

## **On Media Concentration and the Diversity Question**

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### ABSTRACT

Corporate mergers and the consolidation of ownership in the American communications arena have long been sources of concern. US regulatory and antitrust policy traditionally attempted to secure a “diversity of voices” structurally, largely through rules regarding ownership. Although the meaning of diversity was always problematic and under-theorized, the Federal Communications Commission long set ceilings on the numbers of broadcast outlets any single person or corporation could own and enacted cross-ownership rules such as a prohibition against a corporation owning a newspaper and broadcast outlets in the same market. These rules, and the FCC’s authority to make them, were upheld, occasionally even compelled, by the federal appellate courts. In the last 20 years, however, legal trends, in conjunction with political developments, have undermined the diversity rationales behind ownership rules and associated structural regulations of mass media.

Paradoxically, even as media corporations are becoming larger and presumably more powerful, ownership regulations are being rescinded or struck down. This paper explains this history. It concludes with a suggestion that the First Amendment metaphor of marketplace of ideas is misplaced and how our thinking about media ownership and diversity might be better served by the metaphor of a mixed media system.

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Corporate mergers and the consolidation of ownership in the American communications arena have long been sources of concern. The perception of a direct relationship between democracy and a vibrant communications system of diverse sources and owners is near universal (or, at least, is given universal lip-service), as is, for the most part, the converse fear that a communications system which rests in just a few hands will corrupt the freedom of speech, impair the practice of democracy, and impress an ideological pall on society. The Supreme Court's reasoning in the 1945 case of Associated Press v. United States expresses the issue plainly. In language that has since assumed a kind of talismanic status in discussions about the First Amendment and corporate power, the Court stated that

[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression by private interests. (Associated Press v. United States, 1945, p. 20).

Distrust of government control of media is, of course, an elemental principle of American politics, encoded, among other places, in the First Amendment. But because the press could itself stifle freedom of speech through its business practices (in the Associated Press case, restrictive membership regulations), the First Amendment did not preclude government from applying the antitrust laws to that medium. A few years earlier in 1934, apprehension about private power in the then new medium of broadcasting saw Congress embed within the mandate of the Federal Communications Commission, broadcasting's new regulatory body, a general command to preserve competition in commerce in the broadcast medium and a specific directive to refuse a station license

to any person adjudged guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication. Congressional fear of radio's potentially dangerous concentration of political power in part underlay the Act's prohibition against any joint ownership of radio and wired systems (Communications Act, 1934, Sections 313, 314). In the period immediately following the Second World War, the Commission on Freedom of the Press, probably the most important study of mass media in the United States (conducted by a distinguished group of intellectuals under the leadership of the famed educator, Robert Maynard Hutchins), rearticulated these concerns. Seeing in the ownership patterns of the post-war media system a distinct danger of concentration, the Hutchins Commission worried that such concentration undermined the press' crucial roles as conveyer of information, government watchdog, and educator (Commission on Freedom of the Press, 1947).<sup>1</sup> In recent years, many Americans have become apprehensive as they watch a cascade of mergers among already very large media corporations.

In short, while fear of governmental power and government control of media is central to American politics, the dismay over the concentration of private power in media is a very strong undercurrent. US regulatory and antitrust policy traditionally attempted to address the dangers of concentrated media power by securing a "diversity of voices" structurally, largely through rules regarding ownership. This paper examines the history and logic of media ownership rules in the United States, and analyzes why, even as media corporations are becoming larger and presumably more powerful, ownership regulations are being rescinded or struck down. To this end, the analysis of the concept of diversity is a central focus. The framework of the paper is as follows: Part I introduces the concept of diversity within the framework of the First Amendment and examines some of the problems in empirically assessing the efficacy of ownership rules. Part II presents the lineaments of the recent debate over whether media are, in fact, concentrated, and in so doing

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<sup>1</sup> While the members of the Hutchins Commission generally shared the concern over ownership concentration, they disagreed among themselves regarding the proper remedy, especially about the wisdom of government intervention that went beyond conventional regulatory and antitrust policies. The compromise – advocacy of an ethic of professionalism and responsibility among journalists – laid the foundation for the "social responsibility" theory of the press that soon became a mainstay of journalism education, but did not directly address the broad questions of media ownership and access (see Siebert, Peterson, and Schramm, 1956).

contrasts the antitrust mandate of the Department of Justice's Antitrust Division with the public interest touchstone of the Federal Communications Commission. Part III displays the main media ownership rules and their basis in regulatory theory and practice. Part IV reviews the historical relationship between the FCC and the federal appellate courts, highlighting the courts' pressure on the FCC to issue more stringent ownership rules, particularly when the linkage was made between the diversity of voices to issues of race. Analysis of the majority and minority opinions in the important case of Metro Broadcasting v. FCC (1990) is a key focus. Part V follows the logic of Justice O'Connor's Metro Broadcasting dissent into several recent appellate court rulings that have struck down FCC ownership rules and, moreover, require the FCC to engage in "non-conjectural" empirical analysis to support its regulations in the ownership area. Part VI concludes the paper, ending with a suggestion that the First Amendment metaphor of marketplace of ideas is misplaced and how our thinking about media ownership and diversity might be better served by the metaphor of a mixed media system.

## I.

Traditionally, the dangers of ownership concentration in the communications industry were addressed by a combination of antitrust and regulatory policies that attempted to attend to the amalgamation of corporate power but, of course, did not question private power itself. The logic of government policy generally derived from the juxtaposition of the antitrust laws and regulatory practice with free speech jurisprudence. The First Amendment arguments are pretty familiar by now: The robust clash of opinions unimpeded by government is the prerequisite of democracy, that is, of self-government; an uninhibited exchange of diverse ideas yields better public choices, decisions, and policies; a free press provides a vital checking function on government actions and possible abuses; freedom of expression is a condition of being a human subject, enabling individuals to learn, grow, and realize their autonomy; the social system functions better when space is made for people to dissent or blow off steam publicly. The First Amendment literally forbids

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government from abridging the freedom of speech or press (in fact the language literally forbids only Congress from abridging that freedom). Absent such abridgement, the speech marketplace is expected to secure the benefits listed above. The “marketplace of ideas,” formulated by Justice Holmes in the 1919 dissent in Abrams v. United States, typically is the guiding metaphor in free speech jurisprudence.<sup>2</sup>

But the concentration of private power in the communications media may skew, if not undermine, the presumed free marketplace of ideas. To stay with the metaphor, concentrated media ownership tends to corrupt the marketplace and renders it dysfunctional. At the most basic level, concentrated ownership constricts the number and kinds of speakers. Owners of the communication systems that deliver content can erect bottlenecks that favor certain content providers and thwart others. In more pointed analyses that link the ownership question to the predominantly advertiser-supported structure of US media, concentrated mass media are understood to shape content in ways that reproduce the prevailing structures of power and dominant cultural norms. At the very least, a commercially based media system is structurally biased toward content connected to marketable products and services, and, related, is biased away from content valued by the poor. For content that cannot attract commercial sponsorship tends not to see the light of day. To rectify these problems, Congress, the antitrust agencies, and the Federal Communications Commission enacted a set of policies over the decades designed to address media concentration by separating communication industries from each other and restricting common ownership. These policies were pursued under the general rubric of a concept of safeguarding a “diversity of owners” or “maintaining a diversity of voices.” In some instances, such as those concerning telephone companies and broadcast outlets in the same market, or newspaper and broadcast outlets in the same market, common ownership was directly prohibited. Under the same diversity logic, the FCC also set ceilings on the numbers of broadcast outlets any single person or

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<sup>2</sup> “But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” (Abrams v. United States, 1919, p. 630).

corporation could own. These limits, and the FCC's authority to make them, were upheld, occasionally even compelled, by the federal appellate courts.<sup>3</sup> In the early years "diversity" was not explicitly articulated as the theory that legitimated government policy on media ownership, but the theory always underlay the policy, and in recent decades the word itself has become preeminent.<sup>4</sup>

In spite of the long-standing concern over the concentration of ownership, the efficacy of government interventions in American mass media area is hard to assess. It is difficult to know whether and to what degree Justice Department or Federal Trade Commission antitrust actions or FCC ownership rules safeguarded or promoted a free and diverse marketplace of ideas. A central problem here is what is meant by diversity, and how we should assess it. Should we understand by diversity the number of owners of media outlets? Or rather (perhaps in addition) by the number of sources that provide content?<sup>5</sup> By the number of different perspectives conveyed in information content? Or, to take the question out of the dimension of the purely informational and political, by

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<sup>3</sup> The Supreme Court traditionally upheld the structural regulation of media against First Amendment challenge by corporate owners. Associated Press v. United States (1945) has already been mentioned. Other prominent cases include National Broadcasting Co. v. United States (1943), in which the Court ruled in favor of the FCC's "chain broadcasting" regulations; United States v. Storer Broadcasting Co. (1956), in which the Court upheld the FCC's limit on the number of broadcast stations a single entity could own nationally; and FCC v. National Citizens Committee for Broadcasting (1978), in which the Court upheld the newspaper-broadcast cross-ownership prohibition.

<sup>4</sup> In early broadcast regulation, for example, the diversity principle was embedded within the FCC's "public interest" mandate. The Federal Radio Commission interpreted the public interest obligations of the broadcast licensee to be such "that the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program..." (In the Matter of the Application of Great Lakes Broadcasting Co., 1929, p. 32). In comparative hearings for broadcast licenses, the FCC indicated that the diversification of control of the mass media is one of the most important criteria in ranking applicants (Policy Statement on Comparative Broadcast Hearings, 1965).

<sup>5</sup> Outlets and sources are interrelated, but they are not the same, as evidenced by the long struggle over Financial Interest and Syndication Rules in television broadcasting. Those rules, which were in force between 1970 and 1995, prohibited the television networks from owning shares of the firms that provided their programming, with the expectation that the policy would expand the sources of program production (Report and Order, 1970). Similarly, the 1948 Paramount settlement required the movie studios to divest themselves of movie theatres, thus restricting the vertical integration between producer/distributors of motion pictures and their exhibition (United States v. Paramount Pictures, 1948). The separation was rescinded in U.S. v. Syufy Enterprises (1989) on the logic that changes in technology warranted expansion of the product market beyond first-run exhibition to include sub-run exhibition, as well as exhibition in ancillary markets of home video, cable, and pay-per-view TV.

the number of distinct audience segments or demographics appealed to by various content providers, a measure that examines program formats? By the varied racial composition of a media outlet's workforce?

Philip Napoli has written astutely on the varieties of diversity. In a useful typology, Napoli (1999) identifies source diversity as encompassing ownership (within which there is a subset distinction between the ownership of outlets and the ownership of content, a distinction very pertinent to cable television, for example, and the basis for the Financial Interest and Syndication Rules for broadcast) and workforce composition (the theory, connected to Equal Employment Opportunity policies, that a diverse workforce within any given media outlet would inherently stimulate interactions the effects of which would diversify content and viewpoints). Content diversity encompasses format or program-type diversity, demographic diversity (particularly whether minority groups and other demographic groups are portrayed on television in reasonable proportion to their prevalence in society, a metric that has not been central to policy-makers, but has been important to communication studies), and, of course, idea-viewpoint diversity. Exposure diversity, in Napoli's view a neglected dimension, considers the diversity of content "as received," in the sense of actual media selection by audiences.<sup>6</sup> The FCC and Congress usually soft-pedaled the conceptual difficulties associated with diversity, sticking to generic praise of the policy, and assuming that a diversity of owners would translate to a diversity of formats, viewpoints, and audience segments catered to. But the assumption is part of the problem. Can ownership rules, concentration limits, and minority licensing preferences actually bring about desired changes in media content when they are applied in the context of the broader economic structure and sets of incentives and constraints inherent to an advertiser-supported media system? And if these rules, limits, and preferences did secure diverse media content, would audiences avail themselves of it?

There are two issues here. First, much evidence points to the strength of commercially rooted incentives and constraints. Owners, even diverse owners, may have particular ideological

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<sup>6</sup> For earlier attempts to disentangle the many strands of diversity see, among others, Noll, Peck, and McGowan (1973) and Levin (1980).

proclivities or programming visions, but the significant public goods features of media products, the economics of competition (with respect to the number of outlets and structure of existing audience preferences), and the bias toward content linked to marketable products and services, makes it difficult for owners to follow through with those proclivities and visions.<sup>7</sup> Most empirical studies of the effects of ownership rules and other diversity remedies on media content and format are inconclusive at best – a fact that has always left hopeful media reformers somewhat disappointed.<sup>8</sup> Only the FCC’s minority preference rules show some clear relationship between (minority) owners and altered content.<sup>9</sup> Conversely, there are some data that show an increase in diversity at the level

<sup>7</sup> The public goods argument derives from specific features of media products. In economic terms, media products are non-rivalrous; one person’s benefit often does not affect the benefit of others. Also, media products have high first copy costs, but adding distribution incurs essentially no marginal cost. Once a program has been broadcast, for example, there is no additional cost of adding another listener or viewer. These features create problems in pricing and of realizing price discrimination. Elements of this critique have been articulated by many scholars and in many documents for years, including the FCC’s “Blue Book” (Public Service Responsibility of Broadcast Licensees, 1946) but they have been given recent elegant and pointed formulation by C. Edwin Baker (2001).

<sup>8</sup> For example, Harvey J. Levin (1970) was largely critical of the claims made for the group ownership rule in terms of its effects on competition and diversity (though he admitted to a paucity of good data on content diversity). J.C. Busterna (1988) found no significant relationship between the effects of TV/newspaper cross-ownership on the diversity of issues covered in the news. Writing in 1985, Jacob Waklshlag and William Jenson Adams (1985) found that the introduction of the Prime Time Access Rule, enacted in 1970 by the FCC to encourage local production, was largely responsible for a sharp decline in network program diversity. Most of the programming that replaced network shows in the 7 to 8pm hour was cheap (and generally agreed as dreadful) game shows and animal shows. These findings seem to underscore the power of market conditions.

<sup>9</sup> The most careful studies of the efficacy of FCC minority preference policies do register a noteworthy degree of change in format and in primary audience. See Congressional Research Service (1988); Dubin and Spitzer (1995); Waldfogel and Siegelman (1999). Minority broadcast owners (and, according to Dubin and Spitzer, women owners) have a greater tendency to program differently than white owners, though this diversity registers at the level of radio program formats – an important component of diversity, but not one that necessarily reaches directly to the core issue of different viewpoints. Moreover, these programming changes tend to be realized only under particular market conditions. They are much more likely to happen in markets with large numbers of minorities in the audience, where there are large numbers of broadcast stations, and where none of the stations are yet serving minority audiences. In markets that do not satisfy one or more of these conditions, the theoretical chance that a minority owner will program differently from a white owner declines (see Spitzer, 1991). A 2001 study suggests that the race/ethnicity of broadcast station owners enhances news and public affairs diversity, as well as format diversity (Mason, Bachen, and Craft, 2001). The study was based on a nationwide telephone survey with some 200 news directors at radio and television stations, and, while suggestive, is limited by the self-reporting and possible bias of the respondents, as the authors themselves note.

of program formats as a result of deregulation and new entry.<sup>10</sup> The example that many commentators like to highlight (to some degree because of its paradoxical nature) is the Fox television network. Fox, the first new broadcast television network in 50-odd years, was made possible in part due to the expansion of independent television stations and cost reductions in satellite program distribution, but also ostensibly to the rollback of FCC rules on vertical integration (the Fin/Syn and Prime Time Access rules). Discovering an unmet market niche, Fox markedly increased the amount of black oriented entertainment programming on television (Farhi, 1994).

I referred to a second issue about ownership rules. If policy remedies are perceived as bringing about the desired changes in content, that is, if they are perceived as directly effective or even reflect the government's intention to be effective, do they violate the First Amendment's content neutrality

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<sup>10</sup> See, e.g., Steiner (1952); Beebe (1977); Waterman (1992); but see, contrarily, Grant (1994). One recent empirical study (Berry and Waldfogel, 2001) found that the mergers in the radio industry consequent to the 1996 Telecommunications Act increased the number of formats available relative to the number of stations, and some evidence that the increased concentration increased variety absolutely. The logic underlying this phenomenon derives from the fact that multi-product firms do not want their products to compete with each other, so mergers can lead firms to spread similar products apart. A serious problem in assessing the empirical studies, as Napoli (1999) suggests, is that the categories and the methodologies are not consistent. Another problem is that, for methodological ease, most studies focus on format (radio and cable TV) or program-type (television) diversity, most often assessed by categories employed by Arbitron or Nielsen or Duncan or the media industry itself. To some extent, this is perfectly understandable, because the categories seem stable and are hence measurable. After all, how can an empirically oriented social scientist measure viewpoint diversity? A perceptive reader can reasonably discern general differences of tone and coverage among the Wall Street Journal, USA Today, and The Nation, for instance. But, even in this comparison, does one analyze the coverage according to some general reckoning or by particular item? By news article or op/ed column? Over a comprehensive week or by random sampling? And according to what kind of scale? If quantitative, by the frequency an issue or event is covered or by column inches? If qualitative, what exactly does one look for when one conducts a content analysis? And this is news and opinion, presumably conducive to viewpoint analysis. How does one evaluate the viewpoints embedded in entertainment programming? Even approaching this particular problem resurrects the quandary of who does the measuring: the content analyst scholar or the audience; at an overt level of messages and meanings, or a covert one? The ethnographic turn in audience research has, in complicated fashion, revisited the old "selective influence" model of communication, that different people often read different messages into and derive different values from the same entertainment (and news) content (see, among others, Lowery and DeFleur, 1995; Seiter, 1999). Thus it's not surprising that empirical social scientists trying to assess media diversity will gravitate to the stable, if less consequential, measures of format. The problem, of course, is that format/program diversity is just one of several gauges of diversity, yet commentators often leap to broad, general conclusions about the efficacy (or not) of the market in expanding diversity. Researchers attentive to this problem, such as Berry and Waldfogel (2001), make an effort to refer to "variety" rather than "diversity" when analyzing formats.

doctrine?<sup>11</sup> Because the desire of government to bring direct changes in media content flirts uncomfortably close to the possible abrogation of the literal First Amendment, the usual phraseology is geared toward the more abstract and grandiloquent formulation of “enhancing the marketplace of ideas.” Government ownership policies are meant not to secure specific changes in media content, but rather to alter the structure so that different kinds of owners have the opportunity to offer different content.

In the wake of the Telecommunications Act of 1996 and the wave of mergers subsequent to that legislation, and the explosive growth of the Internet, the concern about media concentration remains stronger than ever, but there is reason to believe that the question of diversity has become more complicated than ever. Three interrelated forces are at play. First is the combination of technological convergence in communications and the ideological triumph of liberalization or deregulation. If the traditional regulatory regime was devoted to the separation of elements of the communications industry, defined for the most part according to medium and technology, digitalization has undermined the technical basis of many of those separations. Indeed, a key impetus for the Telecommunications Act of 1996 was the dismantling of regulation-imposed separations, and fostering the ability for previously separated media and communications corporations to compete on each others’ turfs (see Aufderheide, 1999).<sup>12</sup> With technological convergence and liberalization, and the growth of the Internet as an open delivery system, come new questions about the application of conventional antitrust tools, such as the identification of clear-cut product and geographic markets – the traditional building blocks in the determination of what’s concentrated or not.<sup>13</sup> Some of this questioning is statutorily required. The Telecommunications

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<sup>11</sup> “But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (*Police v. Mosley*, 1972, p. 95).

<sup>12</sup> The fact that such competition has not fulfilled expectations is another matter, and may be rooted in the economies of scale and scope that still impel communications toward oligopoly, a discussion I will not take up here.

<sup>13</sup> Merger analysis entails three steps. 1. Define the relevant market. 2. Estimate the merging firm’s strength in the relevant market. 3. Examine industry and transaction specific factors. With regard to the first step, the key determinations are the “line of commerce,” or the product market, and the “section of the country” or the geographic market. What exactly is the product that might be subject to too much market “power”? The more that products are reasonably interchangeable, the more likely it

Act instructed the FCC to eliminate one ownership rule and to revise five others. In view of this changed environment, second, the federal appellate courts, increasingly skeptical of congressional or regulatory assertions of media concentration and imposition of specific ownership rules, insist on a new concentration metric based on “non-conjectural” empirical evidence of anti-competitive behavior and verification of the efficacy of regulatory remedies. Third, this trend in communications law has been abetted by the way that a new conservative formalism in equal protection law has become attached to First Amendment jurisprudence. These jurisprudential developments underscore the enduring historical connection between the civil rights movement and media regulation. As has been mentioned, diversity analysis in mass media has always been a part of the regulatory mandate of the FCC, albeit in a general way. Diversity analysis attained significantly more bite when, in the late 1960s, civil rights litigation provided diversity a much more specific definition. In the media ownership arena, diversity’s star, as it were, got hitched to the success of the legal logic of civil rights and affirmative action. After the 1960s, diversity in broadcasting and other communications industries under the authority of the FCC was assessed essentially by how accessible media were to minority, particularly racial minority, participation. As affirmative action and its jurisprudential logic have lost favor over the past 15 years, the principle of diversity in communications likewise has come under fire. This is best seen in a line of cases starting with Justice O’Connor’s dissenting opinion in Metro Broadcasting v. FCC (1990). In this, the courts have brought to the media ownership debate a formalistic reading of the First Amendment the upshot of which is sympathy for the arguments asserting the free-speech rights of corporations and increasing skepticism of the role of government in promoting diversity in mass media. Corporations have successfully used the new formalism to challenge media ownership

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is that they should be considered the same product market. Traditionally, the geographic market may be a city, a region, or the entire country. What is the geographic scope of competition in the product market? For example, while it may be useful to aggregate the overall market power of a newspaper or cable chain, the degree of competition at the local level needs to be considered separately (see Nesvold, n.d.).

policies as not meeting heightened First Amendment scrutiny.<sup>14</sup> So, even as media corporations are becoming larger and presumably more powerful, ownership regulations are being rescinded or struck down.

## II.

Are American media concentrated, particularly in the light of the merger activity following the Telecommunications Act of 1996? One prominent line of argument responds in the negative. Whereas one finds a notable number of large mergers and combinations in the communications industry over the past twenty years or so, one also finds tremendous overall sectoral growth. Eli Noam (n.d.), for example, contrasts the early 1980s, when three television networks collectively controlled 92% of TV viewership, one company (AT&T) controlled 80% of local telephone service and nearly 100% of the long distance market, and another company (IBM) accounted for 77% of the computer market, to the mid 1990s, when, after the deregulation of cable television and the breakup of AT&T, the networks accounted for barely more than 50% of TV viewership, AT&T served 55% of the long distance market and had virtually no local customers, and no computer manufacturer supplied more than 12% of the microcomputer market. Noam explains that the long period of limited media, characterized by few players and government regulation to limit their market power, had given way to a period of multi-channel communications that greatly expanded the overall media market. The market for broadcast, cable, print, and content grew from \$151 billion in 1979, Noam notes, to \$367 billion in 1993 – an increase of 21% in constant dollars. And if the computer industry is included in this figure, the market grew from \$168 billion in 1979 to

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<sup>14</sup> In an effort to formalize how judges should assess the balance between free speech rights and regulations that seek to safeguard the state's interests, the Supreme Court has adopted an approach known as levels of scrutiny. Scrutiny entails a weighted balancing, using a multi-tiered categorization approach. Strict scrutiny requires the state to show a "compelling" interest in regulating speech. Any content-based regulation will trigger strict scrutiny; to survive, the regulation must be "narrowly drawn" to fulfill only the compelling interest. Intermediate scrutiny requires the showing of a "substantial," "significant," or "important" state interest. To survive, the regulation must be content-neutral, be narrowly tailored to serve the state interest, and leave open ample alternative channels for communication of the information (see United States v. O'Brien, 1968).

\$615 billion in 1993 – 83.5% growth in constant dollars. So, while there has been significant merger activity, the huge overall growth of the industry has alleviated any danger of concentration (also see Waterman, 2000). Moreover, the current multi-channel communications environment, fueled by a technological juggernaut and now, with the 1996 Telecommunications Act, a pro-competition policy structure, will enable the broad convergence of delivery platforms for telecommunications, mass media, and computer data distribution. Under these conditions, although there are particular, delimited, instances of market power, these will tend to erode as existing firms adapt and new firms enter the market.

Benjamin Compaine (2000) makes a similar argument. Notwithstanding recent mega-mergers, such as AOL-Time Warner and Viacom-CBS, media markets are in fact no more concentrated, according to traditional antitrust measures, than in previous decades. When the standard Herfindahl-Hirschman Index (HHI) of industry concentration is applied to the media industry, the change in concentration between 1986 and 1997 is trivial.<sup>15</sup> In fact, in some media sub-sectors, such as television broadcasting, the HHI was lower in 1997 than in 1994 – before the wave of mergers commenced. Arguing that the appropriate unit of analysis for concentration measurement purposes is now the media industry as a whole rather than constituent market segments, Compaine (2000, p. 560-61) finds that its HHI score of 268 reveals a remarkably unconcentrated industry. The shift to viewing the industry as a whole reflects the fact that changing patterns in technology and consumer media uses complicate the traditional geographic and product market distinctions pivotal to antitrust analysis. The Justice Department, FCC, and the appellate courts have now largely accepted the concept of “substitutes,” that the product offered by, say, cable television, broadcast television, and video cassette rentals, is essentially the same. Thus, under many circumstances, companies previously understood as individual media segments operating in

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<sup>15</sup> The HHI is used by the Department of Justice and the Federal Trade Commission to quantify the level of concentration in any given market. The measure takes the market share of each firm, squares it, sums the result, and multiplies by 10,000. The resulting number is then broadly categorized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800) [see US Department of Justice and the Federal Trade Commission, 1992/1997].

separate product markets in fact compete and therefore should be included in the same product market for antitrust purposes.<sup>16</sup> When the product market is understood in that fashion and the communications industry evaluated as a whole, the industry does not appear concentrated; indeed, despite mergers there is more competition than ever before. Finally, changes in delivery systems, in particular the nature and growth of the Internet, enable local radio and local newspapers to be delivered anywhere. Compaine and others argue that the Internet's capacity to erode old bottlenecks and blur lines between traditional media further complicates the traditional antitrust thinking about geographical markets, and thus requires us to move toward evaluating the media industry as a whole.

The overall growth of media (and the particular growth of the Internet) has important bearing on how to think about diversity and regulation. Economic models show that as the number of substitutable outlets increases, the audience fragments, and minority-interest content becomes economically viable, a fact that is born out empirically when the programming of, for instance, large cable television systems is monitored. In a limited media system, such as the old broadcast system, it might make sense to regulate vertically, that is, require that any individual outlet air a broad and diverse mix of programming; in an extensive media system, doesn't it make sense to look at the diversity question horizontally, that is, across all substitutable outlets? If so, and that market shows no troublesome concentration, government intervention is not needed and is, in fact, pernicious. Simple vigilance on the antitrust front will safeguard diversity.

Opposed to this relatively sanguine position on media concentration is a critique that rests less on conventional ownership concentration ratios per se than, rather, the recognition that the media are situated within the wider relations of power. In particular, the analysis of mergers is embedded within a critique of the commercial structure of American media. Ben Bagdikian (1983/1997),

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<sup>16</sup> For instance, in Cable Holdings of Georgia v. Home Video, Inc. (1990) the court of appeals upheld a merger between two cable companies under the logic that the relevant product market definition was all "passive visual entertainment," including cable television, satellite television, video cassette recordings, and free broadcast television. These were reasonable substitutes and hence constituted a single product market. One important question, however, is what is the "product" in an advertising-based media system – the content or the advertising (see Ekelund, Ford, and Jackson, 1999).

perhaps the dean of contemporary critics of media concentration, insists that the great mergers of communications firms over the past two decades have grave effects on the type and diversity of information available. Writing in 1983 in the first of several editions of The Media Monopoly, Bagdikian argued that not only do a smaller number of owners have possession of larger and larger numbers of media properties, but for the first time in the history of American journalism, news and public information have been integrated formally into the highest levels of financial and non-journalistic corporate control. In Bagdikian's analysis, media mergers have reduced the number of controlling corporate players from approximately fifty in 1984 to ten in 1996. In an age when face-to-face communication is far less important for politics than mass-mediated communication and information, media power is, baldly, political power. Bagdikian (1997, p. ix) writes in the 5th edition, "...[T]he communication cartel has exercised stunning influence over national legislation and government agencies, an influence whose scope and power would have been considered scandalous or illegal twenty years ago." As communication scholar James Curran (2000) succinctly puts it, the issue is no longer simply that the media may be compromised by their links to big business; the media are big business. This makes the old "democratic watchdog on power" claim rather time-worn. The concentration of media ownership has led to more controlled information, fewer and less diverse sources of information, and thus less "real" information despite a purported information overload. The ownership of communication media by large corporate conglomerates creates greater likelihood that the old firewalls between news and advertising, between news and entertainment, and between entertainment and rank product placement, erode. Conglomerated corporate ownership also means treating communication media as economic properties pure and simple, without the traditional conflicted balance between profit and public service experienced by stand-alone publishers or broadcast groups. That balance may have been a piece of self-legitimizing ideology of traditional news organizations, but the very existence of the discourse meant that there were grounds for criticism and sites through which to exercise pressure both within and without media organizations. The high prices paid for media properties in this most recent wave of acquisitions means heavy financial pressures for each media

property, including news and journalism outlets, to be profitable. The widely noted cutbacks in broadcast news divisions and instances of commercial conflicts of interest at even quality newspapers in the 1990s would appear to confirm Bagdikian's point (see Downie, Jr. and Kaiser, 2002; Hamilton, 2004).

Edward Herman and Robert McChesney (1997), among others, expand Bagdikian's argument to a worldwide focus and examine the remarkable vertical integration of international media holdings that has occurred over the last few years. The vaunted "synergies" of such integration, where a large national cable system operator may combine with a movie production studio, which already has television station holdings in several nations, magazine publishing, and an Internet portal, result in packaged news and entertainment product characterized by self-promotion and the celebration of the capitalist system of which they mediate. For Herman and McChesney, this isn't just transnational control over exported media content (the earlier form of Western media hegemony) so much as increasing transnational corporate control over media distribution and content within nations, in which formerly public media systems are transformed into commercial systems based on advertising. This ownership structure has unmistakable consequences on media content: a concentration of attention on the stock market rather than poverty and inequality, on business rather than labor, on celebrity rather than social movements and pressing social problems.<sup>17</sup> Advertising values, for the most part, rule over media content, imparting an ethic of consumption and hedonism. The market generally under-produces certain kinds of content, pointedly including content with positive externalities, such as investigative journalism and public affairs analysis, whose watchdog impacts affect far more people than actually consume the specific media product (Baker, 2002). As has been noted for decades, the market ordinarily fails to represent and serve minorities. Contrary to the canard of the liberal media, mainstream commercial media generally avoid presenting political viewpoints of the left, largely due to the left's intrinsic critique of commercialism and corporate power. Synergies of common ownership, especially when

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<sup>17</sup> Not only are advertising-based media outlets structurally biased toward content connected to marketable products and services, their predisposition to avoid content oriented toward the poor

they are news outlets, become the vehicle for the outlets to promote, not compete with, the other outlets. Notwithstanding that there may be more communication outlets than ever before, the critics argue, more is actually less. It is not the total number of outlets that matters, but the number of owners (see Cooper, 2003).

Exacerbating these trends is a propensity of industry competitors to enter into cooperative agreements regardless of ownership, and the fact that consolidations of distributors and content creators invariably lead to concentrated information systems (see Benkler, 1999; Tunstall and Machin, 1999; Hill and Landro, 2000; Wysocki, Jr., 2000). The Internet, for all its wonders, is at risk of being dominated by the same entities that dominate other media and which threaten to destroy its open architecture (see Lessig and Lemley, 1999; Bar, Cohen, Cowhey, DeLong, Kleeman, and Zysman, 1999).<sup>18</sup> Finally, contrary to the argument that more outlets create substitutes, in actuality substitution effects are rather weak because people value content differently, especially with regard to news and information. Relying simply on antitrust to safeguard media diversity is misplaced, because for antitrust purposes the product market for (much) media is advertising, whereas the underlying basis of diversity revolves around content.<sup>19</sup> The advertising market thus cannot be a simple surrogate for content, because the concern about ownership concentration in media cannot rest just on possible economic harm and the ability to practice price discrimination; the concern about media concentration focuses on the access to receive and produce information. Hence any antitrust theory that focuses solely on market power over pricing will be too limited in its consideration of the negative features of media concentration (see Comments of

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exacerbates the general phenomenon of poor people's lack of voice in American politics. A consistent and compelling theme of Ehrenreich (2001) is that poor people's dependence robs them of voice.

<sup>18</sup> The ability of Internet Service Providers to direct the attention of their customers through branding (where the most likely links are the ones that have the most prominent display, fastest connection, best premiums, etc., and are those that benefit the ISP) or data management middleware (software resting between the user applications and the ISP servers and acting as a broker/facilitator/gateway that manages the flow of data in ways that privilege the ISP's offerings) worries some students of the Internet (see Aufderheide, 2002; Center for Digital Democracy, n.d).

<sup>19</sup> The Justice Department's current guidelines for radio mergers, for example, limit ownership to controlling more than half the advertising revenue in major markets. The operative "product market" for radio is advertising. The Department of Justice can review radio mergers on the grounds that they

Consumers Union et al, 2002; Baker, 2002; Cooper, 2003). Concentrated ownership in the communications media yields diminished editorial voice, the decline of journalistic values, diminution of the press' watchdog function, reduction in the diversity of ideas, and, as a consequence, thwarts democratic deliberation.

To some degree, the stark differences between these perspectives on media concentration reflect a long-standing divergence among scholars and lawyers regarding the purpose of antitrust laws, and, more generally, a market economics vs. social value perspective on communications policy. Media mergers, like all industrial combinations, require scrutiny by the Department of Justice and Federal Trade Commission. Section 7 of the Clayton Antitrust Act (1914) requires the DOJ and FTC to evaluate the anti-competitive ramifications of mergers, but also their potential efficiencies as well in terms of bringing economies of scale, lower transaction costs, and technological synergies, etc. An exclusively economic focus on allocative efficiency, the society's total wealth, is fairly characteristic of the Chicago School approach to antitrust. The dominant concern is that mergers should not be permitted "to create or enhance market power or to facilitate its exercise" by enabling firms to "impose at least a 'small but significant and nontransitory' increase in price." In this view, the purpose of antitrust is to promote economic efficiency, not equitable distribution, making results (not actions) the criteria for legal judgments. But antitrust law also encompasses other than economic concerns, including, for instance, preventing the loss of communities' local economic independence to large absentee corporations, protecting small business, and preserving the social and civic ties that bind communities, as embodied in the Celler-Kefauver Amendment (1950) to the Clayton Act. This emphasis on the social and political values of antitrust law is championed by the Multivalued approach to antitrust.<sup>20</sup> Those values are part and

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would potentially raise prices to advertisers. As Berry and Waldfogel (2001, p. 1015) submit, it is not clear the DOJ could review on grounds of product variety because there is no "price" paid by listeners.  
<sup>20</sup> The argument that the protection of allocative efficiency is the paramount, even the only, concern of antitrust has gained ascendance over the last 25 years, to the point of reading the principle back into the drafting of the Sherman, FTC, and Clayton Acts as their sole legislative intent. This is the mode of Robert Bork's (1978) The Antitrust Paradox: A Policy at War With Itself, for example. Yet any reasonable historian can discern that there were many principles embedded into the founding antitrust acts, not the least of which were fear of concentrated corporate power on social and political life and the concern over the distributional inequity resulting from firms with monopoly power extracting

parcel of the Federal Communications Commission's charge. Because of the special role that the communications media play in a democracy, especially, perhaps, at the local level, media mergers must be approved by the Federal Communications Commission. In light of the Justice Department and Federal Trade Commission's proclivity toward looking primarily at efficiency concerns, the FCC in many respects has a broader charge in the media merger area. The FCC must determine whether a proposed merger is consistent with the public interest, convenience, or necessity, which traditionally has been interpreted as, among other things, whether the merger promotes competition and the diversity of voices, and whether it poses special dangers to diversity in the local setting. Indeed, the public interest standard in principle compelled the FCC to act in advance of specific antitrust problems. If, generally speaking, the aim of antitrust is to prevent "restraint of trade," a principal aim of the 1934 Communication Act came to be interpreted by the FCC as the prevention of "restraint of trade in ideas" over the airwaves. The FCC's policy of promoting diversity is distinct from the goal of promoting competition.<sup>21</sup> It may be too strong to state that the Noam and Compaine position is tied to the Chicago School of antitrust and the market economics perspective on communications policy, whereas the Bagdikian and Herman/McChesney position is tied to the Multivalued antitrust approach/social value perspective on policy, but the proclivities of the former to economic efficiency and the proclivities of the latter to social and political values seem pretty clear.

### III.

Let us proceed by returning to fundamentals. As has been mentioned, Congress and the FCC typically addressed antitrust issues by separating communication industries from each other and

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wealth from consumers (see Hofstadter, 1955; Lande, 1982; Millon, 1988). The shift to efficiency principles and the reverence accorded Bork's text must be located in the ideological ascendance, beginning in the 1970s, of the law and economics perspective.

<sup>21</sup> As a testament to how far the pendulum has swung toward viewing communications as just another industry and to conceiving antitrust as a simply a matter of competitiveness and efficiency (as well as revealing the nasty relations between the political parties in the 1990s), there was an effort in the Republican-controlled Congress to strip the Clinton FCC of the power to evaluate media mergers. The gambit disappeared after the disputed 2000 presidential election was decided in favor of George W. Bush and effective control of the FCC would revert to the Republican agenda.

restricting common ownership. One of the most important separations, enacted at the beginning of federal regulation, was that between broadcast and common carrier. A broadcaster could not operate as a telephone provider, and, effectively, could not own the delivery system that linked broadcast stations in a network. The broadcaster was explicitly responsible for the content aired over the station. Telephone companies provided access to the wired delivery system on a non-discriminatory basis, and, as common carriers, were not responsible for the content sent over the system. This essentially encoded into law and policy a division of industry hammered out among the principal corporate players in 1926 (Barnouw, 1966). The FCC endeavored to foster diversity and forestall monopolization in broadcasting by a series of (vague) content and behavioral regulations that, in the wake of the Report on Chain Broadcasting (1941), were augmented by structural regulations. Structural regulations established ceilings on the number of broadcast stations an entity could own nationally, forbade (in theory) the dominance of a local market through cross-ownership restrictions and a rule that an entity could own just a single outlet in a local area, and effectively dictated that broadcast networks must be owned by different entities. Some structural rules were designed to enhance competition and cultivate new programming. The 1970 Financial Interest and Syndication Rules, which barred television networks from owning the firms that provided their programming, were enacted in an attempt to increase programming diversity by separating production from distribution in broadcast television. The Prime Time Access Rule, also enacted in 1979, cleared out an hour of television prime time from network control so that local stations would air their own programming. Specific content rules, such as the Fairness Doctrine and associated rules of section 315 of the Communications Act, were enacted to ensure that broadcasters would present issues of concern and controversy in their programming, guarantee access to stations by candidates for political office, and ensure that informational/editorial programming was aired with a degree of fairness and balance. Other content rules included various regulations against indecent programming. The FCC also developed more specific behavioral rules, such as requiring that broadcasters meet with community groups in their broadcast market to

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ascertain their concerns and interests. The public interest – understood in terms of the maintenance of diverse viewpoints, some degree of local control and local program orientation, a general balance of programming (including of controversial topics), and equitable treatment of political candidates – was the ultimate linchpin of oversight.

The main ownership rules in electronic mass media were historically:

- Dual network rule prohibited broadcast stations from affiliating with any entity that maintained more than a single network.

--One of the earliest rules on ownership, the rule grew out of the FCC's investigation on "chain broadcasting" and was applied to radio in 1941, then to television in 1946. The rule was eliminated with regard to radio in 1977. The Telecommunications Act of 1996 revised the rule for television to prohibit a party from affiliating with an entity if that entity controlled more than one of the four largest networks – ABC, CBS, Fox, and NBC – or with an entity that controlled one of these four networks and either of two emerging networks (UPN and WB). In 2001 the FCC amended the rule to permit one of the four major television networks to own, operate, maintain, or control the UPN and/or the WB network.

- One-to-a-market rule prohibited the common ownership of a radio and a television station serving substantial areas in common (though waivers were routinely granted).

--Waivers were routinely granted in part because in the early years of television, the FCC encouraged radio licensees to obtain TV licenses in order to spur the growth of the new medium. Only later did the FCC see a problem in common ownership. Since 1989 the FCC generally waived the rule in the top 25 markets if, after the combination, there remained at least 30 separately owned independent voices (including radio and TV stations, and certain local newspapers and cable stations) in the market.

- Television duopoly rule prohibited common ownership or control of television stations with overlapping Grade B signal contours, dating from 1964. As a rule, the FCC considered anyone with an interest of at least five percent in the media company as an owner. (But Local Market

Agreements, through which an owner turned over programming to other broadcast owners, undermined the rule.)

--The rule was replaced in 1999 so that a company may own two television stations in the same Nielsen designated market area (deemed more appropriate than the Grade B signal contour measurement) if one of the stations is not among the four highest ranked stations in the market, and so long as 8 independently owned, full-power, operational television stations remain in the market after the merger.

- National multiple ownership rules limited the total number of television and radio stations an entity could own nationally, irrespective of location.

--As originally promulgated in the early 1940s, the rule prohibited common ownership of more than three television stations. Between 1953 and 1985 the number was 7 AM radio – 7 FM radio – 7 television stations (with a maximum of 5 in the VHF band). In 1984 the FCC increased the ceiling to 12-12-12, and in 1992 the FCC raised the national radio ownership limits to 30 AM and 30 FM. The rise in ownership caps in part accompanied expansions in the bands and in the number of licensed stations. The Telecommunications Act of 1996 repealed all national ownership limits for radio; locally a company may now own 5 to 8 radio stations in a single market, depending on the size of the market. The Act also repealed the 12 station national cap for television, though a single company may not own stations that reach more than 35 percent of the nationwide television audience.

- Television networks could not own shares of the firms that provided their programming (Financial Interest and Syndication Rules).

--The FCC implemented the rule in 1970 in an attempt to increase programming diversity by separating production from distribution in broadcast television. The FCC relaxed the Fin-Syn rules in 1991 and appeals courts later relaxed the rules even further, in essence eliminating all traces of Fin-Syn by 1995.

- Cable horizontal ownership. Pursuant to the requirements of the Telecommunications Act of 1996, the FCC adopted rules prohibiting any one entity from having an attributable interest in cable systems reaching more than 30 percent of cable homes passed nationwide.

--The FCC changed the method by which the horizontal ownership cap was to be calculated in 1999, effectively raising it from 30 percent to 36.7 percent. The cap in general was found not suitably justified in Time Warner v. FCC (2001).

- Cable vertical ownership. Pursuant to the requirements of the Telecommunications Act of 1996, a cable company could not have any ownership affiliation with more than 40 percent of the programming that it carried on any of its cable systems with up to 75 channels. On systems with more than 75 channels, 45 channels were required to be reserved for nonaffiliated programming.

--This cap was found not suitably justified in Time Warner v. FCC (2001).

- Broadcast/newspaper cross-ownership rule. Although concern over such combinations surfaced at the FCC as early as the 1930s, an appellate court decision declared in dicta that the Commission could not prohibit newspaper publishers, as a class, from receiving licenses to operate broadcast stations (see Stahlman v. FCC, 1942, p. 127). Adopted in 1975, the FCC prohibited the same company from owning a newspaper and a broadcast station in the same market.

--The FCC “grandfathered” almost all historical combinations.

- Broadcast networks/cable systems cross-ownership rule. Adopted in 1970, the FCC prohibited the same company from owning a broadcasting network and a cable system.

--Relaxed in 1992, the rule was eliminated by the 1996 Telecommunications Act.

- Broadcast/cable cross-ownership rule. Adopted in 1970, the FCC prohibited the same company from owning a cable system and a broadcast television station in the same local market. Congress codified the policy in 1984.

--The 1996 Telecommunications Act eliminated the statutory cross-ownership restriction but retained the FCC rule. Thus, cross-ownership is at the FCC’s discretion.

- Cable/telephone cross-ownership rule. Adopted in 1970 with the intention to protect cable television from telephone companies, the FCC prohibited the same company from owning a cable system and a telephone system in the same market.

--The rule was eliminated by the 1996 Telecommunications Act.

- Finally, the Telecommunications Act of 1996 (Sec. 202[h]) requires the FCC to review each of its ownership rules every two years to “determine whether any of such rules are necessary in the public interest as a result of competition,” directing the Commission to “repeal or modify any regulation it determines to be no longer in the public interest.”

The legitimation of most of the FCC’s structural and many of its behavioral and content rules were weaved in and around a diversity rationale that was itself premised upon the proper role of government in licensing applicants of a scarce public resource. The scarcity theory, that broadcast frequencies were inherently physically (or “naturally”) scarce and thus required government to assign them – the standard accepted constitutional basis for the regulation of broadcasting – has come under considerable fire in recent years. Many courts and commentators have cast doubt on the continued relevance of the scarcity rationale, particularly given the recent growth of the medium.<sup>22</sup> But the rationale for the regulation of broadcasting, as C. Edwin Baker (1994) and others have argued, was never premised simply on the basis of natural scarcity, but of scarcity ensconced within a problem of the commons and a fear of radio’s potential to focus political power. As every standard history of broadcasting recounts, before the licensing of frequencies in 1927, interference plagued the airwaves. The limited availability of a valuable resource, combined with the absence of some form of governmental or social allocation of usage rights, resulted in overuse,

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<sup>22</sup> The central critique is that there is no “natural” scarcity of broadcast spectrum. The scarcity in broadcasting was created by government itself in the process of establishing control over the resource. If there were a proper market in spectrum, so goes the critique, there would be no scarcity, as demand would meet supply at the right price. Like other commodities, there is no real physical or technological scarcity in broadcasting; rather broadcasting is characterized by a normal economic scarcity made problematic by government intervention. Ronald Coase (1959) was the originator of the theory that Congress erred by not adopting a property rights solution in the spectrum. Thomas Hazlett (1990) has argued that while property rights is the correct solution, Congress did not err; rather, lawmakers entered into a rent-seeking arrangement with incumbent broadcasters, both of whom would benefit from a regulatory regime. For a recent statement of the wrong-headedness of scarcity argument, from the Chairman of the FCC, see Powell (1998).

making the resource worthless to everyone. Natural scarcity exists when there is no legal definition of rights. In the language of the Court of Appeals in National Citizens Committee for Broadcasting v. FCC (1977, p. 948), “The need for some regulation of the airwaves became clear in the 1920’s when there was none. ‘With everybody on the air, nobody could be heard’ [quoting National Broadcasting Co. v. FCC, 1943]. In order to ensure the public’s ability to hear some speakers, the rights of other potential speakers were curtailed. The hard choice was between forcing free speech to bend or watching it break.” In other words, the private system of allocation was unable to solve the problem of the commons. The government responded with a licensing regime that, because licenses were given away without charge, inevitably created a second scarcity. Could/should the government have created a standard, exclusionary private property right in the spectrum? Again, as any standard broadcast history will tell, that possibility was recognized and rejected in 1927 as embedding a “right of selfishness” in the medium (Red Lion Broadcasting Corp. v. FCC, 1969, p. 376, n. 5, quoting the House sponsor of the 1927 Radio Act, Representative Wallace H. White). The reasons for rejecting private property rights in the spectrum were unanimously affirmed by the Supreme Court in Red Lion. Noting broadcasters’ claim to have unlimited choice in respect to the use of their licenses, i.e., their ability to treat the license like private property, the Red Lion (p. 392) Court cited Associated Press (1945) that the “First Amendment does not sanction repression of that freedom by private interests.” The Court rejected the print model of private First Amendment rights for broadcasting. In C. Edwin Baker’s (1994, p. 104) words, the Court in Red Lion “essentially held that the government has the power to structure the media in a manner that the government thinks will promote the best communications environment.” Whether or not this is the Court’s understanding of itself, when presented an explicit opportunity in 1994 to repudiate the scarcity doctrine, the Court “declined to question its continuing validity” (Turner Broadcasting v. FCC, 1994, p. 638).

The diversity argument essentially flowed from this logic. Through the licensing process government grants broadcast frequencies to private parties. To make sure that a robust marketplace

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of ideas prevails in the broadcast medium, the government set limits on how many stations a single private entity may own, made sure, for example, that a single voice would not monopolize a local community through the common ownership of broadcast and newspaper, and required a broadcast licensee to open up its frequency to other viewpoints. This set of interventions had its limits, of course. Government could not censor programs and government could not direct content. Indeed, the Fairness Doctrine, adopted in 1959 to formalize the expectation that broadcasters should air contrasting viewpoints, vested in the broadcaster the power to initiate debate and to select the mode for producing viewpoint balance. It was these fundamental limits on government that prompted the FCC to pursue its primary strategy for fostering diversity through ownership regulations.

Diversity was always a concern of the FCC, though in the early years it was implicit, wrapped within the problem of getting broadcasters to fulfill their public interest responsibilities. The public trustee status of broadcast licensees meant that they were to serve a public, rather than a purely private function, which, in turn, meant that they were in principle obliged, within reason, to air a varied set of programs, including news, religious programs, weather, and other types of local productions, to a range of audiences. This was what we now call format diversity, understood vertically, that is, within each broadcast outlet. It must be acknowledged, of course, that this regulatory effort was undertaken within an advertiser-supported broadcast structure and in a political context subject to the exigencies of institutional bias and influence peddling, in which various incarnations of the FCC issued license grants to commercial/corporate broadcasters in the early years and to political cronies in succeeding years (see, among others, Rosen, 1980; Schwartz, 1959). When the FRC and FCC weren't giving away frequencies to favored constituents, the Commissions struggled, contrarily and with limited success, to formulate policies that would encourage broadcasting in the public interest against the strong constraints established by a commercially-based broadcasting system. As the consequences of broadcasting's commercial structure and the Commission's largely corporate license grants became clear, the FCC initiated some structural policies to deal with what was then termed the problem of monopolization (Report on Chain Broadcasting, 1941), and behavioral policies to induce broadcast licensees to air, among

other things, more public affairs, educational, and locally-oriented programming (Network Programming Inquiry, 1960). In 1953, the Commission promulgated the first of its multiple ownership rules on the logic that the “fundamental purpose” of the rules was “to promote diversification of ownership in order to maximize diversification of program and service viewpoints” (Amendment of Sections 3.35, 3.240, and 3.636 of Rules and Regulations Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 1953). A 1964 amendment to those rules stated that “the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect in a...programming sense, on public opinion at the regional level” (Amendment of Sections 73.35, 73.240, and 73.636 of Commission’s Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 1964, p. 1482). Diversification of ownership was one of the comparative criteria used by the Commission to assess applicants competing for a broadcast license (Policy Statement on Comparative Broadcast Hearings, 1965).

Diversity per se became a more explicit concern of the Commission as broadcasting issues and the African-American civil rights struggle intermingled. The famous WLBT case, whose political import was the expansion of the legal doctrine of standing (thus opening up regulatory agencies and courts to parties without direct economic interest in any given controversy), illustrated that broadcasters were not just ignoring huge portions of their audience, but in that instance routinely aired racist programming and practiced workplace discrimination as well (Horwitz, 1997). The Kerner Commission Report on the causes of the racial unrest of the 1960s noted that American media presented an almost totally white world (National Advisory Commission on Civil Disorders, 1968, p. 210). The broadcast reform movement of the 1960s, very often linked to and fueled by the civil rights struggle, challenged broadcasters to air content pertinent to minority audiences and to hire minorities at the stations, and pressed the FCC to enforce the public interest standard of the Communications Act (Fife, 1984). The FCC accommodated some of these demands under the conceptual rubric of diversity. The negligible presence of minority and ethnic groups in broadcasting – whether in ownership, programming, or station employment – was a major element

behind the Commission's behavioral regulations such as the requirement for licensees to "ascertain" the communities to which they broadcast and to air programming relevant to these ascertained local community concerns (Chapman Radio and Television Co., 1970; Primer on Ascertainment of Community Problems by Broadcast Applicants, 1971). The FCC's promulgation of equal opportunity regulations in station employment was another example of the influence of the civil rights movement on the Commission's agenda (Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 1968; Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 1976).<sup>23</sup> By the 1970s this movement began to affect policy on ownership, as well, largely via pressure from the courts.

#### IV.

While the diversification of ownership was one factor of several in the mix of elements considered by the FCC in comparative hearings for broadcast license applications before 1973, minority ownership was not. The FCC, arguing that the Communications Act was "colorblind," would take an applicant's race into account only to the extent that the applicant could show that his or her race would likely lead to better, more diverse programming in the particular instance. In 1973 in a case called TV9, Inc. v. FCC, the D.C. Circuit Court of Appeals ruled that the racial identity of an African-American applicant for a radio license was a relevant consideration in choosing between and among applicants. There was no justification of minority preference as remedial to past discrimination; the court reasoned that minority ownership could result in diverse programming. In the wake of the TV 9 decision, the Commission formulated a policy that gave evaluation enhancement in comparative hearings to minority ownership and participation in station

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<sup>23</sup> The U.S. Commission on Civil Rights (1977) published a highly critical assessment of the television industry's treatment of minorities and women in 1977. Examining the portrayal of women and minorities on television and their employment in the industry, the study found that they were underrepresented on the work forces of television stations and were almost totally excluded from decision-making positions in the industry. This pressure led the FCC to tighten its equal employment guidelines.

management by members of minority groups.<sup>24</sup> The FCC's Review Board subsequently extended this enhancement to women (Gainesville Media, Inc., 1978). However, women's enhancement was less than that of racial minorities, because women, in the Commission's view, have "not been excluded from the mainstream of society" due to prior discrimination (a statement that did insert a notion of minority preferences as remedial, but in a general way, not specific to broadcasting) [Mid-Florida Television Corp., 1978, p. 652]. Included in the FCC's Statement of Policy on Minority Ownership of Broadcasting Facilities (1978) were a minority tax certificate program (which provided incentives to owners of existing broadcast properties to sell their properties to minorities) and a distress sale program (which allowed a broadcast licensee whose license had been designated for a revocation hearing to sell his station to a minority-controlled entity at 75 percent or less of the station's fair-market value). The tax certificate program allowed the seller to defer any gain realized on the sale if the property was sold to a minority purchaser, and the gain was rolled over into a qualified replacement broadcast property.

In 1984 the D.C. Circuit Court of Appeals affirmed the legality of the minority preference in comparative hearings under the Communication Act's public interest standard. The Court argued that the TV 9 decision "required" the FCC to assume that black owners would present distinctive programming valuable not just for black audiences but for all audiences by exposing them to new ideas and points of view. Proof of actual connection between minority or female ownership and diversity in program content was not required (West Michigan Broadcasting Co. v. FCC, 1984). And in 1985 the Commission amended its multiple ownership rules, allowing a non-minority owner to take a non-controlling interest in an additional two minority-controlled television stations, making for a TV ownership limit of fourteen stations (in contrast to the then normal limit of twelve), if the aggregate audience of all its stations did not exceed 30 percent of the national audience. The aim

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<sup>24</sup> If and when a broadcast license came available, there were often several applicants for it. The FCC would conduct a comparative hearing to determine which applicant should be awarded the license. Evaluative criteria in comparative license applications traditionally included local ownership, the integration of ownership and management, past performance, broadcast experience, proposed programming, and diversification of control of media. With the 1978 minority ownership policy, minority applicants in comparative license hearings would receive "extra points," as it were, in the evaluation process (Statement of Policy on Minority Ownership of Broadcasting Facilities, 1978).

was to foster minority ownership (Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 1985).

The legitimation of these policies was premised on the presumed connection between ownership diversity and the program and viewpoint diversity it would bring. "Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum," wrote the FCC in its Statement of Policy on Minority Ownership of Broadcasting Facilities (1978, p. 981). The expected viewpoint diversity was woven into a broader argument on the particularly beneficial consequences of equal employment opportunities in the broadcast industry, "which could 'contribute significantly toward reducing and ending discrimination in other industries' because of the 'enormous impact which television and radio have upon American life'" (Metro Broadcasting v. FCC, 1990, p. 555, quoting Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 1976). Roughly similar preference programs were applied to cable television and enacted in wireless spectrum lotteries and auctions, for which Congressional legislation directed the FCC to give minority groups and women bidding credits (Policies and Rules Regarding Minority and Female Ownership of Cable Television Facilities, 1994). In the wireless area, the viewpoint diversity argument was not relevant, of course. The bidding credits policy partook of the general affirmative action logic of ensuring that minority groups and women would not in any way be excluded from the competitive bidding process for spectrum.<sup>25</sup>

It is probably the case that viewpoint diversity was always the ultimate aim in these broadcast ownership policies from the 1970s – though other manifestations of diversity, such as source, format, workforce, and audience (or demographic) diversity assumed both independent and instrumental importance, especially because of the intersection of civil rights and broadcasting. In

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<sup>25</sup> The FCC formulated four policies to increase the ownership of broadcast licenses by racial and ethnic minorities: lottery preferences, comparative hearing preferences, distress sales, and tax certificates (Statement of Policy on Minority Ownership of Broadcasting Facilities, 1978).

some of its documents the FCC directly stated that the diversity of ownership of outlets and sources was merely means to promote the diversity of viewpoints (see, e.g., *Review of the Commission's Regulations Governing Television Broadcasting: Further Notice of Proposed Rulemaking*, 1995). It is viewpoint diversity that lies at the heart of the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” embodied in First Amendment jurisprudence and famously articulated in *New York Times v. Sullivan* (1964, p. 270) – itself a case rooted in the civil rights struggle. But because any direct pursuit of viewpoint diversity butts up against First Amendment content neutrality doctrine and the provision against censorship in the Communications Act, a more indirect set of strategies, calling upon assumed and logically linked, but often unproved, assumptions were employed. In this regard, the diversity of ownership was assumed to translate into format, demographic, and, down the line, viewpoint diversity. The train of logic went something like this: Putting a ceiling on the ownership of stations not only safeguarded the broadcast medium from being dominated by a single or a few owners, but also ensured the likelihood that different owners would have commitments to distinct broadcast formats and thus reach different audiences. The diversity of owners and formats would translate into a diversity of viewpoints. Similarly, the diversity of broadcast station workforces was expected somehow to infuse the content and viewpoint of broadcast stations. This was understood as especially true in the case with racial minority groups, inasmuch as minority audiences, a series of FCC studies concluded, were not programmed to by traditional (white) station owners and their white employees (*Public Service Responsibility of Broadcast Licensees*, 1946; *Office of Communications of the United Church of Christ v. FCC*, 1966; *Ascertainment of Community Problems by Broadcast Applicants*, 1976).

In general, the diversity rationale received strong approval in both judicial and congressional forums for the roughly 20 years between 1970 and 1990. In *National Citizens Committee for Broadcasting v. FCC* (1977, p. 946, quoting Second Report and Order, 1974 [emphasis added]), for instance, the Court of Appeals upheld an FCC rule forbidding the future formation or transfer of co-located newspaper-broadcast combinations. The court restated with vigor the Commission's

assertion that, “If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible.” Indeed, in this case the court vacated and remanded the portion of the FCC’s rule that limited divestiture to egregious cases of effective monopoly essentially on the grounds that the limitation eroded the diversity motive. The court, in short, considered the FCC’s divestiture policy too meek. “...[W]e believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest” (p. 966). Congress acknowledged the link between minority ownership and diversity in programming in 1982, when it directed the FCC to employ a minority-ownership preference in the newly authorized lottery program for the selection of applicants for any medium of mass communications (House of Representatives Conference Report, 1982).

The minority preference diversity logic reached its high-water mark in a Supreme Court ruling upholding the constitutionality of the FCC minority preference policies in comparative hearings and the minority distress sale program in broadcasting – but by a narrow 5-4 margin cobbled together by Justice Brennan. Metro Broadcasting v. FCC (1990) found that programming diversity represented an “important” governmental interest and that the FCC minority preference policies were substantially related to the achievement of that objective. In First Amendment terms, this meant that the affirmative action regulations triggered only intermediate scrutiny, because

benign race-conscious measures mandated by Congress – even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or society discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. (Metro Broadcasting v. FCC, 1990, p. 564-65)

Relying on Justice Powell’s formulation in Regents of the University of California v. Bakke (1978, p. 311, 313) that just as a “diverse student body” contributing to a robust exchange of ideas is a “constitutionally permissible goal” on which a race-conscious university admissions program may be predicated, the Court majority in Metro Broadcasting determined that the diversity of views and

information on the airwaves serves important First Amendment values. The intermediate scrutiny standard was consistent with previous decisions involving affirmative action plans sponsored by the federal government under Congress' powers in accordance with paragraph 5 of the 14<sup>th</sup> Amendment (Fullilove v. Klutznick, 1980).<sup>26</sup> The minority ownership policies primarily reflected Congress and the FCC's goals to promote programming diversity, said the majority in Metro Broadcasting (1990, p. 566, quoting H.R. Conf. Rep., 1982), but it also indicated that the policies had some remedial purpose ("Congress found 'that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications'"). But there is no factual record that the under-representation of minorities in broadcasting was due to discrimination on the part of the FCC, an important distinction in equal protection claims against government. In keeping with prevailing doctrine on judicial review, particularly when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, the Court majority found that Congress' fact-finding and the FCC's expertise on the nexus between minority ownership and programming diversity should be given great weight. The Metro Broadcasting (1990, p. 570, n.16) majority favorably quoted the FCC to the effect that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation." And in the majority's judgment, those data showed a substantial relationship between broadcast diversity and minority preferences.<sup>27</sup>

It may be, however, that the real importance of Metro Broadcasting was Justice O'Connor's strong dissent, as that opinion laid out the jurisprudential framework for the series of cases reversing minority preferences and casting doubt on the logic of the diversity rationale in

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<sup>26</sup> Paragraph 5 of the 14<sup>th</sup> Amendment states: "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." It has been generally taken to mean that Congress has special powers in the equal protection area and that federal legislation can be judged by somewhat different criteria than state and local legislation.

<sup>27</sup> Spitzer (1991) argues, correctly, that the Metro majority accorded a very high degree of deference to Congress and the FCC's presentation of the nexus between minority ownership and diverse programming. There are some data showing that nexus (see note 9), but they are hardly strong.

broadcasting. In fact, O'Connor's dissent in Metro Broadcasting reflected a battle that had been simmering throughout the 1980s between an FCC, now reflecting Reagan administration ideology, and a more liberal Congress, and between judges of the District of Columbia Circuit Court of Appeals (itself part of the battle between liberal and conservative jurists in that circuit over the nature of judicial review of regulatory decisions (see Horwitz, 1994). In Steele v. FCC (1985), for example, a three-judge panel struck down the FCC's gender enhancement policy in comparative license hearings. The majority argued that there was no evidence that women owners would manifest a distinctly female viewpoint (raising questions about what a female viewpoint is and underscoring the problematic essentialism that sometimes pervades the analysis of difference), and, further, implied that the government's assumption that a station owner's heritage will determine his/her interests was to engage in the kind of stereotyping that the law forbade. The case subsequently was heard by the D.C. Circuit en banc, which vacated the panel's opinion and judgment. In supplemental briefs, the FCC (1984), now dominated by Reagan appointees under the chairmanship of Mark Fowler, claimed that the link between its preference schemes and increased diversity of viewpoints had no factual support, and declared that the race and gender preference policies were contrary to both the Communications Act and the Constitution. When the Commission initiated an inquiry calling for public comments on the preference policies, Congress ordered it to desist (and even forbade the FCC to analyze the data it had gathered in its effort to scuttle the minority preference rules) in a rider to the Continuing Appropriations Act for Fiscal Year 1988 (1987). A divided appellate panel from the D.C. Circuit struck down the Commission's distress sale program as unconstitutional in Shurberg Broadcasting, Inc. v. FCC (1989), while a divided panel upheld the Commission's comparative licensing program for racial and ethnic minorities on statutory and constitutional grounds in Winter Park Communications, Inc. v. FCC (1989).

These issues came to the Supreme Court in Metro Broadcasting, and the opinions in that case reflected the conflicts that had been churning in the D.C. Circuit. Justice O'Connor's dissent in Metro Broadcasting pivoted on the level of scrutiny required of racial preferences. She argued that

intermediate scrutiny would not do. All racial classifications, even “benign” ones, required the Court to apply a strict standard of scrutiny, because such classifications inherently “endorse race-based reasoning and the conception of a Nation divided into racial blocs,” contrary to the Constitution’s guarantee of equal protection that “Government must treat citizens ‘as individuals, not as simply components of a racial, religious, sexual or national class’” (1990, p. 602, 603). Indeed, she argued that a “benign” racial classification “is a contradiction in terms,” because there is no way to determine which classifications are benign and which are motivated by illegitimate notions of racial inferiority (p. 609). Thus, only congressional measures that seek to remedy identified past discrimination do not presumptively violate equal protection.

As for the FCC’s minority preference policies, O’Connor argued, these were not designed as remedial measures and were in no sense narrowly tailored to rectify identified discrimination. In O’Connor’s view, not only does the Metro majority’s assertion of diversity as an “important” government interest not rise to the proper level of scrutiny, but the very assumption that minority broadcast station owners will engage in minority programming or viewpoints itself constitutes an impermissible supposition equating race with thoughts and behavior. “The policies impermissibly value individuals because they presume that persons think in a manner associated with their race” (p. 618). And at the same time, in a kind of damned if you do, damned if you don’t observation, Justice O’Connor asserted that the FCC presented no credible evidence that a nexus exists between the owners’ race and resulting programming. Though her argument focused on the specific question of the nexus between the owners’ race and programming, it clearly cast doubt on the general long-standing logic of an assumed relationship between a diversity of ownership and a diversity of viewpoints. Because “...the market shapes programming to a tremendous extent,” the diversity logic has a fatal flaw (p. 626). The FCC cannot direct viewpoints; it can shape the structure of broadcasting to encourage a general diversity of viewpoints. Yet the FCC is unable to show empirically that there in fact is a viable connection between ownership policy and actual viewpoint diversity. Although the Court has recognized an interest in obtaining diverse broadcasting viewpoints as a legitimate basis for the FCC to adopt measures designed to increase

the number of competing licensees and encourage licensees to present varied views on issues of public concern, the Court, according to Justice O'Connor, has never upheld a measure designed to amplify a distinct set of views or the views of a particular class of speakers (p. 617). Moreover, the dissenting opinion in another closely divided case, Turner Broadcasting v. FCC (1994), shows that at least four members of the Court believe that government regulation designed to ensure access to a multiplicity of voices is based on content and is thus constitutionally suspect.

Justice O'Connor essentially suggested that if the FCC wanted to pursue diversity (given her equal protection analysis, it's doubtful she would even contemplate a category of "minority programming"), the Commission should return to its old methods: develop an effective ascertainment policy, or evaluate applicants upon their ability to provide, and commitment to offer, whatever programming the FCC believes would reflect underrepresented viewpoints – but do so on a race-neutral basis (Metro Broadcasting v. FCC, 1990, p 623). Of course, there is widespread agreement that these methods didn't really work in the past. And the closer the FCC gets to requiring broadcasters to program specific material the closer it gets to violating the First Amendment's content neutrality doctrine.

## V.

Justice O'Connor's Metro Broadcasting dissent in effect provided a wedge for the conservatives on the D.C. Circuit to attack FCC minority preference and diversity policies by way of the new equal protection analysis. In Lamprecht v. FCC (1992), a divided panel again struck down the FCC's gender enhancement policy in the comparative licensing process. (The gender policy had not been an issue before the Court in Metro Broadcasting.) In Lamprecht, the D.C. Circuit majority (in the last opinion written by Clarence Thomas before he was elevated to the Supreme Court) ruled that the FCC's gender preference was not substantially related to achieving the diversity of viewpoints because there was no evidence offered to demonstrate a link between ownership by women and any type of underrepresented programming. Moreover, reasoned the majority, an assumed nexus – unsupported by evidence – between women owners and "a female viewpoint" engaged in a form of stereotyping normally denounced by the Supreme Court.

By 1995, in Adarand v. Peña, the reasoning in Justice O'Connor's Metro Broadcasting dissent had become the majority's opinion. Adarand concerned a subcontractor compensation clause in federal agency contracts, which gave a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals. The policy required the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small Business Administration. Adarand Constructors, which submitted the low bid on a Department of Transportation project, but was not a certified business, filed suit claiming that the race-based presumptions used in the subcontractor compensation clauses violated the equal protection component of the Fifth Amendment's due process clause. The Court agreed. Writing for a 5-4 majority, Justice O'Connor expanded on the logic of her Metro Broadcasting dissent, arguing that all racial classifications, including "benign" ones, imposed by whatever federal, state, or local government actor, must be analyzed under strict scrutiny. To the extent that Metro Broadcasting was inconsistent with that holding, and to the extent that its embodiment of a different standard of review for federal, as opposed to state and local, racial classifications placed the law in an unstable condition, it was overruled. But, while Adarand overruled the intermediate scrutiny standard used in Metro Broadcasting, the Court did not address whether the diversity rationale of Metro Broadcasting was still permissible. Read narrowly, Adarand did not undermine either the importance of the policy goal of viewpoint diversity from a constitutional perspective, or non-race-based ownership regulation as a means to achieve that goal. But between Justice O'Connor's opinions in Metro Broadcasting and Adarand the question was implicitly raised about how non-race-based diversity policy would be treated, especially given the dismissal of the data asserting a nexus between ownership and viewpoints.

The post-Adarand rulings on race-based remedies are slightly mixed, though they mostly follow the logic that only policies addressing past governmental discrimination meet the strict scrutiny test.<sup>28</sup> And where the issue of media diversity was considered directly, in Lutheran

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<sup>28</sup> See Hopwood v. Texas (1996), Police Association v. City of New Orleans (1996), and Contractors Association of Eastern Pennsylvania v. Philadelphia (1996) as cases where set-asides or preferences were struck down as not satisfying strict scrutiny. In contrast, see Wittmer v. Peters (1996) and Erwin v.

Church-Missouri Synod v. FCC (1998), the Court of Appeals held that the FCC's equal employment opportunity (EEO)-related diversity rules did not rise to the level of a compelling governmental interest. The FCC found that the Lutheran Church, licensee of two radio stations in Clayton, Missouri, had not abided by EEO regulations that forbid stations to discriminate in employment and require stations to adopt an affirmative action program targeted to minorities and women. The stations, one with a noncommercial religious format, the other a commercial classical music format with some religious programming, hired few minorities because their hiring criteria stipulated knowledge of Lutheran doctrine and classical music training, thus narrowing the local pool of available minorities.<sup>29</sup> The FCC, identifying "diversity of programming" as the interest behind its EEO regulations, found the Church's hiring preferences too broad, that it was not necessary for receptionists, secretaries, engineers, and business managers to have knowledge of Lutheran doctrine. The Church filed suit, arguing that the FCC violated both its religious freedoms and the equal protection component of the Fifth Amendment.

Following Adarand's stipulation of strict scrutiny of racial classifications, the court sided with the Church. Apart from Adarand doctrine, the court delved into the FCC's logic and found it both contradictory and objectionable. The Commission had argued that the Church could not prefer Lutheran to non-Lutheran secretaries because low-level employees would have little or no effect on the broadcast of religious views, yet the Commission defended its affirmative action recruiting policy by arguing that all employees affect a station's programming. "How, the Church asks, can the FCC maintain that the religion of a secretary will not affect programming but the race of a secretary will? After all, religious affiliation, a matter of affirmative intellectual and spiritual

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Daley (1996) as cases in which the rectification of past discrimination was not the only basis upon which race can be taken into account. However, those have been limited to law-enforcement and correctional settings.

<sup>29</sup> In 1977 the FCC adopted explicit quantitative standards for workplace diversity. Broadcast stations with more than 10 full-time employees would have their license applications reviewed if minorities were not employed at a ratio of 50% of their overall availability in the labor force and 25% in the upper four job categories. The percentage of minority representation in the upper four job categories was raised to 50% in 1980 (Equal Employment Opportunity Processing Guidelines for Broadcast Renewal Applicants, 1980).

decision, is far more likely to affect programming than skin color” (Lutheran Church-Missouri Synod v. FCC, 1998, p. 350). Relying extensively on Justice O’Connor’s Metro Broadcasting dissent, the court argued that encouraging the notion that minorities have racially based views is antithetical to equal protection and antithetical to our democracy. Finally, the court chastised the FCC for “never defin[ing] exactly what it means by ‘diverse programming’,” yet suggested that “any real content-based definition of the term may well give rise to enormous tensions with the First Amendment”(p. 354).

Perhaps this is illustrative as to just how much burden the term ‘diversity’ has been asked to bear in the latter part of the 20<sup>th</sup> century in the United States. It appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life (‘affirmative action’ has only a temporary remedial connotation) and as a synonym for proportional representation itself. It has, in our view, been used by the Commission in both ways. (Lutheran Church-Missouri Synod v. FCC, 1998, p. 356)

In sum, the court verged on attacking the diversity rationale in toto.

What is striking in this rehearsal of court cases is how strongly FCC policies were affected by the civil rights movement, to the extent that the traditional, relatively desultory diversity policy took on much sharper focus in the 1970s on issues of racial and ethnic representation in the media. The conjoining of minority ownership policies with broadcast diversity policies clearly energized the latter. Diversity was no longer a matter that a broadcast station should air a catholic mix of programs or that the FCC should prevent a corporation from operating more than one broadcast network, but that licensees should represent minority communities/audiences in programming, hiring, and ownership. Indeed, minority ownership was valued as a way to secure the diversity of programming and viewpoints. But did it? A central question was whether racial diversity in media ownership enhances political viewpoint diversity, which is, after all, the real concern of Bagdikian, Herman and McChesney, and other critics of American media.

This question was addressed obliquely at first, then head-on in the courts. As the Reagan revolution made its way through appellate court appointees, the attack on affirmative action by way

of equal protection clearly began to confront the new diversity logic, to the extent that very little of the supposed nexus between ownership and programming or viewpoint will be taken on faith, yet when that nexus is asserted, it risks judicial denunciation as an invidious stereotype if racially based, and may raise First Amendment content neutrality problems if the nexus appears too strong. This has led to hard questions for media diversity policy in general. At the risk of numbing the reader with another litany of cases, it is worth briefly noting recent cases in which the longtime premises of diversity policy have been met with a distinct lack of judicial sympathy. In Schurz Communications v. FCC (1992), the Court of Appeals for the 7<sup>th</sup> Circuit struck down the FCC's revised Fin/Syn rules as arbitrary and capricious, in large part because the Commission did not explain how the rules would accomplish the stated goal of enhancing diversity in programming. In an opinion written by noted law and economics proponent Judge Richard Posner, the opinion evinced strong skepticism that increases in source diversity could be presumed to lead to increases in program diversity. By the time the court of appeals heard a non-broadcasting, but diversity-related ownership limitation case, the attack on diversity took on a knife-like empirical edge. In Time Warner v. FCC (2001), the Court of Appeals struck down FCC regulations that had prevented the largest cable companies from growing larger and booking more of their own networks and programs. Congress had directed the FCC in the Cable Television Consumer Protection and Competition Act of 1992 to set two types of limits on cable operators in order to promote diversity in ideas and speech and to preserve competition. Accordingly, the FCC enacted a horizontal rule imposing a 30% limit on the number of subscribers that could be served by a cable multiple system operator, and a vertical rule that reserved 60% of channel capacity for programming by non-affiliated firms. Because, according to the court, the promotion of diversity and preservation of competition were statutorily intertwined, the FCC had to defend its rules with evidence supporting a "nonconjectural risk of anti-competitive behavior" in the horizontal limit. Engaging an antitrust-based economic modeling logic, the court ruled that the FCC had not done so. With regard to the vertical limit, the court ruled that the FCC failed to justify the rule as not burdening substantially

more speech than necessary under intermediate scrutiny. The rules thus violated the company's First Amendment rights to reach new audiences and to control its programming "speech."

In Fox Television Stations v. FCC (2002), the Court of Appeals vacated the cable/broadcast cross-ownership rule and remanded to the FCC the national television station ownership (NTSO) rule for further consideration. In the case of the cross-ownership rule, the court claimed that the FCC's diversity rationale for retention of the rule was so "woefully inadequate," that it accepted the petitioner's arguments in toto and vacated the rule. With regard to the national television station rule, the court asserted that although the rule was not unconstitutional, the FCC's decision to retain it was arbitrary and capricious because the Commission failed to give an adequate reason for its decision. In remanding the rule, the court wrote forcefully that the Commission had "adduced not a single valid reason to believe the NTSO Rule is necessary in the public interest, either to safeguard competition or to enhance diversity." Similarly, in a case that challenged the FCC's television duopoly rule – allowing common ownership of two television stations in the same local market if eight independently owned television stations remain after the merger (referred to afterward as the "eight voices exception") – the Court of Appeals remanded the exception because the Commission failed to demonstrate that its exclusion of non-broadcast media from the exception is necessary for ensuring the appropriate level of broadcast diversity (Sinclair Broadcast Group v. FCC, 2002).

The new Bush administration FCC, under the chairmanship of Michael Powell, seemed to have entered into a kind of alliance, even one-upmanship, with the District of Columbia Circuit Court of Appeals in paying obeisance to corporations' First Amendment rights and removing traditional ownership limitations. Because the social science data on the nexus between ownership policies and programming are weak, most ownership or structural regulations were being read as violations of the speech rights of corporations. In December 2001 the FCC permitted Comcast to purchase AT&T's cable holdings, giving Comcast 20 percent of the nation's cabled homes. The Commission amended the old dual network rule, permitting one of the four major television networks to own, operate, maintain, or control the UPN and/or the WB television network

(Amendment of Section 73.658[g] of the Commission's Rules – The Dual Network Rule, 2001). In September 2002, the Commission announced a Notice of Proposed Rulemaking (2002) on six ownership rules.<sup>30</sup> As expected, the Commission on a party-line vote rescinded the broadcast-newspaper cross-ownership rule, the local multiple television ownership limit, and the national television ownership rule in June 2003.<sup>31</sup> What was unexpected was the public firestorm the FCC's rulemakings precipitated. In July, the US House of Representatives voted 400 to 21 to roll back the Commission's national television ownership rule; the Senate took a similar stand in September on a 55 to 40 vote. And in September the Third US Circuit Court of Appeals, siding with a coalition of media access groups that claimed its members could suffer irreparable harm if the rules went into effect as scheduled, issued an emergency stay of the new rules (Prometheus Radio Project v. FCC, 2003). The court subsequently remanded the case back to the FCC, finding that the Commission had not adequately defended its relaxation of the ownership rules as being in the public interest (Prometheus Radio Project v. FCC, 2004). At this writing, it is unclear whether

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<sup>30</sup> The six included the Newspaper/Broadcast Cross-Ownership Prohibition (1975); Local Radio Ownership (1941); National TV Ownership (1941); Local TV Multiple Ownership (1964); Radio/TV Cross-Ownership Restriction (1970); Dual Television Network Rule (1946).

<sup>31</sup> The key rule changes are as follows:

- Local TV multiple ownership limit: In markets with 5 or more TV stations, a company may own 2 stations, but only one of these can be among the top four in ratings. In markets with 18 or more TV stations, a company can own 3 TV stations. The FCC has a waiver process for markets with 11 or fewer stations in which 2 of the top 4 stations wish to merge.
- National TV ownership limit: A company can own TV stations reaching no more than a 45% share of US TV households (had been 35%). The FCC maintains the historical UHF "discount": Stations in the UHF frequency band count only 50% for calculating the national television reach.
- Continuation of local radio ownership limit, but a change in the methodology for defining a radio market (replacing the signal contour method with a geographic market approach): In markets with 45 or more radio stations, a company may own 8 stations; 30-44 stations: 7; 15-29 stations: 6; 14 or fewer: 5.
- Cross media limits: In markets with 3 or fewer TV stations, no cross-ownership is permitted among TV, radio, and newspapers. In markets with between 4 and 8 TV stations, combinations are limited to one of the following:
  - A. A daily newspaper; one TV stations; and up to half of the radio station limit for that market;
  - B. A daily newspaper; and up to the radio station limit for that market (no TV).
  - C. Two TV stations; up to the radio station limit for that market (no newspapers).

[Report and Order, 2003].

Congress will restore the old rules or whether legislation doing so could withstand a threatened presidential veto.<sup>32</sup>

## VI.

In an essay published in the Journal of Communication in 1992, Robert Entman and Steven Wildman (1992) made the case that the market economics and social value approaches to communication policy for too long have ignored the other's arguments and evidence. Market economics, taking as axiomatic the normative superiority of allowing individuals to choose what they like best, and of using public policy (sparingly) to nudge the market toward that end, tended to neglect externalities that are not quantifiable and do not fit well into the standard economic cost-benefit calculus. As former FCC Chairman Mark Fowler and his legal counsel Daniel Brenner (1982) once baldly and simplistically declared, "the public's interest...defines the public interest." But it is clear that a market-governed media system under-produces certain kinds of content, especially content essential to democratic deliberation and self-government. The social values school, focusing on the spread of knowledge, encouraging democracy, or appropriate content for children, tended to ignore the strength of consumer preferences and the limited effects of regulatory interventions on audiences' consumption of the school's favored content. In addition, the social values school's conceptual dichotomy between information and entertainment, ensconced within a critique of the overwhelming entertainment focus of American media, failed to acknowledge that important ideas may come through entertainment content and that collective understandings and value conflicts are debated and revised in part through media entertainment.<sup>33</sup> Entman and

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<sup>32</sup> As for whether the Supreme Court's summer 2003 decision in the Michigan affirmative action cases will have any bearing on media matters, the majority opinion in Grutter v. Bollinger (2003) is so narrowly focused on university admissions that it seems very unlikely to affect the media diversity area.

<sup>33</sup> Entman and Wildman ask, "How do we distinguish 'The Cosby Show,' with its frequent overt and covert messages about racial prejudice, from the nightly news in terms of idea content?" (p. 11). The contemporary, even more jarring example because it is an irreverent cartoon, would be "The Simpsons," aired, ironically – because it is widely viewed as the most politically conservative and commercially vulgar television network – on Fox.

Wildman attributed the general problem to both schools' faulty understanding of diversity and to their shared, misplaced attachment to the First Amendment metaphor of the marketplace of ideas.

I take seriously the authors' entreaty to bridge the divide between the schools, even as the market economics approach seems to have trumped the social values school at the FCC and in the courts. Let us grudgingly concede that the court conservatives got it right: Despite the longstanding and strongly asserted connection between diverse ownership and diverse content, the evidence generally has been weak. The primary reason, as Justice O'Connor noted in her Metro Broadcasting (1990, p. 626) dissent, is that "the market shapes programming to a tremendous extent." Acknowledging the power of market forces is not to say that such forces are so commanding that ownership is irrelevant and that the concern with who owns the media is fundamentally misguided. After all, the evidence of format variety brought by minority ownership of broadcast stations is modest but significant, and the argument offered by Robert Entman (1989) and others about the crucial importance of philosophy of publishers with regard to the quality of newspapers is surely relevant.<sup>34</sup> Ownership does matter. The proclivities and commitments of the Sulzbergers at the New York Times or Katherine Graham at the Washington Post point to the importance – and the room for maneuver – of individual publishers of newspapers (see Graham, 1997; Tift and Jones, 1999; Downie, Jr. and Kaiser, 2002). (To what extent we can generalize about newspapers' room for maneuver to broadcasters and cable operators, is another question; newspapers tend to monopolize their markets.) The argument is rather that market forces – the amalgam of advertiser pressure, the coercion of Wall Street expectations, high debt service on pricey, newly acquired media properties, the wish for high profit margins, and yes, audience preferences – create very strong constraints and incentives. The long and largely disappointing

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<sup>34</sup> Entman (1989) argues that, while the data are generally inconclusive, the philosophy and proclivities of the newspaper owner are at least as important as markets with regard to the quality of newspapers. It should be noted, however, that newspapers now largely operate under monopolistic competition where the workings of that market give owners more leeway. In the case of minority ownership and minority-oriented programming in radio, Spitzer (1991) suggests that minority owners might be partly able to buck market forces because minority group membership allows them to realize production cost advantages, particularly in knowing their audiences' tastes and in monitoring the performance of station managers. All the same, the specific features of the market limit the extent to which such owners will offer minority-oriented content.

history of FCC policies to induce broadcast licensees to program in the broad public interest and contrary to their narrow economic interests is a testament to the power of market forces. The sway of such forces continues to be underscored, for example, by sober accounts of the economic failure at efforts to air quality local television news even in an era of television abundance (see Winerip, 1998; Kaniss, 1991).

Deregulation and markets do appear to abet some degree of format variety. Market-driven format variety, and especially the formats brought by minority ownership, is not to be belittled. Market-driven format variety has enhanced consumer preference (recognizing, of course, that choice is pre-structured by the conditions of economic competition). And the broadened representation in the mass media of racial and ethnic minorities as a result of FCC minority preference policies has had positive consequences for important issues of access, identity, and visibility. Beyond the cultural politics of representation, these issues have political ramifications inasmuch as representational invisibility often means political invisibility as well.<sup>35</sup> But, notwithstanding the augmentation of consumer preference and the modest broadening of racial/ethnic representation in media, format variety/diversity does not often reach the core of viewpoint diversity. Rap and Latin jazz radio formats, for example, fill a need and a niche, but their entertainment orientation goes only so far in terms of the articulation of different viewpoints, especially political viewpoints. Different viewpoints and overt attention to public affairs are in some fashion taken up by public television and radio, a fact that points to the significance of their different organizational mandates and, equally important, the different mode of their financing. This brings me to my key, if in some respects, pedestrian and, in this day and age, seemingly pie-in-the-sky point. Between deregulation and court rulings, market economics now reign supreme in American media. As I've argued, markets bring some format variety, but are unlikely to beget other forms of diversity. In order to bring diversity, we need a more mixed system of mass media with different mandates and different modes of

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<sup>35</sup> The importance of minority owners in this matter of representational or demographic diversity is noteworthy when the record of cable television is considered. One 1995 study found that new cable channels made no difference whatsoever in the frequency of representation of racial minorities, women, and any age group other than young adults on television (Kubey, Shifflet, et al, 1995).

financing. It is some combination of a mixed system of media and curbs on media concentration that will best secure a diversity of viewpoints and content. James Curran (2000) has proposed such a scheme as a “social market” approach, wherein the media system is designed to promote the expression of diversity by organizing its constituent parts in different ways, and which connect to different parts of society.

In Curran’s social market model, a core media sector constituted by general interest TV channels that reach a mass audience would be entrusted to public service organizations, governed by fairness and access rules and financed by a universalist funding mechanism. This core sector, as the embodiment of the traditional public service media mandate, fulfills the republican functions of being in principle open to everyone’s participation in the formulation of collective ideas and public goals. It is fed by peripheral media sectors, three of which are intended to facilitate the expression of dissenting and minority views. A “civic sector” consists of channels of communication linked to organized groups and social networks. Intended as partisan media, enabling social groups to constitute themselves and clarify their objectives, the sector fulfills liberal-pluralist functions. A “professional media sector” occupies a space wholly independent of both the state and the market in which professional communicators relate to the public on their own terms, with the minimum of constraints. A “social market sector” subsidizes minority media as a way of promoting market diversity and consumer choice. To this is added a conventional market sector, which relates to the public as consumers, and whose central rationale with the media system is to facilitate market preferences and to act as a restraint on the over-entrenchment of minority concerns to the exclusion of majority pleasures. Obviously, such a model is more at home in European social democracies than in the United States, but it is important to acknowledge that the United States does recognize many of these principles, albeit in cribbed fashion. Our public broadcasting system doesn’t approach the range or scope of European public service broadcasting, but the republican values are largely the same. The standard that some constituent part of the electronic media should be universally accessible was one of the bases of the Supreme Court’s affirmation that cable systems

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“must carry” local over-the-air television broadcast signals (Turner Broadcasting System, Inc. v. FCC, 1994/1997). Cable public access channels represent the principle that somewhere in the electronic media system, ordinary people and groups should have the access and ability to produce programming free from operator control over the content. The Supreme Court upheld the principle, even in the face of a challenge to protect audiences from indecent and offensive speech on such channels in Denver Area Education Telecommunications Consortium, Inc. v. FCC (1996).

Thus, although the prevailing legislative and judicial trends as described in the lion’s share of this paper appear quite hostile to the idea of establishing a mixed media system governed by structural rules and curbs on media concentration, there are clearly legitimate grounds for such a policy. That the principle of media diversity got tied to and now apparently has gone down with the equal protection rulings on minority preferences should not be grounds for undermining diversity analysis *per se*. The most charitable reading of recent Court of Appeals decisions on media diversity is that the court seems to believe that, in the absence of “non-conjectural” evidence of the relationship between structural rules and diversity, First Amendment scrutiny analysis requires government to withdraw in favor of the market. Part of the problem here is the metaphor of the marketplace of ideas. The problem with the metaphor is not that it is ill suited *per se*; the problem is that it has become the central metaphor in First Amendment thinking, effectively crowding out other metaphors and the explanations that give rise to metaphor. It is a particularly loaded metaphor because not only does it tie ideas to the market, but essentially conveys the sense that the marketplace is natural and unproblematic. In its rhetorical deployment, the marketplace of ideas metaphor unites and reduces the manifold justifications of freedom of speech to a simple talisman that ignores the reality of the large, concentrated ownership of the electronic means of communication – a point that has been made by many commentators in recent years (see, among others, Horwitz, 1991; Sunstein, 1993; Fiss, 1996; Baker, 2002). I suggest that we give the marketplace of ideas metaphor a rest in favor of the metaphor of a “mixed media system.” This metaphor is surely consonant with American tradition. We are a proudly mongrel nation; why not have a proudly mongrel media system? Freedom of speech has been discussed and defended with

reference to several different arguments, the lineaments of which were noted in the beginning of this paper. If we move off from the marketplace of ideas metaphor toward a mixed media system, we are better placed theoretically to act to guarantee diversity of viewpoints and the forums for democratic deliberation. Different kinds of media fulfill different functions in a democracy; creating structures that facilitate diverse media is both necessary and legitimate. Diversity can be secured not by ownership curbs alone – in a market-driven media system such curbs are likely to be of limited efficacy – but by some such limitations within a mixed media system.

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