COMMENTARY

MEDIA STRUCTURE, OWNERSHIP POLICY, AND THE FIRST AMENDMENT

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Ever since Mark Fowler's 1982 article laid down the gauntlet to those who favor structural media regulation,[1] legal academia has produced a host of free market acolytes advancing his views. These young academics increasingly dominate media law teaching and the FCC. Professor Christopher Yoo is one of this group's best (as well as a personal friend). This short Comment on his article, *Architectural Censorship and the FCC*,[2] is written not because I consider it uniquely objectionable, but rather because its fundamental errors and characteristic distortions are representative of this influential group of scholars. This Comment will start with observations about Yoo's policy and economic analyses and then conclude with a critique of his desired constitutional regime.

* Professor of Law, University of Pennsylvania. I wish to thank Professor Christopher Yoo for encouraging me to publish my comments and the Curb Center for Art, Enterprise and Public Policy for inviting me to comment on Professor Yoo's article at its Conference on Federal Regulation and the Cultural Landscape, held at Vanderbilt University (March 2004). I also benefited from helpful comments of Margaret Jane Radin, Fritz Kubler, and Charlotte Gross.

1. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Actually, regulatory efforts had already peaked in the early 1970s. By the late 1970s, deregulatory efforts had begun, and some significant legal scholars—including Lucas Powe and Douglas Ginsburg—were already criticizing FCC structural broadcast regulation. Still, Fowler and Brenner's article, possibly because Fowler was FCC Chairman, represents the open declaration of a new era.

2. Christopher Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669 (2005).

I. CASE STUDIES OF ARCHITECTURAL CENSORSHIP: OWNERSHIP CONCENTRATION

Yoo offers four examples of architectural censorship that he finds objectionable and favors having legally challenged and invalidated on First Amendment grounds.[3] Each architecture or legal framework has, he says, the (usually unintended) consequence of "degrad[ing] the quantity, quality, and diversity of programming available."[4] My critique is threefold: his discussion represents (1) inadequate normative or policy analyses; (2) simplistic, if not simply incorrect, economic analyses; and (3) misguided constitutional wishes. Of course, not all of the article is wrongheaded. Yoo's description of existing constitutional doctrine, for example, is careful and quite insightful, as far it goes. The task here, though, is to identify real problems, not real merits, in the article. Putting the constitutional points aside until later, and out of a need to be brief, the focus here will be on the normative framework and economic analysis in his discussions of ownership regulation—both horizontal concentration and what he describes as vertical integration. Because ownership issues are presently the most alive politically, the most important, and the most legally unresolved, and because they are the issues to which Yoo devotes the most attention, they are the chief focus of this Comment.

A. REASONS TO RESTRICT OWNERSHIP CONCENTRATION

Any normative evaluation of a legal regulation depends on an understanding of the goals it purports to further or the values it purports to embody. Thus, before turning to Yoo's analysis, it is important to roughly outline the most significant policy reasons for regulatory limits on media ownership concentration.[5]

The first and single most important reason to resist concentration of media ownership derives from a certain vision of democracy. Of course, normative theories of democracy are controversial.[6] Still, the major visions overlap in important ways. For many people (and most theories), true

3. Yoo identifies each as illustrating architectural censorship. He comments that "one would hope that the First Amendment would provide a basis for identifying and redressing architectural censorship when it arises." Yoo, *supra* note 2, at 675.

4. *Id.* at 731.

5. This subsection is adapted from testimony given before the Senate Committee on Commerce, Science & Transportation, Full Committee Hearing on Media Ownership (Sept. 28, 2004), *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=1321&wit_id=3847. *See also* C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 902–19 (2002).

6. *See infra* note 96.

democracy implies as wide as practical a dispersal of power within public discourse.[7] Dispersal of ownership also may promote the availability and consumption of diverse content—but no theorist of whom I am aware believes that this will always be true.[8] But democratic values mean that it makes a huge difference whether any lack of a particular type of diversity is imposed by a few powerful actors or reflects the independent judgments of many different people, for example, owners, with the ultimate power to determine content. The key goal, the key value, served by ownership dispersal is that it directly embodies a fairer, more democratic allocation of communicative power. This *distributive* value, combined with the points raised in the next paragraph, were probably what prompted nearly two million people to write, petition, or e-mail the FCC in opposition to reducing restrictions on concentration.[9] Without more, and regardless of empirical investigations or controversial economic analyses, this value judgment provides a proper reason to oppose any media merger or to favor any policy designed to increase the number of separate owners of media entities. Of course, in some circumstances, countervailing considerations might properly provide a basis to limit the sway of an anti-concentration or anti-merger principle. The Supreme Court approved the propriety of essentially this value judgment when it held that strict limits on media crossownership were appropriate to prevent an "undue concentration of economic power" in the communications realm.[10]

Second, the widest practical dispersal of media ownership provides two safeguards of inestimable democratic significance. Concentrated ownership in any local, state, or national community creates the possibility of an individual decisionmaker exercising enormous, undemocratic, largely unchecked, and potentially irresponsible power. Although this power may seldom or never be exercised, no democracy should risk the danger. Like the Constitutional separation of powers provisions, the fourth estate role of the press is designed in part to reduce the risk of abuses of power. In this sense, the widest possible dispersal of media power serves a structural role

7. As argued below, Yoo is often misled by an almost exclusively commodity-based conception of value. He did occasionally offer, however, a more active or speaker-based view of free speech, for example, when he invoked "the *individual's* interest to engage in speech." Yoo, *supra* note 2, at 730 (emphasis added). Surely, however, contrary to Yoo, most people would find this interest as a reason to limit media concentration, not a reason to treat limits as presumptively objectionable because they restrict the communicative power of corporate conglomerates.

8. *See infra* note 20.

9. Prometheus Radio Project v. FCC, 373 F.3d 372, 386 (3d Cir. 2004) (noting two million individual communications to the FCC).

10. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 780 (1978).

in the democratic process independent of any commodity that it produces or distributes on a day-to-day basis. Structurally, dispersal of ownership prevents a potential "Berlusconi" effect. Whether American owners of media conglomerates will use their power to unequally and partisanly affect the public sphere cannot be predicted abstractly. Whether or not this is true of William R. Hearst's yellow journalism or Rupert Murdoch's commercial or political agenda,[11] the undemocratic distribution and use of communicative power presents real dangers. German democracy did not benefit from Alfred Hugenberg's ability to use Germany's first media conglomerate to substantially contribute to Hitler's rise to power.[12] Note, however, that this serious risk is not the sort that economic or typical social science empirical content analyses are well equipped to identify.

Ownership dispersal can also provide safety by increasing the number of ultimate decisionmakers who have the power to commit journalistic resources to exposing government or corporate corruption or identifying other societal problems. This larger number of independent decisionmakers is likely to increase the chances that at least one will identify contexts in which to make this socially valuable commitment of resources. Similarly, this larger number will normally make it more difficult for any outsider to persuade or bribe the salient media into silence. Roughly thirty-five years ago, the FCC relied on this point when emphasizing that its concern is with diversity of *sources*:

> A proper objective is the maximum diversity of ownership . . . . We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50 . . . . It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis.[13]

The third argument is largely an economic one, combined with a sociological prediction. Economic theory predicts that media markets will radically fail to provide people with the media content they want.[14] One reason for this relates to externalities, both positive and negative. For

11. *See* James Fallows, *The Age of Murdoch*, ATLANTIC MONTHLY, Sept. 2003, at 81, *available at* http://www.theatlantic.com/doc/prem/200309/fallows.

12. *See, e.g.*, Daniel C. Hallin & Paolo Mancini, COMPARING MEDIA SYSTEMS: THREE MODELS OF MEDIA AND POLITICS 155 (2004).

13. Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306, 311 ¶ 21 (1970) [hereinafter 1970 Multiple Ownership Order]. Given this view, the only empirical issue affecting whether a merger is desirable is whether, after the merger, there are fewer independent media owners. Except under unusual circumstances, the answer should be clear.

14. *See generally* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY pt. I (2002).

example, if many nonreaders of a newspaper benefit from its high quality investigative journalism that deters or exposes corruption, those benefits to nonreaders do not generate revenue for the paper. The paper therefore has too little profit-based incentive to produce the good journalism that produces net value for society (that is, value net of its costs). People get less and the market-oriented firm produces less good journalism than people want because transaction costs and free rider effects prevent payments for results that, as individuals, people value. (Corresponding points apply to negative externalities, which include media consumers' antisocial or misguided behavior, ranging from violence to stupid voting, that affect people other than the immediate media consumer.) Additionally, monopolistic competition in the media realm results in successful media entities typically having particularly high operating profits.[15] (High operating profits are generally recognized to exist,[16] although the accuracy of my account of why this is true is not especially important here.)

15. The classic text on this type of competition and industry structure is EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE (8th ed. 1969). Yoo has also applied Chamberlin's theory of monopolistic competition to the media realm. In doing so, he recognized conditions—high fixed costs (compare high first copy costs), a sufficiently low number of (major?) competing products, strong product differentiation, and "asymmetric preferences" (that is, consumers differing among themselves about the comparative desirability of different products)—which allow firms to obtain long-term (as well as short term) supracompetitive profits. *Compare* Yoo, *supra* note 2, at 711 n.191, *with* Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1607–08, 1627 (2003) [hereinafter *Rethinking the Commitment*]. In both Yoo's and my work (which in this regard is substantially similar), monopolistic competition is only one element of the analysis, with the nonrivalrous use element of public good theory also being central; this combination supports my claim that supracompetitive profits will be endemic to monopolistic competition that exists in the media realm. *Compare Rethinking the Commitment*, *supra*, *with* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 3, 20–24, 73–76 (1994), *and* BAKER, *supra* note 14, at 20–40. There are two primary differences between our accounts: (1) my analysis of how this competition in the media realm, particularly as exacerbated by advertising, mega-products, and price discrimination, can sometimes cause a reduction in total surplus (that is, how competition can exacerbate inefficiency by causing the failure of many media products that produce large consumer surpluses); and (2) an explanation for why precisely democratically important media products are likely to be especially subject to this negative effect. Thus, though our accounts are substantially similar (except for Yoo's much more informed and extensive reliance on existing economic literature), our greatest differences lie in my empirical predictions (which seem supported, *see infra* note 16) and my greater engagement in a democratic-oriented normative analysis.

16. According to an FCC study, in 2000 average profits as a percentage of revenues of network affiliate TV stations was over 30.2%, and for the comparatively few independent stations it was 42.3%, as compared to 6.8% for the 500 largest industrial corporations. JONATHAN LEVY, MARCELINO FORD-LIVENE & ANNE LEVINE, BROADCAST TELEVISION: SURVIVOR IN A SEA OF COMPETITION 34 tbl.16 (Office of Plans & Policy, FCC, 37 Working Paper Series, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A22.doc. Given heavy debt in the media industry paid in the form of interest, cash flow may be the more relevant criterion and it is much higher, often adding ten to twenty or more percentage points to the profitability percentage. *See id.* at

Given these two facts about typical media markets, the structural or architectural goals ought to include getting ownership into the hands of people *most likely* to devote a large portion of the media entities' potentially high operating profits to providing better journalism—producing positive externalities—rather than to maximizing the bottom line. My sociological prediction is that both high- and mid-level executives of most large, publicly traded media companies often measure their success and are rewarded largely based on the profits their enterprises produce.[17] In contrast, heads of smaller, more local, especially individual or family-based entities, often self-identify with the quality of their firms' journalistic efforts and service to community. They value the acknowledgment of this service among people in their community as well as by their fellow journalistic professionals.

Direct *structural* pressures caused by corporate mergers can exacerbate the resulting firms' undesirable focus on profit-maximization. The buyer most willing and best able to capitalize the purchased entity's potential profits is able to make the highest buyout bid. But when successful, this price locks the purchaser into needing to maximize operating profits to cover the cost of the indebtedness created by the bid. In contrast, the original or long term owner is freer to use, often she will have been "inefficiently"[18] using, that potential income to provide better quality

33. Similar strong gross profitability exists in the radio industry—and Clear Channel, the country's largest radio station operator with about 1200 stations, reportedly obtained an annual gross profit to revenue rate of between 26% and 29% between 2001 and 2003. GEORGE WILLIAMS & SCOTT ROBERTS, FORMAT AND FINANCE: RADIO INDUSTRY REVIEW 2002, at 4 (FCC, Media Bureau Staff Research Paper, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A20.doc; Clear Channel Communications, Inc., LEXIS CoreData U.S. Institutional Database (on file with the *Southern California Law Review*). The average profit margins in 1998 of seventeen publicly traded newspapers was 18.6, while the reported operating cash flow or EBITA (earnings before interest, taxes, depreciation, and amortization) of the thirteen companies reporting this figure was 27%. GILBERT CRANBERG, RANDALL BEZANSON & JOHN SOLOSKI, TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY 34, 37 (2001).

17. *See* CRANBERG ET AL., *supra* note 16, at 8. Research into newspapers has generally found (unsurprisingly) that increasing the number of journalists leads to a higher quality paper. Relevant to the current point, a study of mid-sized newspapers found that, statistically and holding other factors constant, public ownership (that is, subjecting the newspapers to shareholder demand) leads to higher profits and a staff of fewer journalists. In fact, a higher profit margin and public ownership independently correlate with fewer journalists and, presumably through this effect, with a lower quality paper. *See* Stephen Lacy & Alan Blanchard, *The Impact of Public Ownership, Profits, and Competition on Number of Newsroom Employees and Starting Salaries in Mid-Sized Daily Newspapers*, 80 JOURNALISM & MASS COMM. Q. 949 (2003).

18. The quotes reflect my claim that this practice *is not* inefficient from a social perspective but seems that way from the perspective of anyone who tends to equate efficiency with profit-maximizing use of resources—especially from the perspective of the buy-out firm for whom this creates a profit-

products—by hiring more journalists, providing more hard news, and doing more investigations.

The fourth point begins with the recognition that the ideal legislative or regulatory media policy is not only debatable and reflects experience but also changes with changed circumstances. Entrenched groups always have momentum and political advantage over undeveloped alternatives. The media context, because of the media's unique role in relation to politically salient public opinion, intensifies this problem. This problem can be further exacerbated if a few of these entities become too powerful. Then the likelihood diminishes that subsequent debates and decisions, especially in Congress, but also at the FCC, will reflect lawmakers' or FCC professionals and commissioners' true, informed, and thoughtful evaluation of the public interest. Rather, concentration increases the likelihood that the economic interests of these huge media conglomerates will largely control the policy debates and legal outcomes.

B. OWNERSHIP RESTRICTIONS AS (UNDESIRABLE) CENSORSHIP

With this backdrop of objections to media concentration, consider Yoo's argument. He suggests that the FCC's rationales for ownership restrictions, and the only justifications he considers, have been premised on "the need to protect competition and the need to promote a diversity of programming and viewpoints."[19] Yoo observes that commentators have come out both ways on whether ownership limits actually serve diversity. Originally,[20] he (incorrectly) asserted that one group (which includes this commentator) adopts the categorical position that increases in media

making opportunity. To put it provocatively, the question is whether to see efficiency from the perspective of capital or of people—efficient at producing profit or welfare respectively.

19. Yoo, *supra* note 2, at 689 (footnote omitted).

20. Although Yoo now agrees that this mischaracterizes the alternative positions and has accordingly changed his final text, I have retained my original reference primarily because it illustrates more starkly the perspective that continues to plague Yoo's analysis. Both his original and revised versions want to characterize two conflicting positions about the effect of concentration on "the quantity and diversity" of media content and then present his more nuanced third position. The curiosity is that he presents no reason to think that the first group, those critical of media concentration, could not completely agree with both the less intuitive observation of the second group and with Yoo's claim of complexity. In fact, at least some of them do (and the others are not concerned enough about what Yoo seems to view as the central issue to comment on it). *Compare id.* at 692, *with* Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 831–32, *and* BAKER, *supra* note 14, at 34. In other words, Yoo has not managed to describe contending positions. Yoo's difficulty reflects his continued assumption that scholars' policy-based disagreements will involve concerns with and predictions about commodities. *See infra* note 28. In contrast, all the commentators critical of concentration treat the primary issue as concentration's relevance for democracy.

concentration will reduce "the quantity and diversity of media content"[21] but he (correctly) argues that the issue is more complex.[22] As to horizontal concentration, however, Yoo seems content to claim that concentration will have an impact on program diversity, "even if the direction . . . of the effect remain[s] somewhat uncertain."[23] This conclusion seems somewhat a letdown from his initial claim: that the "structural regulations . . . [that he examines not only] reduce the overall quantity and quality of media programming, they also affect the diversity of media content."[24] Still, this assertion of complexity does not seem to be his final word. He ends the section by first suggesting that efficiencies made available by merger, which lead to a "greater return on investment[,] . . . may enable media outlets to provide more diverse programming."[25] Then, implicitly converting "may enable" into "will cause," he is able to conclude that "[h]orizontal ownership restrictions represent . . . architectural censorship"[26]—by which he apparently means they reduce total "quantity, quality, and diversity of speech."[27]

Though surely right that structure affects content—in fact, I know no one who thinks differently[28]—that point does not alleviate the fundamental problem with Yoo's analysis: diversity and quality of content are not the only, or even the primary, considerations justifying regulation. True, if under particular circumstances effects on quantity, quality, and diversity—

21. Yoo, *supra* note 2, at 692. *See also id.* at 697 n.118. *But see infra* note 28. I would categorically maintain one point about content diversity and ownership distributions: given that different structures will produce different contents, whichever produces the most diversity is not a simple empirical observational or counting matter, but rather depends in part on inevitably contested criteria of relevant content distinctions—criteria generated by necessarily evaluative judgments concerning how significant various differences are.

22. Yoo, *supra* note 2, at 692–699.

23. *Id.* at 699.

24. *Id.* at 674.

25. *Id.* at 700.

26. *Id.* at 701.

27. *Id.*

28. In an earlier draft Yoo incorrectly asserted that various others and I take the categorical position that horizontal concentration always reduces quantity and diversity of media content. *See supra* note 20. I suspect this initial misreading reflects his commodity-focused view of the value of media. From that perspective, any categorical objection to media concentration must be based on a categorical conclusion that concentration negatively affects the commodity—presumably either the quantity, quality, or diversity of content made available to the consumers. As I explain more fully in the text above and in the next subsection, the commodity value, while real, is simply not the reason for the categorical objection. Moreover, few theorists make their objection to concentration categorically. The authors he cites, for example, are unlikely to have such categorical objections to a large media entity or to substantial concentration if (1) the concentrated *private* media is effectively regulated as a common carrier, or (2) a degree of concentration occurs within an appropriately structured public broadcaster subject to appropriate public service obligations.

which Yoo recognizes might be positive or negative—are too severely negative, that would give a strong reason for an exception to an otherwise firm anti-concentration principle. From the beginning, the FCC recognized (as did Congress when it adopted the Newspaper Preservation Act) that media combinations are sometimes beneficial. Given adequate contextual justifications, for example, that local broadcast service depends on joint ownership, the FCC regularly provides for waivers of ownership restrictions. The Court has always praised the FCC for so providing.[29] But Yoo ignores the real issues. None of the reasons noted above for opposing media concentration depend on any empirical assumption about typical effects on quantity, quality, or diversity of content. That is, Yoo ignores the entire set of reasons described above for favoring restrictions. This represents a failure to engage in even a minimally adequate normative or policy analysis of the issue.[30]

29. *See, e.g.*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 802 n.20 (1978).

30. Yoo raises two objections to my focus on democracy in evaluating media policy and, implicitly, in defense of his commodity focus. Yoo, *supra* note 2, at 675 n.17. First, he suggests that this democracy focus is inconsistent with "the autonomy-centered vision that has long dominated free speech theory." *Id*. Although I would be happy if Yoo were right about speech theory, he is entirely wrong about Press Clause theory. No Supreme Court decision makes the almost incoherent suggestion that autonomy theory applies to structural regulation of the media, and virtually every theorist or Justice who has addressed the constitutional role of the press has interpreted it instrumentally in relation to serving a free and democratic society. *See* BAKER, *supra* note 14 (discussing democratic interpretations of the Press Clause); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VANDERBILT L. REV 891 (2002) (discussing the difference between the autonomy rationale of the Speech Clause and the democratic rationale of the Press Clause); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 (same) [hereinafter *Turner Broadcasting*]. If Yoo is interested in media policy, he ought to be concerned with the useful contributions that media makes to human life—and though those contributions do include production and distribution of commodities that audiences value, any analysis that stops there is demonstrably impoverished.

Yoo's second point appears to be that since implications of democratic theory for the media are controversial, media policy should ignore the differential contributions that the choice of media policies makes to the media's democratic role. Yoo, *supra* note 2, at 675 n.17. Would uncertain and controversial contributions of different medical policies to human health and well-being properly lead an analyst to ignore these impacts, and instead consider only how they will affect the profitability of medical providers? The error seems the same as that which plagued many social scientific evaluations of newspaper concentration. Studies would find that chain ownership of newspapers is beneficial because it leads to better front page graphics or harmful because it leads to smaller staff size and a smaller newshole, without considering more important social and democratic impacts because they are both controversial and (often) not quantifiable. *See* C. EDWIN BAKER, OWNERSHIP OF NEWSPAPERS: THE VIEW FROM POSITIVIST SOCIAL SCIENCE (Joan Shorenstein Ctr., John F. Kennedy Sch. of Gov't, Harvard Univ., Research Paper R-12, 1994). Of course, Yoo is right that the contributions of media are normatively controversial. In the middle of the nineteenth century, would an abolitionist paper make a more valuable contribution than a more slickly written, pro-slavery, local booster paper? People would disagree and the First Amendment properly bars censorship of either. But given its inevitable architectural effects, should postal policy make it easier or harder for the abolitionist paper to circulate in the South? A slightly, but only slightly, less value-laden normative judgment is whether a newspaper

C. REDUCTIONIST COMMODIFICATION

Why would someone as smart and careful as Yoo go so wrong? One possibility is that Congress, the FCC, and the courts only offered the limited sort of reasons that he considered. Even if true, this provides no real excuse. Often people know that they value a result without being well able to articulate the reason. Of course, such intuitive judgments should be subject to serious examination—they might reflect prejudices or possibly unconscious, but false, empirical or indefensible normative assumptions. Still, a serious scholarly inquiry should, certainly before rejecting a popular policy as unjustified censorship, consider whether any reasons for the policy are normatively persuasive—and, maybe, consider whether these reasons are consistent with others that society or lawmakers normally consider important. If convinced by the four concerns with ownership concentration that are provided above—or convinced of at least the permissibility of viewing these concerns as important—the proper inquiry would evaluate ownership rules from this perspective, including their costs (in various dimensions[31]). Failure to engage in that effort is my central normative criticism of Yoo.

In any event, blindness to these concerns cannot be explained by a historical failure of the government to assert them. Rather, the failure reflects a tin ear caused by a complete commodity focus, a problem that, although not inherent to economic logic, does seem common among many modern market economists both at the FCC and in the legal academy. Once attuned to political process concerns and noncommodified values described

engaged in careful and expensive reporting about abuses of private and public power generates more positive externalities or greater democratic contributions (which Yoo would ignore) than does a newspaper that reports mostly on buying opportunities in the city's wonderful new shopping mall. The fact that the normative valences of a policy are controversial is not a reason to ignore them in favor of objectively measurable, but possibly much less significant, efficiencies. Rather, it is a reason to recognize, first, that the best policy often will be politically contested and, second, if scholarly inquiry is to provide useful and relevant policy guidance, it must engage in the inevitably inconclusive investigation into the most important issues, issues for which abstract economic analyses often simply do not provide determinative guidance.

31. A key mistake of the FCC's reasoning in its recent ownership decision is that it treats as a cost an interference with the media corporation's purported First Amendment right to speak to as large an audience as it can generate ownership capacity to reach. *See* 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, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003) [hereinafter 2003 Biennial Review Order]. This confuses corporate entities with flesh and blood people. The Court has consistently treated the media's rights as valued only instrumentally in relation to how it serves the democratic interests of audiences. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 20 (1945).

in Part I.A, Yoo's characterizations can be seen to be false. To support the proposition that the two rationales for ownership restrictions are the "the need to protect competition and the need to promote a diversity of programming and viewpoints,"[32] Yoo cites, for example, a 1970 FCC decision that emphasized not diversity of *programming* content but "the importance of diversifying *control*."[33] This concern led the FCC to conclude that "[a] proper objective is the maximum *diversity of ownership* that technology permits."[34] More recently, Congress stated that its purpose in the Cable Communications Policy Act of 1984 was to "assure that cable communications provide . . . the widest possible diversity of information *sources* and services to the public."[35] If real value can lie only in diversity and quality of content, which is a plausible view within a solely commodity framework, this language could be easily mistaken as expressing a purpose to achieve diversity of programming and viewpoints combined with an empirical assumption that diversifying ownership would be instrumental to achieving the result. The Court has stated that this empirical hypothesis is presumptively acceptable—and sometimes it will be correct, but also, as Yoo explains, sometimes it will not. In contrast, from the perspective of distribution of power within the public sphere, and certainly from the perspective of a broader sharing of communicative power, the statements would instead be understood to mean what they say—that the goal is as many different sources as possible. This second conclusion would hold whether or not the diversity of sources produces any particular content diversity. It is the democratic as opposed to commodity vision well stated by the essayist and writer, E.B. White, as quoted by Justice Felix Frankfurter:

> The controlling fact in the free flow of thought is not diversity of opinion, it is diversity of the *sources* of opinion—that is, diversity of ownership . . . . There are probably a lot more words written and spoken in America today than ever before, and on more subjects; but if it is true . . . that these words and ideas are flowing though fewer channels, then our first freedom has been diminished, not enlarged.[36]

A similar tin ear for noncommodified values is evident in Yoo's understanding of the Supreme Court's view that diversification of mass

32. Yoo, *supra* note 2, at 689 (footnote omitted).

33. *See* 1970 Multiple Ownership Order, *supra* note 13, at 311 ¶ 21 (emphasis added).

34. *Id.* (emphasis added).

35. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2780 (codified at 47 U.S.C. § 521(4) (2000)) (emphasis added). *See also* 47 U.S.C. § 532(a).

36. Pennekamp v. Florida, 328 U.S. 331, 354 n.2 (Frankfurter, J., concurring) (quoting E.B. White, *Book Review: The First Freedom*, NEW YORKER, Mar. 16, 1946, at 97).

media ownership serves the public by "preventing undue concentration of economic power."[37] Clearly, the Supreme Court was not duplicating the early trustbusters' concern with a large total amount of private economic power. Though legitimate, that concern would hardly justify focusing on the mass media, where no company that is primarily a media content provider ranks among the largest fifty companies. Wal-Mart, the oil companies, and car companies are the largest, but under existing law and policy, they are not treated as necessarily too large.[38] Rather, the Court's reference was surely to concentrated economic power in the special realm of mass media. After saying that, however, there is still the question of what precisely makes some power "undue."

For Yoo, economic power in the media realm is "undue" if it allows an enterprise to operate noncompetitively. His characterization of the first of the FCC's two rationales for restricting ownership as "the need to protect competition"[39] illustrates this understanding. Still, the value of competition can be given various interpretations. Yoo asserts that this concern with competition "is completely economic in focus and unrelated to the content of speech."[40] His interpretation appears to duplicate antitrust policy's limited concerns—to restrict enterprise power to raise prices to noncompetitive levels (or otherwise exercise monopoly power to increase profits). This interpretation explains his view that limits on national ownership (ownership of multiple media entities that do not compete geographically) are only explicable in terms of the mostly unreal dangers of vertical integration. It also explains his view that after analysis, these dangers do not justify existing FCC restrictions.[41] Finally, this interpretation explains his invocation of the Hirschman-Herfindahl Index as a means to identify competitive problems. So long as an analyst adopts a

37. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 780 (1978) (citation omitted).

38. In *Fortune*'s latest list of largest companies by revenue, Wal-Mart ranks first with revenues of $263 billion, followed by three oil companies and four car companies, respectively. The largest company prominent in the mass media field is General Electric ("GE") at ninth (at about half the revenues of Wal-Mart), but mass media is a relatively minor part of GE's business. Verizon at twenty-eighth and Sony at thirtieth are primarily communications service or appliance companies. From there, media companies are absent until Time Warner at eighty-third. But again, a significant portion of its revenue comes through its communication service, AOL, rather than being solely a mass media content provider—although the two are intertwined. Paola Hjelt, *The Fortune Global 500*, FORTUNE, July 26, 2004, at 159, 163.

39. Yoo, *supra* note 2, at 689.

40. *Id.*

41. *Id.* at 701, 713.

single-minded focus on supplying commodities valued by consumers, Yoo's interpretation of undue economic power makes sense.[42]

From broader perspectives, there are at least two other significant possibilities for understanding undue concentration of economic power. The first offers a different understanding of the value of competition and the second more fundamentally avoids reducing the concern with power to a concern with competition in provision of commodities. Although hardly the received paradigm, the proper issue in antitrust policy generally[43] and even more so in the media realm[44] is not limited to power over price (and monopoly profits), but instead involves a broader power over the consumer's (content or product) choice. Although still commodity oriented, this emphasis has the advantage of recognizing that a firm can have inappropriate power over consumer choice (power over content) even when it has no power to increase profits to monopoly levels (power over price). Consider two newspapers, Paper 1 and Paper 2, competing inside a single city without the ability to reap monopoly profits from either readers or advertisers. Still, without losing customers, changing production costs, or any decline (or increase) in profitability, either paper may be able to choose between alternative editorial orientations. For example, Paper 1 may be able to attract an equally large (although presumably discrete) audience by distinguishing itself from Paper 2 from either the left or the right. This amounts to power over content, a power that may be relatively pervasive in the media field. Wherever it exists, a concern with power involved in concentration is appropriate. An entity with this power can restrict or orient consumer choice.

Measurement of consumer choice, like identification of diversity, is not a merely technical, economic, or empirical matter, but one that requires (usually normative) judgments identifying the precise choices or diversities that matter. Yochai Benkler expressed this point quite simply when he wrote, "If I am interested in learning about the political situation in

42. I should emphasize, however, that my disagreement with Yoo does not reduce to a mere disagreement about interpretation of a phrase in a Supreme Court opinion. The real issue is which interpretation relates best to the actual issues at stake. Our disagreement is solidly normative. To the extent there is room for interpretative choice relating to legal language, when the interpretation relates to giving the language legal force, the interpreter's obligation is to understand the language in its most normatively justifiable sense.

43. *See generally* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

44. *See generally id.* at 750–53; Baker, *supra* note 5; Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).

Macedonia, a news report from Macedonia or Albania is relevant, even if sloppy, while a Disney cartoon is not, even if highly professionally rendered."[45] Lack of market power over price has no bearing on whether competitors are providing for a person's desires for different goods. Only a normative theory can suggest how to weigh whether choice in music formats, political perspectives, or between music and political content, for example, is more significant when evaluating whether existing competition adequately provides for diversity. Showing that there is a reason to expect a Steiner monopolist to provide one does not necessarily provide a reason to expect that it will provide the other. That is, there is no reason to expect that a monopolist will provide the form of diversity that normative theory or even consumers consider more important.[46]

At various points, Congress clearly has concluded that power over content was more significant than power over price. This judgment, for example, explains its repeated concern with national media concentration. Likewise, this judgment is implicit in the Newspaper Preservation Act,[47] conditionally allowing merger of competing newspapers' business operations. So long as the joint newspaper operating agreement keeps power over content dispersed, the Act gives the papers greater opportunities to extract money from customers, presumably both readers and advertisers.

Nevertheless, this consumer choice interpretation of the value of competition is still removed from the reading that anyone except a person attuned only to commodified values would give to the Supreme Court's concern with concentration of economic power. The earlier quote of E.B. White had it right.[48] Agreed, the commodity-oriented concern with audiences' choices of content is worthy and an improvement on the narrow focus on power over price. More fundamental, however, are concerns with

45. Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 383 (2002).

46. Interestingly, while the Steiner explanation of monopolistically created diversity is often cited in this country as a reason to favor some degree of media concentration, recognition of the same point (though not articulated using the same economic language) was also seen in Europe to justify monopoly. This was true, however, only under circumstances where the resulting diversity would not represent merely market forces or ownership whim but was subject to public (legal) policy mandates to provide for the country's varying political and cultural divisions. Essentially, the view was that the government—indirectly, by creating a new independent, non-profit institution—but not the private monopolist would respond to the need for the right kinds of diversity. Thus, the Steiner insight was thought to justify either a strong or monopoly public broadcasting system in Europe. *See, e.g.*, PETER J. HUMPHREYS, MASS MEDIA AND MEDIA POLICY IN WESTERN EUROPE 119 (1996).

47. Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (1970).

48. *See supra* note 36.

a speaker's power within the cultural and political public sphere. These concerns were highlighted in my initial list of reasons for opposing media concentration. None of Yoo's empirical or economic discussion shows why these concerns do not justify all existing, or even greater, restraints on concentration. The presumably "unintended consequences" of following his commodity-centric recommendations could be to undermine basic democratic values.

D. BAD ECONOMICS

The critique so far has been with Yoo's inadequate and economistic normative orientation. Proper economic analysis can provide empirical explanations and predictive insights to which it is hard to object in principle.[49] A poorly executed economic analysis, however, can be seriously misleading. For example, to be informative, any policy-relevant economic analysis must at least take into account all the preferences or values that people have in relation to the matter under examination. Certainly, in the media or political realms, many of these values will not relate to possession of commodities. On this basis, this subsection notes problems with Yoo's economic analysis. Although there is much more to say about various specifics of Yoo's presentation, this subsection briefly illustrates only four generic concerns: whether he gave sufficient or correct attention to (1) distribution of power or influence within the communications realm; (2) externalities, especially as they involve noncommodified values; and, in light of the first two points, (3) consequences of most media firms' high operating profits, which exist probably due to the nature of monopolistic competition; and (4) identification of true efficiencies.

Enterprise-based and welfare-based economics highlight different goals. For an enterprise's economist, a merger's impact on competitive opportunities and possible cost saving are both important. The competitive opportunities could involve a greater ability to produce or sell products or greater market pricing power. The telling point, however, is that this perspective does not make directly relevant any of the four structural economic issues noted in the above paragraph—the merger's distributional effects, the existence of positive or negative externalities, the use of

49. *But see* Margaret Jane Radin, CONTESTED COMMODITIES 6–15, 115–22 (1996) (noting problems associated with commodification as a world view). Economic reasoning is, however, limited. The most important and most difficult tasks for law and legal scholarship are to understand, interpret, and reason about values and normative visions—and for this, economics is largely irrelevant.

monopoly profits, or whether a cost saving is truly an efficiency improvement. Of course, the enterprise's economist might be sensitive to some of these for instrumental, but sometimes socially perverse, reasons. The economist might check for newly created opportunities to externalize costs cheaply or identify someone from whom to collect (internalize) some of the enterprise's otherwise positive externalities. Neither of these, however, and certainly not the first, should be treated as welfare enhancing or efficient even though beneficial to the firm. Similarly, although a firm or its economists might loosely refer to cost savings as efficiency gains, technically this can be incorrect. The overlap between the firm's cost saving actions, some made possible by mergers, and efficiency or welfare gains vary, most obviously depending on whether and how the cost saving action affects externalities. If the action creates negative externalities or eliminates positive externalities—which can be viewed as economic language for my four general objections to media concentration—cost savings may well represent efficiency losses. The critique here is that Yoo's analysis greatly resembles the limited concerns that a firm may have but that it fails as sound economic theory or as the economic analysis needed for public policy purposes. His economics privileges the firm's profit maximization over the goal of maximizing social welfare. Thus, I want to briefly remark on the four inquires noted above.

1. Distribution

In a brief discussion, Yoo argued that the "conventional wisdom [wrongly] presumes that [cable] rate regulation has little to no impact on the content of speech."[50] His primary claim was that although rate regulation "caused nominal cable prices to drop," it "caused quality-adjusted rates to increase," and because "consumers would have preferred larger, higher quality bundles," it "failed to yield any real welfare benefits for consumers."[51] On the contrary, conventional wisdom was not so stupid. Virtually everyone designing cable rate regulation recognized that it would inevitably have some content effects, given the inevitability that cable operators would try to respond by providing lower quality or lower quantity offerings at the mandated reduced rates. The recognized design difficulty was to regulate in a manner that first protected consumers at the basic tier from excessive charges while minimizing the effects on content. On the evidence offered, anyone sensitive to distributive issues should find Yoo's

50. Yoo, *supra* note 2, at 686.
51. *Id.* at 686–687.

report about consumer preferences to be much too sweeping. *Even if* consumers as a group mostly prefer higher rates combined with a better product, there remains the question of whether this is true for all consumers, especially the poor. Would some groups prefer lower prices even if it meant some degradation of quality? Yoo provides no information on this question. Rate regulation could even require a basic-service tier priced below cost, achieving a clear distributive gain for those who limited their purchase to this package, as a condition for selling higher-priced tiers from which providers could reap monopoly profits and finance losses in the basic tier. To be effective in distributional aims, this pricing of basic-tier service would be combined with a requirement to offer service throughout a specified geographic service area. Of course, questions—both empirical and normative—remain. But any economic analysis that ignores these possibilities, or that treats consumers as an undifferentiated group, shows itself to be blind to distributive values.

2. Externalities

Externalities, positive or negative, received virtually no discussion in Yoo's article. This absence had two serious consequences. First, it led his article to ignore the most significant justifications for ownership regulation—the four concerns discussed above. Each of the values of ownership dispersion are, like democracy itself, matters about which many people are passionate but are not purchasable in the context of buying a media product. No welfare or efficiency analysis can provide policy relevant information if it ignores these highly valued externalities. Second, this blindness contributed to an inability to determine which cost savings are efficiency enhancing.[52]

A third consequence of ignoring these externalities is that it may contribute to many economists' inability to understand the political protests against government actions permitting greater concentration. This failure often leads to an elite assumption that the protests show only people's inability to understand unintended effects or represent people's deluded belief that ownership limitations assure a better selection of commodities—the only result that many free market disciples can imagine people valuing. On the contrary, the primary way people are able to express the importance of these externalities (or noncommodified values—the terminology is hardly crucial) is to act politically. As was suggested earlier, these values may provide the most insightful explanation of the mass public objection to

52. *See infra* Part I.D.4.

reducing restrictions on media ownership. Here, politics works better than the market in showing people's true preferences—their willingness to pay.

3. Use of Monopoly Profits

At various points Yoo noted that media mergers could produce cost savings, but he paid scant attention to the abnormally high level of the typical media firm's operating profits. Any economist engaged in a policy-oriented discussion of media structure should provide an explanation for this phenomenon of high operating profits.[53] More important than providing this explanation, however, is a discussion of predictable effects of different structures on how a media firm's potential profits are used. Here, there are two plausible policy goals. A distributive goal would be to lower prices to the advantage of consumers. Alternatively, given media entities' potential to produce high externalities, these profits could usefully be spent on high externality-producing activities like investigative journalism.

The closest Yoo comes to these issues is in his discussion of cable rate regulation. There, his main claim is negative: attempts to prevent monopoly profits did not and, presumably, could not succeed.[54] He also periodically makes what may seem a naive inference: a merged enterprise would use any cost saving to provide the consumer with more or better content rather than improve its bottom line. For example, in discussing the Steiner paradigm, Yoo rightly observes that the monopoly owner would "capture more revenue than under competition"[55] and then curiously asserts that "[t]o the extent that quality correlates with program cost, monopoly provision should *cause* program quality to increase."[56] No reason is ever given for predicting this particular use of the new revenue. Even outside of monopoly, media owners typically have the capacity to spend more than they often do or are competitively required to spend on content. Doing so would often be desirable if more was spent on content that has positive externalities (or that avoids negative externalities). Both sociological and structural factors justify the prediction that dispersed rather than

53. *See supra* note 15.

54. *But see supra* Part I.D.1.

55. Of course, the point that the monopolist could "capture more revenue" has long been accepted in the academic literature and, I suspect, is understood by media firms seeking to merge. Yoo actually said, however, that "each station" would capture more revenue, which does not follow from Steiner's model. Yoo, *supra* note 2, at 695. Rather, both the combination, whose more diverse commodity offerings picks up new viewers, and the station appealing to the dominant taste capture more; the individual station(s) serving marginal tastes presumably do not.

56. *Id.* at 695 (emphasis added). *See also id.* at 699–701.

concentrated ownership would empower decisionmakers more likely to do so.[57]

4. True Efficiencies

Business enterprises and some economists instinctively interpret any cost saving, for example, a cost saving available due to a merger, as an efficiency. This is simply wrong from the perspective of total social welfare and the typical economic meaning of efficiency. If a merged entity can provide and sell news with fewer journalists, but if each journalist engaged in news gathering produces positive externalities, lay-offs would produce cost-saving for the firm but also reduce the number of journalists producing positive externalities. The real possibility, indeed the likely consequence, is that the lay-offs would reduce costs and increase profits but be inefficient.

The FCC, and Yoo by reference, relied on empirical evidence that purportedly showed that local media crossownership generally does not have undesirable effects on news quality.[58] Think a moment about what situation one would expect to find in examining crossownership of a newspaper and broadcaster. To maximally realize possible synergies, a newspaper would predictably own the broadcaster that specialized most in news, a station that provided better than average, probably the best, news coverage in the locale. Not surprisingly, empirical studies bear this out. But what does this show? That crossownership benefits the public? Not at all.

57. This prediction receives strong support from the Project on Excellence in Journalism ("PEJ") report. *See* PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS: A FIVE-YEAR STUDY OF OWNERSHIP AND QUALITY (2003), *at* http://www.journalism.org/resources/research/reports/ownership/Ownership2.pdf

58. *See, e.g.*, 2003 Biennial Review Order, *supra* note 31, at 13,754–55 ¶¶ 343–345, 13,761 ¶ 358 (discussing THOMAS C. SPAVINS, LORETTA DENISON, SCOTT ROBERTS & JANE FRENETTE, THE MEASUREMENT OF LOCAL TELEVISION NEWS AND PUBLIC AFFAIRS PROGRAMS (FCC, Media Ownership Working Group Study No. 7, 2002), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf; and PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 57). Although the PEJ study examined only six cases of crossowned stations, which provides a reason not to find its results in respect to crossownership to be statistically significant, most ownership categories that it considered contained at least fifty sample stations, making the FCC decision to ignore the study's primary results questionable. Thus, the FCC briefly mentioned but made no use of the PEJ's much better-supported finding that small ownership groups (three or fewer stations) as compared to larger ownership groups, and network affiliated stations as compared to network owned and operated stations, produce "higher quality newscasts." *Compare* 2003 Biennial Review Order, *supra* note 31, at 13,840–42 ¶¶ 572–577, *with* PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 57, at 1. This contradicts Yoo's conclusion that national ownership caps amount to censorship that reduces the quality of speech. Yoo, *supra* note 2, at 713.

A thorough evaluation requires consideration of two other questions. First, did the ownership "cause" better broadcast news or did it merely profit from synergies while owning the best local television news station, or did it do both? The best empirical evidence would probably examine whether the crossowned station provides better quality news than the finest news broadcaster in an equivalent market. If not, the crossownership may have merely merged control of the two dominant providers of local news, dangerously concentrating communicative power without increasing in any way the quality of local news. Unfortunately, the studies cited by the FCC do not provide evidence relevant to or otherwise evaluate this issue. Second, what about the effect of the merger on the newspaper? Newspapers are arguably the most significant source of information placed within the local public sphere.[59] If so, the newspaper's journalistic performance is arguably the most relevant issue in relation to crossownership, and this is ignored by the studies. Elsewhere, however, some more ethnographic empirical investigations suggest that the greater workload placed on journalists who are required to perform for both mediums is having a negative effect.[60] That is, the cost savings of crossownership may be real, but whether these should be seen as efficiencies, especially efficiencies that promote provision of a community's information or journalism needs, seems doubtful.

5. Vertical Concentration

Yoo identifies a broad category of regulations of vertical integrations that includes not only limitations on cable operators' freedom to program all their channels with their own or their affiliated companies' content,[61]

59. Sources that people rely on for news are not nearly as significant as the source of correct and relevant information that people actually assimilate. As a source of accurate and assimilated news, newspapers may be much more important than commercial television. *See, e.g.*, Steven Kull, Clay Ramsay & Evan Lewis, *Misperceptions, the Media, and the Iraq War*, 118 POL. SCI. Q. 569 (2003). Moreover, a newspaper can be a media source of information even for a person who does not read it—if, for example, news knowledge comes from conversations and the conversation partners report information learned from the paper.

60. *See* Eric Klinenberg, *Convergence: News Production in a Digital Age*, ANNALS AM. ACAD. POL. & SOC. SCI. (forthcoming 2005).

61. Yoo notes that the D.C. Circuit struck down this "architecture" on First Amendment grounds. Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1137–39 (D.C. Cir. 2001). Given his apparent approval of the decision, *see, e.g.*, Yoo, *supra* note 2, at 704, it is not surprising that he did not discuss its truly remarkable nature. The Court repeatedly invoked the First Amendment "test" from *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) [hereinafter "*Turner I*"], but completely ignored the decision's actual holding and substantive dicta. The majority found must-carry rules possibly valid (actual validity had to await *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). Essentially, mandated carriage of stations other than those of the cable operator

but also rules capping national ownership of broadcast stations or of cable systems.[62] In his discussion, he argues that a careful economic analysis shows that the "integrations" examined do not harm competition.

Put aside here are more specific challenges to Yoo's economic analysis.[63] Another point is more telling. Yoo places all these rules into the category of vertical integration rather than horizontal because "[p]roperly evaluated, horizontal restrictions bar mergers among direct competitors who would otherwise be serving the same customers."[64] This claim is crucial. He purportedly can then demonstrate that, as a form of vertical integration, the restricted mergers are unlikely to create sufficient economic power to restrict market competition and, therefore, the "existing regulations . . . serve to prevent industry participants from realizing the available efficiencies, which in turn reduces total quantity, quality, and diversity of speech . . . [thus] represent[ing] still another form of architectural censorship."[65] Viewing these concerns as vertical integration however, already implies a commodity focus. If the policy concern is power over price, or even over content conveniently available to an individual consumer, Yoo is obviously right that sellers of content in

was the issue in both *Turner I* and *Time Warner*. Thus, the *Turner I* majority should have had little trouble finding that the same interests in diversity and power in the marketplace of ideas justify Time Warner ceding similar control over a portion of its channels to independent content providers. Even more interesting is Justice O'Connor, whose dissent offered cable operators greater First Amendment protection. After noting the "danger in having a single cable operator decide what millions of subscribers can or cannot watch," she suggested that "Congress might . . . conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system or time-sharing arrangement." *Turner I*, 512 U.S. at 684 (O'Connor, J., dissenting). This is the precise scheme that the D.C. Circuit struck down. Thus, the D.C. Circuit relied most heavily on a Supreme Court decision where both the majority and dissent clearly supported the opposite of the Circuit's result.

62. In this category, Yoo also includes chain-broadcasting rules that attempted to limit networks' power over affiliates and must-carry rules that require cable carriage of local broadcasters.

63. Yoo, like the D.C. Circuit in *Time Warner*, 240 F.3d at 1126, finds that vertical integration creates problems only when there is concentrated power in the primary market (for example, the market for cable channels or programming). Yoo, *supra* note 2, at 707–711. Apparently on this basis, the Circuit rejected, as would Yoo, the FCC decision to limit a single company to owning no more than 30% of the country's cable systems—a requirement that guarantees the country will have at least four cable owners. The court could only see a competitive reason to require a 60% ownership limit, which would guarantee just two cable purchasers of cable programming nationwide. To emphasize his point, Yoo notes with approval the Justice Department's use of the Hirschman-Herfindahl Index ("HHI") that does not, at least as a rule of thumb, find a danger of vertical integration if the HHI is below 1800. *Id.* at 707. The Circuit's approved standard, however, which allows a 60% and 40% two-firm market, could produce a HHI of 5200. Even under the FCC repudiated rule, a four firm industry of 30%, 30%, 30%, and 10% produces an HHI of 2800.

64. Yoo, *supra* note 2, at 705.

65. *Id.* at 713.

Sacramento and Des Moines are not direct competitors.[66] If the concern, however, is power or influence over public opinion in a national public sphere, these two stations, and every other station in the country, compete directly to influence the opinions that become nationally dominant. That is, Yoo's construction of "direct competitors" already embodies a normatively inadequate commodity focus. This focus dramatically reduces and reshapes the values that once led the FCC to create stringent national caps on broadcast ownership and that today generate popular opposition to the expansion of national (or international) media conglomerates.

II. CENSORSHIP AND THE CONSTITUTION

Medievalists consider, with affection, Chaucer to be the C-word. In contrast, for First Amendment devotees, though with considerably less affection, the C-word is censorship. Yoo describes as "architectural censorship" those "unintended effects" of structural regulation that have an important "adverse impact on speech."[67] This characterization provides crucial support for the only doctrinal move that would realistically satisfy his "hope that the First Amendment would provide a basis for identifying and redressing architectural censorship when it arises."[68] A constitutional objection to "unintended byproduct[s]" must lie in their "effects."[69] Given the constitutional odiousness of censorship, finding censorship in effects provides the link that could motivate constitutional invalidation.

This Section first objects to Yoo's rhetorical move, and secondly argues that, if followed, his move suggests substantive conclusions against which I suspect even Yoo himself would rebel. Finally, this Section suggests that proper First Amendment theory, as well as existing black letter law, rejects Yoo's hoped-for doctrinal approach.[70]

Possibly because of its extraordinary negative connotations, the term "censorship" is most at home when referring to *conscious attempts to suppress* particular expressive content. Other uses are normally derivative, aiming to add force to some criticism.[71] Of course, First Amendment

66. *Id.* at 705.
67. *Id.* at 673–674.
68. *Id.* at 675.
69. *Id.* at 730.
70. Yoo recognizes that existing doctrine rejects his approach. *Id.* at 730–731.
71. I was guilty of seeking this rhetorical gain, though without trying to turn the claim into a constitutional argument, when I asserted that advertisers today are possibly the greatest censors in America. *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 3 (1994). Sometimes advertisers specifically seek to suppress content that negatively portrays their product, company, or

objections to government actions are possible without characterizing the problem as censorship. Consider, for example, challenges to content neutral regulations—so called time, place, and manner regulations—or objections to judicially ordered disclosures of a reporter's confidential sources. Censorship does not even provide the only basis for objection to content-oriented laws. For example, a possible inquiry is whether requiring drug manufacturers to include warning labels is constitutionally objectionable in the way that compelling a school child to salute the flag is,[72] although the only interesting insight comes from seeing why the two are not normatively or constitutionally analogous. Still, censorship seems to be neither the well-articulated objection to the compelled flag salute nor the rejected objection to warning labels.

Certainly, applying the term "censorship" to unintended consequences requires a considerable stretch. Two taxes, one media specific, the other general, could have the same adverse impact on media provision of expression without being equally identified as censorship. Characterizing Huey Long's 2% "tax on lying" as censorship would not mean that this characterization fits today's general sales taxes.[73] Not only is the term usually reserved for cases where the lawmaker is conscious of the effects, but also implicitly for where these adverse effects are desired. Any intelligent policymaker recognizes that almost any media architecture, as compared to the universe of possible structures, will affirmatively promote some and negatively affect other expressive opportunities.[74] For these reasons, Yoo's use of the term censorship to indicate rhetorical disapprobation for various structural or architectural rules is problematic.

Assume, for discussion purposes, the propriety of Yoo's usage, and that censorship can refer to architecture that has serious adverse consequences for speech even where these consequences are not affirmatively desired or intended. What must be recognized is that the

political agenda—conduct that might narrowly be viewed as censorious. I and others, however, have also described as censorship the media's provision of content aimed at attracting an advertiser-desired audience with full knowledge of, but no particular desire for, the serious adverse consequences for the creation and availability of media content desired by other people. *See* William B. Blankenburg, *Newspaper Ownership and Control of Circulation to Increase Profits*, 59 JOURNALISM Q. 390 (1982).

72. *Compare* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976), *with* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

73. *See* Grosjean v. Am. Press, 297 U.S. 233, 250 (1936) (invalidating Louisiana's gross receipts tax on newspapers and magazines).

74. *Cf.* Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980) (showing that neither state of nature, collective ownership, nor a private property regime can be shown to be Pareto superior to any of the others, but that each has characteristically different Pareto optimal solutions).

market is a form of architecture. Not only is it architecture, it can have severe adverse effects on the quality and diversity of mass media communications. In Yoo's terminology, the market is censorship.[75] Precisely this observation has been central to a Western European view that a predominantly public broadcast architecture is needed in order to prevent this serious censorship.[76]

Certainly, market architecture's potential for adverse consequences for diversity, quality, and some groups' speech opportunities has been central to many disputes about media policy. During the late 1920s and early 1930s, corporate interests pushing a market-based, commercial broadcasting system and labor, religious, educational, and public interest groups favoring a partially or completely noncommercial system were fully aware that "architectural" choices have substantial effects on content. Their disagreement was primarily over evaluation—although they may have also differed somewhat in empirical predictions.[77] Congress realized that either licensing spectrum to noncommercial interests, licensing largely to commercial users, creating private property rights in spectrum, or some other regulatory scheme such as managed common carriage would promote valuable speech opportunities in the face of the tragic chaos of the commons. It also realized that adoption of any scheme would have important adverse consequences for some speech content and speakers in comparison to how they would fare under an alternative regime. The Supreme Court, however, seemed little troubled by Congress's authority to choose a preferred architecture.[78] It also observed that, once having made a choice, Congress could, but was not required to, impose further architectural or affirmative behavioral requirements on favored spectrum users on behalf of the speech interests of those disadvantaged by the chosen architecture.[79] The Court properly found that the choice of which speech to architecturally advantage and which to disadvantage is normally a matter of democratic normative choice about the type of communications order, that is, the type of content, to favor.[80]

75. Implicitly, but famously, Justice Hugo Black made this point in Associated Press v. United States, 326 U.S. 1, 20 (1945).

76. *See* HUMPHREYS, *supra* note 46, at 119.

77. *See generally* ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR CONTROL OF U.S. BROADCASTING, 1928–1935 (1993) (describing the political battles around this choice).

78. Red Lion Broad. v. FCC, 395 U.S. 367 (1969).

79. *Id*. *See also* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

80. *Turner Broadcasting*, *supra* note 30.

In contrast, as he makes clear in his preference for an activist judicial review of "architectural censorship," Yoo presumably must recommend that any reliance on market architecture be subject to strict constitutional review.[81] Interestingly, the German Constitutional Court accepts Yoo's activist ambitions, although it accepts neither his normative nor economic views. It has held that the German constitution mandates provision of the services of public broadcasting; moreover, the German Court found that a mixed system that includes private broadcasting is constitutionally permissible only if private broadcasters are subject to considerable regulation, including regulation aimed at promoting diversity.[82]

Yoo's approach could also lead to examination of other architectural features. In *Miami Herald Publishing Co. v. Tornillo*,[83] the Court glorified the editor's freedom to decide on content.[84] From the perspective of Yoo's article, it may be questionable whether an architecture that allows an owner to fire, or otherwise control, an editor for editorial choices is

81. Yoo offers the state action doctrine as the reason why market structures that censor speech, in his sense of censor, are not problematic, while structures chosen by government that have similar censorious effects "might be [constitutionally] problematic." Yoo, *supra* note 2, at 715 n.207. His article's primarily enterprise is to use economic analysis to identify media structures that have adverse consequences and then to propose changes in constitutional doctrine to invalidate objectionable structures. Thus, it would seem evenhanded and consistent to seek changes in "state action doctrine," just as he proposes changes in "effects doctrine"—unless his real concern was not media performance but protection of corporate power. Clearly the more evenhanded move would be logically easy—and actually, probably more desirable and less dangerous than giving courts the role of monitoring effects. As for logic, the government creates the ownership, contractual, property, corporate, and other rights that determine the form of any market structure. If constitutional law should invalidate various architectures chosen by government (as opposed to, for example, focusing on interferences with the media's content choices), the consistent position should be to evaluate all government created and maintained market structures. Nothing in the abstract logic of state action doctrine prevents this. In fact, as noted below, the Court in an unusual context invalidated on First Amendment grounds the government's attempt to leave content choices to a market entity. Individual Justices—and other countries—have also found reliance on media market structures to create constitutional problems in the media context. *See infra* text accompanying notes 82–89. Of course, my main point is not to advocate this activist result—although, if consistent, Yoo should—but to argue that the Court had it right when it treated media structural choices as not raising serious constitutional problems as long as those choices can be reasonably interpreted as attempting to promote a democratic communications order.

82. *See* Cable Penny Case, BVerfGE 90, 60 (1994); North Rhine-Westphalia Broad. Case, BVerfGE 83, 238 (1991); Third Broad. Case, BVerfGE 57, 295 (1981); HUMPHREYS, *supra* note 46, at 137–38. These cases are translated into English in 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, FEDERAL CONSTITUTIONAL COURT, FEDERAL REPUBLIC OF GERMANY, PARTS I & II: FREEDOM OF SPEECH 199–219, 493–534, 587–619 (1998).

83. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

84. *Id.* at 258 (holding that the "statute [at issue] failed to clear the barriers of the First Amendment because of its intrusion into the functions of editors . . . . [and that] [t]he choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment").

unconstitutional because it "intrud[es] into the functions of editors."[85] Again, some western democracies provide editors some legal protection—often described as providing "internal freedom"—precisely from improper interference by publishers, that is, owners.[86]

Likewise, either market or ideological incentives can lead broadcasters to deny access to those who would pay to present views on controversial public matters, as opposed to advertising their products. Two dissenting Justices generally very sensitive to First Amendment freedoms, Justices Brennan and Marshall, concluded that the government violated the First Amendment by failing to mandate that commercial broadcasters open up their advertising time to paid discussions of controversial issues. These Justices concluded that free market architecture here was unconstitutional, in part because of its severe adverse effects on the diversity of, and opportunities for, expression.[87] Although better explained as a finding that government had engaged in an indirect but content-based attempt to rid cable of indecency, the Court similarly found a peculiar use of free market architecture to be unconstitutional in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[88] The Court invalidated a congressional attempt to recognize the "market-based" authority of cable systems to determine whether certain public, educational, or governmental ("PEG")[89] channels may broadcast indecent material.

Despite objections to the market's important adverse consequences, in this country free market architecture is presumptively not unconstitutional. Still, this result may obtain not because Americans are unable to see that the market is merely one among many possible architectures. Rather, it may and should reflect judicial acceptance of broad legislative choice over communication systems' architecture. Most congressional structural choices that restrict an unregulated media market are also routinely upheld. Before *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*"),[90] the "reasonableness" standard articulated in *FCC v. National Citizens*

85. *Id.* at 258.

86. S*ee* DANIEL C. HALLIN & PAOLO MANCINI, COMPARING MEDIA SYSTEMS: THREE MODELS OF MEDIA AND POLITICS 40 n.4, 175 (2004); HUMPHREYS, *supra* note 46, at 108–09.

87. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (Brennan, J., and Marshall, J., dissenting).

88. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

89. *Id*. at 732.

90. *Turner I*, 512 U.S. 622 (1994).

Committee for Broadcasting[91] ("*NCCB*") arguably represented the courts' treatment of structural regulation in all communications media, not just in the case's "official" domain of broadcasting.[92] It allowed, without specific empirical support, virtually any structural regulation that could be understood as reasonable and not an attempt at speech suppression, even though the regulation might seriously and obviously disadvantage some speech or speakers.

In contrast, in order to restrict what he purports to be censorship in his four case studies, Yoo argues for more stringent review. He believes that *Turner I* could have helped considerably if interpreted to require strong empirical evidence of the necessity for and benefits of regulation.[93] But given the apparent failure of this approach to eventuate, Yoo's activist conclusion is that only an "effects" analysis is likely to achieve the desired results[94]—although he clearly recognizes that the Court is unlikely to adopt such an approach.[95]

This Comment abstains from presenting a general critique of the necessary instrumentalism of any serious constitutional scrutiny of structural regulations (an instrumentalism not inherent in constitutional objections to facial "censorship"[96]). Instead the Comment notes two difficulties with Yoo's proposed activism, both unintentionally illustrated

91. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978) (holding that regulations are valid if "based on permissible public-interest goals . . . so long as [they] . . . are not an unreasonable means for seeking to achieve these goals").

92. *See generally Turner Broadcasting*, *supra* note 30. As Yoo observes, *NCCB* self-consciously limited not just broadcasters but ownership opportunities of entities with "'the fullest First Amendment protection—newspapers.'" Yoo, *supra* note 2, at 722 (quoting 2003 Biennial Review Order, *supra* note 31, at 13,793 ¶ 441). Once the Court in *Turner I* made clear that it viewed *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), as representing an objection to penalizing content choices and not as an objection to a structural rule limiting editorial control, *see Turner I*, 512 U.S. at 653–56, and once *Denver Area Education Telecommunications Consortium, Inc. v. FCC*, 518 U.S. at 727, is seen as invalidating a complex design intended to promote content-based suppression of indecency, only *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), remains as an example of the Supreme Court identifying a structural (architectural) regulation it might invalidate. Even there, invalidation would occur, if at all, only because the government improperly authorized a monopoly without any justification in physical or economic needs.

93. Yoo, *supra* note 2, at 727–728.

94. *Id.* at 730.

95. *Id.* at 731.

96. *See* Simon & Schuster v. N.Y. State Crime Victims Bd., 502 U.S. 105, 124–28 (1991) (Kennedy, J., concurring) (holding that once a general content-based restriction on protected speech is found, the inquiry should end rather than continue to the issue of justification). *See also* Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Brandenburg v. Ohio, 395 U.S. 444 (1969); N.Y. Times v. Sullivan, 376 U.S. 254 (1964). *See generally* C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979 (1997).

by his own analyses, and then observes a final and more basic problem with Yoo's suggestion. First, his hoped-for review, like many instrumentalist scrutinies, slides too easily into improperly finding constitutional violations by first misidentifying a law's legitimate purpose and then showing the law unnecessary, maybe even counterproductive, in achieving that end. This occurred in Yoo's analysis of both horizontal and assertedly vertical ownership restrictions (and arguably is common to many proposed constitutional critiques of non-media structural regulations that limit corporate moneymaking activities). Second, potentially informative economic analyses often mislead because the analyst unjustifiably ignores a law or policy's most important positive effects (especially noncommodified effects). Here too, Yoo's article provides an illustration. By negative lesson, the article should serve as counsel against authorizing rigorous constitutional review of structural or architectural choices.

The final problem is more fundamental. Even without disagreement about the likely overt, immediate consequences, people differ over the significance and even valence of these consequences and, hence, over the value of the structural and distributional rules that produce them. Nowhere is this more true than in the communications sphere. Different respectable democratic theories suggest different, only somewhat overlapping, visions of an ideal communications order. Different structural regulations—including different degrees of reliance on unregulated markets—advance different conceptions of press freedom that are themselves related to different conceptions of democracy.[97] Empirical evidence assessable by courts will not resolve which visions of democracy, and hence which communications orders, are best. The democratic theory that I find most persuasive—which I call "complex democracy"[98] and Jürgen Habermas, in rejecting both republican and liberal theories as adequate in themselves, calls "discourse theory of democracy"[99]—suggests an even greater difficulty for constitutional review. Given real but somewhat conflicting requirements of ideal democratic public discourse, which of many opposing media policies will better serve society's communication needs cannot be determined on the basis of abstract—read "constitutional"—principles. Rather, the best answer will reflect which of several valuable but often competing communicative discourse forms currently needs

97. BAKER, *supra* note 14, at 125–53, 193–213.

98. *Id.* at 143–47.

99. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 166–67, 283–86, 296–302 (1996); Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 4 (1994).

nurturing most. If this claim is right, identifying proper goals of media policy not only will be normatively controversial, it will also be very finely contextually variable. Does society need more common media[100] or more media pluralism? All major democratic theories largely agree that traditional censorship is objectionable. In contrast, the value of varying architectures (and their intended and unintended consequences) is properly subject to contextual debate, a debate that is short-circuited by Yoo's broader use of the censorship label. Commentators, of course, act appropriately in identifying unintended consequences—although they should be modest about any claim that these consequences were really unpredicted. Their effort, however, should aim at informing political debate, not supporting judicial invalidation.

* * *

At the country's beginning, Congress provided a huge subsidy for newspaper delivery. Many newspapers were mailed under rules that provided for free postage, while the general rate for sending a newspaper 500 miles was 1.5¢ as compared to 25¢ for a letter. The result was that letter writers, primarily businessmen dealing with commercial matters, were disadvantaged (censored?) while subsidizing the delivery of newspapers. Nevertheless, support for postal subsidies "transcended national-local, Federalist-Republican cleavages . . . . [since] [a]ll who wanted the fragile union to survive saw the urgency of ensuring a widespread flow of public information."[101] Still, debate about the subsidies' precise content was sharp. All sides saw that the architecture held differential advantages for various contents and different political, cultural, and sectional agendas. Some significant postage charge and distance-sensitive postage would help protect rural papers from being overwhelmed by competition from city papers; a single low rate or, even better, free postage would advantage urban papers and, purportedly, lead to outlying districts being better informed. The initial result in 1792 can be seen as a compromise—free postage for exchange papers (that, though traditional, possibly most benefited the local country papers) plus two distance zones combined with very low rates for newspapers in both zones, as compared to nine zones and higher rates for letters. In fact, these architectural disputes continued. The adamant opposition of Jacksonian forces, for example, defeated free postage for papers in the Senate by only

100. *Cf.* CASS SUNSTEIN, REPUBLIC.COM (2001).

101. RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700–1860S 38 (1989). This paragraph is based on *id.* at 31–38, 58–64, 82–86. The material and its implications are summarized in *Turner Broadcasting*, *supra* note 30, at 98–99, 105–08.

one vote. They clearly feared that free postage would lead to urban papers utterly destroying their local papers, maybe even local culture—"annihilat[ing] at least one-half of [their] village newspapers."[102] By contrast, in 1845 both sides could see benefit in establishing free local delivery for papers as compared to the continued (although still greatly subsidized) charges for delivery of distant papers.

So what is to be learned from this postal history? That Yoo is right in seeing that architectural consequences are real. But who could have thought otherwise? Certainly not those who choose policies that sometimes rely on and sometimes diverge from the market. Those consequences are the point. What else do we learn? Clearly, without these and many other architectural or structural interventions we would not have arrived at the media system that has often served the public and the country well.[103] Without congressional structural interventions, even with the negative censorious effects they had on some publications, the newspaper industry may have never played its crucial political role at the country's beginning. I doubt that the Constitution provides the resources to determine which form of postal architecture is best. I am confident that, whether or not ideal, the country was better off, and possibly its survival achieved, because of political structural choices not being ruled impermissible by the courts. Despite the possibility of severe negative consequences for disfavored competing publications, censorship is the wrong term to apply to, and constitutional law the wrong mechanism to judge, these choices that offered crucial support to the project of creating a nation.

102. KIELBOWICZ, *supra* note 101, at 61 (citation omitted) (quoting Senator Isaac Hill, a former publisher of a "zealous Jackson organ").

103. *See generally* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS (2004).