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A Diversity Policy Model and Assessment: Debates and Challenges of [Media] Diversity

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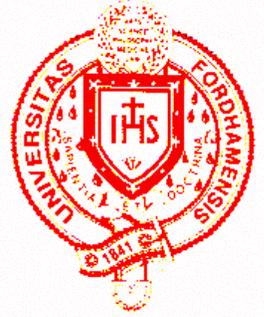
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WORKING PAPER

**A DIVERSITY POLICY MODEL & ASSESSMENT:
DEBATES AND CHALLENGES OF [MEDIA] DIVERSITY**

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Introduction

Diversity is a central policy goal in achieving democracy, which has guided the Federal Communication Commission's (FCC) action in media regulation (see Review and Oder 2003 & 2008). Although the role of diversity in sustaining democracy is presumable, the diversity principle and regulatory concepts applied to communications policy seem far from reaching a practical consensus. Among the regulatory challenges to achieving diversity goals are controversy on a theoretical level, inconsistent measurement, the interplay of conflicting public interest motivations, and the changes in the media system.

Critics, for example, have indicated that policies designed to promote diversity are contradictory due to the FCC's imprecision in defining its regulatory concepts and the limitations of diversity measurement (see Candeub, 2008; Ho & Quinn, 2008; Hill, 2006). Other critics have also noted the problem associated with diversity policy is an increasingly politicized policymaking process itself, struggling over ideological conflict within the policymaking environment (see Braman, 2003; Napoli, 2008; Napoli & Gillis, 2006, etc.). The changes in the relationship between the media system and services due to technological developments have eliminated much of the legal validity of the scarcity concept that has served as a fundamental justification for the FCC's public interest standard in broadcast regulation. The marketplace of ideas that has replaced the scarcity rationale, and served as a primary justification for ownership regulation is now under critical scrutiny due to its contradictory effects on diversity. Growing judicial skepticism about the FCC's economic antitrust based decision in formulating the logic of public interest has opposed to the long standing presumed link between ownership diversity and content diversity (see *Schurz v. FCC*; *Church-Missouri Synod v. FCC*). On the other hand, the ownership regulation and the policy has become a political issue for the public with their

increased awareness of the issue and public benefits of it. There was overwhelming negative public response to the FCC's relaxing of broadcast ownership limits after completing a 2003 mandatory review of its regulation (see Presidential United States Court of Appeals for the Third Circuit, 2004; Shales, 2003).

The discussion above reflects the conceptual, legal, and regulatory challenges the FCC confronts for the promotion of pluralism and diversity. Responding to the central issues and ongoing debates on diversity as highlighted above, this paper investigates the diversity policy within a broad context of legal, political, economic, and socio-cultural grounds. More specifically, this essay 1) proposes a policy model that offers a platform for the analysis of the policy implications and decisions. Following the proposed model, it 2) analyzes the existing policy imposed to achieve diversity goals, and 3) address regulatory challenges within various contexts. Derived from an overview of the analysis, it 4) suggests alternative ways of responding to current regulatory challenges for strengthening policymaking. The proposed policy model is integrative, self-reflexive, and procedural in its nature, which provides several benefits: First, it reconciles the perceived theoretical and ideological schism in formulating the public interest, as it combines the benefits of economic development with social unity in fulfilling democracy. Second, it is flexible in responding to the current policy condition because the self-reflexive mechanism corrects and renews the ongoing policy system. Finally, it offers the grounds for communication research contributing to the policy process, for its procedural step essentially involves various contextual analyses which in turn demands communication resources and research.

The Policy Objective: The Public Interest Standard

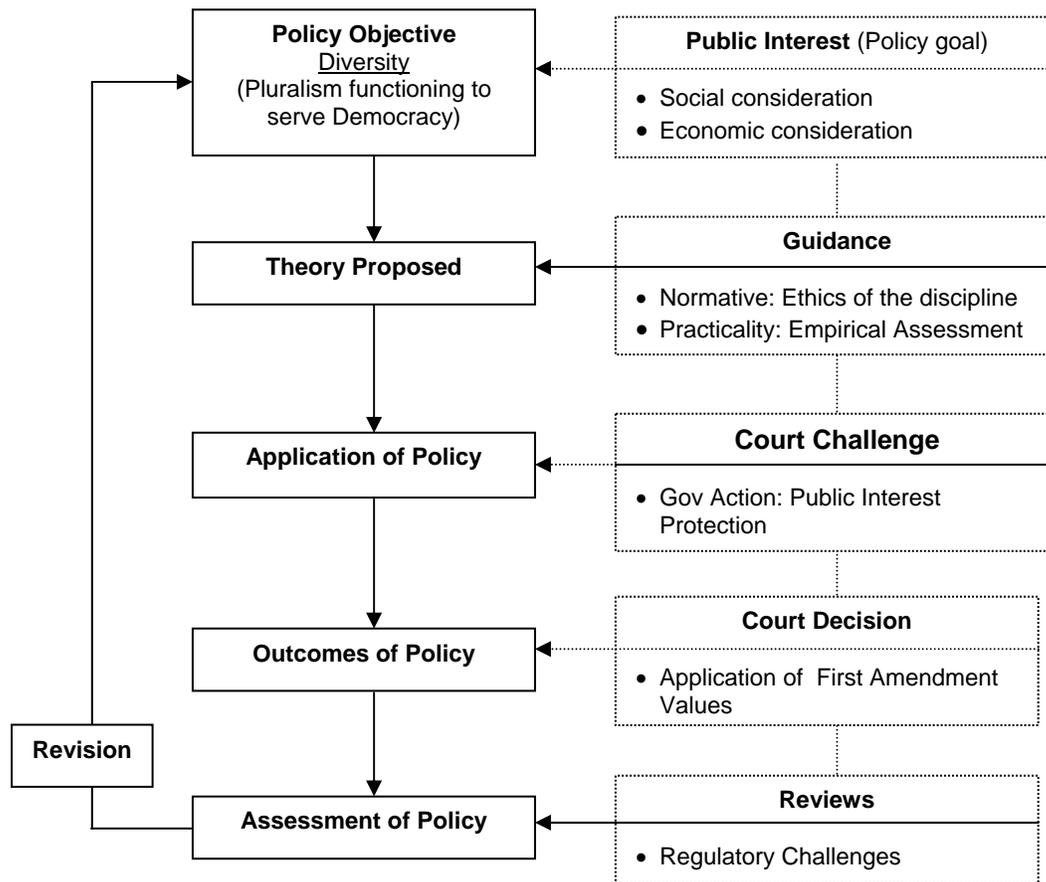
One major challenge in the development of diversity policy stems from the competing principles of the public interest. The FCC states that media ownership rules are designed to foster the Commission's longstanding policies on competition, diversity, and localism (see Report and Order, 2003; 2006 Quadrennial Regulatory Review). Thus, the FCC's interpretation of the public interest mandate means achieving these three values. Alas, these concepts are elusive, and difficult to measure. There is considerable conceptual overlap between localism and diversity, which makes it difficult to distinguish localism from diversity. More importantly, not all these values fit into the existing policy framework due to its deficiency in social and political evaluative criteria. While competition lends itself to the existing economic analysis, diversity and localism do not (see Ho & Quinn, 2008). Strong disagreement on the public interest mandate has led to ideological conflict and increasingly politicized policymaking. Accordingly, developing consistent and pragmatic policy objectives seems far from meeting its ideal demands.

The policy process is inherently political as the public interest has multiple dimensions, and various stakeholders lobby for policies that will best serve their interests. The role of the policymaker (i.e., the FCC, and Congress) is to choose a policy that will best serve the public interest. Establishing a consistent and balanced public interest standard, therefore, appears to be the foremost critical task for diversity policy. As history tells us, the failure of diversity policy is often a result of the FCC's vague definition of regulatory concepts of diversity, closely tied to the public interest standard. See figure 1 for the proposed model.

Establishing the Public Interest Standard

Media and communications policy is a deliberate government intervention for the *benefit of the public*. The public, according to John Dewey, is a social creation, that is not biased toward

Figure 1. Media Diversity Policy Paradigm

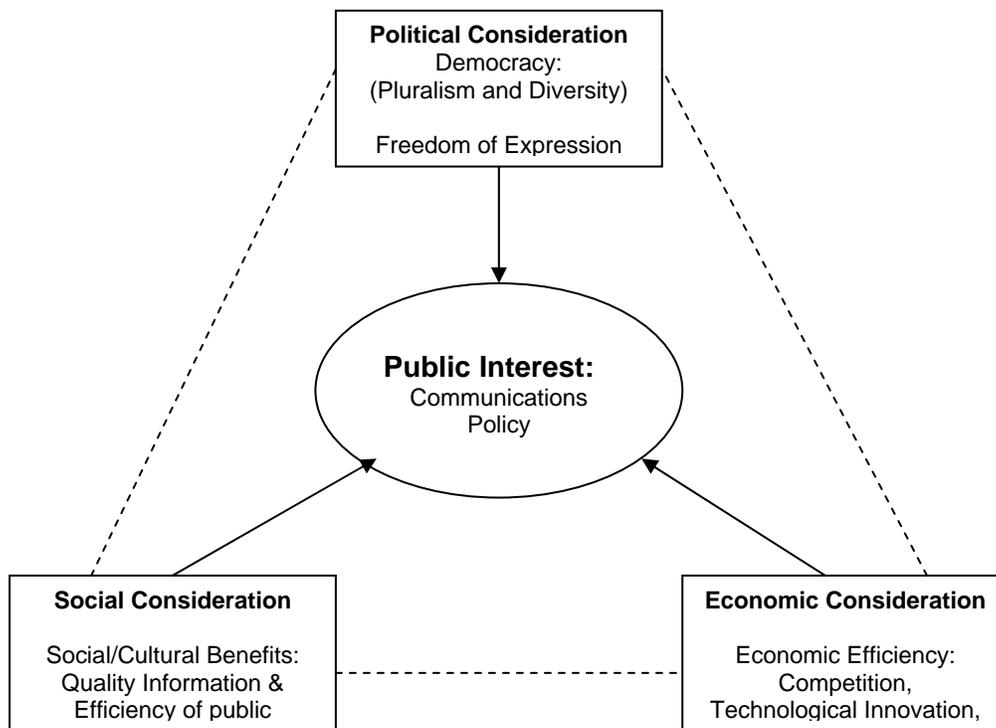


government administrative goals nor individual freedom, but the product that reflects consequences of *social, political, and economic considerations* we all share (see also Aufderheid, 1999; Van Cuilenburg, 2003). Although the public interest may take various forms, depending on what current national policy emphasizes and how a legal system operates in a society, the general components of public interest encompass these three considerations, necessary for guiding media and communications policy.

The criteria defining political values are associated with the function of democracy, ensured by the adoption of the First Amendment: Pluralism and diversity are political goals,

concerned with whether diverse ownership and content would cultivate informed citizenry for their participation in democratic public life. Social values relate to the social impact of media content in terms of cultural and social benefits; under this consideration, diversity concerns whether diverse viewpoints in media content foster socially desirable outcomes for the public needs. Economic values relate to the economic efficiency of technology, competition, and profits; under this consideration, diversity concerns whether diverse competition and media outlets provides an access for citizens' participatory democracy. Economic values, however, are more effective in facilitating pluralism than diversity (see Figure 2).

Figure 2. Dimensions of Public Interest and Media Institution



Discerning the complementary function of the public interest is desirable for approving particular communication service and improving the policy, which avoids a potential political

conflict, fuelled by following the narrow logic in competing principles. As discussed above, the political premise of freedom of expression, such as democracy has been enforced through both the economic consideration of effective competition as well the social/cultural consideration of critical and substantive media content. Developing consistent public interest is critical as the policy objective is informed and guided by the FCC's logic of justifying it with respect to the legal and constitutional discourse of the issue.

Diversity Policy Objective: Pluralism to Serve Democracy

Diversity policymaking starts from stating a clear policy objective; that is creating pluralism to serve democracy. Diversity is a precondition for promoting political or social pluralism for citizens to be well politicized and actively participate meaningfully in democracy. By creating diverse sources, and ideas (i.e., pluralism) through an open communication system (i.e., public sphere or marketplace), it attempts to facilitate genuine public debate by participation of well-informed citizens (democracy). The critical relationship between media and democracy in a society has often been debated, primarily due to the presumption that media exercises a critical public role in cultivating citizenship. Whether or not citizens take an active role in making a democratic decision largely hinges on the responsibility of media in a self governing system. This raises a diversity inquiry into whether the current media system functions as a source of guidance for citizens' participatory democracy, which ultimately guides the FCC's implementation of the public interest standard for the diversity policy. The FCC's vague logic of formulating the public interest, due to the inconsistent policy objective, has resulted in the courts' calling into question the legitimacy of promoting diversity goals and preserving competition (see *Lutheran Church-Missouri Synod v. FCC*; *Prometheus Radio Project v. FCC*; *Schurz v. FCC*).

Theory Proposed: Guidance to the Policymaking

The proposed theory responds to the need for developing a new analytical framework for diversity policy that involves the wider intellectual frames consistent to the public interest standard proposed earlier. It constructs an analytical platform for diversity policy by assessing the claims drawn from both economic and social approaches. It gives expression to the ethical claim of the social approach to complement the limitation in the constructs implied by the empirical claims of the market economics approach. Discerning reasonable bases for both sets of claims is critical to policymaking (see Olufs III, 1999). The following describes two major schools of thought, highlighting the standpoints as well as limitations of each approach.

The Integrative Theory: Political Outcomes in Economic and Social Contexts

Two major approaches to diversity revolve around the economic and social values of media's democratic performance: Each conceptualizes media diversity within separate domains, and proposes divergent ways of envisioning audiences, namely "citizens" and "consumers" respectively. Many critics have identified the problem associated with such division, and suggest the need for conceptual clarification in the study of communications policy (e.g., Braman, 2003; Entman & Wildman, 1992; Giddens, 2000; Meehan, 1981; Mullender, 2000; Streeter, 1990; Vick p. 35, etc.). Braman (2003), for example, pointed out that the failure of issue-oriented policy analysis is due to certain theoretical propositions of researchers, which may lead them to ignore or oversimplify contradictions and complexities of the negotiation held by policymakers. Similarly, Entman and Wildman (1992) criticized the lack of constructive discussion between the market economics and social value schools of thoughts because of their unwillingness to learn from the other's approach, which in turn resulted in ineffective policy analysis and decisions. More importantly, social and economic theories share common goals in the specific context of

media regulation; such as pursuing liberty, pluralism, and diversity, although they differ in their preferred means of achieving these goals. The effort in conceptual clarification of the diversity principle, thus, should abridge and highlight common goals as well as contentious issues of the social and economic standpoints on the diversity policy.

Economic Approach: Empirical Claim and Efficiency of Competition

The economic approach has its roots in market liberalism, dubbed the market economics. It maintains that the media should carry content that most appeals to consumers, and success of media performance is primarily measured by market behavior (see Canbeub, 2008; Croteau & Hoynes, 2006; Shelanski, 2006, etc.). Entrenched in *laissez-faire* economics, the market economic approach proposes the benefits of the free market, advancing the neutral role of government due to its distrust of government. The market is more responsible to consumers than the state, thus can enhance consumer choices (Vick, 2006). By establishing a free market line, the economic approach legitimized deregulation policy (see Candeub, 2008; Curran, 2000; Hopkins, 1996; Vick, 2000). To that extent, the market theory offers an assumption that pluralism and diversity will flourish within a free marketplace.

The economic concept of market liberalism has been widely applied in the courts. The marketplace of ideas has served as the theoretical underpinning of the diversity principle as well as justification for ownership regulations in the U.S. (see Candeub, 2008; Curran, 2000; Hopkins, 1996; Napoli, 1999; Vick, 2006) since it was introduced by Justice Holmes in his 1919 dissenting opinion in *Abrams v. United States*. The metaphor suggests that the best policy can be made out of the “competition of extensively various ideas” in an unregulated market, well reflected in the FCC’s assumption that ensuring *diverse and antagonistic sources* would be

instrumental to achieving diversity of programming and viewpoints (i.e., diversity of media content) for audiences.

In policy and juridical circumstances, empirical evidence takes an important role in justifying FCC's regulatory efforts. Economic analysis is inherently quantitative, and thus can estimate the causal mechanism involved in the issue by either proving or disproving the theory. Such an empirical assessment functions to narrow down a general claim of diversity to testable outcomes, and accordingly can generate pragmatic alternatives to the market reality. Historically, economic analysis has a large role to play in policymaking. Such analyses can provide the empirical justification for regulations.

However, the empirical analyses of the economic approach don't effectively capture the democratic values associated with media content (i.e., diverse viewpoint cultivating citizenship). Although mass media policy has employed various methods to serve the policy interests of market efficiency and democratic issues (Shelanski, 2006), democratic values within the economic approach have often been defined as pluralism and satisfying popular demands rather than diversity, and the FCC has failed to provide substantial evidence to prove the nexus between liberalizing media markets and preserving deliberative democratic values. Consumers' ideas are often the opposite of the diverse intellectual activity and politically informed public body the marketplace of ideas suggests, as they tend to eschew challenging established notions (see Curran, 2000; Entman and Wildman, 1992). This illustrates the limitation of market economics in offering appropriate insights into diversity policy goals, and the need for incorporating a social approach to the diversity principle and policy development.

Social Approach: Ethical Claim and the Deliberative Democracy in Media Content

The social based theory, in general, pursues statism, egalitarian, and deliberative democracy (see Baker, 2007; Croteau & Hoyne, 2006; Curran, 2000; Entman & Wildman, 1992; Giddens, 2000; Mullender, 2000; Vick, 2006). Statism finds expression in the advocacy of government intervention for enhancing social values and protecting the public interest against the private market power. It purports that unregulated private market power is socially detrimental, and can be a threat to democracy, diversity, and freedom of expression; thus, it doesn't identify market efficiency as a primary goal of media policy (see Mullender, 2000; Giddens, 2000; Vick, 2006). Concerned with the inequality of market power, social advocates would argue that the decentralization of media ownership, for its own sake, should be a political goal (e.g., Baker, 2000, 2005, & 2009; Croteau, 2003; McChesney, 1997 & 1999, etc.). However, they also view the ownership restrictions relying on economic mechanism of antitrust law as failure in terms of connecting to any quantifiable social and political goals (see Candeub, 2008).

With an emphasis on deliberative democracy, promoting diversity is seen as facilitating an informed public discussion of important issues and rational-critical debates (see Shelanski, 2006). To achieve such goals, it underlines the media's obligation to pursue social goals as public resources over their professed organizational goals. Hence, diversity is assessed in terms of whether the media facilitate critical independent thought, information quality, and the social/cultural order in society, and whether policy can effectively help the media provide different viewpoints. Because of assuring citizens' informed judgments about public issues, the social approach meets the requirement for deliberative democratic values of content diversity. Unfortunately though, social values are often dismissed as externalities by market economics

proponents because they are not easily quantifiable (see Baker, 2009; Entman & Wildman, 1992).

Application of the Policy: Government Action and Court Challenges

As far as the application to policy is concerned, the public is the foremost bearer of the effect of government action because the government justification for particular rules and regulations are on behalf of the public interest. The development of regulations, however, involves court challenges and judicial decisions about the constitutionality of proposed rules. Various arguments are possible to justify the constitutionality between the censorship of the public authority and the First Amendment protection for private media in facilitating diversity. The constitutionality of the rules and regulations, in this way, hinges on the government's logic to justify the public interest. Nonetheless, in practice, "legislation is vague about desirable outcomes" (Olulf III, 1999, p.16). For example, the widely practiced competition policy for the promotion of diversity wouldn't always be helpful in its application. A wide range of policies attempting to achieve such a goal would be made, yet actual choices to the goal may not clarify the intent of Congress in such situations. The imprecision in defining regulatory concepts to that consequence would lead to the failure of government action in justifying the constitutionality of rules and regulations. The following briefly provides regulatory concepts of diversity defined by the FCC in order to increase the understanding of how the FCC uses them, and second examines the imposition of the regulations rules and the FCC's justifications for them.

Concepts of Diversity Defined by the FCC

The FCC originally defined diversity as four different and interrelated concepts (see Hundt, 1996), and added one more dimension to them in later years, namely viewpoint, program, outlet, source, and minority and women ownership diversity. Each of these concepts was

reviewed recently by the FCC in the context of media ownership policy (2002 Biennial Regulatory Review, 2003): Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives; Program diversity refers to a variety of programming formats and content; Outlet diversity means that, in a given market, there are multiple independently-owned firms; Source diversity refers to the availability of media content from a variety of content producers; Minority and female ownership diversity (i.e., workforce diversity) refers to encouraging minority and female ownership (2002 biennial Regulatory Review, 2003, para 19-42). The first two concern content diversity while the later three concern ownership diversity. Insisting on the presumed link between ownership diversity and content diversity, the FCC has attempted to create viewpoint and program diversity (i.e., diversity of content) through outlet, source, and workforce diversity (i.e., diversity of ownership). This explains that the FCC regulatory concepts center primarily on competition of ownership to achieve diversity goals while disconnecting social impact of media content from it.

Content Control: Fairness Doctrine and Scarcity Rationale-Political Viewpoints

Although content diversity (i.e., viewpoint and program diversity) is the ultimate end of diversity policy, direct content regulation violates the constitutional protection of the First Amendment for media. For that reason, the FCC's media regulations have centered on ownership structure. Yet, the content of broadcasting has been subject to censorship due to its legally distinctive nature. Broadcasting can reach the general public and broadcasters are public trustees for the public. A primary example is the fairness doctrine, which is mostly linked to viewpoint diversity. The fairness doctrine reflects the public interest rationale for content restriction, which allows government supervision of broadcasters' programming, mandating more diverse programming, and particularly political viewpoints (see FRC, 1929). The fairness doctrine-based

content restriction was validated and constituted by firm establishment of the scarcity rationale in *Red Lion Broadcasting Co. v. FCC* (1969). Yet, faced with First Amendment challenges, the public interest demand for media delivering diverse viewpoints doesn't seem applicable to an increasingly competitive economic environment. Accordingly, with its opinion in *Syracuse Peace Councils* in 1986, the FCC refused to enforce the fairness doctrine, and formally abolished it in 1987.

Ownership Regulations: Economic Analysis of Antitrust-Law

The FCC's efforts to achieve diversity goals have focused heavily on ownership structure, largely guided by the economic principles of antitrust law (see Connolly & Kwerel, 2007; Napoli, 2006; Ho & Quinn, 2008). Thus, ownership restriction means furthering substantive content diversity. This assumption pervades in media law and regulations applied to the diversity policy. The ownership regulations involve the three areas, ownership of outlet (outlet diversity), ownership of programming (source diversity), and ownership of workforce within the distribution system (minority and female ownership diversity).

From the Cross Ownership Rules to Cross Media Limit: Outlet and Viewpoint Diversity

Historically, the FCC adheres to the presumption that outlet diversity is the most reliable means of promoting viewpoint diversity (2002 Biennial Review). The cross-ownership rules are clear examples, adopted to preserve viewpoint diversity, particularly relevant to editorial content. The FCC has imposed various cross ownership rules to prevent common ownership within a local market, including newspapers-broadcaster cross-ownership and the television-radio cross-ownership. The newspaper-broadcast cross ownership rule, promulgated in 1975, limits co-owning the number of a daily newspaper and broadcast stations in the same market. Similarly, the television/radio cross-ownership rule limits co-owning a number of commercial radio and

television stations within the same market. The public interest rationale for these rules was to protect the availability of viewpoint diversity to local communities where consolidation would harm such diversity (or localism). Yet, the cross-ownership rules were substantially relaxed over the years with the increased provision of the benefits of common ownership. The Commission explained that there is no substantial record that indicates that the cross ownership limits significantly protect a diversity of viewpoints (or localism) in those media (Report and Order, 2003 & 2007). Hence, based on the FCC's adoption of the cross-media limits in 2002, the newspaper-broadcast cross ownership rule was substantially relaxed and the television-radio cross ownership rule was entirely eliminated (retained now due to a failure of justifying the new rules).

When the commission first proposed the newspaper-broadcast cross-ownership rule it was challenged in *FCC v. National Citizens Committee for Broadcasting* (1978), the court held the validity of the challenged regulations, accepting the difficulty of defining and measuring viewpoint diversity (436 U. S. 793-815). Although it was conceded that the rulemaking record was inconclusive in establishing the connection between ownership and diversity, the court recognized the need for qualitative judgment on defining an elusive concept of viewpoint diversity. In other words, the court didn't require the FCC to specifically define viewpoint diversity, instead relied on the FCC's rational judgment based on experiences. Nevertheless, the court began to take seriously the connection between the ownership limit and viewpoint diversity in the *Prometheus Radio Project v. FCC*. In challenging the FCC's relaxation of the cross ownership limits, the Third Circuit conceded that the FCC didn't provide a reasoned analysis to support the specific cross-media limits that it chose (FCC No. 03-127). The court critically reviewed the FCC's use of the Diversity Index which attempts to measure viewpoint diversity,

and remanded it because the DI employed several “irrational assumptions and inconsistencies” (Dissent by Chief Judge Scirica).

Fin/Syn Rules: Source and Program/Viewpoint Diversity

The FCC’s ownership regulation to ensure content diversity is concerned with not only the ownership of outlet (i.e., outlet diversity), explained above, but also the ownership of program producers (i.e., source diversity). By increasing independent program suppliers, the FCC hoped to further program and viewpoint diversity, which created the metric of diversity by measuring the number of different producers of network programs (see Report and Order, 2003). The FCC indirectly controlled programming through Financial Interest and Syndication rules (fin/syn) in order to limit the vertical integration between program producers and broadcast television networks. The fin/sin rules were originally adopted in 1970 to restrict the three established networks (ABC, CBS, and NBC) from owning monetary rights in syndicated programs while encouraging the bargaining power and profitability of independent program suppliers (see Review of the Syndication and Financial Interest Rules, 1995; McAllister, n.d.; Rosencrans, 1990). The public interest rationale for the fin-syn rules is to limit the networks’ control over television programming and thereby encourage the development of a diversity program through diverse and antagonistic sources of program services (Review of the Syndication and Financial Interest Rules, 1995). Unfortunately, neither of these goals has been achieved: “The new rules appear to harm rather than to help outside producers as a whole by reducing their bargaining opinion” (United States Court of Appeals, Seventh Circuit, 1992, 1051).

Notably, the rules have received substantial criticism. Along with changes in the media market, the networks, restricted from the syndication market, seemed unable to compete with the cable and video companies in terms of the price offered. The independent producers who were

supposedly to be privileged and thus expected to produce diverse programming have tended to purchase inexpensive products from domestic syndicators rather than producing innovative television content. As a result, in 1983, the FCC proposed eliminating much of the fin/syn rules fueled by a deregulation climate. In 1991, after receiving extensive comment and conducting a hearing, the FCC relaxed certain aspects of the fin/syn, yet retained the revised fin/ syn rules. On appeal, however, the 1991 decision was overturned by the United States Court of Appeals for the Seventh Circuit, due to the failure of proving the nexus between the modified rules and diversity goals (Review of the Syndication and Financial Interest Rules, 1995). In *Schurz Communications, Inc v, FCC* (1992), Judge Posner struck down the revised fin/syn rules, criticizing the FCC's logic of the public interest built on a vague economic theory. In his opinion, he wrote:

economists do not agree on the relation between monopoly or *competition*, [italics added] on the one hand, and the *quality or variety of an industry's output*, [italics added] on the other, so that it is difficult to obtain a theoretical perspective from which to evaluate the Commission's claims about that relation..(982 F. 2d 1048)

It is apparent that Posner rejected the FCC's longstanding economic antitrust foreclosures, which were applied for enhancing diversity.

EEO Rules: Workforce Diversity and Viewpoint Diversity

The FCC's continual effort to create diverse viewpoints or programming though ownership control has extended to the ownership of the workforce within the distribution system. The Equal Employment of Opportunity rules (EEO) are an obvious example linked to minority and women ownership diversity. The EEO rules have been maintained for broadcasters since 1969 and for cable TV since 1972. The rules were designed to ensure that minority groups (racial, ethnicity & gender based) have a fair chance of being employed in electronic media services to foster diversity in programming. Yet, in *Lutheran Church-Missouri Synod v. FCC*

(1998) the D.C. Circuit court criticized the FCC's logic of formulating the race-based rules, and rejected the FCC's ruling against the church:

The Commission has unequivocally stated that its EEO regulations rest solely on its desire to foster *diverse programming content* [italics added]...The Commission *never defines exactly what it means by diverse programming* [italics added]...The government's formulation of the interest seems too abstract to be meaningful. The more appropriate articulation would seem the more particular: the fostering of programming that reflects minority viewpoints or appeals to minority tastes. (D.C. Cir.1998, 141 F.3d 344, 349)

Certainly the FCC failed to clarify what constitutes diversity of programming (perhaps cultural variety or viewpoints of minorities?). Due to the deficiency of a precise definition of diversity of programming, providing evidence to establish the connection between workforce diversity and content diversity seems an impractical effort. As a result, the FCC's justification of the rules was invalidated. The FCC revised EEO rules in 2000, which failed again. By setting its goal as to enhance viewpoint diversity, defined in Report and Order, 2003, the third attempt to revise the rule was made in 2003 that imposed three outreach requirements: 1) Widely disseminating notice of all full-time job vacancies, 2) providing vacancy information to employment recruitment organization, and 3) conducting two to four long term recruitment initiatives.

Outcomes: Court Decisions and First Amendment Values

Scarcity Rationale and Social Impact of Media: The Broadcast Model

The legal question, raised by the court challenges involves the validity of the primary justification for media regulations, which lends itself to different applications of First Amendment values to the diversity policy. It addresses the significant challenges in regulatory justification for achieving diversity goals. The scarcity rationale is the primarily legal justification for broadcast regulations, allowing government intervention to promote the First Amendment values for *the public* (see Krattenmarker & Powe, 1999; Spitzer 1989). The court imposed a legal presumption of distinctive treatments for different communications media for

First Amendment purposes (476 U.S. 496), drawing upon “the social impact of the media content.” Democracy (i.e., diversity) is, thus, achieved through an adoption of the legal framework based on the normative principle that demands diverse programming or “*socially desirable content*,” equally applicable to all “*citizens*.”

However, the constitutional significance of the scarcity rationale was widely attacked during the convergence era that legitimized deregulation policy. The blurring media services, due to technological innovation and digitalization, goes beyond the ability of the broadcast model that is confined to single media legislation. In this way, it seems impossible for the Supreme Court to apply a distinctive legal framework to First Amendment issues, evidenced when the Supreme Court expressed doubts about continued reliance on scarcity, and the minimal control of government over broadcast programming in *Turner Broadcasting System, Inc v. FCC* (1994). Consequently, the diversity goals envisioning social values and deliberative democracy, enforced within broadcasting, have been greatly undermined.

Failure of the Marketplace of Ideas: The Presumed Link between Completion and Diversity

While the changing media landscape eliminated much of the scarcity in broadcast regulations, the marketplace of ideas has been a primary justification for ownership decisions, and still remains one of the most prominent guiding metaphors in the laws and policies that govern communications (see Napoli, 2001). Nevertheless, as examined in the previous section, the courts threw the validity of the marketplace of ideas into doubt, calling into question a mere economic authorship over media structure with little regard to its connection to viewpoint diversity that involves First Amendment (e.g., *Schurz*, *Lutheran Church*, *Time Warner*, and *Prometheus* cases). The courts, with an undercurrent of the demand for substantial proof to justify ownership rules, discredited the marketplace of ideas as the FCC’s reliance on economic

antitrust law governing the marketplace of ideas failed to empirically establish the value of content diversity, particularly viewpoint diversity (see Ho & Quinn, 2008; Candeub, 2008). The question raised about the continued validity of the regulatory justifications, including the scarcity rationale and the marketplace of ideas, addresses the critical demands for reframing the existing policy framework for an adequate implementation of the policy.

Assessment of Policy: Reviews and Regulatory Challenges

Section 202 (h) of the Telecommunication Act of 1996 allows the Commission to periodically review its ownership rules (except the national television ownership limit) and determine whether any of such rules are necessary in the public interest as the result of competition (Report and Order and Order on Reconsideration, 2008). The reviews of 1998, 2002 Biennial and 2006 Quadrennial indicate that the FCC's general policy goal is aimed at deregulation responding to a new media landscape. However, such policy direction faces the challenges in defining consistent and precise regulatory concepts in terms of competition, localism, and diversity. Growing judicial skepticism about viewpoint diversity in part points out the limitation of the entire range of existing economic regulations to further the democratic values of content diversity. However, the FCC insists the presumption that diversity of ownership is an essential proxy for content diversity without substantial empirical backing. Thus, the FCC would continually confront difficulty in making its regulation constitutional in the future unless it develops a meaningful matrix of media diversity, connecting to democracy.

Deregulation Policy and Value of Monopoly

The FCC's decisions within the 2002 Biennial and 2006 Quadrennial Review Orders reflect their profound consideration of diversity at the local level (i.e., localism) and the increased provision of the benefits of common ownership. In 2002 Biennial Review and Order,

the Commission significantly relaxed the cross ownership limits with an adoption of the cross-media limits, derived from the Diversity Index (DI). In completing the 2006 Quadrennial Regulatory Review, the FCC further relaxed the 32- year old ban on newspaper/broadcast ownership rules within the television market (Report and Order, 2008). The rules ban not only certain newspaper/broadcast cross ownership combinations in the top 20 markets, but generally will apply to all other markets (see Report and Order, 2008).

The ownership decisions, contained in 2002 and 2006 Orders are based on the FCC's belief that the cross ownership actually produces localism rather than harms competition; the newspaper-owned television stations tend to produce local news and public affairs programming (Report and Order, 2008, para. 15). The FCC's consideration of the benefits of common ownership is also based on the assumption that the technological advancements support the operation of mainstream media companies' delivering news and information to their local communicates (see Report & Order, 2003 & 2008). The growing number of media outlets for news and information, and entertainment today provides more choices via nontraditional modes of media, such as cable, satellite television, digital transmission, and the Internet (Report and Order, 2003 & 2008). As most media markets are diverse, the cross ownership relaxation wouldn't harm localism.

The FCC's significant liberalization of the media ownership was not a simple modification of the rules, but rather a significant change in media structure, which allows substantial concentration in both the national and local television markets. The ownership decisions encompass the benefits of a free market, provisioned by values of monopoly in creating multiple media outlets or voices for consumers. In fact, the significant teleological advancements have fully developed economic sectors around electronic media and

telecommunications since the 1970s, leading to vertical integration of the previously separated communication industry, known as convergence (see Aufderheide, 1999; Albarran & Mierzejewska, 2004; McQuail & Siune, 1998; Vick, 2006). With increased provisions of economic viability of communication services, the value of monopoly has been reconsidered. As Aufderheid (1999) argued, the market liberalists and economists advanced the benefit of monopoly and contrived competition among corporate media, necessary for increasing national compatibility within globalized market.

Nevertheless, the commonly expressed concern raised by critics revolves around a gradual decline of the public accountability of media. It argues that many media channels do not necessarily guarantee democratic performance of media if these channels produce the same or similar content and suppress the democratic process. The literature supports that today's highly competitive media system with increased news outlets hasn't yielded a sufficient amount of public issues and diverse news, indicating the failure of healthy democracy (see Entman, 2003). More outlets produced by new media do not offer new media content when "broadcast TV programs are recycled for cable channels, and newspaper and cable news content is repackaged for the internet, and so on" (Croteau, 2003, p. 2). Relevant research also indicated that media diversity has declined where scarcity has been more present after the passage of the Telecommunication act of 1996, in broadcasting and local media (e.g., Croteau, 2003; Einstein, 2004; Benton Foundation & Media Access Project, 1998, etc.). The decline of space for new programs and for public services was also true in spite of a multi channel environment (Aufderheide, 1999; Barnheart, 1996).

Defining Regulatory Concepts: Limitation of Economic Regulation for Democratic Values

The FCC's economic regulation for democratic values of diversity also illustrates the FCC's inability to precisely define regulatory concepts. In the 1998 Biennial Review, the cross ownership limits of cable and broadcasting was vacated by the D.C. Circuit due to the FCC's inability to define what constitutes a voice for diversity. As a corollary, the Commission used the Diversity Index (Report & Order, 2003) to measure viewpoint diversity at the local market. Localism was measured as programming addressing local needs and interests, and local news and quality, which overlaps the standard measurement of viewpoint diversity. Such an attempt, however, resulted in the rejection of the FCC's public interest rationale and a further remand on most of the rules from the Third Circuit Court of Appeals in its *Prometheus decision*, due to the fatal flaw of the Diversity Index.

The Diversity Index (DI) is an antitrust analysis, and was designed to measure viewpoint diversity by giving insight at consumers' reported preferences for their media sources of information and news (see *Prometheus*). It weighs the market share of various media outlets in local media markets for antitrust purposes. Yet, the DI does not directly measure, nor sufficiently measure viewpoint diversity. With its economic scheme, it measures the number of participants rather than to coherently measure viewpoint diversity (see Candeub, 2008; Hill, 2006). The court found that DI is not clearly linked to viewpoint diversity, citing in its remands that the Commission irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the cross-media limits from its DI results (*Prometheus*).

On the issue remanded by the Third Court in *Prometheus*, the FCC commissioned the empirical research, namely the Media Ownership Study that informed the 2006 Quadrennial Review of the ownership policies. Yet, the broad and inconsistent definitions of local and localism renders contradictory results from the research, making its application questionable.

The FCC broadly defines localism as the level of responsiveness of a station to the needs of its local communities. The definition of local is based on a Designated Market Area (DMA) as determined by Nielsen Media Research; that has boundaries of geographically distinctive television viewing areas (see Alexander & Brown, 2004). Establishing the necessary condition (i.e., viewpoints or stories taking place within the DMA), and sufficient condition (the story itself), the analysis of localism was measured at whether the story has “great importance” to average “local people” (see Alexander & Brown, 2004). However, local, is defined by some research of the Media Ownership study of 2006 and is not precisely delineated from DMA (e.g., Milyo, 2007). Furthermore, a broad definition of localism resulted in inconsistency in defining the local news, in which some research (e.g., Milyo, 2007) included sports and weather in the component of local news while the previous study (e.g., Alexander & Brown, 2004) excluded them. And, only a few studies respond to the intention of the court’s demand for precisely defining viewpoint diversity; for instance, Milyo’s (2007) study is the only one directly performing content analysis that directly measures local content and the political slant of local television news among the others of the Media Ownership Study.

The use of the DI to measure viewpoint diversity and inconsistency of measuring localism indicates the FCC’s inability or unwillingness to define viewpoint diversity, simply equating outlet diversity to viewpoint diversity. It also explains the FCC’s assumption that viewpoint diversity could be empirically established by a justification for economic based regulations. Yet, the current Supreme Court and Court of Appeals seem to view such economic regulations as unrelated to the First Amendment value of diversity. The Problem is that viewpoint diversity is difficult to measure as it involves political or democratic values, and such values are not effectively quantified by the existing economic analysis. Baker (2009) notes that

the viewpoint measurement relies on what is easy to measure rather than what is important, and such quantification of viewpoint diversity often lacks qualitative development of either information or argument. Similarly, Entman and Wildman (1992) argue that economic analysis fails to address what can't be quantified. Social benefits of media imparting a better-informed citizenry, or democratic values of media diversity do not seem to render economic analysis. The Scholarly criticisms about viewpoint diversity discussed above indicate an inconclusiveness of a range of existing definition and measurement of viewpoint diversity. More precisely, the conceptual and methodological issues of viewpoint diversity center on the limitation of the economic regulation for democratic values of content diversity.

Revision

Policy Objectives: Government Responsiveness to the Major Problem

The policy analysis in the previous sections indicates insufficient government responsiveness to the major problem with the unpredictable impact of a new media landscape on the marketplace. Instead of balancing the potentially negative effect of ownership concentration on diversity against the economic viability of struggling media outlets, the policy tends to leave out the democratic value of diversity, insofar as the assessment of diversity has relied on the economic impact of the marketplace. In opposition to the democratic purpose of antitrust law, its economic analysis has provided justification for significant relaxation of ownership. Although the First Amendment principles for unprecedented media convergence inherently value the liberalization of ownership undermining the traditional regulatory rationale, it is important to recognize the courts' shifting concern from the structure of the communication market to the content of communication, and government is responsible *to* that content contributing to democracy (see Krattenmaker and Powe, 1995). With this regard, two possible responses the

FCC could make to the given regulatory challenges are: 1) developing a more sophisticated and rigorous measure of viewpoint diversity, aimed at democratic values, and 2) diversity of ownership as a separate political goal from viewpoint diversity.

Metrics of Viewpoint Diversity: Input of Communication Research into the Policy

The regulatory challenges address the need for empirical evidence about viewpoint diversity, yet existing quantifiable measures lack in accounting variables that influence outcomes of viewpoint diversity. More critically, a substantial effort to increase analytical resources has been degraded in spite of increasingly evidence-driven policymaking demanded by current law (see Napoli, 2008). The perceived gap between the FCC's rationale for economic regulations and judicial interpretation of First Amendment values of diversity addresses the need for a collaborate effort of policymakers, legal and communication scholars in answering the constitutional questions and capitalizing the norms for an empirical assessment of diversity. Indeed, the input of communication research into the policymaking is valuable in responding to the courts' increased requirement for convincing empirical justification for viewpoint diversity- the potential metrics of viewpoint diversity developed within the communication field will be discussed below. A number of scholars provide the value of communication research serving as a resource for policymaking. Napoli (1999), for example, suggested a potential contribution of communication research to policymaking, emphasizing the relevance of content analysis and audience research to diversity inquires. Braman (2003) also addressed the value of communication research that provides informational inputs to policy decisions. Briefly, communication research with its social scientific approach can improve the existing empirical evidence for viewpoint diversity by statistically quantifying democratic/social values of viewpoint diversity, thereby complementing the limitation of the economic analysis.

In order to develop a more sophisticated and meaningful metrics of viewpoint diversity, it should entail the complementary functions of 1) deliberative democracy that ensures substantive ideas and information for cultivating informed citizenry, and 2) participatory democracy that encourages citizens' engagement in the democratic process. The norms for assessing viewpoint diversity, thus encompass the inquiry into how media democratic system affects informed citizenry, and in turn how citizens' wide spread habit of media use affects their democratic decisions. Such metrics of viewpoint should be drawn from a collective understanding of normative and empirical inferences developed and contextualized within and across, economic, and social disciplines that propose reasons for value-laden inquires as well as statistical analysis respectively.

Normative and Empirical Inferences: Not All Social Values Infer the Normative

Unlike the critical social approach that challenges the uncritical acceptance of empirical findings and proposes an unquantifiable nature of social values with its normative approach (see Craig's seven traditions of communication theories, 1999), social scientists have empirically or statistically measured "social values" with its positive approach. Inversely, statistical analysis quantified by the market economics is not necessarily drawn from positive inferences, as its conceptual root is grounded in Marxist's critical perspective that proposes normative social justice based on class analysis. The economic analysis is ineffective for measuring viewpoint diversity, not because of its quantification, but because of its assumption of equating pluralistic ownership to quality dimension of diversity (e.g., more "numbers" of outlets and program choices would fulfill democratic values of content diversity). Moreover, contemporary economists have imposed a critical role of government to attain the desired democratic needs, which is opposed to the classical market approach (see Van Cuilenburg, 1999; Van Cuilenburg,

& McQuail, 2003). Understanding such complexity of theoretical and methodological propositions in terms of democracy, developed within and across the social and economic field, is critical to avoid theoretical schism and ideological conflict that often hinders developing a comprehensive and schematic assessment of diversity. In other words, two democratic values of diversity, such as deliberative and participatory democracy, should be explained from the interdisciplinary interplay between normative and empirical inquiries developed across a variety of disciplines.

Deliberative Democracy: Political Diversity Reflected in Media Content

The FCC's definition of viewpoint diversity and various approaches to it have involved these two democratic values stated above. Traditionally, as reflected in *Red Lion*, and enforced through the fairness doctrine, viewpoint diversity would measure "political endorsement." Later, as stated by Hundit (1992), the measure of viewpoint diversity involves "editorial perspective" or editorial content. Most recently, the FCC in the 2003 Report and Order states that viewpoint diversity is most easily measured through "news and public affairs programming," concerning political ideas and information that inform citizens. These tell that the norms of viewpoint diversity underline deliberative democratic values represented in media content, which affects the robustness of democratic participation of citizens by increasing political knowledge or ideological viewpoints. Under this direction, many researchers have developed variables relevant to political endorsement, and editorial perspectives and positions in news and public affairs programming in measuring viewpoint diversity (e.g., Miller, Goldenberg, & Erbring, 1979; Entman, 1989; Halavias, 2007; Ho & Quinn, 2008, etc.). The variables that involve such deliberative democratic values of viewpoint diversity are:

- Newspaper or broadcast content based on political endorsements
- Counts of time and space allotted to political candidates in broadcast.

- Political content (liberal vs. conservative positions) of news articles offered by newspaper editors and broadcasters
- Word frequencies in editorials and news article

These variables would be empirically analyzed particularly within social science, such as public opinion research and journalism. Viewpoint diversity reflecting deliberative democracy is critical to cultivate well informed citizenry, thus their participation in democracy is accountable. The scholarly criticism questioning the reliability of viewpoint diversity stems from the deficiency of critical social values of deliberative democracy in its measurement, which is closely linked the methodological flaw of the Diversity Index that measured the number of participants in a market (number of media outlet) rather than substantive viewpoints. Although statistic analysis of media content inherently reduces its in-depth analysis of quality dimension in general, continual efforts in capitalizing and advancing norms for deliberative democratic values of viewpoint diversity in statistics is critical to empirically assessing the social benefits of media content.

Participatory Democratic Values: Survey of Citizens and Use of Media

Viewpoint diversity extends its definition to participatory democracy that accentuates the citizens' participation in their democratic public life. Technological advances have greatly increased citizens' active participation in public issues and democratic decisions through an interactive medium, namely the Internet. The emphasis of participatory democratic values of viewpoint diversity inherently involves audience research, such as surveying citizens or ethnographic inquiries into citizen's information processing through various mediums. The norms for viewpoint diversity in this approach involve access for civic engagement in democratic decision via news and information served by various media outlets (see Braman; 2007, Horwitz, 2005; Waldfogel, 2007). The citizens' right to receive a diverse range of ideas

through guaranteed access has been understood as a more encompassing notion of the freedom of communication system and is a central principle of diversity (see Bagdikian, 1989).

It is, however, important to note that the market approach to participatory democracy has measured viewpoint diversity based on media reflection of public demands with little regard to how their demands fulfill democratic ideals. However, the public demands are not necessarily equivalent to the public needs in their democratic decisions. Emphasized earlier, the literature supports that audiences' demands are popular rather than intellectually diverse. Thus, measuring political dimension of viewpoint diversity in participatory democracy should entail the inquiry into whether citizens' response to, or use of media information (i.e. citizens' participation) through various mediums (i.e., access offered by media outlets) affects their public or democratic decisions. Considerable research in the communication field has addressed this diversity inquiry (e.g., Braman; 2007; Dalton, Beck, & Huckfeldt, 1998; Gunther, 1992; Entman & Wildman, 1989; Horwitz, 2005; Napoli, 2007; Waldfogel, 2007, etc.). The variables that potentially measure such participatory democratic function are:

- Citizen's public competence, or knowledge that affect civic engagement in political issue and public decision
- Citizens' education level that affects information processing in terms of political issue
- Cultural or demographic aspect, including racial, gender, and age background that affect their participation in political issue
- And how these variables affect their particular use of mediums and its relevance to democratic decisions

These variables would be empirically measured within the communication field, such as public opinion research, applied research, communication policy, etc.

Diversity of Ownership as a Separate Goal from Viewpoint Diversity

Developing objective and meaningful metrics of viewpoint diversity is necessary and should be a primary goal in academic research since such an effort has its own intellectual rigor.

But, particularly, in times of increased judicial skepticism about viewpoint diversity and empirical justifications for regulations, the FCC inevitably faces methodological challenges. Even if more rigorous and advanced methodologies of viewpoint are developed within and across various disciplines, ongoing debate on its conceptual elusiveness and subjectivity is more likely to exist as a result of the contradictory effects of the economic antitrust law on diversity. Dealing in a practical manner, there seems no greater chance that the FCC would satisfy the court's critical demand for objective and scientific proof for establishing the connection between ownership diversity and viewpoint diversity, thereby continually hindering the government responsiveness to media's democratic performance. If this is the case, an alternative way of countering such struggle in regulations is setting diversity of ownership as a separate goal from viewpoint diversity. In other words, the FCC could change its longstanding presumption that antagonistic outlets as proxy for viewpoint diversity, simply making diversity of ownership as a political goal in a First Amendment principle. This consideration was reflected in the 2002 Biennial Review, stated as "the question is whether ownership diversity by itself is a political goal" (Review and Order, 2003). Enforcement of antitrust law, in this way, is not preserving democratic values of content diversity, but ownership diversity itself in First Amendment values.

The proposition of decentralizing ownership is not a new concern. Grounded in normative concern, numerous media scholars have addressed the danger of ownership concentration. For example, McChesney (1997 & 1999) proposes reform of media structure to affirm the democratic function of media. He argues that concentrated corporate control is detrimental to any notion of participatory democracy, yet the First Amendment has provided an exclusive shield for corporate media. Croteau (2003 & 2006) addresses the potential danger of corporate media power that undermined democracies deemed in the public interest, thus the

relaxation of ownership would reduce diversity in terms of both quantity and quality. Baker (2009) also provides reasons for decentralized ownership regardless of the contradictory effect of antitrust law on viewpoint diversity. The commonly expressed reasons for diversity of ownership itself as a policy goal, addressed by these scholars are:

Concentration of ownership,

- would reduce quality diversity, journalism, cultural pluralism in commercial media content.
- would hinder informed public participation or distribution of citizens' voices with the democratic public sphere.
- would undermine democratic value of egalitarian premise in sharing political power.
- would lead to demagogic political power, failing to serve watchdog function.

These assumptions illustrate that concentration of media ownership is itself a threat to democracy. Implementing diversity of ownership as a separate political goal from viewpoint diversity would avoid burdensome scrutiny as a result of its content neutral restriction. This approach, while encouraging government responsiveness to media democracy, may also be less competing against the courts' interpretation of the First Amendment values than approving its connection to viewpoint diversity, thus more easily justifies regulation.

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