Media Ownership Regulation, Agency, and Federalism

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Introduction

Section 202(h) of the 1996 Telecommunications Act requires the Federal Communications Commission (FCC)to perform periodic regulatory reviews of its restrictions affecting the broadcast television, radio, cable and newspaper industries.[1] In challenges to these reviews, courts consistently have rejected the FCC's attempts to justify its ownership limits (for instance, seven media outlets within a local market or three national cable operators or five local radio stations) on the grounds of what the FCC terms "viewpoint diversity."[2] Although courts do accept the FCC's power to limit ownership in order to encourage viewpoint diversity, these courts have vacated and/or remanded particular limits, failing to see how valuing viewpoint diversity could justify any particular limit on the number of independently owned outlets. This unhappiness with FCC decisions has set into motion endless judicial remands and administrative reconsiderations.

At the same time, the intellectual debate over the justifications for media ownership restrictions remains unresolved, with fundamental disagreement over whether non-economic goals, like diversity of content or ownership or furtherance of democratic

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996). This section reads as follows:

> Further Commission Review: The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

[2] *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 386 (3d Cir. 2004); Fox Television Stations v. FCC, 280 F.3d 1027 (D.C. Cir. 2002); Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002); Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001), *cert. denied*, Consumer Fed'n of Am. v. FCC, 534 U.S. 1054 (2001).

public discourse, should guide regulation.[3] Many argue for non-economic goals, believing that limiting the number of media firms one entity can control furthers democratic discourse and public deliberative space. Others argue that the antitrust laws can effectively respond to any economic injury that media consolidation might inflict and/or that markets can be best relied upon to produce a well functioning media.[4] Mirroring the debates in the judiciary, many who support an economic justification for media regulation argue that agencies cannot effectively quantify "democratic" goals in a coherent manner.

Attempting to break this impasse—both regulatory and academic, this article argues for a new approach to media ownership regulation—one based upon agency theory and monitoring costs. Recent scholarship demonstrates the connection between the availability of mass media and the citizen's ability to influence government and obtain government resources.[5] These studies suggest that a well-functioning media reduces monitoring costs of government, allowing citizens to effectively pressure or control the behavior of their agents, elected government officials. This allows citizens to obtain their share of public benefits or even uncover officials' opportunistic behavior.

Under an agency model of government, the success of media ownership regulation can be evaluated on whether it increases or decreases available information about government functioning, thereby decreasing citizens' monitoring costs. Unlike the current diversity standard, for which quantification has proven so difficult, the amount of

[3] *Compare* Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 MICH. ST. L. REV. 671 (2003); Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669 (2005) *with* C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 734-739 (2005); CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).
[4] *See* Owen, *supra* note 3 , at 698.
[5] David Stromberg, *Mass Media Competition, Political Competition, and PublicPolicy, 7*1 REVIEW OF ECON. STUD. 265 (2004); Timothy Beasley & Robn Burgess, T*he Political Economy of Government Responsiveness: Theory and Evidence from India*, CXVII Q. J. Econ. 1415 (2002); Min Shi & Jacob Svensson, Conditional Political Budget Cycles, Disc. Paper 3352, Center for Economic Policy Research (2002).

news about government which any particular media market structure produces relative to another structure is relatively quantifiable. This approach would both further democratic goals and avoid the vagueness and regulatory intractability of the FCC's current diversity and localism standards.

This approach, however, creates a problem—a problem unique to a federal government with dual sovereigns like the United States: should media policy be aimed at reducing monitoring costs of federal or state government—or those of the state's subordinate agencies, the localities? This question turns on the economic features of the media industry—which demonstrates that often there is a trade-off among the incentives to produce various types of news. Mass media operate under increasing returns-to-scale. Once a TV program is produced, the added cost of an additional viewer is zero. This feature leads media firms to cover issues that would interest the largest number of individuals within the firm's media market. From the perspective of stories monitoring government activity, a media outlet would likely cover political issues common to consumers within its media market—and would more likely cover political issues common to *all* consumers.

However, statute and FCC regulation set the boundaries of broadcast media markets (i.e., Designated Market Areas ("DMAs")) and the reach of cable systems. (The local distribution of broadcast spectrum is largely a political, not a technological or economic artifact. Similarly, localities typically franchise cable systems.) Statutes and FCC-created geographic media markets are not necessarily (and, in fact rarely are) contiguous with political boundaries, resulting in many media markets with overlapping state and local boundaries. These media markets may not be designed to optimize news about state or local government. For instance, important DMAs, like those of New York

City or Philadelphia, span numerous state jurisdictions. In such DMAs, consumers would *not* all share the same interest in state news and thus one would expect that state issues would be covered less than in DMAs contained completely within one state.[6]

By the same token, to the degree that a DMA contains numerous local government entities (say several small towns and one large city), coverage of the smaller political entities may be ignored.[7] In DMAs in which there is no one dominant local political entity, political coverage of local government may be ignored completely and, in its place, media outlets will cover matters "common" to the region. This could explain, to some degree, the extensive coverage in the local news of crime, a matter that is of regional interest regardless of political boundaries. This result, as Professor Jerry Kang has pointed out, perpetuates and reifies racial and ethnic stereotypes.[8]

The law's creation of property rights and the geographic media markets in which they are exercised leads to a certain structure and allocation of the means of media production, which, in turn, determines the nature of super-structural cultural output. Media regulation must take into account the relationship between geographic market structures and content. It should make explicit the effect of market structure on coverage of various levels of government. Indeed, a function of media ownership regulation might be to remedy or lessen these content biases which ownership structure creates.

The article proceeds as follows. First, it briefly describes the important FCC's media ownership regulation. Second, it examines the academic arguments of those who advocate a non-economic basis for media regulation. It then examines "diversity," the FCC's similar non-economic justification for ownership restrictions. The section

[6] The degree to which DMAs that cover multiple state jurisdictions cover less state news is examined empirically in *Political Boundaries, Geographic Media Markets, and News Content* (with Keith Brown, Ph.D.) (work in progress).
[7] I am indebted to Steve Wildman for this insight.
[8] See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005)

concludes that these goals cannot serve to justify any particular ownership limit—especially given recent courts' requirements. Third, the article proposes a new justification for media ownership restrictions: reduction of monitoring costs. It argues that this justification (i) effectively re-describes the concerns of those who advocate for the non-economic basis of media regulation; (ii) proceeds from the First Amendment and applicable Supreme Court precedent; and (iii) avoids the problem of quantification and regulatory intractability posed by the other non-economic justifications for media ownership. Fourth, the article examines the problem of jurisdictional trade-offs that a monitoring cost approach to media ownership regulation creates. This section examines the unique constitutional questions that are raised when federal communications policy discourages news coverage of state news. It concludes with some thoughts on how these observations can be incorporated into current media ownership policy.

I. The FCC's Regulation of Media Ownership

The Federal Communications Commission has been in the business of restricting media ownership almost since the agency's inception.[9] Since the 1930s, the FCC has considered furthering diversity in ownership as a goal in awarding radio licenses and later applied the principle to television broadcast licenses.[10] The history of these limits, by any reasonable analysis, reflects a tortured and convoluted story of continuing political shifting and accommodations.

[9] *See generally* Enrique Armijo, *Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 N.C. L. REV. 1482, 1486 n.21 (2004); Loy A Singleton & Steven C. Rockwell, *Silent Voices: Analyzing the FCC "Media Voices" Criteria Limiting Local Radio-Television Cross-Ownership*, 8 COMM. L. & POL'Y 385, 387 (2003) (stating "[a]t its inception, the Communications Act of 1934 provided the [FCC] with authority to regulate concentrations of [media] ownership in the public interest.").

[10] *See* LUCAS A. POWE JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 167 (1987).

In any case, the FCC's current restrictions affect virtually every mass medium: cable, television, radio, and even newspapers. Some of its more notable restrictions include:

- national television multiple ownership rule: a cap on the number of television stations a single entity may own nationwide;[11]
- the national cable ownership rule: a limit on the size of cable systems and their degree of integration with program providers;[12]
- the local television multiple ownership rule: a limit on the number of stations a single entity may own in a local viewing market;[13]
- the radio/television cross-ownership rule, which limits joint holdings among those media within a given media market;[14]
- the dual network rule, which prohibits combinations among the four major TV networks;[15]
- the newspaper/broadcast rule, which limits cross-ownership of television stations and daily newspapers within the same local media;[16]
- the local radio ownership rule, which governs the amount of consolidation permissible in a local listening market.[17]

The D.C. Circuit in *Time Warner Entertainment Co., L.P. v. F.C.C.*[18] remanded the FCC's 1999 cable limits.[19] The FCC has yet to take action on remand. Similarly, the other rules listed above were reviewed, and for the most part significantly liberalized, in the mammoth 2003 *Biennial Media Order*.[20] The Third Circuit in *Prometheus Radio Project v. FCC*[21] vacated and remanded most of these changes. The FCC has yet to take action on remand.

II. Non-economic Justifications for Media Ownership Restrictions

[11] See 47 C.F.R. § 73.3555(d) (2004), overruled by Congress.
[12] Communications Act of 1934, § 613(f)(1)(A), as amended, 47 U.S.C.A. § 533(f)(1)(A); 47 C.F.R. § 76.503. 47 U.S.C. § 533(f)(1)(B).
[13] 47 C.F.R. § 73.3555(b).
[14] See 47 C.F.R. § 73.3555(c).
[15] See 47 C.F.R. § 73.658(g).
[16] See 47 C.F.R. § 73.3555(d).
[17] See 47 C.F.R. § 73.3555(a).
[18] 240 F.3d 1126 (D.C. Cir. 2001).
[19] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992,* 14 F.C.C. Rcd 19098, 19127-28 ¶ ¶ 71-73, 1999 WL 958598 (1999)
[20] .Prometheus Radio Project v. FCC, 373 F.3d 372, 386 (3d Cir. 2004).
[21] 373 F.3d 372, 423-25 (3d. Cir. 2004).

The Communications Act of 1934 requires the FCC to determine whether the transfer of an FCC license that would occur as part of a merger would serve "the public interest, convenience, and necessity."[22] The public interest standard is the "touchstone of authority" for the FCC.[23] Further, Section 202(h) of the 1996 Telecommunications Act, which was added to the 1934 Act, ordered the FCC to undertake biennial reviews of its mass media regulations and to "repeal or modify any regulation it determines to be no longer in the public interest."[24]

Much ink has been—and continues to be—spilt over what is the nature of the public interest standard. Professor Howard Shelanski, a former FCC chief economist, has identified two general approaches: the economic efficiency-oriented model and the "democracy" model. Shelanski sums up the difference as follows:

> This [efficiency-oriented] version of the public interest aims for an efficient market, where efficiency means that media companies take consumer preferences as given and produce as much content as people want, in the varieties they want, as cost effectively as possible. . . . .
>
> Opponents of deregulation, on the other hand, typically define the public interest in terms of fostering constitutional and social values of quality and diversity, as well as preserving an effective forum for informed public debate. In this model, what the economic market would dictate gives way at some point to what is necessary to achieve an open and broadly representative marketplace of ideas.[25]

Despite a succession of pro-market Republican chairmen, the FCC has never adopted a pure market-based definition of the public interest. To the contrary, the FCC, at least according to its most recent promulgation, the *Biennial Media Ownership Order*, states that its media ownership regulation has three goals: "competition, diversity, and

[22] Communications Act of 1934, 47 U.S.C. § 310(d) (2000).
[23] FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).
[24] Telecommunications Act of 1996 § 202(h). Note that Congress has since modified this provision to call for quadrennial as opposed to biennial reviews. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004).
[25] Shelanski, *supra* note 27, at 383-84.

localism."[26] Diversity and localism are clearly non-efficiency goals, as at least the FCC believes they would be under-provisioned if media ownership policy aimed solely to maximize competition and a competitive market.

The democracy model "finds particular expression in the FCC's concern about diversity of media content and ownership."[27] The FCC sees diversity as necessary to ensure that "the free flow of ideas under-girds and sustains our system of government." Following such Supreme Court precedent in *FCC v. National Citizens Committee for Broadcasting* (*NCCB*),[28] the FCC states that a plethora of viewpoints is salubrious to the policy. It defines diversity of ownership as equivalent to diversity of viewpoint because "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 political, editorial, or similar programming sense, on public opinion at the regional level."[29] In this way, the FCC states its goal is diversity of viewpoint but, as a practical matter, does not look at actual views expressed in the marketplace. It simply counts noses of independent media outlets.

The problem for the FCC has been that courts, while lauding these goals, have given up trying to discern how any particular limit the FCC sets relates to this goal. Similarly, commentators in favor of democracy-based media regulation present powerful arguments supporting their goal of a more representative and dynamic marketplace of ideas, but fail to engage in the more specific analysis of showing how any particular ownership limit would further their admittedly worthy goals.[30]

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[26] 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620 (2003), rev'd and remanded, Prometheus Radio Project v. FCC, 373 F.3d 372 (3rd Cir. 2004)
[27] Howard A. Shelanski, *Antitrust Law and Mass Media: Can Merger Standards Protect the Public Interest,* 94 CAL. L. REV. 371, 382 (2006).
[28] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 796 (1978).
[29] Biennial Media Ownership Order, ¶¶ 34-35.
[30] See, e.g., C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 902-13 (2002); C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002); CASS SUNSTEIN, REPUBLIC.COM (2001). Ellen P. Goodman,

The following section discusses recent cases rejecting the FCC's media ownership limits, examining how the courts' frustration with the FCC's notion of diversity leads to endless remands. The section argues that the economic and judicial critique of the democratic approach to media ownership regulation share a common frustration with the approach's lack of precision and quantification. The next section's theory of agency attempts to answer that critique.

A. The Failure of the FCC's Diversity Regulation

Since the 1996 Act instructed the Commission to conduct a rulemaking proceeding, "to determine whether to retain, modify, or eliminate its limitation on the number of television stations that a person may own in . . . the same television market,"[31] the FCC has failed to forward a convincing public justification for its rules, with courts remanding or vacating virtually its every effort to either regulate or deregulate. In *Fox Television Stations v. FCC,*[32] *Sinclair Broadcast Group, Inc. v. FCC*, *Prometheus Radio*,[33] and—in a related matter *Time Warner*,[34] the FCC has failed to win judicial approval of its particular media ownership limits. The FCC's regulatory concept of diversity has not proven to be an effective tool to justify limits on ownership.

Sinclair Broadcast Group. This case involved the FCC's long-standing ban on one entity controlling more than one broadcast station in a particular Nielsen designated market area. In the 1998 *Local Competition Order*, the FCC relaxed this prohibition under certain conditions, one being the existence of eight independently owned full-power television stations.[35] In counting this eight voice exception, the Commission

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Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets, 19 BERKELEY TECH. L.J. 1389, 1391-92 (2004).

[31] Telecommunications Act of 1996, Pub L. No. 104-104, §202(c)(2) (codified at 47 U.S.C. §303(c)(2)).

[32] 280 F.3d 1027 (D.C. Cir. 2002).

[33] 373 F.3d 372, 423-25 (3d. Cir. 2004).

[34] 240 F.3d 1126, 1130 (D.C. Cir. 2001).

[35] .Sinclair Broad. Group v. FCC, 284 F.3d 148, 155 (D.C. Cir. 2002).

determined that *only* broadcast television should count because, "there remain unresolved questions about the extent to which [non-broadcast television, *i.e.,* cable] alternatives are widely accessible and provide meaningful substitutes to broad[cast] stations."[36] The Commission adopted a different counting approach for exceptions to the radio-television cross-ownership rule in which it *does count* local newspapers and cable television stations.[37] *Sinclair Broadcasting* challenged the rule on the grounds that eight was an arbitrary number of voices and that there was no reason to exclude non-broadcast voices.[38]

The D.C. Circuit, while reciting the language of deference in *NCCB*, remanded on the ground that the Commission irrationally excluded cable from its eight-voice count.[39] While the Commission correctly stated that broadcast was more important than cable in providing local news, it never presented a theory or any data as to why broadcast, but not cable, should constitute a "voice"— sometimes, but not others.[40]

By defining diversity in terms of the number of independently owned outlets in a given market, the FCC has avoided the difficult problem of actually having to count viewpoints expressed in the media markets. This method lacked sufficient rigor to definitively exclude certain media outlets but not others.[41] Clearly, not every participant in the media market counts equally—the New York Times is not the Upper East Side Weekly Gazette, but the FCC never developed an approach for understanding what diversity in the media means. It is certainly true that cable systems, while providing their own national news programming, like CNN and CNBC, provide little local programming. The FCC, therefore, while not necessarily without justification in ignoring cable in

[36] *Id.*
[37] *Id.*
[38] *Id.* at 158-59.
[39] *Id*. at 169.
[40] *Sinclair Broad. Group*, 284 F.3d at 163.
[41] *Id.* at 164-65.

determining what constitutes a local voice, lacked a sufficiently rigorous theory of diversity to exclude (or include) cable.

Judge Sentelle, who dissented in part on the grounds that the diversity rules should be vacated, not simply remanded, further needled the FCC on its imprecision in defining its regulatory terms. He attacked the Commission for claiming that eight voices ensures an appropriate level of diversity but then failing to provide evidence that its rules will result in diversity.[42] While agreeing that an agency has broad discretion to draw lines, Sentelle points out that "there are no meaningful limits to the diversity rationale offered [and] . . . [t]here is no suggestion as to how much diversity is enough, how much it too little, or how much is too much."[43]

Fox Television. In the 1998 *Biennial Review* order, the FCC retained the cable/broadcasting cross-ownership prohibition and the 35% limit on the total number of broadcast stations one entity can control.[44] The D.C. Circuit vacated the FCC's action on the cable/broadcast cross-ownership. In doing so, the court rejected the FCC's diversity justification primarily on the grounds that it failed to consider the large number of new television stations that developed since 1970.[45] Again, the FCC failed to justify what counts as a voice for diversity purposes.

With respect to the national broadcast ownership cap, the court again rejected the FCC's diversity analysis. The Court reasoned that "the question, therefore, is whether the Commission adequately justified its retention decision as necessary to further diversity or localism." The court looked at earlier FCC reports that stated that national diversity is

[42] *Id.* at 169-172.
[43] *Id.* at 170.
[44] On May 26, 2000 the Commission announced its decision (by a 3-2 vote) to retain the NTSO and CBCO Rules, among others, and to repeal or to modify certain other of its ownership rules. A few weeks later the Commission issued a written report in which it explained its actions. 1998 Biennial Regulatory Review, Biennial Review Report, 15 F.C.C.R. 11058, 2000 WL 791562 (2000) (1998 Report). 47 C.F.R. § 73.3555(e), and the cable/broadcast cross-ownership rule, 47 C.F.R. § 76.501(a).
[45] *Sinclair Broad. Group*, 284 F.3d at 170.

not an important goal.[46] This 1984 report stated that media ownership at the national level need not--and given the Commission's local ownership rules cannot--reduce local diversity, *i.e.,* the number of independently owned cable, TV and radio outlets available to the individual consumer in his or her community. Thus, the rule does not affect the number of viewpoints in the local market, which the FCC determined was the relevant information market.[47] Again, determining what constitutes diversity—local or national markets—proved fatal.

Time Warner. In *Time Warner Entertainment Co. v. FCC*,[48] the D.C. Circuit reviewed the FCC's national caps for cable ownership.[49] Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992,[50] ("1992 Cable Act"), requires the Federal Communications Commission to set (i) "limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest" (the "horizontal limit") [51] and (ii) "limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." (the "vertical limit").[52] Pursuant to the statute, the FCC imposes a 30% "horizontal" limit on the number of subscribers that may be served by a multiple cable system operator and required cable systems to reserve 60% of their channel capacity for programming by non-affiliated firms.[53]

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[46] *See Amendment of Multiple Ownership Rules,* Report & Order, 100 F.C.C.2d 17, ¶ ¶ 14, 16, 1984 WL 251222 (1984).
[47] *Id*. ¶43.
[48] Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001), *cert. denied*, Consumer Fed'n of Am. v. FCC, 534 U.S. 1054 (2001).
[49] *Time Warner*, 240 F.3d at 1028-30.
[50] Cable Television Consumer Protection & Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 533).
[51] 47 U.S.C. § 533(f)(1)(A).
[52] 47 U.S.C. § 533(f)(1)(B).
[53] *Time Warner,* 240 F.3d at 1129.

The cable companies, Time Warner and AT&T, challenged the horizontal cap as exceeding statutory authority, unconstitutionally infringing on their freedom of speech, and resulting from arbitrary and capricious decision-making in violation the Administrative Procedure Act.[54] Time Warner similarly challenged the vertical limit.[55] The Commission supported its horizontal limit on the grounds that it "maximizes" the number of cable systems. "More MSOs [Multivideo System Operators, [i.e., cable companies]] making purchasing decisions [will] increase[e] the likelihood that the MSOs will make different programming choices and a greater variety of media voices will therefore be available to the public."[56]

The court rejected this justification, finding, *inter alia*, the FCC's understanding of diversity as too flimsy.[57]

> [w]e have some concern how far such a theory [of diversity] may be pressed against First Amendment norms. Everything else being equal, each additional "voice" may be said to enhance diversity. And in this special context, every additional splintering of the cable industry increases the number of *combinations* of companies whose acceptance would in the aggregate lay the foundations for a programmer's viability. But at some point, surely, the marginal value of such an increment in "diversity" would not qualify as an "important" governmental interest. Is moving from 100 possible combinations to 101 "important"? It is not clear to us how a court could determine the point where gaining such an increment is no longer important.[58]

While the court sidestepped this issue of how much value the marginal voice has when weighed against "First Amendment norms," it did rule that under the Cable Act amendments, diversity means that a programmer is guaranteed only two possible outlets.[59] The court remanded to the FCC on the grounds that ownership caps could be justified, *inter alia*, on the excess bargaining power they gave cable operators.[60]

Prometheus Radio. In the FCC's most ambitious effort to date to try to clarify the concept of diversity, the Biennial Media Ownership Order created the "Diversity Index" (DI) to determine whether markets were "at risk" for a lack of media diversity The DI

[54] *Id*. at 1128.
[55] *Id*.
[56] Id. at 1134 (citing In the Matter of Implementation of Section 11(C) of the Cable Television Consumer Protection and Competition Act of 1992, 14 F.C.C.R. 19098, 19119 ¶ 54 (Oct. 20, 1999)) (parenthetical text added).
[57] *See* Time Warner Entertainment Co. v. FCC, 240 F.3d 1126, 1135 (2001).
[58] *Id.* (emphasis in original).
[59] *Id.*
[60] *Id.* at 1144-45.

was modeled after the Herfindahl-Hirschman Index (HHI) in antitrust law, which measures the degree of concentration in markets for antitrust purposes.[61] The higher the HHI, the more concentrated the market, and the more potential there is for market participants to exercise market power.[62] The HHI is a simple calculation that squares each market participant's share.[63]

Analogously (in a rough way), the DI attempts to measure "viewpoint diversity" concentration. It weighs various media (newspapers, radio, etc.) by their market share in the total media market.[64] But then, the DI does *not* weigh the market share of each firm.[65] Rather, within a given media category (newspaper, television, etc.), each outlet counts equally, regardless of its market share.[66]

The DI, however, only really counts the number of participants in a market, not the diversity and dissemination of viewpoints.[67] Thus, unlike the HHI, which is tied to market performance in some general way, it is not clear what the DI attempts to measure. It does not measure diversity; it measures market share and the number of market participants.[68] There is no relationship, even purported, between viewpoint diversity and the DI. Thus, a market with 50 independent radio stations all saying the same thing would rank higher in the DI than an NPR and FoxNews duopoly.[69] Further, as media economists have been pointing out for decades, and continue to point out, the relationship between media concentration and viewpoint diversity may be positive.[70]

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[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Id*. at 403.
[65] 373 F.3d at 404.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *See id*.
[70] P. Anderson & Stephen Coate, *Market Provision of Broadcasting: A Welfare Analysis,* 72 REVIEW OF ECONOMIC STUDIES 947 (2005); Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952).

The *Prometheus Radio* court rejected the DI—and the FCC's elimination of the cross-ownership rules—largely because it failed to coherently count heads in order to provide a meaningful estimate of media diversity.[71] Thus, as the court observed, "the Dutchess Community College television and the stations owned by ABC" receive equal weighting.[72] The Court also rejected the Commission's inclusion of internet news, but exclusion of cable news in its diversity calculation.[73] Again, the FCC was on shaky grounds because it attempted to pick and chose which outlets to "count" rather than observe consumer behavior and the nature of news coverage, *i.e.,* measure real media diversity.

B. The "Democratic" Justifications for Media Ownership Restrictions: Problems of Definition and Quantification

Like the FCC in its use of "diversity" as a justification to limit media ownership, advocates of non-economic justification for media ownership restrictions see the media as providing benefits that the market imperfectly values and will likely under-provide. Advocates of non-economic justifications, however, seem to have two distinct sets of goals. On one hand, they want media to promote "Madisonian democracy" in which media has "an important deliberative feature, in which new information and perspectives influence social judgments about possible courses of action. Through exposure to such information and perspectives, both collective and individual decisions can be shaped and improved."[74]

Legal academics have set forth powerful arguments supporting non-market values as a guide for media regulation, and they often provide interesting policy recommendation.

[71] 373 F.3d at 409.
[72] *Id*. at 408.
[73] *Id*. at 408-09.
[74] SUNSTEIN, *supra* note 30, at 18-19.

They have concentrated less, however, on providing workable, regulatory tests for when these goals have been satisfied. In particular, very little insight has been provided as to how the FCC should fulfill its mandate to provide diversity in media output.

For instance, Sunstein states that the public interest goals of communications policy can "promote the aspiration to deliberative democracy." He recommends several means to achieve this end including mandatory public disclosure of information about public interest broadcasting, economic incentives to encourage worthwhile discourse, and voluntary self-regulation, as through a "code" of appropriate conduct, to be created and operated by the industry itself."[75] Professor Ellen P. Goodman, also a powerful advocate for non-economic goals for media ownership policy, argues for subsidies to encourage public service media and other types of media that markets are likely to under-produce.[76]

Yet advocates for the democracy model of media regulation fail to provide guidance to the structural question—how should ownership restrictions be crafted so as to further these goals. In this way, the FCC's diversity justification, the pro-democracy media regulation commentators, and the reviewing courts in *Sinclair, Fox News, Prometheus Radio, and Time Warner* all share the same dilemma: if a robust media is the goal, how does the regulator know if he or she has achieved this goal?

C. The Problem of Measuring Diversity: A Philosophical Digression

Media robustness describes a media with a great number opinions, views, facts, theories, and insights. While media robustness seems, as courts have said an "elusive" goal, the notion can be reduced simply to a diversity of ideas. When locating ideas in the media, one looks to the meanings expressed in the media. Here, meaning is defined

[75] *Id.*
[76] Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failuresof Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1391-92 (2004)

simply as "how one person conveys some proposition [idea or concept] to another."[77] The question of diversity, therefore, is how a regulators count the number of propositions in a media market

If words expressed meaning in a simple way, then it would be possible to count words or any other symbol used in media to quantify diversity of meanings. If one were to accept that method and if the phone book and the Encyclopedia Britannica had the same number of words, then one would assume that they contain an equal number of meanings. Obviously, merely counting words is not the solution.

What is important are words' meanings—what they refer to. Or, as Claude Shannon, would put it that process by which words "refer or are correlated according to some system with certain physical or conceptual entities."[78] If one could delineate what these references and correlations are, one could count them and would have a handle on media diversity. There are two broad approaches: conventionalist and realist. A conventionalist, such as Wittgenstein of the *Philosophical Investigations*, would say that meanings are matters of socially agreed upon practice. The way words divide up the world is somewhat arbitrary. The only way one can figure out what words refer to is, according to Wittgenstein, to "look at the sentence as an instrument, and as its sense as its employment."[79] One has to look at the practices and behavior of people.

A realist, say Saul Kripke, Keith Donnellan, or, for that matter Plato, would say that words, or at least certain kinds of words, are "rigid indicators" that refer to "natural types."[80] To understand the point, consider gold. Before the dawn of modern chemistry, gold was probably identified by certain of its qualities: it is ductile, yellow,

[77] Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 289 (1985).
[78] Claude E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYSTEM TECHNICAL JOURNAL, 379, 379 (1948).
[79] Ludwig WITTGENTSTEIN, PHILOSOPHICAL INVESTIGATIONS § 421.
[80] SAUL KRIPKE, NAMING AND NECESSITY 79-85 (1971).

has a high melting temperature. There may be some other substance, pseudo-gold with similar qualities that under this older convention would be considered "gold." When chemists realized that gold is a substance with an atomic number of 79, did the pseudo-gold, stop being gold? If you say no—pseudo-gold was never *really* gold, then you would be committed to the idea that gold refers to some "natural type" that exists regardless of convention. In a roughly analogous way, Plato in the *Phaedo* claimed that the disparate application of the word "beautiful" means there must be a "form" of beauty of which its various applications partake.

The methodological difference between a realist and a conventionalist is crucial for a theory of judging, as Professor Michael Moore has pointed out. When, for instance, a judge must determine what "death" means, does she examine the conventional definition that people have held for millennia—that the heart has stopped beating—or does she examine what death *really* or *essentially* is under current theory, *i.e.,* cessation of brain functioning. Such judge's view on the nature of meaning would likely influence the interpretation she gives to the word "death" and determine how she would rule on the famous Karen Quinlin case.[81]

The conventionalist/realist-essentialist debate also bears on what sort of expertise an agency could have in measuring media diversity and suggests that a conventionalist approach is probably more appropriate. Under a conventionalist approach, an agency's expertise would be in sampling and recording conventions of language and representation. Its job would be to conduct numerous studies of how consumers, in fact, view media, what they consider different news stories and opinions, and how they substitute one media for the other.

[81] Moore, *supra* note 77, at 299-301.

Under a realist approach, the agency would claim some expertise in uncovering the true nature of media diversity—whether a particular radio format is truly "country" or "adult pop." As even the realist-essentialists, such as Kripke admit, their notion of meaning only extends to natural kinds, such as gold or the other chemical elements of the Periodic Table. Radio format is not likely to be a natural kind. Further, even if there were "natural types" of radio formats, it is unclear who would be "expert" in delineating them.

However, a conventionalist approach presents certain methodological problems in measuring media diversity—problems that render the concept unstable and have arguably led to the remand of so many FCC decisions. This is because diversity of viewpoint or meaning does not fit well into established scientific methodologies. The late Milton Friedman provided a classic methodological statement of "positive economics."[82] His version of economics—a version that places the field firmly in the domain of the empirical sciences—requires theory to abstract "essential features" that can be described in particular categories. The validity of economic theory turns on a "comparison of its predictions with experience" and must be rejected if "its predictions are contradicted."[83] In other words, economics, like any positive social science, must provide confirmable

[82] The two main approaches in social sciences have been, and continue to be, the naturalistic/positivistic, asserting that "the social sciences should approach the study of social phenomena in the same way that the natural sciences approached the study of natural phenomena—that the social sciences should have as their goals prediction and nomological [law-like] explanation," *Introduction,* READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE xvi (M. Martin & L. McIntyre, eds. 1999), and interpretive method that asserts that there are no laws in social science but rather social scientists should use *Verstehen* or interpretive and empathetic understanding to understand the meanings and significance of social processes from the subject's perspective. *Id.* The notion of interpretive understanding as the goal for social science probably originates with the work Wilhelm Dilthey and Max Weber. Weber defines sociology as "That science which aims at the *interpretive understanding* (Verstehen) of social behavior in order to gain an explanation of its causes, its course, and its effects." Lewis A. Coser, MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT 220 (1977). Not surprisingly, positivism is the dominant approach in economics today. *See* Lawrence A. Boland, *Current Views on Economic Positivism* in COMPANION TO CONTEMPORARY ECONOMIC THOUGHT 88, 88 (D. Greenaway et al. eds., 1991) ("Positive economics is now so pervasive that every competing view (except hard-core mathematical economics) has been virtually eclipsed.").

[83] Friedman, *supra* note , at 650.

hypotheses about "essential features," *i.e.,* things in reality which are clearly and uncontroversially defined.

Media diversity fits awkwardly into a model of positive economics because diversity measurements require interpretation of communications—and such interpretations are inherently controversial. The validation of an interpretation is a circular procedure and, as many including Charles Taylor have argued—disagreements about interpretations ultimately rest on conflicting intuitions.[84] Whether X means Y or some news story has a different slant or angle than another or some radio format is "adult pop" is simply a matter of interpretation—and does not rest upon easily confirmable empirical criteria. It is an exercise of Jacobellis-like "know it when I see it." Chairman Michael Powell explicitly describes diversity as "a visceral reaction."[85]

That does not mean that a conventionalist approach to diversity is, in theory, impossible. It is simply that in order to discover non-controversial categories of diversity one must use categories on which the entire interpretive community would agree. This would be extremely expensive. Consider an important study of media diversity, the Berry & Waldfogel analysis of the relationship between industry concentration and the availability of different radio formats.[86] To determine what constitutes a radio format, Berry & Waldfogel used Duncan's 18 formats.[87] Duncan, a service for radio advertisers, has 18 formats, and it categorizes all radio stations nationwide.

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[84] Michael Martin, *Taylor on Interpretation and the Sciences of Man in* READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE 259, 259 (M. Martin & L. McIntyre, eds. 1999).
[85] As Commissioner Powell said, "diversity is very had to define, and is at some level a visceral concept."
[86] Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Product Variety?* 2001 QUARTERLY J. OF ECON. 1009, 1014 (2001).
[87] *See id*. A similar approach can be found in David Waterman & Andrew Grant, *"Narrowcasting" on Cable Television: An Empirical Assessment* (Annenberg School of Communications Act, University of Southern California 1989). There, cable programming was coded by subject matter, origin, and format.

Berry & Waldfogel are no doubt justified in relying upon Duncan—after all it is in Duncan's economic interest to accurately measure diversity and difference. But, say someone disagrees with Duncan, claiming that there are eight radio formats; Berry & Waldfogel provide no criteria for determining difference in format so that they would have no response to such a criticism and, therefore, they probably fail Friedman's confirmability and predictability criteria. Any rules or theories that might emerge from Berry and Waldfogel's work have the potential to be predictive—but only if one agrees that there precisely 18 radio formats.

In fact, the FCC did decide that there are fewer radio formats than those found in Duncan:

> A number of commenters cite a recent study by Berry and Waldfogel that found that reductions in the numbers of owners in radio markets led to an increase in radio format labels. . . . The evidence presented in MOWG Study No. 11, however, suggests that the number of formats across radio markets has remained flat since the passage of the 1996 Act. The discrepancy between these two studies is due to the different classification of format used in each study. MOWG Study No. 11 uses the most general type of classification available in the BIA database, while Berry and Waldfogel uses the finer classification formats available in Duncan. An example will illustrate the difference. One radio format Adult Contemporary taken from the BIA can be broken down into five different subformats under Duncan's system: Adult Contemporary, Adult Contemporary/Album Oriented Rock, Adult Contemporary/Contemporary Hit Radio, Adult Contemporary/ New Rock, and Adult Contemporary Oldies. While we agree that the Duncan formats allow a somewhat richer portrayal of the variety of music than the more general format categories, we are not certain how substantial the difference between many of these minor subcategories within the major categories of format are. We therefore question how well the increases in radio formats reported by Berry and Waldfogel imply increases in radio program diversity.[88]

Deciding whether the more "correct" radio format taxonomy includes only Adult Contemporary, as the FCC MOWG research paper maintains, or includes Adult Contemporary, Adult Contemporary/Album Oriented Rock, Adult Contemporary/Contemporary Hit Radio, Adult Contemporary/ New Rock, and Adult Contemporary Oldies, as Berry & Waldfogel assumed,

[88] *Media Ownership Order* ¶ 310.

requires asking thousands of radio listeners. This is a rather expensive procedure—and utterly impossible considering all the potential terms of media diversity and the FCC's limited budget.

It is the difficulty of encompassing viewpoint diversity into a social scientific framework that perhaps led the Supreme Court in *NCCB* to call the term "elusive," giving the FCC great deference as a result.[89] Other courts, more recently, have required greater specificity—and, as a result, diversity has proven to be the Achilles' heel of the FCC's media ownership regulation. The next section turns to another approach.

II. Agency, Monitoring Costs, and Media Regulation

Professor Richard Pierce states "The Constitution is premised on the belief that government should act as the agent of the people. In its effort to achieve this principal-agent relationship, the Supreme Court seems increasingly willing to construct public law doctrines designed to maximize the power of the people to control their agents."[90] If the relationship of government and the citizenry is conceived as an agency relationship, then the question of monitoring and information costs becomes central. Without adequate monitoring, the agent can engage in "opportunistic" practices, taking advantage of the trust place in him or her. The benefits of efforts to monitor the agent must be weighed against the cost of monitoring him or her.

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[89] *See National Citizens Committee for Broadcasting*, 436 U.S. at 796-97. Not surprisingly, the FCC has been quite fond of describing media diversity as elusive, for the term transforms the Commission into a sort of Delphic expert agency—whose often cryptic pronouncements should be accepted by even robed mortals. Citation to the "elusive" language in *NCCB* is found in virtually all subsequent FCC decisions concerning ownership and media diversity. *See Biennial Media Ownership Order*, 18 F.C.C.R. 13,620, para. 432 (July 02, 2003); 1998 Biennial Regulatory Review-Review of Commission's Broadcast Ownership Rules, 15 F.C.C.R. 11,058, para. 81 (Jun 20, 2000); Review of the Commission's Regulations Governing Television Broadcasting Television Satellite Stations Review of Policy And Rules, 14 F.C.C.R. 12,903, n. 49 (Aug 06, 1999); Matter of Evaluation of the Syndication and Financial Interest Rules, 6 F.C.C.R. 3094 (May 29, 1991) (Separate Statement of Commissioner James H. Quello, dissenting to the overall result, and concurring in part); In the Matter of Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations., 95 F.C.C.2d 360 (Oct 20, 1983)

[90] Richard J. Pierce, Jr , *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989).

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The media, of course, plays a vital role in reducing monitoring costs and ensuring that government officials act in the interest of their principals, the People—and that People obtain benefits and services from the government. Rather than conduct their own investigations of politicians' activities or scan the Federal Register to learn of important government actions, people can simply read the newspaper or watch TV. David Stromberg empirically demonstrated this point, showing that counties which had more radio listeners received more unemployment relief funds.[91]

The agency model of government has an important application for media ownership regulation—its purpose should be to further the media's ability to reduce monitoring costs and allow the citizenry to better keep tabs of government behavior and obtain government services and benefits. This purpose, unlike other non-economic justifications for media regulation, is amenable to a simple measurement: the regulator could compare various market structures and observe which produces the most news about government activity.

This section has three parts. The first part examines the justifications for non-efficiency based media regulation. It argues that, for the most part, the calls for non-economic or non-efficiency based media regulation center around a concern for political accountability. Government intervention is not needed to create flourishing or rich markets in other areas—why do the media deserve these special attentions? The article argues that, for the most part, the need to intervene in media markets stems from the importance of political discussion about government. In short, media reduces monitoring costs.

Further, viewing the goal of media ownership as the reduction of agency costs avoids a problem that has plagued the diversity concept—that in fact the "empirical evidence . . . is less than compelling" that, in fact, "citizens take advantage of the diversity of sources and content available to them to become the well-informed decision makers."[92] Viewing the goal of media regulation simply to further citizens' desires to monitor government—and presumably better

[91] David Stromberg, *Radio's Impact on Public Spending,* 118 Q. J. ECON. 189 (2004).
[92] Philip M. Napoli, *Access and Fundamental Principles in Communication Policy,* 2002 MSU L. Rev. 797, 800 (2002).

obtain benefits from government—is consistent with seeing citizens as selfish welfare-maximizers. It does not posit an unrealistic goal of transforming everyone into little James Madisons.

Second, not all the concerns of those who advocate non-efficiency based justifications can be reduced to monitoring costs. Many fear, for instance, media control concentrated in a few hands—and those hands may not respond to the public interest but to their owners' own private agenda. While an economic perspective may pooh-pooh this fear on the grounds that profit-maximizing media firms will provide the views and content the market wants—not the idiosyncratic views of the media owner—this response can ring a bit hollow, particularly given the extraordinary degree to which large media firms are, in fact, held by individuals or families rather than publicly traded corporations. To use Professor C. Edwin Baker's apt phrase the "Berlusconi impropriety" is not chimerical.[93] This type of "idiosyncratic foreclosure" seems especially dangerous in rural areas where there may be few media outlets, and these outlets may have close financial and even personal connections to the political and business establishments.

Given these concerns, this section argues for various types of regulatory responses. It argues that the primary role for media regulation should be the examination of market structures to determine those which maximize the output of news about government—subject to the jurisdictional trade-offs discussed in the following section. Merely counting news stories does have some of the methodological difficulties discussed above, but probably is a less controversial practice. This section also supports a legislative solution to the problem, or perceived problem, of what this article calls "idiosyncratic foreclosure."

Third, the issues and trade-offs involved in an agency/monitoring approach to media regulation is discussed.

A. Is a Robust Media an End Unto Itself?

[93] Baker, *supra* note 3, at 736.

What is the purpose of media ownership regulation? The Supreme Court in *NCCB,* the most expansive statement of the ends of regulation, states "Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. '[T]he "public interest" standard necessarily invites reference to First Amendment principles,' and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'"[94]

Many legal theorists have built upon this notion. Drawing on the work of John Dewey, Cass Sunstein argues that the purpose of media should be to develop a "deliberative democracy."[95] This rational deliberation among citizens will result in a consensus that drives public policy. For such a consensus to develop, the media must be diverse at the same time it must foster a shared vocabulary and common intellectual heritage.[96]

Drawing on the work of Jurgen Habermas, Professor C. Edwin Baker argues in his theory of "complex democracy" for a contentious media with various plural conceptions of the good. The ideal media speech exposes citizens to difference at the same time that difference is exposed in speech. According to this conception, the ideal marketplace attracts a varied public with a wide range of wares, inviting comparisons between the known and the unknown.[97]

Professor Ellen Goodman explicitly adopts the notion that media regulation should change preferences. "Market supplementation as a policy goal depends on the notion that

[94] National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938, 961 (D.C. Cir 1977), *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973); *Associated Press v. United States,* 326 U.S., at 20.
[95] SUNSTEIN, *supra* note 3, at 18.
[96] *Id.*
[97] Baker, *supra* note 3, at 760.

commercial interests have the power to distort individual preferences. Individual preferences thus become the product, rather than the creator, of the market."[98] Rather, media policy should "increase consumption of programming that exposes viewers to difference, forges community, and elevates discourse."[99] Note again the purpose of media regulation is to improve positive externalities (benefits to others) and "public elevation of discourse."

While not arguing with these goals, this article only points out that they are explicitly political. Baker (and Habermas) want individuals to be exposed to different views not so that they may be rendered appreciative anthropologists, glorying in the manifold majesty of human expression—but so that they become better citizens. Unlike, say art appreciation, openness to difference is not an end unto itself—its purpose is to make a better society. Similarly, it goes without saying that the goals of Sunstein's civic republicanism are essentially political.

Knowledge about government seems to be a necessary first step to pursuing any of the democratic model'ss visions or goals. The democratic media theorists would have to agree that media ownership regulation must increase information about media to decrease monitoring costs. It also seems that a robust media is not an end unto itself—or, at least, government regulation should not view it so. Rather, regulation can only be justified if it is instrumental in helping citizens better self-govern. To play on an old metaphor, if we do not worry too much about the ownership structure and product variety and diversity in the toaster industry, why should we care so much about the media industry? Again, the answer must reside in that media aids individuals in self-governance, allowing them to more easily monitor their government. Toasters presumably do not.

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[98] Ellen Goodman, *Media Policy Out of The Box: Content Abundance, Attention Scarcity*, 19 BERKELEY TECH. L.J. 1389, 1413-14 (2004).
[99] *Id.*

Or, to make the point less flippantly, Walt Whitman once said "To have great poets, there must be great audiences too." The same goes for media markets. In the end, it is individual interests and tastes that will drive the formation of sophisticated, intelligent media that advances the cause of deliberative democracy. To develop such tastes, individuals need facts about their democracy.

In addition, the goal of maximizing news coverage is also consistent with calls for media regulation to change preferences and improve people's tastes, rather than simply to cater to them. Certainly, news about government activity is generally considered "spinach" in people's media diet. To the degree media regulation increases the amount of news coverage it is improving and broadening people's preferences.

As discussed in the *Introduction*, media structure can influence the content of news. The geographic media markets, created by spectrum allocation policy, may or may not map onto existing political boundaries. To the extent that a DMA does not, it will create a media market that is less likely to cover political issues—or, at least, those in which only a fraction of their audience has a stake. This may lead to elimination of local political news—of clear social benefit—and the extra-coverage of news that may have negative externalities, like crime. In this way, regulation that concentrates on the structure of media markets can effectuate normative goals.

Finally, a specter that has haunted the democracy model of media ownership regulation is whether it works, as an empirical matter. Do vibrant, robust media markets produce better informed, more involved citizenry? As mentioned above, the evidence is quite mixed. Some studies show that consumers use media from fewer sources even as the number of sources available to them increases.[100] Further, as Bruce Owen has argued, media concentration is unrelated to the flow of ideas. Rather, "ideas, once related to the public, can no longer be

[100] Napoli, *supra* note 92, at 800; SUNSTEIN, *supra* note 30, at 59-84; PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 151 (2001).

suppressed or controlled by government or commercial interests."[101] Citing the famous work of Elihu Katz and Paul F. Lazarsfeld, Owen argues that the media do not truly influence individuals. Rather "communication with friends, family and co-workers, and opinion leaders dominates in the diffusion and acceptance of ideas."[102]

The agency/monitoring costs model for media ownership regulation avoids these problems. It is not concerned about whether individuals consume information from a variety of sources or whether information is somehow suppressed. Rather, it aims to make available more easily information about the government that may interest the audience. Further, this model does not necessarily require that anyone accept any idea and, therefore, it does not aim for the media to engage individuals in a Madisonian dialogue of citizenship. Instead, the agency/monitoring costs model allows self-interested individuals to learn more about aspects of government of interest and benefit to them.

Those who advocate for the democracy model for media ownership regulation share many of the goals that motivate an agency--monitoring cost approach. They might prefer *not* to view citizens as self-interested consumers of government services for whom the media serves simply as a tool to render the government a more effective agent, thereby obtaining more government benefits. On the other hand, learning about government, for whatever reason, is a necessary first step for involved, engaged citizenship. A supporter of the democracy model for media ownership, therefore, would agree with everything that the agency model advocates but would probably want more.

B. Concentration as an evil in itself

[101] Bruce Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules,* 2003 MICH. STATE L. R. 671, 693.
[102] *Id.* at 693, *citing* PAUL F. LAZARSFELD ET AL., THE PEOPLE'S CHOICE; ELIHU KATZ & PAUL F. LAZARSFELD, PERSONAL INFLUENCE (1955).

Robust media, however, cannot be said to be the only goal of the advocates of democratic media regulation. Many argue for the benefits of decentralized control *per se*. For instance, consider Baker's six justification for media de-concentration:

(1) Local owners will likely be more concerned about quality than out-of-town conglomerates
(2) One media interest, allied with a political interest, exercising an excessive control over a democracy's civil discourse.[103]
(3) Decentralized control performs a watchdog or checking function—correcting the errors and mistake of any one source of information.[104]
(4) Decentralized ownership prevents control of the media by corporate interests outside of media—interests that may skew reporting.
(5) concentrated ownership can lend itself to co-option by one particular approach to the news, such as Rupert Murdoch's,
(6) concentrated media structures can create unwelcome synergies with other corporate interests.[105]

None of these concerns really involve media robustness. Rather, they involve media control and the fear that media will be used—not to further civil discourse—but to further private corporate interests or personal preferences.

Difference over the fear of corporate control separates the advocates of democratic and economic efficiency media regulation. The former group does not trust the market to provide media that matches the preferences—or is in the best interest of the public. The latter would argue than any firm that fails to do so would go out of business and be replaced by a firm that did do so. Further, pro-market advocates would argue that, in the age of the internet, fear of one media entity controlling industry is overblown.

To paint with an admittedly broad brush, advocates of democracy-based media regulation are concerned about what this article terms "idiosyncratic foreclosure." Media outlets will under-report or ignore certain stories because of their owners' personal bias or corporate or financial interest. To which the market-based advocates respond—nonsense! That would never happen, because it would be unprofitable.

[103] Baker, *supra* note 30, at 905-06.
[104] *Id.* at 906-07.
[105] *Id.* at 909.

Even the most diehard advocate of efficiency-based regulation would admit that if a firm engaged in idiosyncratic foreclosure, it would take time for the market to correct and discipline such a firm. While citizens wait for markets to correct, the ship of state may face violent storms—and need guidance from the most robust of civil discourses. A vast number of media companies are in private hands. To take a particularly prominent example, The New York Times has placed severe limitations on the alienability of its stock so as to ensure that it remains under the control of the Sulzberger family. On a different ideological coin stands the Murdoch family and in between are the Roberts of Cablecast, EchoStar's Charlie Ergen, and the protective share classes of the McClatchy family's ownership. As of the time of writing, the Tribune Co. and Clear Channel are in negotiation to return to private hands.[106] It would be reasonable to expect that privately held corporations would be more susceptible to idiosyncratic foreclosure.

The regulatory solution for this problem is difficult because it is not clear at what point the chance of idiosyncratic foreclosure become so great that ownership restriction is necessary. Certainly the odds of foreclosure decrease as the number of outlets increase. That general principle, however, will not satisfy the legal standard that the courts of appeals have created. They require agencies to state a theory and/or provide data for when enough voices are enough. At any point, can the FCC state that the risk of idiosyncratic foreclosure is eliminated? There simply is no metric to measure such a contingency. Without such a metric, courts are not likely to accept any answer based solely on the grounds that more voices decreases the risk of foreclosure in some unspecified amount.

The appropriate solution to the problem would be to allow simple limits to be set by Congress. This approach would establish clear business expectations, and would receive a deferential, "rational basis" review in court. Politicians have an interest in avoiding idiosyncratic foreclosure because it can affect their ability to communicate with voters. For instance, President Clinton, a media consolidation opponent, used to tell people there were only two major media outlets in Arkansas; one owned by a detractor. If his detractor owned both, then Clinton claimed

[106] Dale Kasler, *New News Strategy has risks, too*, Sacbee, at D1 (Nov. 9, 2006).

that neither he nor any other progressive would ever get his message across.[107] Similarly, when the 2002 *Biennial Media Ownership Order* lowered the national television cap, Congress, in an unusual reversal, raised it.[108]

C. Challenges of an Agency/ Monitoring Cost Approach to Media Ownership Regulation

Media structure's effect on news output is poorly understood. On one hand, there is little evidence to suggest that structure increases the number of shows devoted to news programming. For instance, Professor Philip Napoli found little connection between competitive conditions (cable penetration, number of public television stations, number of commercial television stations) and the hours devoted to public affairs programming. Napoli found that "market incentives may not be sufficient to promote the provision of public affairs programming."[109] Others have found positive relationships between competition and news output.[110] There has been some research examining the relationship between local ownership and the delivery of local news.[111] A program of media regulation based upon the examination of the relationship of market structure to quantity and nature of news production would build upon this research.

III. Jurisdictional Balancing: Content, Quality, and Federalism

Once it is established that media ownership regulation should decrease monitoring costs through encouraging market structures that are more likely to produce more news programming, two questions emerge. First—and most obvious—which market structures create the most amount of news about political institutions. As mentioned above, the assignment of spectrum according to DMA—regardless of local political structure could

[107] Eric Boehlert, *Former FCC chairman: Deregulation is a right-wing power grab*, Salon, *available at* htto://dir.salon.com/story/news/feature/2003/05/31/fcc/index.html.
[108] Frank Ahrens, *Compromise Puts TV Ownership Cap at 39%,* Washington Post, at A19 (Nov. 25, 2003).
[109] Philip M. Napoli, *Market Conditions and Public Affairs Programming: Implications for Digital Television Policy,* 6 Press/Politics 14 (2001).
[110] PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 154 (2001).
[111] *See* Nodir Adilov et al., *Scale, Scope, and Cross Ownership: Story Choice in Broadcast News* (draft).

result in under reporting of political matters and over-reporting of certain local matters, such as crimes, fires, or human interest that presumably interest the community.

Second, virtually every market structure favors one level of government over the other. To use the example discussed in the *Introduction*, distributing spectrum locally in DMAs might create geographic media markets that are less likely to cover state news—if, and to the extent, a given DMA overlaps state boundaries. This example is particularly interesting because it involves constitutional issues. Federal distribution of spectrum, as well as other communications policies, like local cable and video franchising, affects the degree to which state matters are covered. The federally mandated assignment of spectrum arguably diminishes citizens' ability to monitor state government—or allow politicians to advertise their services. While hardly a slam dunk, one might argue that a federal communication policy that increases monitoring costs for state government and makes it more difficult for state governments to communicate with citizens is unconstitutional. At the very least, jurisdictional effects should be an important part of media ownership policy.

Many have written penetrating analyses of the politicized genesis of the United States spectrum allocation regime.[112] This article does not presume to add to them. Rather, the article assumes the simple insight that media firms, because they enjoy significant economies of scale, are likely to cater to shared tastes. Taste in political matters, however, is jurisdictional. We are interested in our local school board meeting; we are significantly less interested in the workings of the neighboring school board. Similarly, we are interested in the state government in which we reside, but less so in that of neighboring states. In this way, political boundaries dictate our preferences in news stories. The Philadelphia, New York, Chicago, or St. Louis DMAs would likely have

[112] THOMAS KRATTENMAKER & LUCAS POWE, REGULATING BROADCAST PROGRAMMING (1994).

less state news than if each were within one state jurisdiction. Or, if spectrum were allocated by state so that every DMA would be co-terminus with state boundaries, one would certainly expect *more* state news.

Similarly, this effect can be found within DMAs. Consider a DMA that includes numerous political institutions, (cities or counties) with one being much larger than the others. Such a DMA will likely have news about the large institution, to the exclusion of the others. DMAs that contain numerous political institutions of the same size may, in fact, destroy a common taste. If a DMA contains numerous jurisdictions, consumers would not share similar tastes in political news. Local news preferences would be too fractured to allow firms to profitably cater to each of them. In the place of political news, media outlets could produce news that less furthers democratic values.

This "substitution effect," created by the interaction between political boundaries and geographic media markets, may create news with negative externalities, like stories about crime. According to most recent empirical evidence, crime stories are covered to a hugely disproportionate degree by local news. This may have highly negative effects, furthering certain racial and ethnic stereotypes, as Professor Kang has powerfully argued.

The degree to which media firms own firms outside DMAs also complicates production biases. Owners of firms that have outlets in numerous political jurisdictions may have an incentive to produce more news that would be interesting to consumers of all its media firms. That would mean that such firms might produce more national news at the expense of local news.

Cable television might well provide another example of communications regulation creating an industry structure that results in biases in the types of political news coverage. The legal decision to grant cable franchises locally has resulted in a

crazy quilt of cable systems, covering numerous jurisdictions. The customers of a large cable company, therefore, will likely lack shared taste in local news. Not surprisingly, cable systems provide news interesting to all of their consumers—i.e., national news. At the same time, due to the public access requirement, cable systems *also* provide local news, or at least information about local affairs.

Take the counter-factual arrangement—which under the current political climate is quite possible and under which many states such Texas have already adopted—that cable franchises are allocated on the state level. One would expect that a cable system having such franchise might well have more incentive to provide state news—and, to please the government officials on which its franchise depends, public access programming concerning state officials and government would likely increase.

These observations concerning the interaction between the legal creation of geographic media markets and their likelihood to produce news concerning certain jurisdictions are for the most part just that—observations. While economic research on these matters continues, the Federal Communications Commission seems, at times, hostile to such research.

Nonetheless, these jurisdictional trade-offs must play a role in media ownership as they affect what this article has argued is the *raison d'etre* of media ownership: the ability of citizens to monitor the behavior of government. Recognizing the role of structure on content and changing policies to maximize certain types of results is necessary regardless of ones ideological preference for markets or against regulation. The very existence of rights in spectrum and franchises creates certain structure that result in certain content biases. Regulators must make explicit these biases and allow policymakers to determine whether or not they forward normative goals.

Further, the production of state news implicates constitutional concerns. As the Supreme Court still insists, the governments of the several states are sovereign entities. The Court states ""It is incontestible that the Constitution established a system of "dual sovereignty.""[113] As sovereigns, the federal government may not impede or interfere in state functions.

In its cases involving state sovereignty and immunity, the Court has developed the notion of political accountability. The state government may not upset the channels of federal political accountability—and that the federal government may not interfere with the channels. For example, in *Printz v. United States* and *New York v. United States*, the Court explained that federal commandeering diminished the political accountability of (1) the federal government to the national electorate and (2) state governments to state citizens. The Court concluded this loss of political accountability seriously threatened the maintenance of a strong federal system and violated basic postulates of American federalism.

Similarly in *New York v. United States*,[114] the Supreme Court reversed a federal regulation that required state officials to accommodate the provision for the disposal of radioactive waste. The Court stated "[W]here the Federal Government compels the States to regulate, the accountability of both state and federal officials is diminished. . . . where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the

[113] Printz v. United States, 521 U.S. 898, 919 (1997), citing *Gregory v. Ashcroft,* 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt,* 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). The Court stated "Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). *Id.*

[114] 505 U.S. 144 (1992).

regulatory program may remain insulated from the electoral ramifications of their decision.[115]

Conversely, the Court has struck down efforts by the state to interfere with the federal government's avenues of accountability. In *Cook v. Gralike*,[116] the Court struck down a provision in the Missouri Constitution that would have required ballots in federal elections to state explicitly when a federal candidate opposed term limits. In his concurrence, Justice Kennedy noted, "[i]f state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred."[117]

The notion that interference with political accountability could occur via communications policy has not been addressed by the Court. However, the legal issue is not novel. For instance, before the civil war, there was intense controversy concerning abolitionists' attempts to mail large amounts of anti-slavery literature to southern states. Southern postmasters—typically political appointees—often refused to delivery this mail. Similarly, several southern states passed laws concerning the delivery of such mail. While the postmasters' actions were never challenged in court, considerable debate centered around the states' constitutional power to regulate the federal mail system.[118]

Admittedly, it seems unlikely that merely changing the incentives for the creation of state news through federal media ownership policies would rise to a constitutional violation. It does raise general structural constitutional issues concerning state and federal government, however. To the extent lawmakers or policymakers are concerned about respecting the sovereignty of state government, ownership polices should be analyzed at least in part on their effect on state news coverage.

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[115] 505 U.S. at 168-69.
[116] 531 U.S. 51 (2001).
[117] Id. at 528 (Kennedy, J., conc.).
[118] *See generally* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery, Speech, Press, and Petitions in 1835-37*, 89 NW. U. L. REV. 785, 786-802 (1995)

Conclusion

This article has argued that diversity is an intractable regulatory concept that has led to, in no small measure, to the recent failure on appellate review of most of the FCC's attempts to revise its ownership rules. This intractability proceeds from the methodological difficulties that studying media diversity presents.

Instead of maximizing diversity, this article argues that the FCC should seek to maximize the media's production of news stories about government. This strategy (i) avoids the methodological problems inherent in the diversity inquiry and (ii) reflects, in a very concrete way, the difficult to quantify goal of furthering deliberative democracy—which many argue quite convincingly should guide media ownership policy.

If maximizing news about the government guides ownership restrictions, there are numerous trade-offs a regulator must consider. Perhaps most important, the relationship between geographic media markets and political boundaries may have a significant effect on news content. To the degree that it does, regulators must fashion media ownership regulation to ensure that under-served jurisdictions, possibly certain of the states, receive adequate coverage. Similarly, regulation could respond to structures that produce too much undesirable content at the expense of news about the government.

Finally, this proposal is consistent with one of the federal government's oldest media policy: the postal service's subsidization of newspaper delivery in the 19th century.[119] This practice, as does this article's proposal, lowered the cost of providing information about government activities.

[119] *See* Kelly B. Olds, *The Challenge To The U.S. Postal Monopoly, 1839-1851*, The Cato Journal (Spring/Summer 1995).