproval," effectively nullifying any ruling by a federal agency.<sup>84</sup> The CRA had been used only once before, and its chances of passing the Senate seemed slim. However, it enjoyed certain advantages. First, it was a simple message; total reversal. It presented a standard bearer for organizing public pressure that was easy to understand. The public pressure and media attention generated by the CRA threat would be used to drum up more support and momentum for the new, revamped Stevens-Hollings bill. Second, the CRA did not suffer from the procedural problems that burdened a normal bill. Even if Stevens-Hollings were to pass the Senate, which was by no means clear since Majority Leader Bill Frist (R-TN) opposed its consideration on the Senate floor,<sup>85</sup> the House seemed unlikely to move a similar bill through committee.<sup>86</sup> Without Representative Tauzin's acquiescence, there would be no future for Stevens-Hollings, despite the importance of its markup.

The CRA resolution would not need approval from Senator Frist or Representative Tauzin. According to the rules of the CRA, a

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81. Ted Leventhal, *Telecommunications—FCC Media Rule's Hill Opponents Vow To Keep Up Fight*, CONGRESS DAILY, June 24, 2003, at <http://nationaljournal.com/cgi-bin/iffetch4?ENG+CONGRESS+7-cd0097+1098605-REVERSE+0+0+32746+F+1+1+Leventhal+AND+PDF06f24f2003de06f24f2003> (on file with the American University Law Review) (quotations omitted).

82. Anselmo, *supra* note 80, at 1743 (quotations omitted).

83. *Congress Moves to Overturn New Media Ownership Rules*, ONLINE NEWS HOUR, July 16, 2003, at [http://www.pbs.org/newshour/media/media\\_watch/july-dec03/fccresolution\\_9-1.html](http://www.pbs.org/newshour/media/media_watch/july-dec03/fccresolution_9-1.html) (on file with the American University Law Review).

84. Congressional Review Act, 5 U.S.C. § 802(a) (2004).

85. See Anselmo, *supra* note 80, at 1743 (stating that Senator Frist, as of July 9, "had not yet considered scheduling of the bill").

86. See Leventhal, *supra* note 81 (discussing Republican opposition to the bill).

resolution could be forcibly brought to the floor with a petition bearing the signatures of thirty senators. As Stevens-Hollings had thirty-two cosponsors at that point, this seemed easily within reach. Moreover, if the Senate passed the CRA, it would not be referred to the House Energy and Commerce Committee like a typical Senate resolution. It would stay at the Speaker of the House's desk. Though Representative Dennis Hastert (R-IL) did not indicate that he would grant the measure a vote, it would certainly be much closer to the House floor than if it had to first bypass Representative Tauzin's committee and *then* get the Speaker's approval. The CRA represented the possibility that a majority of members could execute an end-run around the GOP leadership.

The introduction of the CRA provoked a rapid response. Newspaper publishers, network broadcasters, and the NAB turned up the lobbying pressure. The steady flow of cosponsors to Stevens-Hollings, Burr-Dingell, and the Sanders bill began to dry up as more cautious representatives opted to stand clear of the fray. For the moment, Representative Tauzin served as an effective roadblock. According to the provisions of the CRA, the resolution would have to sit in the Commerce Committee for twenty calendar days before it could be discharged to the floor. That deadline would expire during Congress' August recess. September was presumed to be the next opportunity for further action on media ownership.

Once again, however, the political pressure did not abate. The following day, July 16, the issue spilled over into yet another avenue: the appropriations process. The action returned to the House, where the appropriations bills were to be addressed first. The strategy involved attaching a limitation amendment, also called a rider, to the Commerce, Justice, State ("CJS") Appropriations Bill.<sup>87</sup> The amendment would prohibit the FCC from using any appropriated funds to implement its June 2 rules, thus effectively blocking them for one fiscal year. Unlike in the Energy and Commerce Committee, Chairman Bill Young (R-FL) could not refuse to consider the CJS Appropriations Bill, which like all appropriations measures is must-pass legislation containing tens of billions of dollars in spending. Furthermore, there appeared to be a sizeable block of Republicans willing to support a Democratic amendment to rollback at least the broadcast cap rule, led by the influential chairman of the CJS subcommittee, Representative Frank Wolf (R-VA). Attaching one or

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87. See Anselmo, *supra* note 80, at 1743 (noting that an amendment could be considered on July 21).

more media ownership amendments to the CJS bill in committee might result in securing majority support on the floor, despite the opposition of House leadership. Such a victory in the House would almost certainly produce a similar result in the Senate, where support for a rollback was even stronger. GOP leaders moved to reign in their errant members and cut off this potential challenge before it could materialize.

They had their first opportunity in the run-up to the full committee markup of the CJS appropriations bill in the House. This was the first vote that mattered politically. If House appropriations passed limitation amendments on FCC rules, the Senate would likely follow suit. If they arrived at the President's desk, it would place him in a difficult position. Either he would use his first ever veto to reject a massive appropriations measure (which White House advisors had publicly recommended),<sup>88</sup> or he would accept the media ownership reversals. Such a chain of events was certainly not guaranteed, but its very possibility made the House committee vote important. The fact that rank-and-file House Republicans on that committee might be willing to support the amendments is nothing short of remarkable, given the repercussions it would visit upon their party leaders. The only explanation is a sincere desire to open up the debate on the future of media policy to an entirely different set of principles. Representative Paul Gillmor (R-OH) summarized the situation he and his colleagues faced saying, "I have great respect for Billy Tauzin and Tom DeLay and Speaker Hastert. But on this issue, I don't agree with them. I think the public interest is in the other position."<sup>89</sup>

On the morning of July 16, the House Appropriations Committee met to consider the CJS Appropriations Bill. In the audience portion of the committee hearing room were dozens of broadcast executives who had spent the previous two days pushing hard for a flat rejection of ownership amendments. Representative Tauzin was in the halls that morning, leaning on Republicans to defeat the measure. It seemed that the votes for rule reversal might not be there. Yet, when ranking Democrat David Obey (D-WI) introduced an amendment to block the forty-five percent broadcast cap, a number of Republicans spoke up in support. Eleven voted with the Democrats, and the rider passed forty to twenty-five.<sup>90</sup> GOP committee members had voted

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88. Steinberg, *supra* note 58 (quoting White House spokeswoman Claire Buchan's statement that "the president's senior advisors would recommend a veto" if a bill including that amendment were presented reached the president).

89. Anselmo, *supra* note 80, at 1743.

90. *Now with Bill Moyers* (PBS television broadcast, July 25, 2003), at [http://www.pbs.org/now/transcript/transcript229\\_full.html](http://www.pbs.org/now/transcript/transcript229_full.html) (on file with the



their conscience, responding to the argument that concentrated broadcast ownership would reduce local control over programming. Representative Wolf commented later on his defection that, "I did not get elected to be a potted plant, and I don't care what the White House thinks."<sup>91</sup> Representative Tauzin's spokesman, Ken Johnson, acknowledged the defeat but predicted what was to come, saying, "[w]e may have one hand tied behind our back, but as long as we have one free hand, we can still swing a bat."<sup>92</sup>

CJS went to the floor on July 22. The debate that afternoon was heated and the tactics complex.<sup>93</sup> In the days between the markup and the floor vote, many insiders presumed that the Republican leaders would attempt to strip Representative Obey's amendment from the bill and crush any further amendments offered to block the new rules on cross-ownership and local television mergers. Democrats raced to protect the rider that was already in the bill by reaching out to GOP supporters of Burr-Dingell. They also discouraged liberal Democrats who wanted to offer a cross-ownership rider on the theory that reaching for two amendments might result in the loss of both in the eventual conference committee. If all the chips were bet just on the Obey amendment, it might survive the process and become law. The realities of the advancing legislation in the teeth of the majority leadership forced some Democrats to limit their goals to the reversal of the broadcast cap.

The floor debate played out quite differently than expected. The Republicans said nothing about the Obey amendment, presumably because they lacked the votes to remove it. The debate then centered around an amendment, offered by Representatives Maurice Hinchey (D-NY), David Price (D-NC), and Jay Inslee (D-WA) (Hinchey amendment). This amendment blocked the two other major rule changes, the lifting of the cross-ownership ban and the relaxation of limits on local TV mergers, in an effort to test how much support existed for a comprehensive rule reversal.<sup>94</sup> Many members felt that without legislation addressing the cross-ownership rule, which would

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American University Law Review).

91. CAPITOL BROADCASTING COMPANY, CONGRESS IMPLEMENTS TOOLS TO BLOCK FCC'S JUNE RULING, July 21, 2003, at [http://www.cbc-raleigh.com/capcom/news/2003/corporate\\_03/fcc\\_congress/fcc\\_congress.htm](http://www.cbc-raleigh.com/capcom/news/2003/corporate_03/fcc_congress/fcc_congress.htm) (on file with the American University Law Review) (quotations omitted).

92. Brody Mullins, *FCC Decision Dealt Big Blow*, ROLL CALL, July 17, 2003, at 24.

93. See *Understanding Tuesday's House Vote*, FREE PRESS, July 23, 2003 [hereinafter *Tuesday's House Vote*], at [http://chicagomediawatch.org/fcc\\_freepress.html](http://chicagomediawatch.org/fcc_freepress.html) (on file with the American University Law Review) (detailing the split between House Republicans and the President's veto threat that preceded it).

94. Nichols, *supra* note 6, at 36.

produce far more sweeping changes in the media system than an increased broadcast cap, the heart of the debate would be lost. They also assumed that the Hinchey amendment would fail for lack of Republican votes. The question was by how much. If it got 150 votes or more, then the House would have demonstrated respectable support for a full rollback and opened the door for Senate action on cross-ownership. Less than 150 votes would all but end hope of reversal of the cross-ownership rule.

In the hours before the vote, activist groups mobilized and launched the largest call-in campaign of the year. Within two hours of the roll call, practically every phone in every House office was ringing. It was an impressive scene, as Americans who had never heard of an appropriations rider called to demand that their representatives support one. Representative David Price, moved by the action said in his speech on the House floor, "Mr. Chairman, in the history of media policy, there has never been a moment when the public was more engaged than they are right now."<sup>95</sup> Representative Edward Markey (D-MA), a twenty-seven-year veteran of the telecommunications subcommittee, blasted the FCC ruling in the harshest terms, calling it "the worst decision ever made by the Federal Communications Commission."<sup>96</sup>

Despite this show of support, the Democrats were divided. Representatives Obey and Dingell, key Democratic leaders, spoke against the Hinchey amendment during the floor debate. They felt they had a winner if they marshaled all defenses around the broadcast cap, but a cross-ownership amendment would be a political overreach. Representative Obey began his speech by praising the principles behind a full rule reversal, but he warned that "[t]he Hinchey amendment is not intended to be so, but it is a killer amendment. It will load up the camel, and it will break the camel's back."<sup>97</sup>

The Hinchey amendment was defeated 254 to 174. Sixty Democrats voted against the amendment and thirty-four Republicans voted for it.<sup>98</sup> Shockingly, had the Democrats held their ground, the measure would have passed easily. Few Democrats thought that almost three dozen GOP members would vote for the amendment, yet they were now on the record. Democratic tactics doomed the Hinchey amendment. It was now clear that if a straight up-or-down

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95. 149 CONG. REC. H7280 (daily ed. July 22, 2003) (statement of Rep. Price).

96. 149 CONG. REC. H7287 (daily ed. July 22, 2003) (statement of Rep. Markey).

97. 149 CONG. REC. H7279 (daily ed. July 22, 2003) (statement of Rep. Obey).

98. *Tuesday's House Vote*, *supra* note 93.

vote on the full set of rules came to the House floor, a reversal would very likely succeed. For the moment, the Hinchey amendment achieved a respectable vote tally, well above expectations. Moreover, the renewed wave of public support emboldened reform-minded Senators who now saw that the cross-ownership issue was still in play.

When the amended CJS bill passed the House by a vote of 400 to twenty-one, it made the front page of the *New York Times* and the *Washington Post*.<sup>99</sup> The Democrats apparently stole a victory from the Republican leadership in the House. What the *Los Angeles Times* described as a “sudden change in political currents” put the outcome of Chairman Powell’s rule changes in serious doubt.<sup>100</sup> Several of the Democratic presidential candidates, including Howard Dean, John Edwards, John Kerry, and Dennis Kucinich, responded by publicly voicing support of more progressive media policy.<sup>101</sup> But, this was not a case of purely liberal activism. The White House renewed its veto threat, and the Republican leadership began to mobilize political defenses.<sup>102</sup>

Throughout the next few weeks, while Congress was in recess, the political battle was waged in the press and in lobbying visits. The NAB switched their position again. Realizing that an appropriations rider on the broadcast cap would provide the one-rule-only reversal they could support, the association put their lobbying strength behind it.<sup>103</sup> Troubled GOP leaders began circulating a letter promising the President that a veto of the media ownership rules would be sustained by the House.<sup>104</sup> Knowing that 146 votes would block a veto override, the Republicans sought that number of supporters. But the letter failed to solicit the required number of votes.<sup>105</sup> A White House spokesman was unfazed saying, “In every instance the administration has issued a veto threat, the [offending] provision has been changed or dropped.”<sup>106</sup>

99. Stephen Labaton, *F.C.C. Media Rule Blocked in House in a 400-to-21 Vote*, N.Y. TIMES, July 24, 2003, at A1; Christopher Stern & Jonathan Krim, *House Votes to Prevent Change in Media Rule*, WASH. POST, July 24, 2003, at A1.

100. Richard Simon & Janet Hook, *FCC Rule May Bring a Veto Standoff*, L.A. TIMES, July 25, 2003, at C1.

101. Labaton, *supra* note 99, at A1.

102. Frank James, *Bush Threatens Veto to Keep FCC Changes*, CHI. TRIB., Sept. 12, 2003, at C10.

103. Susan Crabtree, *NAB will fight FCC*, Variety, July 28, 2003, at 28.

104. See *House Republicans Fail to Rally Media Bill Opposition*, FREE PRESS, July 31, 2003 (online version), (noting that Republican Congressman Chris Cannon drafted and circulated the letter), at <http://www.freepress.net/news/article.php?id=809> (on file with American University Law Review).

105. *Id.*

106. Simon & Hook, *supra* note 100, at C1.

In late July, the *New York Times* published an editorial by Chairman Powell attacking critics as misguided.<sup>107</sup> On August 20, Chairman Powell announced that the FCC would be launching a "Localism in Broadcasting" initiative, a taskforce aimed at collecting public testimony on the local public service of broadcasters.<sup>108</sup> Despite the apparent relevance of this initiative as a corrective to the furor over June 2, he declined to stay the rule changes. Commissioner Copps called it "a policy of 'ready, fire, aim!'"<sup>109</sup> On the day Congress reconvened in early September, Republican pollster Frank Luntz released survey numbers in full page ads in the Capitol Hill newspapers. His data, distributed to every congressional office, purported to show that the American public rejected government regulation of media. His message stated that, "America Says: Don't Get Between Me and My TV."<sup>110</sup>

The political volume of FCC supporters was lowered substantially on that same day, September 3, by an event which almost no one predicted. The Court of Appeals for the Third Circuit issued an order in the case of *Prometheus Radio Project v. FCC*.<sup>111</sup> The suit, filed by a small group of community radio activists and argued by public interest attorneys of the Media Access Project, asked for a stay on the implementation of the media ownership rules. FCC and industry lawyers for broadcasters such as Fox, NBC and Viacom, defended the rules. The Court granted the stay.<sup>112</sup> It was a stunning victory for the coalition of policy reformers. The *Wall Street Journal* reported that the tiny non-profit law firm "bested legal teams from the FCC and three of the nation's broadcast networks."<sup>113</sup> By earning a stay, the lawyers

107. Michael K. Powell, *New Rules, Old Rhetoric*, N.Y. TIMES, July 28, 2003, at A17 ("[T]he current debate has ignored a disturbing trend the new rules will do much to abate: the movement of high-quality content from free over-the-air broadcast television to cable and satellite."). To support his point, Powell point to the mass movement of most sports content and to the number of Emmy nominations earned by HBO. *Id.*

108. Press Release, FCC, FCC Chairman Powell Launches "Localism in Broadcasting" Initiative (Aug. 20, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-238057A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf).

109. Press Release, FCC, Copps Criticizes Willingness To Let Media Consolidation Continue (Aug. 20, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-238079A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238079A1.pdf).

110. Memorandum from Luntz Research Companies, Why Americans Support the FCC Decision (Sept. 3, 2003) (on file with the American University Law Review).

111. *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896, at \*1 (3d Cir. Sept. 3, 2003).

112. *See id.* ("Given the magnitude of this matter and the public's interest in reaching the proper resolution, a stay is warranted pending thorough and efficient judicial review.")

113. Yochi J. Dreazen, *No-Frills Fighter Stuns the FCC, Media Goliaths*, WALL ST. J., Sept. 5, 2003, at B1.

at Media Access Project opened a window for congressional action. Although the case would not be decided until at least the spring of 2004, this legal win represented perhaps the single most successful effort of the reform campaign. If the rules were implemented, the prospect for a legislative rollback or compromise would have dimmed. It is one thing for Congress to nullify rule changes which remain hypothetical; it is quite another to reverse new ownership regulations that have already permitted further consolidation and mergers.

On September 11, 2003 Senators Dorgan and Lott held a press conference to announce that they would force a vote on the CRA resolution of disapproval.<sup>114</sup> MoveOn.org presented 300,000 petitions of support to the Senators to drive home the point.<sup>115</sup> The debate began that afternoon and continued on September 16. Senator John McCain, who would vote against the CRA in the end, nonetheless had this to say during the debate, “[i]n my time as chairman of the Senate Commerce Committee, no issue has erupted so rapidly and evoked such passion from the public as media consolidation.”<sup>116</sup> He concluded that the CRA would likely pass the Senate that day, but that it would die in the House. Indeed, he chided, that may be why so many Senators felt that they could vote safely in favor of it.<sup>117</sup>

The Senate CRA passed fifty-five to forty. The *New York Times* described the vote as a “stinging political rebuke of Michael K. Powell” while quoting Chairman Powell as describing the vote as “bordering on the absurd.”<sup>118</sup> Chairman Powell complained that “there was a concerted grass-roots effort to attack the commission from the outside in.”<sup>119</sup> Indeed, as over two million members citizens from a broad cross-section of society contacted Washington regulators and lawmakers to voice their protest. This was the high-water mark for the effort to reverse the rules.

Given the political unlikelihood of the House leadership bringing the Senate CRA resolution to a vote, members of Congress assumed

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114. See James, *supra* note 102, at C10.

115. *Senators Lott and Dorgan hold news conference calling for rollback of FCC media consolidation rules*, FREE PRESS (Sept. 11, 2003) (online version), at <http://www.freepress.net/news/article.php?id=1117> (on file with the American University Law Review). The National Rifle Association also collected 300,000 signatures of support by postcard. *Id.*

116. 149 CONG. REC. S11,507 (daily ed. Sept. 16, 2003) (statement of Sen. McCain).

117. *Id.*

118. Stephen Labaton, *F.C.C. Plan to Ease Curbs on Big Media Hits Senate Snag*, N.Y. TIMES, Sept. 17, 2003, at A1.

119. Stephen Labaton, *F.C.C. Chief Talks of Frustration and Surprise*, N.Y. TIMES, Sept. 22, 2003, at C1.

that the fifty-five to forty record would serve to put considerable pressure on the most viable of the three legislative strategies to pass a rollback of the FCC rules; the CJS appropriations bill. On September 4, the Senate Appropriations Committee quietly approved the CJS bill. It did not even vote on an FCC rider. Senator Stevens attached the broadcast cap reversal as a manager's amendment before it came before the committee, using precisely the same language as the House bill to make it more difficult to strip it out in the conference committee.<sup>120</sup> Members understood that Senator Dorgan would offer his cross-ownership amendment when the CJS bill was debated on the floor. Since fifty-five votes had been collected for a nullification of the entire June 2 ruling, it was thought probable that the votes could be gathered to pass such an amendment. It was, however, far from certain whether any amendments concerning the FCC, much less a cross-ownership amendment passed only by the Senate, could survive a conference committee under heavy pressure from the White House to remove the language.

As the fall wore on, the Senate CJS bill looked increasingly unlikely to even have a floor vote. Its fate was wrapped up together with several other controversial spending bills in an omnibus package. The omnibus carries the weight of a must-pass bill. But, the bill would have little opportunity for further amendment since Senator Dorgan would not have the chance to offer an amendment blocking cross-ownership. Further, the omnibus negotiations would allow much stronger influence from the White House as even the broadcast cap was in danger of being stripped out. In the back channels of Senate power, the tides were turning against reform legislation.

When appropriations negotiations languished in October, attention returned to the CRA—which was then on the Speaker's desk in the House—GOP leadership called the resolution “dead on arrival.”<sup>121</sup> As McCain predicted, the CRA was turning into a showpiece vote, not a substantive action. But, the House was not finished. Led once again by Representatives Sanders and Hinchey, a new coalition was cobbled together. The goal was to get signatures on a letter to the Speaker of the House calling for an immediate vote on the Senate CRA. House rules placed the decision in the Speaker's hands as to whether a vote would be held or not. Once more a public call-in campaign encouraged members to sign on. By late October,

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120. Labaton, *supra* note 32, at C1.

121. Katherine Mangu-Ward, *Shut-Up, They Explained: Congress Draws a Bead on Talk Radio*, WKLY. STANDARD, Sept. 29, 2003, at 17 (quoting House majority leader Tom DeLay) (quotations omitted).

205 members of the House, including eleven Republicans, signed the letter in support of a vote on the measure.<sup>122</sup> Though 205 votes is short of the 218 required majority, it was a clear statement to the leadership that the resolution would pass *if it were to have a vote*. Many of the thirty-four Republican votes cast in July in favor of the Hinchey amendment could be counted on for the CRA. The formerly divided Democrats were now all but fully aligned behind a comprehensive reversal. Consequently, Representative Hastert declined to bring the CRA to the House floor. It would remain on his desk when the session ended in December. Supporters vowed to introduce a House version of the CRA and force a vote using a discharge petition in 2004.<sup>123</sup>

Meanwhile, with the issue back in the limelight, the pressure was on the Senate appropriators to hold the line on the thirty-five percent broadcast cap in the omnibus bill, which finally entered the closing stages of consideration on a lengthy conference report. Bipartisan conferees agreed to keep the language in the bill. But, at the eleventh hour in late November, Senator Stevens met with White House counsel and reopened the issue. They emerged with a new deal. Senator Hollings (D-SC) blasted the action stating: "The Republicans went into a closet, met with themselves, and announced a 'compromise.' . . . It was a total violation of the conference agreement."<sup>124</sup>

The new deal went beyond adjusting percentages. The broadcast cap would be set at thirty-nine percent permanently, not as a one-year appropriations rider. Further, the FCC's biennial review period would be extended to quadrennial, thus easing the burden of constant review. The new thirty-nine percent rule would no longer be considered in these reviews. These provisions, in and of themselves, seemed a positive solution. However, there appeared to be loopholes. Any company could violate the thirty-nine percent limit for two years without penalty before being forced to sell stations, up from a standard of six to twelve months. Moreover, the FCC's

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122. Press Release, Rep. Bernard Saunders, Bipartisan Coalition of House Members Demand Vote on FCC Media Regulations (Nov. 5, 2003), at <http://bernie.house.gov/documents/releases/2003/105175717.asp> (on file with the American University Law Review).

123. See Klaus Marre, *Discharge petition looms over FCC rules*, THE HILL, Sept. 23, 2003 (online edition), available at <http://www.stopmediaregulation.org/articles/092303th.htm> (on file with the American University Law Review).

124. Press Release, Sen. Fritz Hollings, Republican's Media Ownership Agreement a 'Total Violation' of Conference (Nov. 25, 2003) (quotations omitted), at <http://hollings.senate.gov/~hollings/press/2003B25547.html> (on file with the American University Law Review).

authority to grant a waiver to the thirty-nine percent was not explicitly removed. Indeed, the new legislative language was written in such a way as to make unclear who had the legal authority to change the rule.<sup>125</sup>

Critics of the new language charged that it provided the pretense of public interest regulation while signaling to the industry that consolidation could proceed. Some critics questioned the thirty-nine percent limit. Viacom and News Corp. stood in violation of the thirty-five percent limit, at thirty-nine percent and thirty-eight percent, respectively.<sup>126</sup> The compromise simply legalized the status quo, and the NAB endorsed it.<sup>127</sup> Rupert Murdoch, the iconic leader of News Corp., acknowledged that the deal “‘suits us just fine.’”<sup>128</sup>

Conversely, the thirty-nine percent compromise satisfied few others. Critics viewed it as a carefully tailored solution that fit the needs of powerful corporations. It contained loopholes that suggested the “permanency” of the limit was temporary.<sup>129</sup> It did not address the more substantial rule changes, cross-ownership and local television consolidation. Moreover, the process was heavily political. Essentially, two powerful Republicans colluded and came to an arrangement, without consulting with anyone, much less a vote before a relevant committee. Additionally, there was little in this solution which spoke to the new policy directives sought by the coalition. This was a top-down solution which massaged the details of technocratic regulation for political purposes, not a reevaluation of the process and principles behind public accountability in ownership rules. Many critics found it hard to avoid the conclusion that money won out over the public interest in this contest, especially since the broadcasters walked away with a reasonable deal and the public was left with next to nothing.

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125. Opponents viewed the compromise as designed specifically to give media companies exactly what they wanted. See, e.g., Frank Ahrens, *Democrats Decry ‘Compromise’ on FCC Rule*, WASH. POST, Nov. 26, 2003, at E1 (quoting the view of a Consumer Union spokesman that the compromise was “a backroom deal to let the two largest networks keep all their stations”).

126. *Id.*

127. Edmund Sanders, *Deal on TV Cap Fractures Coalition*, L.A. TIMES, Nov. 26, 2003, at C1.

128. Ahrens, *supra* note 125, at E1.

129. See Mark Wigfield, *Congress gifts FCC with Fewer Reviews on Media Ownership*, FREE PRESS, Dec. 1, 2003 (online version), (describing an appeals court decision that found that because the original limit of thirty-five percent could be raised or repealed, that the new limit of thirty-nine percent could be altered as well), at <http://www.freepress.net/news/article.php?id=1826> (on file with the American University Law Review).



Despite considerable opposition, the omnibus bill containing the thirty-nine percent deal passed the House on December 8, 2003.<sup>130</sup> The media ownership rules were a sticking point in the debate, but the omnibus carried so many contentious issues that the failure of this compromise was only a part of the chorus of dissent. The Senate did not consider the omnibus bill before closing the session for the year due to intense conflict over the legislation. The Senate will consider it in late January 2004, but its passage is by no means certain. Numerous provisions in the bill have provoked opposition, particularly those concerning the thirty-nine percent compromise. Senator Dorgan fumed: "I, and others who have fought so hard to overturn these rules, will not sit quietly by while the White House insists on provisions that are counter to the public's interest."<sup>131</sup>

#### CONCLUSION

Heading into 2004, the legislative vehicles for reversing the FCC's media ownership rules are all still alive. Burr-Dingell and the Sanders bill sit in committee with 194 and 100 cosponsors, respectively. Stevens-Hollings, with forty-seven cosponsors, is out of committee and awaits floor consideration. A House version of the CRA resolution has been introduced and it promises to be advanced aggressively by frustrated supporters.<sup>132</sup> And, of course, the omnibus appropriations bill must still move through the Senate. All of these are likely to kick up considerable political dust in the first few months of 2004. However, none of these are particularly likely to bear fruit as substantial reversals of the FCC rules or as major changes of policy direction *in the short term*. The thirty-nine percent compromise will likely withstand pressure from both sides and remain as it is in the final bill. Only the pending court case in the Court of Appeals for the Third Circuit is likely to stop the FCC rules from going into effect next year.

The difficulty of passing the rollback and the circuitous methods of appropriations and the resolution of disapproval belie the political realities of Congress. Good policy with majority support has no guarantee of passage if the leadership stands opposed. Recall that the reversal of media concentration is an issue that the vast majority of Americans agree on. It is not a partisan issue. It is hardly

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130. 149 CONG. REC. H12,845 (daily ed. Dec. 8, 2003) (statement of Rep. Bill Young).

131. Ahrens, *supra* note 126, at E1 (quotations omitted).

132. H.R.J. Res. 72, 108th Cong. (2003). The bill was introduced by Rep. Maurice Hinchey and has fifty-five cosponsors.

contentious. It is the subject of debate in the Congress only because powerful interests stand to lose a great deal of money if the public's work is done. Yet, the House leadership derailed the measure without too much difficulty. As the Speaker of the House expressed in a recent speech:

Sometimes, we have a hard time convincing the majority of the House to vote like a majority of the House, . . . On occasion, a particular issue might excite a majority made up mostly of the minority. . . . The job of Speaker is not to expedite legislation that runs counter to the wishes of the majority of his majority.<sup>133</sup>

On the question of media ownership, as well as almost every other issue in the first session of the 108th Congress, he found a way to leverage political power to defeat policy opponents.

Does this mean that a progressive media reform is dead in the long term? Quite the opposite. What happened in the last six months of 2003 was nothing short of a transformation in the nature of media policy making because there is now an actual debate on the topic. There is a bona fide alternative policy position which emanates from a new, publicly vitalized agenda of public service standards and market controls. Millions of Americans participated in the debate and convinced the majority of members of Congress that the prevailing trends of concentrated power in the media system should be reversed. What this issue accomplished in six months usually takes years on Capitol Hill. That the reformers did not achieve a legislative victory was a matter of politics.

Politics cannot stop this issue from recurring in the next session of Congress or undo the exposure of the FCC's practice of conducting important media policy debates behind closed doors and outside the public debate. Nor can politics prevent the energy and public attention spawned in the media ownership campaign from spilling over into other media issues, such as low-power radio, Internet governance, public service obligations for digital broadcasting, children's programming, free political airtime, and a host of other topics from spectrum allocation to copyright reform. According to the trade publication *Communications Daily*, industry analysts, political insiders, and public service advocates all agree on one thing after the ownership fight, "it seems clear that the impact of the issue on

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133. Rep. J. Dennis Hastert, Reflections on the Role of the Speaker in the Modern Day House of Representatives, Address at the Library of Congress (Nov. 12, 2003), at <http://speaker.house.gov/library/misc/031112reflect.shtml> (on file with the American University Law Review).

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Capitol Hill has surprised many and seems likely to carry over into other media issues.”<sup>134</sup>

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134. Terry Lane & Michael Feazel, *Cause Celeb—Media Ownership Issue Could Have Long Legacy*, COMM. DAILY, Aug. 8, 2003, 2003 WL 5755999.