

# THE FCC'S TRANSACTION REVIEWS AND FIRST AMENDMENT RISKS

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## INTRODUCTION

In the run-up to the 2004 Presidential election, Pulitzer Prize- and Peabody Award-winning journalist, Carlton Sherwood, made a film featuring Vietnam POWs that cast Democratic nominee Senator John Kerry in an unfavorable light.<sup>1</sup> The Sinclair Broadcast Group, which owns TV stations scattered around the country, announced plans to air the forty-minute film but received significant criticism because of the timing before an election. Democratic politicians complained to the Federal Communications Commission about the film's lack of balance and advocacy groups vowed a multi-year regulatory challenge to Sinclair's airwave license renewals.<sup>2</sup> The *Boston Globe* and *New York Times* editorial pages requested the FCC investigate Sinclair for countenancing to air the film.<sup>3</sup> MSNBC television host Deborah Norville captured the mood when she asked a Sinclair vice president on air, "Why would Sinclair Broadcasting, which has a license from the FCC, risk that very, very precious license by going forward with a program like

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

2. Bill Carter, *Risks Seen for TV Chain Showing Film about Kerry*, N.Y. TIMES (Oct. 18, 2004), <http://www.nytimes.com/2004/10/18/business/media/risks-seen-for-tv-chain-showing-film-about-kerry.html> [https://perma.cc/Q6JD-K9K6].

3. Editorial, *Sinclair's Slander*, BOS. GLOBE (Oct. 15, 2004), [http://www.boston.com/news/globe/editorial\\_opinion/editorials/articles/2004/10/15/sinclairs\\_slander/](http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2004/10/15/sinclairs_slander/) [https://perma.cc/9M4Z-FA6Z]; Editorial, *Dangerous Territory*, N.Y. TIMES (Oct. 15, 2004), [http://www.nytimes.com/2004/10/15/opinion/dangerous-territory.html?\\_r=0](http://www.nytimes.com/2004/10/15/opinion/dangerous-territory.html?_r=0) [https://perma.cc/UH6H-4PSZ].

this?”<sup>4</sup> Former FCC Chairman Reed Hundt similarly asked Sinclair executives, “Why should a broadcaster keep its licenses if it behaves in this manner?”<sup>5</sup>

Sinclair got the message. Financial analysts and FCC staff predicted the controversy posed political and financial risks to Sinclair and other FCC-licensed stations—what one analyst report called “the Sinclair payback provision”<sup>6</sup>—and Sinclair stock value quickly dipped 17%.<sup>7</sup> Within days, Sinclair abruptly backed off and chose to broadcast only four minutes of the film.<sup>8</sup>

The Sinclair episode illustrates the power the FCC holds over some media outlets and gives a glimpse into how political actors and activists are able to channel the FCC’s regulatory process to chill unwanted speech. Quite simply, many U.S. firms that carry and distribute speech, like Sinclair, must remain in the FCC’s good graces—via license renewals and approvals of license transfers—to operate. Over the last twenty years, the FCC has increasingly used its leverage during licensing proceedings as an opportunity to engage in ad hoc merger review that substitutes for formal rulemaking. Through license renewals and—the focus of this Article—through transaction approv-

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4. Deborah Norville Tonight, *Sinclair Controversy*, MSNBC (Oct. 21, 2004), <http://www.nbcnews.com/video/msnbc-news/6303047#6303047> [<https://perma.cc/M8BA-ZHL7>].

5. Josh Marshall, *Yesterday Former FCC Chairman*, TALKING POINTS MEMO (Oct. 11, 2004), <http://talkingpointsmemo.com/edblogger/-97479> [<http://perma.cc/C3CU-UHEE>] (reproducing Reed Hundt’s letter).

6. Bill Carter, *Risks Seen for TV Chain Showing Film about Kerry*, N.Y. TIMES (Oct. 18, 2004), <http://www.nytimes.com/2004/10/18/business/media/risks-seen-for-tv-chain-showing-film-about-kerry.html> [<https://perma.cc/Q6JD-K9K6>].

7. *Sinclair revises Anti-Kerry Broadcast*, CNN Money (Oct. 20, 2004), <http://money.cnn.com/2004/10/19/news/midcaps/sinclair/> [<https://perma.cc/S8TY-MEHJ>].

8. Bill Carter & Scott Shane, *Viewers Get Only a Peek of a Movie Chiding Kerry*, N.Y. TIMES (Oct. 23, 2004), [http://www.nytimes.com/2004/10/23/politics/campaign/viewers-get-only-a-peek-of-a-movie-chiding-kerry.html?\\_r=0](http://www.nytimes.com/2004/10/23/politics/campaign/viewers-get-only-a-peek-of-a-movie-chiding-kerry.html?_r=0) [<https://perma.cc/46X2-G6XN>]. The Republican FCC chairman at the time, Michael Powell, refused to intervene and exercise prior restraint, citing agency precedent and First Amendment concerns. *FCC won't block airing of anti-Kerry film*, NBC NEWS (Oct. 14, 2004), <http://www.nbcnews.com/id/6249909/ns/politics/t/fcc-wont-block-airing-anti-kerry-film> [<https://perma.cc/R7FJ-2T35>]. Nevertheless, the possibility of Kerry winning the close election and nominating a new FCC chairman a few months later contributed to Sinclair’s stock decline. As one major Sinclair shareholder noted, “Those guys at Sinclair better watch out if Kerry is elected.” Carter, *supra* note 6.

als, the agency allows special interest groups to influence media content, business models, and operations.

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

Not much has changed in the fifteen years since Bryan Tramont, then-Legal Advisor to Commissioner Harold Furchtgott-Roth, wrote that “procedural loopholes and circumstance create opportunities for the Commission to operate free of the discipline imposed by the statute and administrative procedure” during license transfer approvals and consent decrees.<sup>11</sup> If anything, the severity of the problem may be getting worse.<sup>12</sup> Scholars criticize lawmakers’ “jaw-

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9. *Novel Procedures in FCC License Transfer Proceedings: Hearing Before the Subcomm. on Comm. and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 11–12 (1999) (statement of Harold Furchtgott-Roth, Comm’r, Fed. Commc’ns Comm’n) (“Agency decisions regarding which license transfers to review . . . are entirely *ad hoc* . . .”).

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

11. Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy “Voluntary” Agreements*, 53 *FED. COMM. L.J.* 49, 52 (2000), <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1260&context=fclj> [<https://perma.cc/L7XD-WDUP>].

12. Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, 45 *REV. INDUS. ORG.* 295, 312 (2014) (noting that since 2004, “conditions have become increasingly common features of [FCC] merger clearances”); see also Derek E. Bambauer, *Against Jawboning*, 100 *MINN. L. REV.* 51, 128 (2015) (“Jawboning of Internet intermediaries is increasingly common, and it operates beneath the notice of both courts and commentators.”); T. RANDOLPH BEARD ET AL., PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES, PHOENIX CENTER POLICY PAPER NO. 49, *ERODING THE RULE OF LAW: REGULATION AS COOPERATIVE BARGAINING AT THE FCC* 5 (2015),

boning”—a term for informal regulation and threats using dubious legal authority—of Internet and media companies outside of transparent regulation.<sup>13</sup> Professor Derek Bambauer notes that “[i]nformal enforcement . . . cloaks what is in reality state action in the guise of private choice,”<sup>14</sup> and such “regulation by transaction” has far-reaching legal and constitutional effects.

Once an acquisition or license transfer is before the Commission, the applicants and the FCC engage in a secretive bargaining over what “voluntary” commitments the applicants must make to remain in the agency’s good graces.<sup>15</sup> These negotiated agreements are made pursuant to a consent decree or to gain transaction approval and are, practically speaking, not appealable.<sup>16</sup>

These circumstances eviscerate norms of good governance and rule of law and may also be unconstitutional because of the amount of discretion the FCC has over speakers. The FCC’s transaction practices pose the speech infringement risks the Supreme Court warned of in a 1988 case, *City of Lakewood v. Plain Dealer Publishing Co.*, regarding a city’s licensing of newspaper racks: “the mere existence of the licensor’s unfettered discretion, coupled with the power of prior restraint, intimi-

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<http://www.phoenix-center.org/pcpp/PCPP49Final.pdf> [<https://perma.cc/8XGZ-2HLL>].

13. The term derives from the Biblical story of Samson, who killed thousands of men with a seemingly weak instrument, a donkey’s jawbone. See *Judges* 15:14–17.

14. Bambauer, *supra* note 12, at 65.

15. See BEARD, *supra* note 12, at 5.

16. In theory, the transaction applicants could submit to a hearing with an administrative law judge. 47 U.S.C. 309(e) (2012) (“If . . . a substantial and material question of fact is presented or the Commission for any reason is unable to make the [public interest, convenience, and necessity] finding . . . it shall formally designate the application for hearing . . .”). However, scholars like Daniel Deacon, a lecturer at Harvard Law School and former telecommunications law attorney, point out the “adjudication process is considered so onerous that the reference to the ALJ (or merely the announcement that the FCC will refer) effectively denies the merger,” and that “the idea that the FCC cannot deny a merger without sending it to a neutral adjudicator is largely a fiction.” Daniel Deacon, *Some Thoughts on FCC Merger Review Occasioned by the Demise of the Comcast-Time Warner Cable Deal*, NOTICE & COMMENT (Apr. 29, 2015), <http://www.valeireg.com/blog/some-thoughts-on-fcc-merger-review-occasioned-by-the-demise-of-the-comcast-time-warner-cable-deal-by> [<https://perma.cc/TX7W-UWJV>].

dates parties into censoring their own speech, even if the discretion and power are never actually abused.”<sup>17</sup>

The FCC continues down its current path at legal peril. The expansion of FCC authority during license transfers, its ad hoc determinations of the public interest, and the impracticability of timely judicial review have pernicious effects on modern media and the rule of law. Given the immense discretion over media, the FCC’s transaction reviews may be subject to facial First Amendment challenges.<sup>18</sup> If the FCC does not voluntarily abandon its de facto merger review, the agency should at least promulgate guidelines for what its public interest standard requires.

#### I. BACKGROUND ON FCC AUTHORITY OVER COMMUNICATIONS TRANSACTIONS AND THE PUBLIC INTEREST STANDARD

By statute, the FCC must find that a wireless license transfer serves “the public interest, convenience, and necessity”<sup>19</sup> and there must be similar finding for a transfer of common carrier lines.<sup>20</sup> Parties with transactions subject to FCC jurisdiction bear the burden and must prove by a preponderance of the evidence that the transaction affirmatively provides public interest benefits.<sup>21</sup> Notably, the Communications Act provides no general merger authority but the agency has treated its authority over license transfers as reason to evaluate and approve mergers. As a result, the subsequent trans-

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17. 486 U.S. 750, 757 (1988).

18. *Lakewood*, 486 U.S. at 759 (“Therefore, a facial [First Amendment] challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.”).

19. 47 U.S.C. § 310(d) (2012) (“No . . . station license . . . shall be transferred . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”).

20. 47 U.S.C. § 214(a) (2012) (“No carrier . . . shall acquire or operate any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require . . . the . . . operation[] of such . . . line.”).

21. *See, e.g., AT&T Inc.*, 30 FCC Rcd. 9131, 9139–40 (2015).

action analysis frequently makes only incidental mention of the underlying licenses.<sup>22</sup>

This regulatory power over speakers exists because the FCC's authority predates changes in the market that created more speakers—for instance, traditional telephone companies now provide television—and predates the expansion in coverage of the First Amendment since the 1970s.<sup>23</sup> The “public interest” standard was first applied to mass media over eighty years ago, with the creation in 1927 of the FCC's predecessor, the Federal Radio Commission, which regulated radio broadcasters.<sup>24</sup>

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

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22. Furchtgott-Roth, *supra* note 9 (“[M]ost orders involving mergers do not even identify the radio licenses or section 214 authorizations at issue or discuss the consequences of their conveyance, but instead move directly to a discussion of the merger . . .”).

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

24. Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930).

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

26. Acting Attorney General Donovan noted that what is necessary to satisfy the FRC's public interest standard has to be marked out and developed by a line of administrative and judicial decisions. See William J. Donovan, *Origin and Development of Radio Law*, 2 AIR L. REV. 107, 114–17 (1931).

27. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (2012), for instance, bars “contract[s] . . . in restraint of trade or commerce.” Taken literally, this provision makes even the most routine commercial agreements illegal. Rather than trust the antitrust agencies with that immense discretion, courts provided common law-like standards to the statute to prevent the exercise of arbitrary power.

28. See *FCC v. RCA Commc'ns, Inc.*, 346 U.S. 86, 90 (1953) (“The statutory standard no doubt leaves wide discretion, and calls for imaginative interpretation.”); Furchtgott-Roth, *supra* note 9, at 14 (“[T]he Commission has failed to place

Since the 1970s, Congress and the FCC have moved away from formal industrial policy in telecommunications and public interest programming mandates in media and moved towards market competition<sup>29</sup> and free speech norms.<sup>30</sup> Old habits die hard, however. Lacking the legal authority or political will to engage in, for instance, formal broadband rate regulation and cable TV programming mandates, the FCC extracts nominally voluntary commitments from merging firms about rates, programming, and other issues like net neutrality.<sup>31</sup> Combined with the FCC's pervasive public interest standard,<sup>32</sup> regulation by transaction commitments "may be the [FCC's] primary and most potent form of regulatory control."<sup>33</sup> As communications scholar Randolph May explains:

The Commission merely withholds approval of the merger until the parties come forward to propose conditions which the Commission has telegraphed in closed door negotiations that it would find acceptable to meet whatever public interest concerns that opponents, the FCC, and others have raised.<sup>34</sup>

Since it lacks merger authority under the Communications Act,<sup>35</sup> the FCC does not have statutory time limits for transac-

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any outer limits whatsoever on [the public interest test], freely reinterpreting the standard in each new case."); John O. Robinson, *Spectrum Management Policy in the United States: An Historical Account* 43 (Fed. Comm'ns Comm'n OPP Working Paper Series, Paper No. 15, 1985), [https://transition.fcc.gov/Bureaus/OPP/working\\_papers/oppwp15.pdf](https://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp15.pdf) [<https://perma.cc/PC92-7EQ2>] ("The public interest has become, therefore, whatever the Commission decided it to be.").

29. See, e.g., Joseph D. Kearney, *Will the FCC Go the Way of the ICC?*, 71 U. COLO. L. REV. 1153, 1153–54 (2000).

30. See, e.g., Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1285–87 (2005).

31. AT&T Inc., 30 FCC Rcd. 9131, 9284–9301 (2015).

32. Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 429 (2001) (estimating that nearly one hundred statutory provisions direct or authorize the FCC to act according to the public interest standard).

33. BEARD, *supra* note 12, at 23.

34. Randolph J. May, *A Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 ADMIN. L. REV. 895, 904 (2008).

35. The FCC does have concurrent authority with the Department of Justice to enforce Sections 7 and 11 of the Clayton Act against common carrier mergers. 15 U.S.C. § 21(a) (2012).

tion reviews and reviews often take about a year.<sup>36</sup> This is much longer than competition reviews at the Federal Trade Commission and Department of Justice, which generally take two to four months<sup>37</sup> because of the requirements of the Hart-Scott-Rodino Act.<sup>38</sup>

Since transaction delays are costly to merging firms and they bear the burden of showing public interest benefits, this gives the agency great leverage over firms and appears designed to extract public interest concessions from firms. The FCC challenges license transfers typically when the underlying value of the transaction is in the billions of dollars. Some firms spend tens or hundreds of millions of dollars on FCC approval-related expenses alone, which presumably are substantially less than the value of the transaction to the firms.<sup>39</sup> In one of the largest recent merger attempts, reporting suggests Comcast and Time Warner Cable collectively spent over \$500 million on merger-related expenses, a deal that the FCC rejected.<sup>40</sup> Merging firms who disagree with the need or legality of a merger condition are in no position to challenge the condition.<sup>41</sup>

There are sensible debates about where voluntary action by a private firm ends and government coercion begins. We do not believe that distinction is relevant here and are aware of no scholarship defending the agency's coercive "regulation by transaction." Law professor Tim Wu wrote perhaps the most

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36. It has self-imposed guidelines to limit review to six months but typical FCC merger review takes nine to twelve months. Yoo, *supra* note 12, at 311.

37. *See id.* at 310.

38. 15 U.S.C. § 18(a) (2012).

39. Bob Fernandez, *How Comcast Sealed the NBCU Deal*, PHILA. INQUIRER (Jan. 23, 2011), [http://articles.philly.com/2011-01-23/business/27044733\\_1\\_nbcu-deal-comcast-shareholder-largest-cable-distributor](http://articles.philly.com/2011-01-23/business/27044733_1_nbcu-deal-comcast-shareholder-largest-cable-distributor) [<https://perma.cc/RUT7-J336>] (reporting that Comcast alone spent nearly one hundred million dollars in NBC Universal acquisition expenses).

40. Kyle Wiggers, *Comcast's Failed Acquisition of TWC Cost a Third of a Billion Dollars*, DIGITAL TRENDS (May 5, 2015), [http://www.digitaltrends.com/home-theater/comcast-spent-\\$336-million-on-failed-twc-merger/](http://www.digitaltrends.com/home-theater/comcast-spent-$336-million-on-failed-twc-merger/) [<https://perma.cc/9VU8-Q45G>].

41. Harold Furchtgott-Roth, *The FCC Racket*, WALL ST. J. (Nov. 5, 1999), available at [https://transition.fcc.gov/Speeches/Furchtgott\\_Roth/fccRack.html](https://transition.fcc.gov/Speeches/Furchtgott_Roth/fccRack.html) [<https://perma.cc/7CWN-X98R1>] (noting that merging firms do not sue the FCC "out of fear that the corresponding delay will sink this and future deals."). The notion that the FCC cannot deny a transaction before a hearing before a neutral adjudicator "is largely a fiction." Deacon, *supra* note 16.



prominent defense of informal regulation in fast-moving industries, yet he expressly names the FCC's merger reviews as potentially abusive because legal review is unfeasible.<sup>42</sup> We therefore argue that conditions extracted during the FCC approval process are coerced and not voluntary because the penalty for not offering concessions is so severe—a rejected merger. Further, as we explain below, when speech interests are at stake the Supreme Court regards even modest regulatory oversight, such as licensure and a requirement to show public interest benefits, as unconstitutional because the risk of government intimidation is too large.

To provide some context for FCC decision making in the absence of any clear standards being set by Congress or enforced by courts, in the next Part we outline a basic model of bureaucratic action. Beginning with the premise that officials within the FCC are individuals that respond to incentives, it is important to model what incentives are driving decisions within the agency. By revealing the legal precariousness of the FCC's current practice in the second Part, we aim to change the incentives of agency officials to attempt more modest, defensible transaction reviews.

## II. A MODEL OF FCC ACTION, AGENCY COERCION, AND THE RULE OF LAW

Scholars have long recognized that government actors are not selfless, disinterested actors seeking to maximize the public interest.<sup>43</sup> Instead, regulators may use this as cover to achieve their own goals and objectives. If the “public interest” is not the chief concern of individuals within the FCC, what then do bureaucrats within the agency seek to maximize? Max Weber, the German political economist, notes that in general bureaucrats seek to maximize “power.”<sup>44</sup> While this basic idea has laid the foundation for much of the public choice research on bureau-

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42. See Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1855 (2011).

43. See, e.g., MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 340–366 (2009).

44. Max Weber, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 233–34 (H.H. Gerth & C. Wright Mills eds., trans., 1946); see also STEARNS & ZYWICKI, *supra* note 43, at 342.

cratic action, it nonetheless fails to adequately describe FCC decisions. A more specific description is necessary.

Elaborating on this basic idea that individuals within agencies seek to increase power, William Niskanen provided the first systematic analysis of bureaucratic action.<sup>45</sup> The core insights of his initial framework are that individuals within agencies, such as the FCC, are primarily engaged in maximizing their budgets and expanding the overall scope of the agency's jurisdiction. This is what scholars have come to recognize as "empire building," and has shaped the understanding of agency behavior. It is also central to understanding the FCC's use of its merger review authority.

However, much of Niskanen's initial empire-building model of agency behavior is not universally accepted.<sup>46</sup> One criticism of Niskanen's initial model is that the primary focus, budget maximization, is somewhat disconnected from observed agency behavior.<sup>47</sup> Building upon this insight, others have stated that this model is not simply wrong, but may in fact predict the precise opposite of what actually occurs at agencies.<sup>48</sup> Niskanen himself noted that while his initial framework was certainly important, it was "conspicuously flawed."<sup>49</sup>

Given the criticisms, the model has been refined over time and our use of the insights from the empire-building model extends beyond the FCC's budget. While agencies may seek to enlarge budgets, there are other ways in which an agency, such as the FCC, may build its empire. In addition to simply seeking a larg-

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45. WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

46. See, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2005); see also STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2007); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989).

47. Levinson, *supra* note 46, at 932 (noting that "[e]ven if most bureaucrats were primarily interested in lining their own pockets, the relationship between a larger agency budget and higher salaries or cushier working conditions is empirically tenuous").

48. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1294–95 (2006).

49. William A. Niskanen, Jr., *Bureaucracy: A Final Perspective*, in REFLECTIONS OF A POLITICAL ECONOMIST: SELECTED ARTICLES ON GOVERNMENT POLICIES AND POLITICAL PROCESSES 194 (2008).

er discretionary budget, an agency may also seek to build its empire by maximizing, among other variables, the agency's public reputation, patronage, output, ease of rulemaking, and ease of management.<sup>50</sup> For the FCC, this can be best understood as seeking to increase a combination of the agency's discretionary budget, the scope of the agency's jurisdiction, and its independence from congressional oversight and the courts.<sup>51</sup>

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

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

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

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50. Niskanen, *supra* note 49, at 196–98.

51. See STEARNS & ZYWICKI, *supra* note 43, at 343–44.

comply with its policy goals.<sup>52</sup> This has been undertaken through concessions from merging parties to achieve what would traditionally be done through formal, industry-wide rulemakings.<sup>53</sup> In addition, as suggested earlier, many of these voluntary concessions would not have been achieved if sought through the formal process.

Moreover, with the lack of institutional constraints, the FCC can engage in *de facto* rulemaking via transaction review with little external oversight or control. Without a clear objective standard upon which merger approvals are granted, the agency can use its amorphous public interest standard to achieve its policy goals without any practical limitations. This places the FCC in a unique position when compared to other agencies empowered with merger review authority, especially the FTC. As noted above, merging parties are forced to establish—to the FCC’s satisfaction—that the merger will affirmatively provide public interest benefits.<sup>54</sup> Moreover, unlike other agencies, the FCC has no statutory time limits to review mergers.<sup>55</sup>

This places the FCC in a position of power and creates a strong incentive to achieve extraneous policy goals through merger review. This has consistently played out in several high-profile examples. For instance, when News Corp acquired DirecTV in 2004, the FCC used its transaction review to impose program access conditions.<sup>56</sup> Program access rules are authorized by Congress through formal, industry-wide rulemaking,<sup>57</sup> but require public notice and comment periods, as well as the potential for judicial review. Working through merger conditions, however, avoids notice and comment and is unreviewable by courts.

Moreover, the FCC uses its transaction review to create policies that are beyond the scope of its statutory authority. For example, AT&T Broadband agreed to comply with the FCC’s dubious

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52. BEARD, *supra* note 12, at 10.

53. *Id.*

54. Yoo, *supra* note 12, at 298.

55. It has self-imposed guidelines to limit review to six months but typical FCC merger review takes nine to twelve months. *Id.* at 311.

56. *Id.* at 312.

57. 47 U.S.C. § 548(b)–(c) (2012).

regulations that capped a cable company's market share at 30% when AT&T acquired MediaOne in 2000. Those regulations were subsequently struck down in 2001 in *Time Warner Entertainment Co. v. FCC*.<sup>58</sup> Similarly, the agency conditioned the Bell Atlantic-NYNEX merger on the merged firm's agreement to accept a complex price ceiling—a total element long run incremental cost (TELRIC)—for allowing competitors access to the firm's networks.<sup>59</sup> This remained in force even though the Eighth Circuit just held that TELRIC was impermissible and beyond the agency's jurisdiction.<sup>60</sup>

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

The FCC's extracted conditions increasingly relate to speech and the distribution of speech. For example, the FCC used three large mergers in the mid-2000s—SBC-AT&T, Verizon-MCI, and AT&T-BellSouth—to extract agreements from these firms to abide by the 2005 policy statement on network neutrality, a norm that Internet access providers should not discriminate between content.<sup>61</sup> In 2010, the FCC's authority to enforce the 2005 policy statement as an official rule was struck down.<sup>62</sup> However, since the voluntary concessions are not recognized as official agency action, they remained in place.<sup>63</sup> Moreover, as a condition for FCC approval of the Comcast-NBCU merger, Comcast agreed to abide by the 2010 Open Internet Order for ten years. While these rules were substantially struck down in 2014,<sup>64</sup> the parties were still bound by their consent decrees.

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58. 240 F.3d 1126 (D.C. Cir. 2001). The FCC agreed not to enforce the condition. Yoo, *supra* note 12, at 312.

59. NYNEX Corp., 12 FCC Rcd. 19985, 20107–12 (1997).

60. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

61. Yoo, *supra* note 12, at 313.

62. *See Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

63. Yoo, *supra* note 12, at 313.

64. *See Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

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

### III. THREAT TO FREE SPEECH

If the FCC persists in extracting public interest benefits from firms that create and distribute speech, it may see its transaction authority limited after a facial First Amendment challenge. When courts are alerted to circumstances where government intimidation of the press is foreseeable and appeal is difficult, they typically take a dim view. The Supreme Court noted in a 1994 case that "laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State."<sup>65</sup> Since court scrutiny is higher when government action is directed at portions of the press, the FCC's chosen path of empire building—extracting unreviewable concessions from firms during coercive transaction reviews—likely violate the Constitution's protection of the press and free speech.<sup>66</sup>

Speech distributors that the FCC oversees, like cable and satellite TV companies, are protected by the First Amendment press protections.<sup>67</sup> As Justice Potter Stewart wrote:

[T]he Free Press guarantee is in essence a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of in-

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65. *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 640 (1994) (internal quotation marks omitted) (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)). However, "a differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Leathers v. Medlock*, 499 U.S. 439, 452 (1991) (citing *Mabee v. White Plains Publ'g*, 327 U.S. 178 (1946); *Okla. Press Publ'g v. Walling*, 327 U.S. 186 (1946)).

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

67. "The press" expands as the modes of information distribution change. See *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals."). New forms of media distribution are protected by the First Amendment. See, e.g., *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (explaining that cable companies exercise editorial discretion over content they distribute).

dividuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution.<sup>68</sup>

As one federal court said in striking down access regulations directed at an Internet service provider, “[n]ot only the message, but also the messenger receives constitutional protection.”<sup>69</sup> Court sensitivity to state intrusions into the press arises because there is a historic appetite among many lawmakers and regulators to censor undesired speech, to compel desired speech, and to compel speakers to waive their speech rights.<sup>70</sup> For hundreds of years, governments have targeted speech intermediaries for censorship rather than dispersed speakers and authors, who are more numerous, more difficult to identify, and more protected by law and social norms.<sup>71</sup> Regulation of nascent distributors of speech throughout history is unfortunately the norm, not the exception. Ever since the spread of the printing press in the 1500s, when “broadcast” media first became economical, governments have initially sought to license and exert control over the producers and distributors—the printing press,<sup>72</sup> the first newspapers,<sup>73</sup> and motion pictures<sup>74</sup>—of mass communications.

Those illiberal instincts survive today. In the 20th century, scholars and judges in the United States—like the printing press licensors of old—manufactured justifications<sup>75</sup> for why

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

69. *Comcast Cablevision of Broward Cty. v. Broward Cty.*, 124 F. Supp. 2d 685, 693 (S.D. Fla. 2000).

70. See *Lovell*, 303 U.S. at 451 (“The struggle for the freedom of the press was primarily directed against the power of the licensor.”).

71. See Bambauer, *supra* note 12, at 85–86.

72. See Cyndia S. Clegg, *Censorship*, in 1 OXFORD ENCYCL. OF BRITISH LIT. 417, 420 (David S. Kastan ed., 2006). Some present-day governments license printing presses, as in Singapore. See *Newspaper and Printing Presses Act*, c. 206, § 3(1) (Sing. 2002) (requiring license to operate printing press).

73. See Berrin A. Beasley, *History of Journalism: Before 1861*, in 2 ENCYCL. OF JOURNALISM 695, 695–96 (Christopher H. Sterling ed., 2009) (discussing early licensing of printers and newspapers in England and in American colonies).

74. See *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243–45 (1915) (listing cases that uphold state laws regulating and licensing motion pictures).

75. The *Red Lion* case, upholding the FCC’s equal time rules because of the scarcity of the airwaves, is particularly criticized. See Jim Chen, *Liberating Red Lion From the Glass Menagerie of Free Speech Jurisprudence*, 1 J. ON TELECOMM. & HIGH

new speech distributors should face license renewals,<sup>76</sup> should be compelled to carry speech,<sup>77</sup> or should be prosecuted for transmitting speech the government or its constituencies dislike.<sup>78</sup> Though First Amendment jurisprudence since the 1970s has weakened direct FCC regulation of speech, legacy FCC intrusions into a free media exist today. In the United States, then, radio and TV broadcasters, like Sinclair Broadcasting, can be subjected to programming mandates,<sup>79</sup> and cable and satellite TV companies are compelled to carry video and speech from those local broadcasters.<sup>80</sup>

Therefore, our model of empire building suggests that the FCC's transaction reviews will increasingly violate free speech norms. The appetite to put speech distributors under duress is always present and transaction reviews give the agency leverage and little risk of judicial review. Alarming, governments are increasingly looking to regulate content online even as Internet-delivered media gains constitutional protection in the United States. Federal courts and legal scholars are concluding that Internet-based media distributors—ISPs,<sup>81</sup> search engines,<sup>82</sup> online

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TECH. L. 293, 296 (2002) (citing *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969) (“Of course, no one besides the Justices actually believes the scarcity rationale.”)).

76. See 47 U.S.C. § 309(k)(1)(A) (2012) (providing that FCC can renew broadcaster's license if broadcaster has, *inter alia*, served the public interest).

77. Congress requires, for instance, that cable operators carry local commercial broadcast TV channels in the cable market as well as certain noncommercial educational broadcasters. See 47 U.S.C. §§ 534–35 (2012).

78. For instance, the FCC fined a licensee, a college FM station, for airing an interview with Jerry Garcia of the Grateful Dead that featured profanity. *WUHY-FM, Eastern Education Radio*, 24 F.C.C. 2d 408, 408–09 (1970) (notice of apparent liability). Federal law prohibits profanity on the airwaves. 18 U.S.C. § 1464 (2012). Broadcast programming featuring drugs, oral sex, violence, cigarette advertising, and children's advertising has also brought FCC punishment. See THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 103–40 (1994).

79. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215–16 (1943) (“[T]he [Communications] Act does not restrict the Commission merely to supervision of the [broadcast] traffic. It puts upon the Commission the burden of determining the composition of that traffic.”).

80. See 47 U.S.C. §§ 534–35 (2012).

81. See *Comcast Cablevision of Broward Cty. v. Broward Cty.*, 124 F. Supp. 2d 685, 697–98 (S.D. Fla. 2000) (applying strict scrutiny to county's ISP open access requirement for a cable company and finding this ordinance violated First Amendment).



video distributors, and social media companies<sup>83</sup>—create and disseminate information and therefore are speakers protected by the First Amendment.<sup>84</sup> Congressional policy is that the Internet should be unregulated<sup>85</sup> and the Supreme Court applies strict scrutiny to Internet regulation that has a nexus to speech,<sup>86</sup> so regulation is more difficult, but online speech regulations continue to arise in the United States and around the world.

The FCC's recent Open Internet regulations, for instance, compel Internet service providers to carry video and other content they do not wish to carry.<sup>87</sup> In recent years, several states and Congress have attempted to deputize ISPs and other online intermediaries to remove indecent material and to pre-

82. See *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (finding that Google's search results are protected by First Amendment).

83. See Eugene Volokh & Donald M. Falk, *Google First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL'Y 883, 890 (2012) (explaining that interactive online media is protected by First Amendment).

84. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding that First Amendment protects communications delivered via Internet as much as it protects print communications); see also *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011) (“[C]reation and dissemination of information are speech within the meaning of the First Amendment.”); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

85. See 47 U.S.C. § 230(b)(2) (2012) (“It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation . . .”).

86. See *Reno*, 521 U.S. at 874.

87. See Fred B. Campbell, *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation*, 94 NEB. L. REV. 559 (2016); Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 ISJLP 197, 202 (2007) (“Because neutrality mandates invariably require ISPs to send or post content which the ISPs might prefer not to send or post, they are in effect, speech restrictions that infringe the ISPs’ constitutional rights.”). Some scholars argue that ISPs are not protected by the First Amendment. See, e.g., Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343, 2345 (2014). But see *Comcast Cablevision of Broward Cty. v. Broward Cty.*, 124 F. Supp. 2d 685, 697–98 (S.D. Fla. 2000) (applying strict scrutiny to county’s ISP open access requirement for cable company and finding this ordinance violated First Amendment); Stuart M. Benjamin, *Common Sense and Key Questions*, 127 HARV. L. REV. F. 346, 347–48 (2014) (“If an Internet access provider is willing to say, ‘We give you an edited Internet—the Internet we think you want,’ I think they are engaged in speech under the prevailing jurisprudence.”); Brent Skorup, *ISPs have a First Amendment right to block offensive content*, PLAIN TEXT (Nov. 17, 2015), <https://readplaintext.com/isps-have-a-first-amendment-right-to-block-content-323ca1ebdf0b#4vmksnc0v> [<https://perma.cc/RFF9-CT48>] (providing examples of “edited” Internet access).

vent copyright infringement.<sup>88</sup> Lawmakers recently requested the FCC Chairman pressure Facebook to prevent terrorist and gang communications.<sup>89</sup> In 2015, the UN Broadband Commission went so far as to encourage regulators to “use their licensing prerogative to ensure that only those Telecoms and search engines” that monitor and screen “cyber abuse and violence” against women are allowed to operate.<sup>90</sup>

Coverage of the First Amendment has broadened in recent decades but advocates still call for compelled speech of new speech distributors. In the 1970s, courts began reversing the earlier trends, which permitted expansive regulation of media. The Supreme Court’s *Tornillo* decision<sup>91</sup> held that freedom of speech is violated not only by censorship but also by governmental attempts to compel speech.<sup>92</sup> Today, many legal scholars express frustration that the First Amendment hinders content-based regulation of these modern distributors like cable TV, the Internet, search engines, and algorithms.<sup>93</sup> Scholars are now searching for novel justifications for why search engines

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

89. John Eggerton, *FCC’s Wheeler Connects With Facebook’s Zuckerberg*, BROADCASTING & CABLE (Dec. 8, 2015, 4:00 PM), <http://www.broadcastingcable.com/news/washington/fccs-wheeler-connects-facebook-s-zuckerberg/146268> [https://perma.cc/9QEQ-LYSH].

90. U.N. BROADBAND COMMISSION FOR DIGITAL DEVELOPMENT WORKING GROUP ON BROADBAND AND GENDER, CYBER VIOLENCE AGAINST WOMEN AND GIRLS: A WORLD-WIDE WAKE-UP CALL 47–48 (2015), [http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber\\_violence\\_gender%20report.pdf](http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf) [https://perma.cc/6748-ZXCE].

91. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995) (holding that “an edited compilation of speech generated by other persons” is protected under First Amendment).

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

93. Professor Bracha, for instance, warns that First Amendment arguments threaten to upend “the basic structure of post-New Deal constitutional law.” *Id.* at 1633; see also Jedediah Purdy, *The Roberts Court v. America: How the Roberts Supreme Court is using the First Amendment to craft a radical, free-market jurisprudence*, DEMOCRACY: A JOURNAL OF IDEAS, Winter 2012, at 46, 49 (“[The Supreme] Court has made the First Amendment a new anti-regulatory hammer.”). See generally Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005).

and ISPs lack First Amendment protection and can be compelled to carry speech,<sup>94</sup> though their success in court is in doubt.<sup>95</sup> Since most formal regulation of content is precluded, but appetite for content regulation persists,<sup>96</sup> the FCC relies on informal methods like extracting conditions during transaction reviews. In fact, given deregulatory policy and norms, this is the most powerful tool the FCC has left.<sup>97</sup>

For the reasons described above, transaction review serves to achieve what the FCC cannot or refuses to achieve through formal regulation. Under existing law, the FCC can, as noted, require more racial minority, children's, health, and public affairs programming on broadcast TV and radio through rule-making. It is also permissible for the FCC to promulgate modest regulations about industry composition if intended to increase viewpoint diversity in broadcast and cable TV.<sup>98</sup> Yet, today, the FCC is wary of formal mandates because they bring unwanted congressional attention, irritate media companies, and provoke public complaints of censorship. In ways consistent with the empire building model, the agency uses opaque, coercive pressures that end in ostensibly voluntary commitments, thereby avoiding headline risk while allowing the agency to take credit for any public benefits.

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94. Bracha, *supra* note 92, at 1651 (asserting that "search engines do not qualify for First Amendment protection given to editors against compelled speech"); Crawford, *supra* note 86, at 2345 (arguing that ISPs are not speakers protected by First Amendment).

95. Skorup, *supra* note 87; Susan Crawford, *Reading Brown v. Entertainment Merchants Assn*, SUSAN CRAWFORD BLOG (June 27, 2011), <http://scrawford.net/reading-brown-v-entertainment-merchants-assn/> [<https://perma.cc/HSW9-U6KZ>] (lamenting "the absolutist approach of the current Supreme Court to protection of speakers of all kinds—including distributors of speech").

96. See Ammori, *supra* note 93, at 82–83, 122.

97. BEARD, *supra* note 12, at 23.

98. The Supreme Court in *Turner I* concluded that three of the FCC's main policy goals underlying regulation—(1) the preservation of free, local television; (2) the promotion of a diversity of information sources; and (3) the promotion of competition—are unrelated to the content of message conveyed. *Turner Broad. Svs. v. FCC*, 512 U.S. 622, 662 (1994); see also *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 798–801 (1978) (holding that promotion of diverse views is content-neutral). See generally Christopher Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669 (2005). Diversity and localism are types of content, however, and the *Turner I* holding presents a paradox. Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1777–79 (1995).

Jawboning and informal pressures on media cannot be eliminated. It is likely beneficial to have government officials joining advocates in encouraging good media norms about, say, offering diverse viewpoints, respectful treatment of controversial issues, and educational programming. The problem of coercion arises when these expectations are paired with the FCC's coercive power in transaction reviews. Hortatory language about diverse viewpoints and local news transform into something more pernicious for a free media, and media companies are increasingly cooperating to satisfy their regulator's whims, including decisions related to content.<sup>99</sup>

Firms that have been through the FCC transaction process and are likely to have transactions in the future are, for fear of FCC retaliation and poor press, not forthcoming about their motivations for various concessions. Nevertheless, the political activity and advocacy surrounding a transaction suggests which concessions will quiet a powerful transaction opponent and sate the FCC's loudest constituencies.<sup>100</sup> Occasionally, parties' transaction strategies become public information.

The size of the Comcast-NBCU merger in 2010 and the nature and amount of the concessions received news and scholarly coverage. The episode reveals what firms are willing to concede to in order to accomplish a merger, and many of Comcast's and NBCU's concessions were related to hiring, pricing, and programming decisions. For instance, knowing Commissioner Clyburn's desire for more TV programming targeted for racial and ethnic minorities, Comcast promised to add cable channels that were owned by minorities or aimed at minority audiences.<sup>101</sup> After pressure from smaller cable distributors who feared a vertically-integrated competitor, Commissioner Clyburn also re-

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99. See BEARD, *supra* note 12, at 6 (“[B]argaining in the regulatory sphere is increasing in importance and this development may be among the most important innovations in regulation in many years.”); Bambauer, *supra* note 12, at 88 (“Internet platforms face structural incentives to knuckle under government jawboning over content.”).

100. See BEARD, *supra* note 12, at 9–10 (“[T]he FCC now routinely expects the merging firms to proffer various ‘voluntary commitments’ as part of the transaction . . . to sweeten the deal for regulators and public-interest groups.”).

101. Fernandez, *supra* note 39.

requested that Comcast allow small cable providers easier, inexpensive access to NBCU content.<sup>102</sup>

Comcast-NBCU volunteered many other conditions that the FCC will enforce. The concessions require Comcast to continue providing NBC programming to online distributor Hulu. Hulu is a joint venture of NBCU, 21st Century Fox, and Walt Disney Co., but NBCU can no longer exercise influence over Hulu operations.<sup>103</sup> The merged firm was required to create a new Spanish-language broadcast channel and to expand its Spanish-language video-on-demand programming choices from 35 to 300 within three years.<sup>104</sup> Comcast-NBCU agreed to purchase certain programming content (“a new weekly business news program”) from an independent producer and use a certain business model (syndication) for that program.<sup>105</sup> The content-based conditions included expanding local and public interest programming<sup>106</sup> and entering into agreements with local non-profit news organizations for local reporting.<sup>107</sup> There are similar requirements for children’s programming and the FCC required the company to add 1,500 choices of video-on-demand programming targeted to children and families.<sup>108</sup> Comcast-NBCU is also required to spend “\$15 million each year on digital literacy, FDA nutritional guidelines[,] and childhood obesity” on networks targeted to young families,<sup>109</sup> and must transmit public access, educational, and governmental programming to 85% of its cable subscribers, exercise no editorial discretion over these programs, and create additional video-on-demand options.<sup>110</sup> The list goes on, and Comcast-NBCU’s agreement showed sufficient public interest benefits to gain approval.

The FCC asserts it is preserving Comcast-NBCU’s editorial discretion with regards to these conditions,<sup>111</sup> but this is a polite

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102. *Id.*

103. *See* Comcast Corp., 26 FCC Rcd. 4238, 4263 n.134, 4362 (2011).

104. *Id.* at 4371.

105. *Id.*

106. *Id.* at 4372.

107. *Id.* at 4373.

108. *Id.* at 4374.

109. *Id.* at 4376.

110. *Id.* at 4376–77.

111. *Id.* at 4373.

fiction. The company must file a semi-annual report with the FCC identifying the parties with which it is working, the nature of its agreements, and the quantity of programming produced down to individual “videos, articles, blog posts and photos.”<sup>112</sup> The fact that the content required in these programming concessions are pro-social or (more dubiously) relatively easy for the merged company to accomplish distracts from the questionable legality of the process. These are precisely the circumstances the courts would deem unconstitutional for print media.

Suppose the same regulatory process that applies to broadcast, cable, and Internet companies applied for newspaper-related transactions. Any time major newspapers merged, or sold or acquired delivery trucks, printing facilities, or some other necessary input for operation, the newspaper would have to first show the FCC that the transaction served the public. Suppose further that in short time the commissioners made it publicly known to newspapers that they would substantially help the likelihood of a transaction if they made certain public interest concessions. The agency does not formalize these guidelines but in short time, merging newspapers promise to give a column to an activist, publish more stories about climate change, no longer endorse candidates, publish new Russian-language dailies, and give free advertising to local churches.

Most readers likely sense that these circumstances represent a First Amendment violation and predictably chill the free exercise of speech. They would be correct. This follows from *City of Lakewood*, where a city ordinance that gave the mayor a much more modest regulatory power—the ability to reject and accept applications to install newsracks on public property according to public interest determinations—was found to violate the First Amendment.<sup>113</sup> In that case, the Supreme Court established that a licensing law with a “nexus to expression” that gives discretionary power to a governmental official is subject

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112. See *id.* at 4373–74.

113. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988).

to facial challenge and presumptively unconstitutional.<sup>114</sup> The Court went on to note that:

[A] law requiring the licensing of printers has historically been declared the archetypal censorship statute . . . . [W]ithout standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference.<sup>115</sup>

The Court noted that “nothing in the law as written requires the mayor to do more than make the statement ‘it is not in the public interest’ when denying a permit application.”<sup>116</sup> Recall, this is the very standard to which the FCC is bound. The *City of Lakewood* Court called such a standard an “illusory constraint” on the mayor’s discretion.<sup>117</sup> The Court stated that absent binding judicial or administrative construction of the public interest or some other explicit limits, the law was impermissible.<sup>118</sup>

The review of mergers by media companies and distributors give the FCC substantial power to discriminate between speakers.<sup>119</sup> Improper censorial motive is not required for an action to be a violation of the First Amendment.<sup>120</sup> If the Congress authorized expressly that the FCC could compel, say, Spanish-language programming and contracts with independent documentary producers, the law would likely be subject to facial

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114. *Id.* at 759–60; see also David C. Knieriem, Comment, *Diminishing the First Amendment Rights of Newsracks: City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 37 WASH. U. J. URB. & CONTEMP. L. 243, 253 (1990).

115. *City of Lakewood*, 486 U.S. at 760.

116. *Id.* at 769.

117. *Id.* (internal quotation marks omitted).

118. *Id.* at 770.

119. It is likely legally irrelevant that the regulator claims to be regulating merely the means of distribution and promises to leave editorial discretion to the firms. Regulating speech distribution can also violate the First Amendment. As the Supreme Court has said, a law “cannot be saved because it relates to distribution and not to publication. ‘Liberty of circulation is as essential to . . . freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.’” *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1878)).

120. See *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 592 (1983) (“Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.”).

challenge by any party subject to the rules.<sup>121</sup> Many large cable companies, broadcasters, and ISPs have many financially significant dealings with the FCC and are unlikely to challenge the law even if there was a great possibility of success. The risk of retaliation in other proceedings is too great. Further, some large parties may regard the existence of opaque public interest reviews as a competitive benefit.<sup>122</sup> Any challenge, therefore, would likely need to come from a smaller operator that is not as reliant on the Commission's good graces for competitive survival. Such a challenge, however, may be successful in light of the FCC's more recent transactions that single out certain speech distributors and solicit "voluntary" programming obligations.

#### IV. PROPOSALS FOR REFORM

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

These protections, however, are not present when it comes to the FCC's transaction review authority. When it uses its transaction review authority in novel ways to condition approval on firms' concessions, the FCC is essentially engaged in rulemaking that is free from the safeguards that have been imbedded in the formal rulemaking process. Moreover, as we have shown above, the FCC may even use its review authority to extract concessions that would be overturned by courts if implemented as an official, industry-wide rule. If the agency does not articulate predictable standards in transaction reviews, it is vulnerable to a facial First Amendment challenge that could limit the FCC's existing authority.<sup>123</sup>

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121. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988).

122. Bambauer, *supra* note 12, at 103–04 (explaining that insider knowledge required to navigate informal enforcement may serve as helpful barrier to entry).

123. *City of Lakewood*, 486 U.S. at 758 ("Only standards limiting the licensor's discretion will eliminate [the danger of speech infringement] by adding an element of certainty fatal to self-censorship.").



The most straightforward proposal to guard against the problems inherent in the FCC's current approach is removal of the agency's authority to review mergers. This could be done in one of two ways. First, the FCC could simply choose to constrain itself. As noted above, the Communications Act provides no general merger authority. However, the agency has treated its authority over license transfers as *de facto* merger review authority.<sup>124</sup> Reversing this position could be achieved by something as simple as the chairman of the FCC stating that the commission will no longer review mergers because it is outside its authority under current law. However, it is unlikely that the FCC would voluntarily give up this authority.

Second, if the FCC is unwilling to constrain itself, Congress could explicitly preclude the FCC's Communications Act authority to review transactions. It is important to note that constraining the FCC's authority to review transactions would not leave telecommunications industry mergers unreviewed. The DOJ currently reviews telecommunications mergers under the Clayton Act, with overlapping authority given to the FCC.<sup>125</sup> Instead of FCC reviews, however, transaction review could be left with DOJ or given to the FTC, whose scope and jurisdiction already covers mergers in most industries, rather than the FCC's industry-specific focus.

Ending the FCC's transaction reviews and leaving the reviews with DOJ and the FTC would achieve two goals. First, it would provide for a transaction review process that has clearly delineated standards. Currently, mergers reviewed by the FTC and DOJ are subject to welfare-based standards and analysis rather than the FCC's amorphous public interest standard.<sup>126</sup> Second, since the FTC and DOJ focus almost solely on anti-competitive effects across a number of industries, the incentive

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124. *Cf.* AT&T Inc., 30 FCC Rcd. 9131, 9370 (2015) (Commissioner Michael O'Rielly, approving in part and concurring in part) ("I find the conditions being imposed, albeit less onerous than some of those extracted in past merger approvals, are unrelated to the transaction at hand . . .").

125. See KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RS22940, MERGER REVIEW AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION 1 (2008).

126. See, e.g., DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1–2 (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [<https://perma.cc/3UL3-M8DU0>].

to use transaction review as a tool to further other communications and media policies is much lower.

Another option, short of removing FCC transaction review authority, is for the Congress to clearly articulate limits to the FCC's ability to condition transaction approval. Specifically, the FCC's statutory authority could be defined to include only those conditions sought to remedy only merger-related harm.<sup>127</sup> The FCC could then be required to articulate the merger-related harms it identifies, the remedy it seeks to condition approval on, and provide some theory as to how that particular condition will remedy that specific harm.

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

Moreover, if Congress were truly interested in constraining FCC review authority, it should do away with the public interest standard regarding transaction reviews altogether. Instead, a welfare-based standard—similar to that applied by courts in general antitrust cases—ought to be adopted. In this way, transaction reviews will shift away from the current standard, which is a grab bag of economic, social, political, and personal goals of individuals within the agency and in advocacy groups, and toward one that focuses on the actual competitive effects of a proposed merger. Adopting this standard would also shift the burden to the FCC. Under a welfare-based standard, the agency would bear the burden of showing a merger's harm to competition, rather than requiring merging parties to establish its benefit.

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127. For a further discussion, see generally BEARD, *supra* note 12. The FCC is empowered to enforce sections of the Clayton Act for common carriers. 15 U.S.C. § 21(a) (2012).

## V. CONCLUSION

Regulatory agencies have a natural incentive to engage in empire-building behavior. However, the FCC, through its public interest standard, faces few formal legal constraints on growing its power. Continuing to allow the FCC's broad discretion to approve or deny transactions under a public interest standard violates basic rule of law norms and poses significant First Amendment problems.

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