MEDIA POLICY OUT OF THE BOX:
CONTENT ABUNDANCE, ATTENTION SCARCITY,
AND THE FAILURES OF DIGITAL MARKETS

Ellen P. Goodman*
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ABSTRACT

Media policy debates are today marred by outdated and ultimately unworkable justifications for government intervention in media markets. Both proponents and opponents of such intervention have obscured the appropriate goals of media policy. Moreover, they have paid insufficient attention to the impact of digital media on the marketplace of ideas. This article proposes a new account of media policy goals and offers the first detailed analysis of how new media market dynamics should affect future media policies.

Policies that promote greater diversity in video products, whether through regulations or subsidies, serve both reactive and proactive purposes. In its reactive posture, media policy aims to correct what I call narrow market failures. These are failures of media markets to deliver content that small audience segments desire. But media policy must also pursue a proactive agenda by supplementing even well-functioning markets. This proactive thrust responds to broad failures of the market to deliver media content that audiences might not currently desire, but promotes democratic discourse and social solidarity.

What this article shows is that digital networks substantially affect both reactive and proactive media policy objectives. Existing media policies are premised on the mid-twentieth century reality of scarce content and abundant audience attention. But in the digital era, it is attention that is scarce and content that is abundant. Drawing on empirical evidence and theory from several disciplines, I show how this shift changes the narrow market failures to which media policy must respond and undermines past responses to broad market failures. This article concludes with an application of these theories to media subsidies, arguing that subsidies for a robust public service media are the proper channel for media policy in the digital era from both a First Amendment and practical perspective.

* Associate Professor, Rutgers University School of Law – Camden; Of Counsel, Covington & Burling. J.D., Harvard University, 1992, A.B., Harvard University, 1988.
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I. Introduction .................................................................1

II. Media Policy, Civic Life, and Consumer Sovereignty........5
   A. Media Policy Components ...........................................6
   B. Reactive Policy Thrust: Serving the Consumer ..........11
   C. Proactive Policy Thrust: Altering the Consumer ....17
      1. Common Exposure ...........................................17
      2. Public Elevation ...........................................25
   D. Narrow and Broad Market Failures ......................28

III. Media Policy, Markets, and New Technologies ...............32
   A. New Media Dynamics .........................................32
   B. Narrow Market Failures and Market Corrections ....35
      1. Audience Voice ...........................................36
      2. Programming Gambles ..................................45
      3. Industry Structure ......................................58
      4. Conclusion ...............................................69
   C. Broad Market Failures and Market Supplementation ....70
      1. Availability Mechanism in the Analog Mediascape ....70
      2. Availability Mechanism in the Digital Mediascape ....72

IV. Out of the Box Public Service Media ................................75
   A. Subsidy Policy and The First Amendment ..............76
   B. Possibilities for Reform ..................................80
   C. Real World Beginnings ...................................83

V. Conclusion ................................................................87

I. Introduction

Federal media policy is in a state of flux. In 2003, the Federal
Communications Commission (FCC) relaxed its limits on media
concentration in a controversial ruling that both Congress and the
courts later criticized.¹ Now, the FCC will re-evaluate these rules

* Associate Professor, Rutgers University School of Law – Camden; Of Counsel,
Covington & Burling. J.D., Harvard University, 1992, A.B., Harvard University,
² 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast
Ownership Rules and Other Rules Adopted Pursuant to Section 202, Report and
Order and Notice of Proposed Rulemaking. 18 F.C.C.R. 13620, 13634 (2003),
remanded in part sub nom. Prometheus Radio Project, et al. v. FCC, 373 F.3d 372
(3rd Cir. 2004) [hereinafter Media Ownership Order]. Both during and after the
FCC deliberations, there emerged surprisingly fierce and widespread opposition to
amidst heated debates about broadcast “indecency,” public television funding, and public interest obligations for digital television. As these policy disputes unfold, the media landscape is changing dramatically, most notably because of digital networks. And yet, analysis of how emerging patterns of media use affect policy has been relatively scant. Moreover, neither policymakers nor commentators have effectively articulated media policy goals beyond a narrow allegiance to consumer sovereignty.

This Article offers a new analytic framework for evaluating media policies in the digital era. It starts from the following premise: the purpose of government intervention in video markets has as much to do with influencing the consumption of media products as with responding to existing consumer demands that the market has failed to satisfy. In this sense, media policy must be, and to some extent has long been, proactive as well as reactive. An emphasis on the reactive


5 This article deals with the subset of media policy comprised of federal intervention in the market for video distributed to the public by cable, broadcast, satellite, and Internet broadband networks.
media policy goal – the perfection of consumer sovereignty – has dominated the discourse since media deregulation gathered speed in the 1980’s. Indeed the most powerful critique of media regulatory policy today is that media markets are competitive enough to ensure that consumers are well served.\(^6\) To date, commentators have failed to answer such critiques effectively in light of technological change,\(^7\) and policymakers have largely proceeded on the assumption that these critiques are correct.

By articulating the proactive justification for media policy, this article offers a new prescription for public policy in this area. On the conceptual level, media policy should support the kind of marketplace of ideas that democracies need, doing more than just promoting the satisfaction of existing tastes. It must strive to cultivate those tastes in ways that build social solidarity and democratic debate. There was little need to distinguish the proactive from the reactive in media policy theory so long as conditions of mid-twentieth century media markets obtained. These were conditions in which video content was scarce and audience attention was abundant. A public hungry for content and captive to the schedules of three major broadcast networks was likely to be exposed in significant numbers to all content on offer, even programming that it did not initially demand.

In the changing technological environment, with digital networks remaking the mediascape, the scarce resource is attention, not programming. Content abundance is replacing scarcity and attention scarcity is replacing audience captivity to network schedules. Today, consumers sit in the eye of a storm of bits surging through cable and satellite channels, DVDs, video games and websites.\(^8\) Moreover, program guides and search engines allow them


\(^{7}\) See, e.g., C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002); CASS SUNSTEIN, REPUBLIC.COM (2001).

\(^{8}\) Digital plenty has a holographic character, allowing critics to see media products as either tremendously diverse or monotonously similar. The perception of diversity focuses on the sheer number of outlets. For example, most Americans have access to more than 100 television channels, dozens of radio stations, and thousands of Internet radio stations and news venues. Media Ownership Order, supra note xx at 13620, 13634 (2003); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report, 19 F.C.C.R. 1606, 1608 (2004) [hereinafter Video Competition Report]; Testimony of Michael Powell, FCC Chairman, before the Comm. on Commerce,
to construct their own media environment into which the unsought media experience seldom strays. The supply of programming for which there is no ready demand, but anticipated public value, is unlikely to reach viewers who are otherwise committed.

The growing abundance of media content, contrary to the claims of deregulators, is not a basis for the dismantling of media policy. Rather, new media dynamics require new policy approaches. First, policymakers must resist the facile conclusion that media abundance guarantees consumer satisfaction. Rather, notwithstanding the explosion of media distribution channels, there will remain demand that media producers fail to satisfy because of the economic and cultural characteristics of media. Second, technological change requires an emphasis on media subsidies as opposed to regulations, as an instrument of proactive media policy. Subsidies can achieve what regulations cannot: they can influence consumer appetites constitutionally, without relying on the shaky First Amendment exceptionalism that underlies much broadcast regulation.9

In conceptualizing a new vision for media policy, this Article progresses as follows. Part II distills what I have identified as reactive and proactive media policy goals, showing how they grow out of various democratic theories, how they have been implemented to varying degrees in policy, and how they relate to varieties of market failure.

9 Regulations of broadcasting that would be unconstitutional if applied to print or new electronic media like cable and the Internet, have passed muster on the grounds that the airwaves are unusually scarce and the government’s interest in controlling them unusually great. See Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); NBC v. United States, 319 U.S. 190 (1943). Multiplying channels of communication undermine this First Amendment exceptionalism. See infra notes xx and accompanying text. I have argued elsewhere that tightening First Amendment constraints on media policy necessitate the more creative use of subsidies, as opposed to regulations, to effectuate policy goals. See Ellen P. Goodman, Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media, 1 J. TELECOM. & HI  TEC H. LAW 217, 224-28, 231-38 (2002).
Part III shows how digital media affect the pursuit of these media policy agendas. By analyzing the relationship between distinct policy goals and consumer choice in both the ebbing analog mediascape and the emerging digital one, I demonstrate how digital media may improve the functioning of media markets, but will not correct all failures of the market to satisfy consumer demand. More importantly, digital media will reduce the likelihood of consumer exposure to unsought, but ultimately valuable, media experiences.

Given the consumer impact of new media dynamics, Part IV argues that simply putting content into the mass media flow is unlikely to attract viewers to content they did not seek, but media policy urges upon them. At the same time, First Amendment constraints limit the creative possibilities of media regulation. Pursuit of proactive media policy goals requires a new emphasis on media subsidies, and a new brand of public service media that engages a distracted and fractured audience in content that is important for democratic flourishing. Media subsidies must literally emerge from the broadcast box to be effective in the digital mediascape, taking advantage of new communicative tools, techniques, and real space encounters to bring the public to programming. Recent “out of the box” public broadcasting initiatives, although limited by existing legal authority and funding, illustrate the possibilities for using multiple distribution platforms and techniques of public engagement to develop demand for and exposure to under-produced content.

II. Media Policy, Civic Life, and Consumer Sovereignty

Media policy assumes a special bond between media outputs and the character and vibrancy of democracy – a connection that does not exist for other consumer products. The existence of this bond charges media policy discussions and fuses them to a larger discourse about democratic culture. At the same time, video products are consumer goods, chosen or rejected through marketplace mechanics. Obscured in both media policy and the underlying theory is the appropriate relationship between policy goals and the market.

The most vigorously defended, and widely embraced, posture of media policy is reactive. In this stance, policy submits to the yoke of consumer sovereignty and strives to make media markets more

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10 See Cheryl Leanza and Harold Feld, *More than “A Toaster with Pictures”: Defending Media Ownership Limits*, 21 COMMUNICATIONS LAWYER 12 (2003). Despite its ambitions, American media policy is today a rather modest enterprise. Indeed, there is very little to it outside of structural regulations, consumer protection rules, subsidies in the broadcast area, and some limited access requirements for cable and satellite.
responsive to consumer demand. Another posture, sometimes evident in policy, but required by theory, is proactive or aspirational. The proactive approach to media policy accepts, as Cass Sunstein has put it, that there “is a large difference between the public interest and what interests the public.”¹¹ Between the reactive and aspirational approaches is the tension between satisfying and shaping media experiences – a tension that digital media exacerbate. This section briefly outlines today’s major media policy goals: diversity and localism in commercial media, and diversity, localism and the elusive property of excellence in noncommercial media.¹² It goes on to show how the policies themselves and their theoretical justifications depend on, but sell short, aspirations to shape media experiences through policy.

A. Media Policy Components

The Supreme Court has identified speech diversity as a “basic tenet of national communications policy” because “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”¹³ Diversity policy is


embedded in twentieth century First Amendment jurisprudence.\textsuperscript{14} It reflects the instrumentalist free speech tradition that values unfettered expression for society’s sake, not for the speaker’s sake.\textsuperscript{15} Expression, in antagonistic engagement, is expected to produce a healthy democratic culture of “uninhibited, robust, and wide-open debate.”\textsuperscript{16} This debate, in turn is important for uncovering truths important for both public and private life.\textsuperscript{17} Taking its instructions
from this instrumentalist free speech tradition, the FCC, operating almost entirely within the broadcast arena, has tried to foster debate by increasing the number of viewpoints, program genres, program sources, and owners of distribution outlets within a market. After experimenting with approaches aimed at each kind of diversity, the agency has settled on increasing the number of independently owned broadcast distribution outlets as the principal tool of diversity policy.

Ostensibly distinct from, but closely related to diversity policy, is broadcast localism policy. This policy seeks to improve broadcaster responsiveness to the needs and interests of the local community, especially by strengthening the local voice in media. With localism as with diversity, ownership rules now bear the weight of policy goals once encoded in more varied regulations. By cultural diversity). Courts have taken the same expansive approach. See, e.g., Finley v. Nat’l Endowment for the Arts, 795 F. Supp. 1457, 1473 (C.D. Cal. 1992), aff’d, 100 F.3d 671 (9th Cir. 1996), rev’d, 524 U.S. 569 (1998) (“Artistic expression, no less than academic speech or journalism … is at the core of a democratic society’s cultural and political vitality.”).

18 Media Ownership Order, supra note xx at 13627 (identifying viewpoint, outlet, program, source, and minority and female ownership diversity metrics). For a comprehensive discussion of FCC rules emanating from its diversity policy, see 3 HARVEY L. ZUCKMAN, ET AL., MODERN COMMUNICATIONS LAW § 14.4 (1999).

19 See, e.g., Media Ownership Order, supra note xx at 13633-13634. Policymakers have long linked the ownership of media outlets with the viewpoint expressed in programming. Id. at 13629-30 (discussing evidence of, and continued adherence to policy based on, this linkage). See also Amendment of Sections 73.35, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 FCC 1476, 1477 (1964) (“[T]he 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.”). The Supreme Court has sanctioned this linkage. See, e.g., Metro Broadcasting, 497 U.S. 547, 571 n. 16 (1990) (“ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation…”).

20 For early endorsements of localism policy, see, e.g., FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 139 (1940) (denying broadcasting application because “applicant did not sufficiently represent local interests in the community.”); FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 362 (1955) (upholding FCC’s authority to distribute broadcast licenses “to a community in order to secure local competition for originating and broadcasting programs of local interest”). Congress reaffirmed localism as a media policy goal in the legislative history of the 1996 Telecommunications Act, H. Rep. No. 104-104 (1996) at 221 (localism “is a vitally important value, … [and] should be preserved and enhanced as we reform our laws for the next century.”).

21 Localism is, in principle, preserved through limitations on network ownership of local stations and restrictions on network contractual requirements of their affiliated
restricting ownership of local broadcast stations, the FCC hopes to bolster local control over media content as measured by an ill-defined brew of locally-produced content, content on matters of local interest, and local say over content.\footnote{22} Despite the ambiguity of the concept, the recent political and popular protest against the FCC’s relaxation of its broadcast ownership rules is a reminder that localism has broad appeal.\footnote{23} The courts continue to affirm localism as a media policy goal and the FCC and Congress continue to assert it in regulating existing and new media distribution services.\footnote{24}

\footnote{22}{Four times in the past several years, the courts have vacated or remanded challenged broadcast and cable ownership regulations on the grounds that they were not sufficiently well defended. Prometheus Radio Project, et al. v. FCC, 373 F.3d 372, 435 (3rd Cir. 2004); Fox Television Stations v. FCC, 280 F.3d 1027,1053 (D.C. Cir. 2002), \textit{modified on reh’g}, 293 F.3d 537 (D.C. Cir. 2003) (vacating rules prohibiting broadcast station and cable system ownership in same market and remanding national broadcast ownership cap); Sinclair Broadcast Group Inc. v. FCC, 284 F.3d 148, 162 (D.C. Cir. 2002) (invalidating limits on ownership of multiple television broadcast stations within a market); Time Warner v. FCC, 240 F.3d 1126, 1144 (D.C. Cir. 2001) (invalidating cable ownership caps and channel occupancy provisions).}

\footnote{23}{See \textit{Media Ownership Order}, \textit{supra} note xx at 13624 (describing public concerns over localism). In an effort to articulate the localism interest and measure “localism” performance among broadcasters, the FCC established a Localism Task Force to hold hearings across the country on the issue, Press Release, “FCC Chairman Powell Launches ‘Localism in Broadcasting’ Initiative,” at 2-3 (Aug. 20, 2003), at \url{http://www.fcc.gov/localism}, and issued a Notice of Inquiry concerning new localism rules. \textit{Broadcast Localism, Notice of Inquiry, MB Docket No. 04-233} (July 1, 2004).}

\footnote{24}{See \textit{Media Ownership Order}, \textit{supra} note xx at 13644 (“We remain firmly committed to the policy of promoting localism among broadcast outlets.”); Fox Television Stations, 280 F.3d at 1042 (“[T]he public interest has historically embraced … localism…”). The FCC adopted localism rules for its new low power radio service. Creation of Low Power Radio Service, 15 F.C.C.R. 2205 (1999); 47 C.F.R. § 73.853(b) (limiting initial eligibility for licensees to local entities); 47 C.F.R. § 73.872(b)(1), (3) (giving preference to license applicants that have had an established community presence for two years and those that pledge “to originate locally at least eight hours of programming per day” respectively). At the direction of Congress, the FCC adopted more substantive localism rules when it created a new low power television service. Establishment of a Class A Television Service, 15 F.C.C.R. 6355, 6363-64 (2000) (requiring new low power television stations to...}
The pursuit of speech diversity and localism extends beyond the regulation of commercial media to support for noncommercial media, by way of federal subsidies for public broadcast programming and transmission facilities.\(^{25}\) Public broadcasting was conceived in large part as a means to satisfy consumer appetites for diverse and local content that the market overlooked. The public broadcasting system was assembled in the 1960’s from scattered local stations, supported principally by state legislatures, universities, and foundation grants, which provided instructional and other educational programming.\(^{26}\) In 1965, the independent Carnegie Commission issued *A Program for Action*, in which it called for a new system of “public television.”\(^{27}\) This system would retain its local character, and its connections with local and regional institutions like universities.\(^{28}\) It would also be charged with an explicitly diversity-


\(^{28}\) The Carnegie Commission hoped for noncommercial programming that would “deepen a sense of community in local life… show us our community as it really is … bring into the home meetings … where people of the community express their
enhancing mission to develop and distribute distinctive national programming. Finally, as E.B. White captured in correspondence with the Carnegie Commission, noncommercial television would “address itself to the ideal of excellence” through programs that “arouse our dreams [and] satisfy our hunger for beauty,” delivered by a system capable of becoming “our Lyceum, our Chautauqua, . . . and our Camelot.”

The Public Broadcasting Act of 1967 closely followed the Carnegie Commission’s recommendations, incorporating not only localism and diversity aspirations, but also its insistence on excellence.

B. Reactive Policy Thrust: Serving the Consumer

Each of the policies discussed above is implemented through rules and subsidies aimed at enhancing the array of consumer media choices. These policies posit the existence of unsatisfied consumer demand for such media options, to which government then reacts. Indeed, democratic theories analogizing discourse to market exchanges support reactive policies that improve service to the sovereign consumer.

Both diversity and localism policy, and to a lesser extent noncommercial media policy, are dominated by the “marketplace of ideas” metaphor of speech competition. It is from this metaphor

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hopes, their protests, their enthusiasms, and their will.” CARNEGIE COMMISSION REPORT, supra note xx at 92-99.

29 CARNEGIE COMMISSION REPORT, supra note xx at 3 (finding that “a well-financed and well-directed educational television system, substantially larger and far more pervasive and effective than that which now exists in the United States, must be brought into being if the full needs of the American public are to be served.”).


31 47 U.S.C. §396(a) (2003) (to further the general welfare, noncommercial television should be “responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence…”).

32 See, e.g., Media Ownership Order, supra note _ at 13788 (“Ultimately, our goal is not to prescribe what content citizens access, but to ensure that a wide range of viewpoints have an opportunity to reach the public.”).

33 The term “marketplace of ideas” is usually attributed to Justice Holmes. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes J. dissenting) (“the best test of truth is the power of thought to get itself accepted in the competition of the market…”). The actual phrase was first used much later. See Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).
that the FCC’s efforts to diversify speech radiate.\textsuperscript{34} Embedded in the marketplace metaphor is an image of speech consumers and of speech. Listeners pursue truth much as they might pursue bargains, turning over a wide range of ideas in competition with each other.\textsuperscript{35} In this sense, the marketplace analogy is all about an open and competitive market that can supply consumers with the content they want.

Notwithstanding the criticism the marketplace metaphor has endured, policymakers seem largely untroubled by its use.\textsuperscript{36} More troubling has been the question of what kind of competition and quality of antagonism media policy should promote. Attempts to increase one form of diversity, like independently owned distribution outlets, might actually decrease diversity along other lines, like program genre.\textsuperscript{37} This is the position the media giant Clear Channel

\textsuperscript{34} See, e.g., Media Ownership Order, \textit{supra} note xx at 13627 (the pursuit of a diverse and robust marketplace of ideas is at “the foundation of our democracy.”); \textit{id.} at 13631 (the FCC’s “core policy objective of facilitating robust democratic discourse in the media” is premised on the notion that “the free flow of ideas undergirds and sustains our system of government.”). The FCC began to use the marketplace of ideas metaphor with regularity in 1967. \textit{See Philip M. Napoli, Foundations of Communications Policy: Principles and Process in the Regulation of Electronic Media} 109-121 (2001) (reporting results of empirical study).


\textsuperscript{36} For criticism of this metaphor, see Cass R. Sunstein, \textit{Democracy and the Problem of Free Speech} 25 28, 46-51 (1993) (applying traditional critiques of free markets to speech markets and proposing a New Deal for speech); Owen M. Fiss, \textit{Free Speech and Social Structure}, 71 Iowa L. Rev. 1405, 1408-1413 (1986) (criticizing the dominant free speech tradition which equates freedom from government intrusion with uninhibited and robust debate); Stanley Ingber, \textit{The Marketplace of Ideas: A Legitimizing Myth}, 1984 Duke L. J. 1, 48-50 (arguing that the marketplace metaphor perpetuates a myth of personal autonomy which supports the status quo and a system that simply fine-tunes differences among elites).

\textsuperscript{37} This is because efficient combinations of media outlets may create the conditions for genre diversity. See Benjamin J. Bates & Todd Chambers, \textit{The Economic Basis for Radio Deregulation}, 12 J. Media Econ. 19, 23 (1999); Bruce M. Owen & Steven S. Wildman, \textit{Video Economics} 65-68 (1992) (outlining Peter Steiner’s model of viewer preference in which competing media outlets duplicate programming to capture the largest audience in contrast to a monopolist which would differentiate media offerings); Christopher S. Yoo, \textit{Copyright and Democracy: A Cautionary Note}, 53 VAND. L. Rev. 1933, 1936-1951 (2000) (discussing Steiner’s and other economic modeling of the effects of concentrated distribution markets on program diversity); Jim Chen, \textit{The Last Picture Show}, 80 MINN. L. Rev. 1415, 1449 (1996) (“In an increasingly diverse landscape of leisure
takes, for example, when confronting criticism that its ownership of some 1200 radio stations has reduced variety in radio content. The efficiencies of concentrated ownership, the company claims, have allowed it to increase programming genres that the public demands.\textsuperscript{38} While some listeners might miss the idiosyncratic voice, most listeners are better satisfied.\textsuperscript{39} Wal-Mart can make the same claim as it out-competes small businesses that are diversely owned, but provide a narrower range of products. The important aspect of this debate for our purposes is that it turns on different dimensions of consumer satisfaction.

The same reactive thrust has dominated localism policy. Local stations are required, in an undefined and largely unenforced way, to satisfy consumer demand for difference.\textsuperscript{40} Indeed, in this respect, localism policy is really a subset of diversity policy. Policy interventions to ensure that local media outlets respond to community interests are simply another way of increasing the number of competing perspectives available to viewers – particularly those perspectives within distinct geographic markets that may be lost in the

\textsuperscript{38} For an account of this debate, see Gregory M. Prindle, \textit{No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism}, 14 \textit{Fordham Intell. Prop. Media \\ Ent. L. J.} 279, 313-321 (2003). The FCC itself has concluded that more concentrated outlet ownership might produce more genre diversity, \textit{Review of Commission Regulations Governing Television Broadcasting}, 10 F.C.C.R. 3524, 3551 (1995) (“where there are competing parties, each of their strategies would be to go after the median viewer with the ‘greatest common denominator’ programming...[whereas] where one party owned all the stations in a market, its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests.”).

\textsuperscript{39} The courts have criticized the FCC for failing to make explicit tradeoffs between different kinds of diversity. Schurz Communications v. FCC, 982 F.2d 1043, 1054-1055 (7th Cir. 1992) (remanding financial interest and syndication rules as arbitrary and capricious in part because the FCC did not explain how rules designed to increase source diversity would enhance program diversity); Sinclair Broad. Group v. FCC, 284 F.3d 148, 170 (D.C. Cir. 2002) (Sentelle, J., dissenting) (the FCC “should define its diversity goal, and in doing so explain the distinctions (and interaction) between programming diversity and viewpoint diversity, rather than simply quoting boilerplate on the ‘elusiveness’ of diversity.”).

\textsuperscript{40} Media Ownership Order, \textit{supra} note xx at 13644 (“The Commission decided long ago that local station licensees have a responsibility to air programming that is suited to the tastes and needs of their community”) (citing \textit{Deregulation of Radio}, 84 FCC 2d 968, 981 (1960)).
national din. Consider, for example, the early structural approach to localism epitomized in the requirement that the FCC distribute broadcast licenses to as many communities as possible. This elevation of cities and towns, at the expense of larger political or territorial units, reflects the early republican belief in disbursed power as a guarantor of liberty. In media as in politics, the hope was that devolution of control would promote responsiveness to the will of the people. After experimenting with more substantive rules, discussed below, the FCC has returned to this structural approach over the past several decades. At the heart of this approach is the notion that some combination of market pressures and licensee responsibility will produce a satisfying local service, so long as the market is not unduly concentrated.

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41 See Sixth Report and Order on Television Allocations, 17 Fed. Reg. 3905 (1952) (localism policies “protect[] the interests of the public residing in smaller cities and rural areas more adequately than any other system.”).

42 47 U.S.C. § 307(b) (directing the FCC to “make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”). See generally FCC Policy Statement on Comparative Hearings, 1 F.C.C. 2d 393 (1965).


45 See Broadcast Localism, Notice of Inquiry, MB Docket No. 04-233, ¶1 (July 1, 2004) (in the 1980’s, the FCC “found that market forces, in an increasingly competitive environment, would encourage broadcasters” to serve local communities). The Supreme Court has endorsed indirectly the structural approach to localism in upholding the statutory requirement that cable operators retransmit broadcast signals within their local communities. Turner Broad. Sys. Inc. v. FCC,
The dominance of the structural, reactive approach to localism can be seen in the recent battles over local television ownership restrictions. Those opposing these restrictions attempted to show that the market ensured responsiveness to local consumer demand for such products as local news.\textsuperscript{46} This is because local news is often the most profitable part of a station’s operations.\textsuperscript{47} In other words, the stations are meaningfully local because they are responsive to consumer demand for the local. Supporters of the ownership restrictions have fought on the same grounds, arguing that the rules are necessary to satisfy consumer desires.\textsuperscript{48} The FCC too has come to equate localism


policy with support of programming that has popular appeal within a local market.\textsuperscript{49}

It might be supposed that the development of a noncommercial alternative to consumer-driven broadcast media would not emphasize consumer sovereignty. But today’s system of public broadcasting does. The public television system proposed by the Carnegie Commission was meant to identify demand that commercial television did not serve. Because commercial television “is obliged for the most part to search for the uniformities within the general public, and to apply its skills to satisfy the uniformities it has found,” the Carnegie Commission thought it was likely to amass audiences by muting, rather than satisfying, differences.\textsuperscript{50} The Public Broadcasting Act followed up on this insight by making it a policy goal to serve “unserved and underserved” audiences.\textsuperscript{51} In other words, public television was to enhance the marketplace of ideas, with its emphasis on customer service, by going beyond the market to deliver communications that market exchanges should have, but failed to, produce.\textsuperscript{52}

As discussed below, it is in the area of noncommercial television policy that the inadequacy of the consumer satisfaction model is most evident. The problems are exposed whenever the nominally underserved audiences that non-market media target are, for practical purposes, non-existent audiences. The limitations of the consumer sovereignty model are evident in diversity and localism policy as well. Policy aspirations require, and policy has sometimes

\textsuperscript{49} See Media Ownership Order, supra note xx at 13755-60, 13839-42 (relying heavily on ratings for local news in assessing the impact of television ownership rules on localism). Taken to its extreme, the procedural or responsive approach to localism would not rule out a decision by local broadcasters to provide their communities with a wholly national program service if that is what the population desired. It is difficult to imagine the persistence of the localism principle under such circumstances. Indeed, the tendency to equate localism with local content (and particularly news and public affairs) has proved to be irresistible. See e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) (identifying broadcast coverage of matters of local concern as objective of broadcast localism policy); NBC v. U.S., 319 U.S. 190, 192 (1943)(equating local control with a local program service that is a “vital part of community life.”).

\textsuperscript{50} CARNEGIE COMMISSION REPORT, supra note xx at 13-14.


\textsuperscript{52} Upon signing the Public Broadcasting Act in 1967, President Johnson adverted to the democratic theory behind the marketplace of ideas, remarking that “at its best, public television would help make our Nation a replica of the old Greek marketplace, where public affairs took place in view of all the citizens.” Gary O. Larson, \textit{Fulfilling the Promise: Public Broadcasting in the Digital Age} (Center for Media Education 1998), ar http://www.cme.org/publications/fulfill.html.
revealed, a more proactive approach to the provision and consumption of media products that transcends consumer sovereignty.

C. Proactive Policy Thrust: Altering the Consumer

Most media policy criticism has focused on the technical implementation of diversity, localism and non-market goals. But there is a more important question. This is to what extent media policy, however implemented, should be proactive as well as reactive with respect to media consumption. To what extent should media policy take into account not just what consumers currently want, but what democracy needs? These needs include common exposure to a broad array of ideas, and public elevation through especially excellent programming.

1. Common Exposure

As we saw above, both diversity and localism policies pursue greater choice. And yet, the objectives of the “marketplace of ideas” are not met merely with more content. Robust debate depends on a trade in ideas. And trade requires that speech consumers be exposed in common to the abundance of ideas that the marketplace yields. It requires water cooler conversation over diverse viewpoints, not atomized consumption. To the extent that consumers do not want to be exposed to difference they do not seek, interventions in media markets to encourage exposure are proactive, not reactive.

That communication should integrate listeners as well as satisfy demand for speech products is an idea with roots in both communication and political theory. What James Cary has called the ritual view of communication relates communication with “‘sharing,’ ‘participation,’ ‘association,’ ‘fellowship,’ and ‘the possession of a

53 For a critique of the government’s diffuse approach to diversity, see Ronald J. Krotoszynski and Richard M. Blaiklock, Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas, 2000 U. ILL. L. REV. 813, 818 (2000) (“The [FCC’s] inability to define coherently the concept of diversity has resulted in a confused mix of regulatory policies – a regulatory gumbo that lacks even the pretense of some overarching goal or objective.”). See also NAPOlI, supra note xx [Foundations] at 135-146. For a critique of localism policy, see HOROWITZ, supra note xx at 155 (calling localism is an “ambiguous policy goal” leading to “a kind of mushy policy foundation”); Glen O. Robinson, The Electronic First Amendment: An Essay for the New Age, 47 DUKE L. J. 899, 938 (1998); Tom A. Collins, Local Service Concept in Broadcasting: An Evaluation and Recommendation for Change, 65 IOWA L. REV. 553, 635 (1980). For an economic critique of particular localism regulations, see Christopher S. Yoo, supra note xx [Rethinking the Commitment] at 1677-82; OWEN & WILDMAN, supra note xx at 123-4.

common faith.” Communication is thus embedded, lexically and conceptually, in community, communion, and common. It is “directed not toward the extension of messages in space but toward the maintenance of society in time; not the act of imparting information but the representation of shared beliefs.”

One of the chief exponents of this view of communication was John Dewey. For Dewey, communication was a defense against isolation and a force for solidarity. He wrote that “consensus demands communication” because “communication is the way in which [people] come to possess things in common.” Civic republican theory nests Dewey’s communitarian sentiments within the discourse of free speech. To oversimplify, the hallmark of a civic republic, also referred to as a deliberative democracy, is rational deliberation among citizens emerging into a consensus that drives

55 JAMES W. CAREY, COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY 18 (1988) (opposing the ritual view of communication to the transmission view of communication which conceives of communication like railroads and highways as tools to control far-flung territories).
56 Id.
57 A number of contemporary media scholars share this perspective. See, e.g., PRICE, supra note xx at 216 (“While it is popular to regard expansions of freedom as the consequence of increased choice, and to think of choice as the archetypal prerequisite for increased liberty, [the loss of a sense of place] represents deprivation as well as growth for our democratic processes and notions of identity, a geography of anomie as well as a geography of opportunity.”); Gigi B. Sohn & Andrew Jay Schwartzman, Broadcast Licensees and Localism: At Home in the Communications Revolution,” 47 Fed. Comm. L. J. 383, 388 (1994) (arguing that localism and diversity policies serve “basic human needs… to care and to have pride in the places they have chosen to live in and become a part of… to not only know their neighbors, but to have some thread of commonality with them…[and] to insure that they do not become just another faceless name in a faceless society.”).
58 JOHN DEWEY, DEMOCRACY AND EDUCATION 5-6 (1916). See also JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 219 (1927) (“We lie, as Emerson said, in the lap of an immense intelligence. But that intelligence is dormant and its communications are broken, inarticulate and faint until it possess the local community as its medium.”). Concern about the impact of media consolidation on the ability of communities to forge a shared culture was prominent in the debate over Clear Channel’s dominance of the local radio market. See Broadcast Ownership En Banc, Richmond, Virginia, 2003 FCC LEXIS 2010 (April 15, 2003) *122 (Statement of David Croteau) (“in its embrace of nationally syndicated personalities to the exclusion of locals, Clear Channel has made it clear that it has no use for [Richmond’s] talents, viewpoints and flavor.”). See also Comments of Future of Music Coalition, Radio Deregulation: Has it Served Citizens and Musicians? in 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202, MB Docket No. 02-277, at 79-80 (F.C.C. filed Nov. 20, 2002).
public policy. The idea is that a common culture can emerge within a free and heterogeneous population only through exposure to, and discussion of, difference. Such rational exchange requires a shared vocabulary and common intellectual heritage, which the media is influential in providing. There must, in other words, be exposure to difference as well as satisfaction of appetites for difference.

This distinction between exposure and satisfaction recognizes that speech markets are not like widget markets. Unlike widgets, most utterances are not substitutable. Two expressions will not compete unless the listener thinks they are close enough substitutes to compare them, or the opportunity and other costs of listening are low. As content options increase, so do the opportunity costs of listening to speech that the listener does not think will satisfy. The listener in effect has the choice between perusing the aisles of a supermarket, where diverse goods are all available, or making a beeline to a specialty shop stocked with just what she wants. If the “more” that diversity policy engenders simply fractures audience attention among multiple specialty shops, then audience members are less likely to share a common media culture. The civic republican ideal rejects this specialty shop model of diversity. Instead, the ideal is diverse expression whose “more” destroys the homogeneity of the consumed, not shared consumption patterns. In other words, the object of diversity should be to increase exposure to non-substitutable speech utterances in the supermarket, thereby increasing tolerance of

59 See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948) (identifying the importance of free speech in the education of a citizenry capable of effective democratic participation); Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L. J. 283 (1996). See also Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180, 227 (1997) (federal “communications policy seeks to facilitate the public discussion and informed deliberation which … democratic government presupposes”) (Breyer, J., concurring in part, dissenting in part). But see Edward Rubin, Getting Past Democracy, 149 U. Pa. L. Rev. 711, 749-54 (arguing that deliberation is an anachronistic concept in our democracy and is not central to our political process).


61 See infra notes xx and accompanying text.
difference and creating the “solidarity goods” that bind citizens together.

It is not just in communitarian or civic republican traditions that one can locate aspirations for media policy that transcend consumer satisfaction. These aspirations exist too within the liberal traditions more closely associated with the marketplace metaphor. At the surface, the value of speech diversity is the value of difference, not consensus. And yet, robust democratic debate depends upon exchanges, which in turn require a common vocabulary and shared content. This centripetal thrust within diversity policy is merely reactive, as I have defined it, to the extent that citizens want to consume the diverse expression on which democracy depends. But if they do not initially demand it, and they can easily avoid it, the marketplace of ideas will not host debate without proactive efforts to expose citizens to shared diversity.

In his gloss on the traditional liberal theory underlying the marketplace of ideas metaphor, Ed Baker exposes the fissures between diversity and debate. Like traditional liberal theorists, Baker embraces the competitive jousting among plural conceptions of the good. But he recognizes the danger of the specialty shop of ideas to democratic debate: that consumers may avoid the competitive arena, demanding only the sort of speech that confirms their existing viewpoints. To address this danger, Baker formulates a theory of “complex democracy” in which 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.

Bridging the liberal and civic republican conceptions of speech diversity is Jürgen Habermas’ depiction of the public sphere.

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64 See BAKER, supra note xx [Media, Markets] at 142-147 (contending that plural conceptions of the good in a complex democracy are best formed through deliberative exchange with others holding similar and competing conceptions).
Habermas’ public sphere is a space where different viewpoints jostle for public consumption on the basis of their public appeal. In this sense, the public sphere celebrates the difference and conflict that is. Yet the public sphere is also a forum for deliberation and the forging of consensus. It aspires to what might be, and can only be if citizens engage with each other and consume ideas they might not seek. The public sphere thus becomes a forum for intellectual exchange that at once satisfies diverse tastes and supports common norms.

Given the First Amendment constraints on policy, it is not surprising that these aspirational elements of media theory have been de-emphasized. What efforts there were to actualize the aspirational in media regulations are now mostly dead. The FCC’s erstwhile “fairness doctrine,” for example, took seriously the importance of consumer exposure to difference for the satisfaction of democratic goals. By requiring broadcast licensees to present opposing
viewpoints on matters of public importance, the doctrine tried to increase diversity on each channel, not just across the sum of channels. In other words, it took the supermarket approach to media exposure. Policies directed at increasing independent television production prior to the mid-1990’s reflected a similar concern with exposing viewers to difference on all channels, rather than simply enabling difference across channels.

Aspirations for common exposure to content are faintly evident in localism policy. Arguably, the stated objective of localism policy itself, which is that broadcast stations should serve the “needs and interests” of their local communities, is aspirational in its reference to “needs” as well as “interests.” If needs and interests are

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70 See Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C. 2d 1 (1974). For examples of fairness doctrine cases, see, e.g., Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), aff’d on rehearing, 425 F.2d 543 (D.C. Cir. 1969) (holding that station must air pro-integration programming if it aired pro-segregation programming); Complaint of Representative Patsy Mink, 59 F.C.C.2d 987 (1976) (holding that licensee must air coverage of environmental aspects of strip mining if it reported on pending federal legislation on issue).

71 Another example of this approach can be found in the rules requiring broadcasters to afford “equal opportunities” to political candidates entitled by statute to reasonable access of broadcast facilities. 47 U.S.C. §§ 312(a)(7), 315(a), 315(b) (2003). An equal opportunity is measured by the likelihood of, not just the opportunity for, audience exposure. Thus, a candidate is entitled to obtain time within a program that has equivalent ratings to that of his opponent. Law of Political Broadcasting and Cablecasting: A Political Primer, 100 F.C.C.2d 1476, ¶¶ 54-56 (1984).

72 For several decades, the financial interest and syndication rules limited the ownership interests that broadcast networks could have in studios that produced broadcast content in order to create greater diversity in the source of broadcast programming. The rules were codified at 47 C.F.R. § 73.658(j) (1970) and eliminated by Review of the Syndication and Financial Interest Rules, 10 F.C.C.R. 12165 (1995). See also Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382, 400 (1970), aff’d sub nom. Mt. Mansfield Tel., Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971) (justifying financial interest and syndication rules on grounds that “[d]iversity of programs and development of diverse and antagonistic sources of program service are essential to [each] broadcast licensee's discharge of his duty as trustee for the public in the operation of his channel.”) (emphasis added).

73 See Media Ownership Order, supra note xx (referring to the “needs and interests” of local communities 16 times without clear explication of how those needs and interests should be defined). This phrasing seems to descend from language first used by the Federal Radio Commission, the predecessor to the FCC. Great Lakes Broad. Co., 3 F.R.C. Ann. Rep. 32, 34 (1929) (ordering radio stations to satisfy “the tastes, needs, and desires of all substantial groups among the listening public...”).
distinct, and they do not have to be, then the difference may be that interests are self-defining while needs are not. The use of the word “needs” evokes democratic theories about the kind of communications environment that is necessary for robust democratic debate and reasoned decisionmaking. Consonant with this interpretation, localism policies adopted between 1960 and the early 1980’s required broadcasters actively to seek out what their communities needed, and established “guidelines” for supplying the “major elements usually necessary to meet the public interest.”

Having made the determination that local content, and not just local control, was important for satisfying community needs, the FCC used the broadcast license renewal process to privilege those stations that aired designated amounts of specific types of local programming.

Other policy interventions supported the production of local content for which there was negligible or at least insufficient demand.

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74 See, e.g., Broadcasting in America and the FCC’s License Renewal Process: An Oklahoma Case Study, 14 F.C.C.2d 1, 10 (1968) (“the greatest challenge before the American people today is the challenge of restoring and reinvigorating local democracy…[which can only be met by] a working system of local broadcast media actively serving the needs of the community for information about its affairs, . . . and allowing all to confront the listening public with their problems and their proposals.”).


77 Amendment of Section 0.281 of the Commission’s Rules: Delegations of Authority to the Chief, Broadcast Bureau, 59 F.C.C. 2d 491, 493 (1976) (calling on local stations to air at least “five percent total local programming, five percent informational (news plus public affairs programming), [and] ten percent total non-entertainment programming.”). See also Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Third Further Notice of Inquiry and Notice of Proposed Rulemaking, 4 F.C.C.R. 6363, n.11 (1989) (identifying service of local needs and local production as factors contributing to the prospects for license renewals).

78 This approach is evident in rules that protect local broadcasters’ contractual rights to exclusive transmission of syndicated programming within their local markets. Cable Television Syndicated Program Exclusivity Rules, 71 F.C.C.2d 1004, 1023 (1979) (“Our concern with localism… may be characterized as a concern with externalities – that is, the true value of local news and public affairs programming
Although policy has clearly moved away from the aspirational elements of diversity and localism, the tension between reactive and proactive policy approaches is evident in today’s debates. In localism policy, recent FCC actions suggest that substantive policy in keeping with proactive approaches may be heading for a revival.\textsuperscript{79} The same can be said for diversity policy. Take, for example, the measurement of diversity. In conformance with a procedural, reactive approach, the FCC has in the past simply counted the stalls in the market, looking at how many independent television stations and other outlets are available to the public, without inquiring into actual media usage and exposure patterns.\textsuperscript{80} An alternative would be to assess diversity by what media people actually consume.\textsuperscript{81} The FCC struggled recently to combine the two approaches in constructing a quasi-scientific “Diversity Index” to guide broadcast ownership deregulation.\textsuperscript{82} It measured actual consumption patterns, as opposed to mere availability, for some purposes,\textsuperscript{83} but not for other purposes.\textsuperscript{84} This may not be reflected in the number of individuals who view it or the value they place on it but in the value it has to our society as a whole and especially in the functioning of our democratic institutions.”); 47 C.F.R. §§ 76.122-124 (2003).

\textsuperscript{79} Broadcast Localism, Notice of Inquiry, FCC No. 04-129 (July 1, 2004) at ¶¶ 11-14 (asking whether the FCC should impose more substantive localism requirements on broadcasters rather than relying on structural controls and market pressure).

\textsuperscript{80} See, e.g., 47 C.F.R. §73.3555 (2003) (restricting ownership of multiple broadcast stations based on the number of independently owned outlets in the market). Such usage patterns might be measured by an outlet’s market share within a medium or by a more sophisticated market analysis by particular program type, such as news and information, prime time, etc.…

\textsuperscript{81} For scholarship endorsing this direction, see Philip Napoli, Deconstructing the Diversity Principle, 48 J. OF COMMUN. 7 (1999).

\textsuperscript{82} The FCC developed a “Diversity Index” to measure “the availability of outlets that contribute to viewpoint diversity in local media markets.” Media Ownership Order, supra note xx at 13775. The Diversity Index, which is loosely based on the Herfindahl-Hirschman Index that the Department of Justice and the Federal Trade Commission use to analyze mergers by summing the square of market shares to yield a total level of market concentration, calculates each media owner’s share of media outlets within a market, adjusted to reflect each medium’s share of the total media market. \textit{Id.} at 13789-90. \textit{See also} Prometheus Radio Project, et al. v. FCC, 373 F.3d 372, 404 (3rd Cir. 2004).

\textsuperscript{83} The Diversity Index considered actual consumption patterns in creating the universe of media outlets that would be included in the Index, for example discounting cable as a source of local news and information because consumer surveys suggested scant reliance on cable, while counting the Internet because consumer surveys suggested the opposite. \textit{See} Media Ownership Order, supra note xx at 13778 (“[O]ur method for measuring viewpoint diversity weights outlets based on the way people actually use them rather than what is actually available as a local news source.”). \textit{See also} Prometheus Radio Project, et al v. FCC, 373 F.3d
inconsistency in the treatment of audience exposure was partially responsible for the Third Circuit’s remand of the Diversity Index and associated rules. As the FCC comes to rework these rules and the underlying Diversity Index, it will have to take a more coherent approach to the consumption, as well as the availability of, diverse expression.

2. Public Elevation

The proactive component of media policy is, unsurprisingly, most evident in support for noncommercial media. Here, the aspiration is not only for media consumers to be exposed to content in common, but for them to be exposed to content that elevates or educates. It is this goal that has tagged public television with the “elitist” label for much of its existence, even though most American households watch at least some public television. Although too politically incendiary to state boldly, the goal of elevation figured prominently in both the precursors to the Carnegie Commission Report and subsequent policy enactments.

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372, 405-06 (2004) (criticizing the FCC for failing to explain why Internet news consumption should count when the news consumed is typically sourced by television and newspaper news operations).

84 The FCC abandoned its focus on consumption when it came time to analyze the diversity of outlets within a medium. It considered all television stations, for example, equally significant sources of local news even if they broadcast very little news or garnered very small market shares. Media Ownership Order, supra note xx at 13786 (“We have chosen the availability measure, which is implemented by counting the number of independent outlets available for a particular medium and assuming that all outlets within a medium have equal shares. In the context of evaluating viewpoint diversity, this approach reflects a measure of the likelihood that some particular viewpoint might be censored or foreclosed, i.e., blocked from transmission to the public.”).


86 According to Nielsen ratings, more than 70% of all U.S. television households and about 144 million people tune into public television during the average month. See PBS Audience, http://www.pbs.org/aboutpbs/aboutpbs_corp_audience.html.

87 See supra notes xx. The same could not be said in Britain, at least until relatively recently. The BBC started as an unabashedly elite institution intent on providing the public what the elite thought it needed. See Michael Tracey, The Decline and Fall of Public Service Broadcasting 21-25 (1998) (citing an influential 1962 report ascribing to public television the “power to influence values and moral
The most important such precursor was the influential report of the post-war Commission on Freedom of the Press. This Commission, chaired by former University of Chicago Chancellor Robert M. Hutchins, was established to explore dissatisfaction with the commercial press. Drawing on the liberal theory underlying speech diversity goals, the Commission argued that democratic life requires a “public mentality … accustomed to the noise and confusion of clashing opinions.” Drawing on civic republican theory, the Commission also located democratic strength in mutual understanding. The media, it concluded, have an obligation to foster such understanding and “to elevate rather than to degrade” the public.

These same ideas formed the intellectual backbone of the Carnegie Commission Report, which envisioned a public service media that would support high quality communication. This emphasis on quality and excellence connects public service media to the notion of “merit goods.” Often used in connection with the performing and fine arts, merit goods refer to products that the market would not produce but should be made available because they do people good.

standards”); IEN ANG, DESPERATELY SEEKING THE AUDIENCE 101-103, 108-112 (1991). In the 1970’s, the BBC evolved into a media institution that tried to reflect society rather than to mold it. See ANG at 115 (observing that in the 1960’s and 1970’s, the metaphor for public service broadcasting changed from that of a ship forging a cultural course to that of a mirror reflecting honestly a cultural truth).

88 COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947). Other members of the Commission included First Amendment scholar Zechariah Chafee, Jr., philosopher Reinhold Nieburh, and historian Arthur M. Schlesinger. 89 Id. at 91-92.

90 See id. at 68 (finding democratic infirmities in “the perpetuation of misunderstanding among widely scattered groups whose only contact is through these media.”).

91 Id. at 92.

92 See supra note xx. See also Testimony of Ken Burns, Florentine Films, before the Senate Comm. on Commerce, Science and Transp. (July 13, 2004), available at http://commerce.senate.gov/hearings/testimony.cfm?id=1265&wit_id=3648 (in defending the mission of public service media, contending that the “pursuit of happiness” requires “an active involvement of the mind in the higher aspects of human endeavor – namely education, music, the arts and history – a marketplace of ideas.”)

93 See Richard A. Musgrave, Merit Goods in RATIONALITY, INDIVIDUALISM AND PUBLIC POLICY 207-210 (Geoffrey Brennan & Cliff Walsh eds., 1990); DICK NETZER, THE SUBSIDIZED MUSE, 16-24 (1978) (arguing for art subsidies because society benefits from artistic production even if there are small audiences). See also GILLIAN DOYLE, UNDERSTANDING MEDIA ECONOMICS 66, 162 (2002).
What the Public Television Act did not address, nor has any subsequent policy, are the irreconcilability between the provision of merit goods and the satisfaction of public desires, between “popularity and publicness” in public service media. 94 Public broadcasting is expected to provide alternatives to the market to satisfy the aspirations of a democracy. 95 And yet it is also expected to mirror the existing orientation of audiences towards particular kinds of media products. The Carnegie Commission’s attempt to meld audience satisfaction with audience elevation has never worked very well for public television’s critics. 96

The need to better theorize the relationship between consumers and media policy is nowhere more important than in the area of media subsidies where the entire enterprise rises or falls on this relationship. Government intervention in media markets depends on a conception of why the market might fail to deliver what people want or what democracy needs.

criticism of the notion of public service media as a merit good, see JOHN KEANE, THE MEDIA AND DEMOCRACY 117-126 (1991) (arguing that the terms “quality” and “excellence” cannot be defined and “allow the market liberals to elope with the old vocabulary of ‘liberty of the press.’”); MICHAEL TRACEY, THE DECLINE AND FALL OF PUBLIC SERVICE BROADCASTING 278 (1998) (arguing that public media’s pursuit of quality presupposes understanding and empathy, but society has now been so “coarsened… by sheer mediocrity, the flight from excellence, and the enthronement of the trivial, the superficial, the ghoulish in much market-driven television” that this level of understanding and empathy no longer exists.).


95 Rowland, supra note xx at 14.

96 See Howard A. White, Fine Tuning the Federal Government's Role in Public Broadcasting, 46 FED. COMM. L.J. 491, 501-503, 513 (1994) (discussing Congressional attempts to eliminate funding for public television and criticizing public broadcasts’ over reliance on its most popular programming); Chris Johnson, Federal Support of Public Broadcasting: Not Quite What LBJ Had in Mind, 8 COMMLAW CONSPECTUS 135, 138-140 (2000) (criticizing public television for political bias and a failure to garner a larger audience). The development of alternative non-commercial ratings standards to credential lightly-viewed programming might have resolved some of the tensions for a service that is supposed to satisfy demand too insignificant for commercial services. But this alternative did not materialize, and presents its own problems for a publicly-subsidized media service. E.B. White’s vision of a public service medium that could broadcast to the few (in many instances) in the hopes of influencing the many is simply not politically viable.
D. Narrow and Broad Market Failures

Building on the distinction between reactive and proactive policy goals, this last subsection provides a vocabulary for addressing the impact of market developments on policy goals in the digital mediascape.

Since the operative principle of the marketplace is to satisfy public demand, reactive media policy that seeks to better serve the sovereign consumer is justified only in cases where business arrangements have blunted the force of consumer preferences. I am calling these failures of the market to serve consumer welfare, identified in Section III, “narrow market failures.” Media policy interventions to address these kinds of failures are designed merely to correct the market, thereby enhancing consumer sovereignty.

Even a perfectly functioning market will not meet the aspirational goals of media policy. It will not serve the public welfare that is external to markets by accounting for the value programming can add to civic life through increased education, political engagement, or social solidarity. These are what I am calling “broad market failures.” To the extent that media policy steps in to address broad market failures by facilitating or compelling the production of this kind of programming, it is not a market corrective but a market supplement. 97

The notion of broad market failure requires more discussion. The argument for market supplementation is premised on the ability of certain media products to generate positive externalities. 98 Positive externalities exist whenever A’s consumption produces value created by B for which B is not compensated. 99 For example, let us assume

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97 This argument might also be characterized, not as one concerning market failure, but as one concerning “market reach” as Owen Fiss has termed it: “The market might be splendid for some purposes but not for others. It might be an effective institution for producing cheap and varied consumer goods and for providing essential services (including entertainment) but not for producing the kind of debate that constantly renews the capacity of a people for self determination.” Owen Fiss, Why the State? 100 Harv. L. Rev. 781, 788 (1987).
that exposing children to educational television programming produces a range of benefits.\textsuperscript{100} Some of these benefits will be purely private, like the personal enjoyment of learning. Some will accrue more broadly in society, like the likelihood that an educated child will become a more productive adult. In deciding how much to invest in educational programming (in terms of the costs of the programming and the aggravation of getting their child to consume it), the child’s parent will internalize the private benefits, but not all of the public benefits. As a result, there will be fewer children in the audience, resulting in reduced compensation for the content producers, than would be optimal.

It is generally accepted that information of many kinds can produce positive externalities, such as by contributing to civic discourse or by checking official power, to a degree that is not reflected in the market for information.\textsuperscript{101} The prevalence of positive externalities in media markets is related to the hybrid nature of media outputs and actors. A video experience is a consumer product that may also become a basis for political decision or social behavior. A cable operator or broadcaster is simultaneously a commercial operation and a political institution.\textsuperscript{102} If these positive externalities

\textsuperscript{100} See generally, Policies and rules Concerning Children’s Television Programming and Revision of Programming Policies for Television Broadcast Stations, 11 F.C.C.R. 10660, 10664 (1996) (reviewing positive effects of educational programming on social skills and school preparedness).

\textsuperscript{101} By the same token, media products can fail to produce these desired effects or even reduce social welfare to a degree that is not internalized in the consumption of programming. These harmful effects, the costs of which are external to the economic decisionmaking of media enterprises and individual consumers, are negative externalities. See, e.g., GEORGE COMSTOCK & ERICA SCARRER, TELEVISION: WHAT’S ON, WHO’S WATCHING AND WHAT IT MEANS 274-298 (1999) (reviewing studies on the causal relationship between viewing of television violence and violent or other anti-social behavior); JAMES T. HAMILTON, CHANNELING VIOLENCE 20-30 (1998) (same). But cf. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH 243-253 (2001) (criticizing the media effects literature); Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954, 958-59 (8th Cir. 2003) (questioning linkage between exposure to violent video games and harm to minors).

\textsuperscript{102} See, e.g., Garnham, supra note xx at 47 (the incompatibility between the commercial and political functions of the media turns on “the value system and set of social relations within which commercial media must operate and which they serve to reinforce…[P]olitical communication [on a commercial platform] … becomes the politics of consumerism. Politicians relate to potential voters not as rational beings concerned for the public good, but in the mode of advertising, as creatures of passing and largely irrational appetite, to whose self-interest they must appeal.”).
are not internalized into the production of media products, the collective consequences of consumer choices will “turn out to be very different from what … [the consumer] anticipate[s].”\(^\text{103}\)

What complicates the positive externalities defense of market supplementation is that the external benefits of media products, unlike typical externalities, may not be concentrated in third-party effects.\(^\text{104}\) Instead, these benefits may accrue to the individual consumer who is making the media choice as well as to society at large. The viewer exposed to an incisive report on local politics, for example, may herself benefit, as may others influenced by her. And yet, she will eschew the programming if she does not value the private benefits it would confer. Particularly where this is the case, the idea that government should foster the delivery of such programming runs head long into charges of paternalism, making such policies suspect especially for those whose democratic and economic theories are premised on individual autonomy.

Advocates of market supplementation may avoid the taint of paternalism even with respect to the generation of these effects by refuting the notion that individual demand is exogenous to the market.\(^\text{105}\) Work in behavioral economics, drawing on cultural studies and psychological theories, emphasizes the contingency of personal preference.\(^\text{106}\) In the media context, commercial media enterprises,

\(^{103}\) Sunstein, supra note xx [Television] at 517.


\(^{105}\) See Baker, supra note xx [Media, Markets] at 97-98, 121 (suggesting that it would be paternalistic to deprive consumers of the choices that media policy promotes); Sunstein, supra note xx [Democracy] at 115 (“the deprivation of opportunities is a deprivation of freedom – even if people have adapted to it and do not want anything more.”). For an attempt to square paternalism with liberal ideals, see Cass R. Sunstein & Richard H. Thaler, Libertarian Paternalism is Not an Oxymoron, 70 U. Chi. L. Rev. 1159, 1162-66 (2003) (defending attempts by public and private institutions to influence behavior even when the objective is purely to improve the individual’s own behavior and not to change third party effects so long as such attempts are non-coercive).

\(^{106}\) See Douglas A. Kysar, The Expectations of Consumers, 103 Colum. L. Rev. 1700, 1758 (2003) (characterizing the consumer, from the perspective of cultural studies theory, as “neither purely sovereign nor purely susceptible, but rather permanently engaged in a dialectical conversation with product manufacturers, marketers, regulators, and others regarding the social significance of consuming activities.”); Samuel Bowles, Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions, 36 J. Econ. Literature 75, 75 (1998) (“Markets and other economic institutions do more than allocate goods and services: they also influence the evolution of values, tastes, and personalities.”);
through marketing and the exploitation of informational cascades, are able to develop tastes in the kinds of fare that they intend to produce. So developed, consumer desires naturally agitate for more of the same. Understanding this, it becomes possible to square market supplementation with liberalism, going beyond positive externalities to embrace a conception of personal choice as a product of media offerings themselves and thus endogenous to market dynamics. As one commentator has put it, a purely market-based approach to video products creates “a danger that consumers will under-invest in their own tastes, experience and capacity to comprehend because it is only in retrospect that the benefits of such investment become apparent.”

The debate over consumer preference formation and its relationship to media policy is not just a matter of academic theory, but has become a point of contention in policy discussions. At an FCC field hearing held prior to its sweeping relaxation of broadcast ownership limits, FCC Chairman Michael Powell challenged the Chairman of the Parents Television Council, who had described television offerings as “raw sewage.” Powell observed that, “[w]e can call it sludge, but it’s the sludge people are watching.” The


See COMMISSION ON FREEDOM OF THE PRESS, supra note xx at 68 (claiming that the media train the public to accept and even embrace sub-optimal content by “building and transforming the interests of the public.”). See also, Guy Pessach, Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities, 76 S. CAL. L. REV. 1067, 1074 (2003) (arguing that broad copyright protection leverages the ability of “corporate media” to “dominate the market and shape the audience’s tastes and preferences according to their common types and genres of creative materials, as well as their specific media products.”).


DOYLE, supra note xx at 66 (quoting G. Davies). The notion that consumer preferences are as much the result as the source of media products is rooted in the critical media studies of the middle and late twentieth century. The argument of the post-War critical theorists, led by Theodor Adorno and Max Horkheimer, is that mass commercial culture perpetuates the values of, and supports the winners in, a capitalist system by removing from the consciousness of consumers any alternative to capitalism. See, e.g., NICK STEVENSON, UNDERSTANDING MEDIA CULTURES: SOCIAL THEORY AND MASS COMMUNICATION 53-54 (1995) (analyzing the relationship among various Frankfurt School theorists).

Broadcast Ownership En Banc, Richmond Virginia, 2003 FCC LEXIS 2010 * 47 (April 15, 2003) (statement of Brent Bozell criticizing “ultra violence, ... graphic sex, ... [and] raunchy language” in media).

Id. at *83 (Statement of Chairman Powell).
consumer advocate responded that “when you’ve got a handful of corporations controlling … [programming], then what they determine is going to go on television is what can by itself determine what the market wants…when the public is getting a certain message, a certain kind of program, a certain value system, … ultimately, there is going to be a significant part of that market that is going to accept that message and want more of it”.

Given the existence of broad market failures, an aspirational media policy must do more than correct a poorly functioning market. It must provide diversions around existing media markets and taste constellations. It can do this by changing consumer wants and then reintroducing a richer consumer palette to the market. So reintroduced, the consumer might then force the market to provide media products with greater positive externalities, including common exposure to difference and public elevation.

III. Media Policy, Markets, and New Technologies

We have seen that a competitive marketplace of mediated expression, if it is to serve democratic purposes, must at once serve and influence the sovereign consumer. Digital technology creates new dynamics in media production and consumption that ought to change the way media policy approaches both reactive and proactive goals. The following subsections unpack the relationship between media policy and the market, showing how new media innovations at once challenge and support policy interventions in the media marketplace. Subsection A identifies the major changes that digital technologies effect in the production and consumption of video media. Subsection B then shows how these changes reduce, but do not eradicate, narrow market failures. Broad market failures, subsection C argues, are aggravated in a digitally networked environment.

A. New Media Dynamics

Digital media involve the following phenomena often, but not always, in concert: the digital encoding of media content by producers, the distribution of such content through digital networks, and the storage and playback of such content on digital devices. The spread of these phenomena has two major consequences for media policy. The first is simply the increased amount of content that becomes available through broadcast, cable, satellite, and broadband networks as a result of increased carrying capacity. The second is the

\[112 \text{Id. at *84 (Statement of Brent Bozell). See also id. at *91-92 (Statement of Andrew Schwartzman) (media conglomerates use cross-marketing and vertical power to develop appetites for products).}\]
increased degree of consumer control over the consumption and even the production of video content.

Digital media increase the amount of content available to consumers in a number of interrelated ways. First, digital compression technologies allow traditional subscription television services like cable and satellite to offer hundreds of content channels at various price points. Second, interactive technologies then allow these distributors to fully exploit increased channel capacity by providing programming to consumers on an on-demand basis. The interactive components of digital television distribution systems enable consumers to draw on video libraries on a per-program basis, disaggregating networks from bundled service tiers, and programs from networks. Third, digital broadband networks create new distribution channels for traditional video content like movies and television programs, as well as other forms of video entertainment like games and video chatting. These digital channels may be used

113 Broadcast stations that could transmit only one channel of programming by analog means can now transmit five by digital means. See Ellen P. Goodman, Digital Television and the Allure of Auctions: The Birth and Stillbirth of DTV Legislation, 49 Fed. Com. L.J. 517, 523 (1997) (describing the capabilities of digital broadcast technology). Cable systems that were once limited to 35 channels have now joined satellite services in offering several hundred, see Video Competition Report, supra note xx at 1624, although the average cable subscriber only receives 62 channels. See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, 18 FCC Rcd 13284 (2003). Although this paper does not address the distributional effects of changes in video distribution technologies, they are manifold. The channel explosion is concentrated in pay television services like cable, DVDs or subscription-based broadband services, as opposed to free-to-the-viewer broadcast services.


115 Today, most of the major cable operators are deploying video on demand services. It has been estimated that about seven million homes had access to video on demand at the end of 2002. Unlike pay-per-view services, which provide a relatively limited menu of programming on the operator’s schedule, video on demand allows consumers to order a wide array of programming from a central server at any time of the day and to pause the programming. Because technologies like video on demand use distribution capacity on an opportunistic basis, rather than “occupying” real estate on the distribution pipe, the distributor can carry many more programs on an on-demand basis than it could accommodate ordinary program networks. Video Competition Report, supra note xx at 1638-39.

116 See, e.g., Sarah McBride, Studios to Set Deals in Bid to Get PCs to Show Movies, WALL STREET JOURNAL, July 14, 2004, at D4 (reporting on new partnerships
themselves to stream content or may be used to facilitate the
distribution of DVDs directly to the consumer.\footnote{117}

As content options increase, the ability of the audience to
navigate media offerings becomes more critical. Digital technologies
respond to this need by providing tools for audience control over the
selection and timing of media experiences. It is this control, in
tandem with the spread of viewer attention over more video options,
which makes attention an increasingly scarce resource. By using
digital electronic program guides and search engines, the viewer can
filter out content of little interest and program her digital delivery
systems to provide more of what she wants.\footnote{118} These search
techniques, in combination with personal video recorders or other
digital storage devices, enable the viewer to create her own viewing
schedule and skip freestanding commercials.\footnote{119}

Another kind of audience control facilitated by digital
technologies is consumer contribution to the production of video
content. Most minimally, real time interactive features of television
programming can funnel viewer reactions into programming that is
professionally produced. More substantially, digital production
techniques and Internet distribution make it possible for amateur
involvement in the production and distribution of video content either
individually or as part of collaborative peer networks.\footnote{120} These

\footnote{117 Video “rental” enterprises like Netflix and direct sales from producers exemplify
how the cheap production and shipment of DVDs can create new markets for video
content. \textit{See}, e.g., Peter Wayner, \textit{In the Era of Cheap DVD’s, Anyone Can Be a
Producer}, N.Y. TIMES, May 20, 2004, at G1 (reporting on distribution of
independent films and other video productions in DVD format through the mail).

\footnote{118} \textit{See infra} notes xx and accompanying text.

\footnote{119} \textit{See Video Competition Report}, \textit{supra} note xx at 1715 (“A [personal video
recorder] is a device connected to a television set, either embedded in a set-top box
or as a stand-alone device, which uses a hard disk drive, software, and other
technology to digitally process and record programming.”). Approximately 3.7
million homes had PVRs at the end of 2003. \textit{Id.} This number will rise
precipitously as cable and satellite operators roll out PVRs in their digital set-top
boxes. \textit{See} Stuart Elliott & Ken Belson, \textit{Stop Me if You’ve Seen This One Before,

\footnote{120} \textit{Seeinfra} notes xx and accompanying text. \textit{See also} F. Gregory Lastowka & Dan
how digital video game participants create virtual worlds online).}
contributes can take the form of original productions or of modifications to professionally produced content.\footnote{See, e.g., Joseph P. Liu, Copyright Law’s Theory of the Consumer, 44 B.C. L. REV. 397, 418-19 (2003) (providing examples of consumer contributions to video content).}

Taking media abundance and audience control to be the most significant innovations of digital media, the question is how these innovations impact government intervention in media markets in furtherance of media policy goals. The subsections below approach this question with respect to both narrow and broad market failures.

**B. Narrow Market Failures and Market Corrections**

Many have a complaint about television – what it does not offer, what it offers too much of. Yet it is difficult to determine with confidence whether video markets really fail to deliver on consumer preferences, suggesting market failures, or whether demand for certain products is simply insufficient, suggesting market lacunae. Arguments that media markets fail the public are vulnerable to the claim that most markets fail to deliver what some segment of the market might desire. One cannot necessarily find the exact automobile configuration one wants either. The difference is that “[t]ruth and understanding are not wares like peanuts and potatoes,” as Justice Frankfurter put it.\footnote{Associated Press v. United States 326 U.S. 1, 17 (1945) (Frankfurter, J., concurring).} It is because media products have an unusually potent social and political valence, making the abandonment of even small audience communities particularly important from a policy perspective, that media markets deserve special consideration. Given the stakes, intervention may be warranted in the market for information where it would not be in the markets for legumes and root vegetables.

Even if the failure of video markets to give many people what they want were not worth more consideration than equally plausible claims about other markets, media markets have challenged consumer sovereignty to an atypical degree.\footnote{There is a substantial literature on the relationship between media market structure and economic welfare. Using game theory and theories of monopolistic competition, this literature has focused largely on the normative question of how much media concentration should be allowed. See Peter O. Steiner, Program Patterns and Preference, and the Workability of Competition in Radio Broadcasting, 66 Q. J. ECON. 194 (1952) (concentrated media outlet ownership can result in greater diversity of program genre given stringently limited channel capacity); Jack H. Beebe, Institutional Structure and Program Choices in Television Markets, 91 Q.J. ECON. 15 (1977) (the ideal degree of competition in media markets depends on viewer tolerance of second-choice programming and channel capacity);}

At least under conditions of
channel scarcity, three market features tend to reduce market responsiveness to smaller audience groups below optimal levels. First is the absence of strong price signaling by consumers in video markets that remain heavily reliant on advertising revenue. Second, further diluting the force of smaller audience preferences, are the unusually risky gambles entailed by expensive and mostly unsuccessful video programming. These gambles create pressures on program producers, aggregators and distributors to favor proven program formulae and talent, and to spread the costs and risks of media products over large audiences. These same pressures lead to the third feature: the concentration of media enterprises in large, integrated corporations with interests that may not be in perfect alignment with consumer choice.

This subsection takes each of these features in turn, predicting the ability of digital innovations to cure narrow market failures by improving responsiveness to consumer demand.

1. Audience Voice

The translation of audience desires into television programming, whether it is distributed by means of broadcast, cable, or broadband, is distorted by the way in which programming is sold. Specifically, the historic domination of advertiser interests combined with the lack of precision in the expression of audience preferences serve to mute the audience voice. Technologies that foster audience control and content abundance threaten the dominance of traditional advertising in video media markets, changing the role of advertisers in mediating the audience voice. These changes cut both in favor and against consumer sovereignty.

a) Analog Mediascape

That advertising so dominates today’s video marketplace is the result of market responses to the public good characteristics of video programming. Like other information products, video

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Spence & Owen, supra note xx (a market with a higher degree of price discrimination (i.e., pay television) and competition is more likely to produce diversity in programming). See generally OWEN & WILDMAN, supra note xx at 64-92, 141-42 (summarizing the literature on program distribution and market structure).

programming is non-rivalrous, meaning that a video product consumed by some is still equally available to others. Moreover, a video product is to varying degrees, non-excludable, meaning that the owners of a video product can only imperfectly control its dissemination to the public.\textsuperscript{125} Because of these public good features, advertising was the sole means of support for television programming before the advent of cable. Although consumer payments in the form of cable and satellite subscription fees now contribute substantially to video production and distribution, advertising remains the preponderant source of revenue across distribution platforms.\textsuperscript{126}

Advertisers then are the real consumers of video programming in the case of broadcast and other freely available content and are at least co-equal with viewers in the case of subscription television.\textsuperscript{127} The advertiser’s desire for a large audience means that advertiser and

\textsuperscript{125} Some have suggested that the ability of subscription services to exclude non-payers eliminates the non-excludability aspect of television. See, e.g., Yoo, supra note xx at 1584. However, with the exception of pay-per-view or on demand programming, viewers are excluded from programming only on a network-by-network basis and, far more commonly, only on a tier-by-tier basis. With respect to any particular program and any given network, the excludability tools of producers remain very crude. Powers of excludability would be increase should the cable and satellite industries shift from tiered services to what are known as á la carte services, allowing consumers to purchase only those networks that they wanted. Such a conversion would impose its own costs on consumer satisfaction. See infra note xx.

\textsuperscript{126} This is true, of course, in the case of broadcast television services, which are free to the viewer, but it is also true of subscription cable or satellite television services, which rely heavily on advertising revenue as well. Total cable network advertising revenue for 2002 was reported to be $10.828 billion out of the total revenue for the same networks of $20.146 billion. Thus, advertising revenue constituted approximately 54\% of the cable networks' revenue in 2002. Kagan, BROADBAND ADVERTISING No. 331 at 2-3 (March 31, 2003) (cable network advertising revenue); Kagan, CABLE PROGRAM INVESTOR No. 65 at 3-4 (April 16, 2003) (total cable network revenue). Cable operators take in significantly less advertising revenue than do cable networks. When combined, the cable industry relies on advertising for about 30\% of its revenue. HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 274 (6th ed. 2004).

\textsuperscript{127} See THOMAS STREETER, SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERCIAL BROADCASTING IN THE UNITED STATES 276 (1996) (“One of the central incongruities of American broadcasting is that the audience is construed simultaneously as both subject and object of the system, both the buyer and the thing sold.”); C. Edwin Baker, Giving the Audience What it Wants, 58 OHIO ST. L. J. 311, 319 (1997) (“The media enterprise commonly sells media products to audiences and sells audiences to advertisers.”); Sunstein, supra note xx [Television] at 514 (“... it is more accurate to say that viewers are a commodity, or a product, that broadcasters deliver to the people who actually pay them: advertisers.”).
consumer interests will substantially overlap. However, advertisers are not perfect surrogates for consumers and the interjection of advertiser interests can distort the conversion of consumer preferences into media products.\(^\text{128}\)

There are several reasons for the misalignment between advertiser purchases and consumer preferences. To begin with, advertisers have an inexact understanding of audience desires.\(^\text{129}\) More profoundly, advertisers and consumers are buying different products. Consumers, of course, are buying programming. Advertisers are purchasing viewer attention (especially the attention of younger viewers) adjusted for the likelihood that the viewer will actually buy the goods and services being advertised, not the program being supplied. As a result, advertisers place a higher value on those demographic groups associated with the ability and inclination to spend on consumer goods.\(^\text{130}\) Advertisers may be willing to sacrifice

\(^{128}\) Economic models of television programming have long noted the biases introduced into programming selection by advertiser support. See generally Owen & Wildman, supra note xx at 91-92. For a governmental perspective, see Jonathan Levy et al., FCC OPP Working Paper No. 37: Broadcast Television: Survivor in a Sea of Competition, at 7 (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A22.doc (observing that because “[t]he value of the programming to viewers will differ from the value of the audience to the advertisers,” not all audiences will get what they want).

\(^{129}\) The Nielsen ratings, which monopolize the measurement of television audiences, depend on the self-reporting of a small sample of households. Even when the sample size is large, the ratings data may be highly inaccurate due to poor reporting. See, e.g., Bill Carter, Young Men are Back Watching TV. But Did They Ever Leave?, N.Y. Times, Aug. 9, 2004, at C1 (reporting on erroneous Nielsen ratings purporting to show 10% drop in young men aged 18-34 watching television in 2003). Because the samples are more accurate the larger they are, ratings accuracy decreases with the size of the audience, resulting in the chronic mismeasurement of niche audiences. See Philip M. Napoli, Audience Economics 139-145, 176 (2003) (showing how ratings data becomes less accurate with audience fragmentation); Communications Daily, Feb. 20, 2004, at 9 (citing report showing that Nielsen Media Research ratings may underestimate Latino viewing of particular programs by 30%). So poor are ratings data for smaller audiences that Nielsen will not even rate programming on cable networks that are not available in at least 20 million households. Michael G. Baumann & Kent W. Mikkelsen, Economists Incorporated, Benefits of Bundling and Costs of Unbundling Cable Networks in Comments of the Walt Disney Company in A La Carte and Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, MB Docket No. 04-207, at 9 (F.C.C. filed July 15, 2004).

\(^{130}\) The most desirable such group consists of 18-34 year olds, followed by 19-49 year olds. Wayne Friedman, Cable Jumps Upfront Gun, Television Week, May 17, 2004, at 1.
a larger audience for a more desirable demographic, resulting in a preference for programming skewed to attract these cohorts.\textsuperscript{131}

The disconnect between advertiser and consumer interests extends beyond advertising sales. Consistent with their desire to sell goods or services, advertisers favor relatively sanguine programming that enhances the “buying mood” of the public.\textsuperscript{132} They can exercise this preference not only after production, through advertising purchases, but before the fact in intimate consultation with the networks developing program schedules.\textsuperscript{133}

Perhaps the greatest source of divergence between consumer desires and advertiser support is the crude communication of audience demand. Apart from their inaccuracies, ratings measure interest in a binary fashion -- thumbs up or thumbs down. Because ratings do not capture the intensity of viewer preferences, an advertiser’s valuation of a consumer may have very little correlation with the consumer’s valuation of a program.\textsuperscript{134} The inability of viewers to signal the intensity of their desires often results in commercial television programming that reflects the middling interest of the many instead of the strong interest of the fewer.\textsuperscript{135} So, for example, a program that receives six points out of ten from ten viewers in a focus group might

\textsuperscript{131}See, e.g., C. Edwin Baker, Advertising and a Democratic Press, 140 U. PA. L. REV. 2097, 2165 (1992) (“Advertisers ‘pay’ the media to obtain the audience they desire, providing a strong incentive for the media to shape content to appeal to this ‘desired’ audience.”); Sunstein, supra note xx at 514-15 (“Advertisers like certain demographic groups and dislike others, even when the numbers are equal; they pay extra amounts in order to attract groups that are likely to purchase the relevant products, and this affects programming content.”); Yoo, supra note xx at 1635.

\textsuperscript{132}See, e.g., Baker, [advertising] supra note xx at 2153-64 (discussing advertisers’ interests in programming that creates a “buying mood” and avoids controversy); Sunstein, supra note xx [Television] at 515 (“[A]dvertisers want programming that will put viewers in a receptive purchasing mood, and hence not be too ‘depressing’ . . . and also tend to dislike programming that is highly controversial . . .”); Inger L. Stole, Advertising in CULTURE WORKS: THE POLITICAL ECONOMY OF CULTURE 100 (Richard Maxwell ed., 2001) (advertisers “want the overall media content to complement their commercial messages…”).

\textsuperscript{133}Early in the production schedule, advertisers preview programs under consideration for placement in the network schedule. According to a study prepared for the FCC, “[f]or all shows, programmers consider the demographics of the audience the show is likely to attract”. Mara Einstein, Program Diversity and the Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group Study No. 5, at 7-8 (Sept. 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf (arguing that media consolidation has not diminished media diversity).

\textsuperscript{134}See Yoo, supra note xx at 1630-31 (noting that reliance on advertising support undermines any price signaling of intensity).

\textsuperscript{135}Einstein, supra note xx at 33 (quoting producer Rob Burnett).
be favored over one that received three tens and seven zeros, depending on the demographic characteristics of the individuals. It is also plausible that a program receiving a three from ten viewers would be preferred to one receiving a ten from three viewers. This makes video programming very different from consumer goods whose prices fluctuate depending on the intensity of demand for them.

Cable and satellite operators increase price discrimination through differential subscriber fees for different program packages. However, because most cable programming is bundled into tiers of a dozen or more channels, consumers are unable to signal the intensity of their preferences for a particular network carried on the tier, or for programs aggregated by that network. Moreover, cable audiences are sold to advertisers by program tier, not by program or network. As a result, the advertising rates for particular networks depend upon the popularity of other networks with which they are grouped. Such bundling further obscures the true audience interest in any particular channel on the tier.

b) Digital Mediascape

Innovations in audience measurement, digital recording, and program sales raise questions about the future of advertising and whether advertising will continue to distort the responsiveness of media markets to consumer choice. These distortions will likely decrease as tailored fee-for-service video packages reduce reliance on advertising. The result will be an increased quantity of niche programming disadvantaged by the dominance of advertisers. At the

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136 Id.
137 In the first example above, substitute diamonds for network programs. A merchant might earn as much from selling three madly desired diamonds as from selling six moderately desired diamonds. The result is that people can get the diamonds they want depending on the amount they're willing to pay.
138 See Owen & Wildman, supra note xx at 111-117 (flat fees for a bundle of video services deprive the programmer of any way to realize the value of intensely held preferences, leading to non-production of a program whose value to viewers, when measured by their willingness to pay, is greater than the cost of producing it). Premium networks, like HBO and Showtime, which are sold on an unbundled per-network basis are able to capture the intensity of audience interest through more perfect price discrimination. The price, however, is higher marketing costs. See note xx.
139 Video Competition Report, supra note xx at 1706 (cable advertising revenues are based on the number of potential viewers, i.e., the number of subscribers to the service tier on which the network is carried); National Cable & Telecommunications Association, supra note xx at 6 (explaining relationship between service tiers and advertising rates).
same time, we can expect advertisers to find new ways of reaching audiences through video products. Advertiser responses to digital abundance and consumer control may well introduce new distortions that contribute to narrow market failures.

At the very least, digital technology might be expected to eradicate the problems advertisers have had with audience measurement. Interactive tools lodged within digital television or Internet receiving devices can provide more fine-grained information on the preferences of participating audience members. However, early digital audience measurement techniques show that technology alone cannot remedy inaccuracies that result from sampling. New digital Nielsen “people meters,” for example, may substantially mismeasure actual audiences due to small audience samples.

Whether or not technology that improves audience measurement can keep pace with audience fragmentation, the value of the audience to advertisers, and thus the impact of advertising on content, may decline in the digital mediascape. There are two developments to note in this respect. The first is audience fragmentation across more channels of video entertainment and information. Not all advertisers require a mass audience. But the largest funders of media products, such as Procter and Gamble and General Motors, value mass audiences much more highly than niche audiences. Audience fragmentation makes it more difficult to

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141 See, e.g., Stuart Elliott, *Critics of Nielsen’s Changes in its Television Ratings Methods Take Their Battle to the Small Screen*, N.Y. TIMES, June 2, 2004 at C2 (reporting on industry protests against Nielsen’s implementation of new technology to measure audience sizes which allegedly undercounts minority viewers). Embedding this technology into all devices would correct for sample distortions, but would raise a host of privacy and performance problems.

142 Some niche audiences, such as upscale golf viewers, can be of more value on a cost per thousand basis to particular advertisers than a mass audience. See PICARD, supra note xx at 135 (“For media with specialized audiences, advertisers are willing to pay a higher cost per thousand than is available in mass media because the media are able to deliver audiences with specific characteristics that the advertising may be targeting.”)


144 See W. RUSSELL NEUMAN, *THE FUTURE OF THE MASS AUDIENCE* 156 (1991) (presenting the “Nielsen slope” as a graphic depiction of the increase in the cost per
find such mass audiences, explaining why advertising revenue on the
most watched broadcast channels has increased even as the total
viewership on these channels has declined. Digital consumer
technology which enable convenient ad skipping, today most often
found in personal video recorders, also devalue audiences to
advertisers. Consumers enabled with this technology are more likely
than not to fast forward through conventional 15 or 30 second spot
advertisements, thereby reducing the advertiser’s reach even where a
mass audience has been assembled.

The advertising industry may respond in three possible ways
to audience devaluation. It could abandon television and other
broadly distributed video media – a course so improbable, we can
disregard it. Alternatively, it could increase the frequency of
 commercials to counterbalance the reduction in audience attention.
Given the commercial saturation of video programming that already
exists, populating content with even more ads would seem to be
counterproductive, particularly given the spread of ad-skipping
 technologies. The most likely advertiser response to fragmentation
and viewer flight from advertising is to develop new communication
tools that penetrate the audience more effectively so as to recapture
some of the attention television once delivered. These tools will have
both salutary and harmful impacts on audience service.

Assuming that audience measurement techniques are able to
provide advertisers with more accurate information about who is
watching what, with what constancy of attention, and even what

thousand audience members to advertisers as the ratings for a program increase). One advertisement that reaches 1 million viewers is more valuable that two that reach 500,000 viewers each because the 1 million constitutes “unduplicated reach.” Baumann & Mikkelsen, supra note xx at 10. The value of mass audiences to advertisers is further increased if they can purchase exposure to such audiences on a bundled basis within or across networks. These economies favor concentrated distribution for media products.

145 TODREAS, supra note xx at 188 (showing how broadcast networks, in part because of the transactional efficiencies they offer, have maintained a disproportionate share of advertising revenue even as their share of viewers has decreased). Broadcast television advertising increased from $26.6 billion in 1990 to $41.8 billion in 2002; cable advertising increased from $2.6 billion to $15.8 billion in the same period. U.S. Bureau of Census, Annual Survey of Communications Services, at 794 (2003), available at http://www.census.gov/prod/www/statistical-abstract-03.html.

146 See Georg Szalai, Sales Boom Replays PVR Debate, HOLLYWOOD REPORTER at 1 (Dec. 29, 2003)(personal video recorder users skip 70% of televised advertisements). There are estimates that the personal video recorder will cost the television industry $12 billion in advertising revenue by 2006. NAPOLI, supra note xx [audience economics] at 151.
amount of pleasure, advertisers could take advantage of interactive capabilities to better tailor promotions for particular audiences. They could, for example, provide more detailed information to interested viewers, supporting a stronger and more lasting impression. Better information about the target audience might, thus, improve the effectiveness of the advertisement and reduce the minimum audience size necessary for programming to attract advertiser support. These innovations would allow program producers, aggregators, and distributors to be more attentive to smaller audiences that advertisers now ignore, perhaps improving the optimal mix of programming.

Other possibilities for advertising’s evolution may decrease the responsiveness of programming to consumer desires. Faced with a fractured and inattentive audience, advertisers are finding new ways to make their messages unavoidable. For example, they are inserting product placements into the program narrative and “wrapping” program content with product logos. Taking this approach one step further, advertisers are working with programmers to develop programming around products, rather than simply working to place products into programming developed independently. Federal Express, for example, worked closely with the producers of the popular film Castaway to control the portrayal of the company’s products and services in a movie about a Federal Express airplane


148 It should be noted that no amount of measuring or appealing to niche audiences solves the problem of general interest advertisers aiming at a mass audience. These advertisers will continue to look for programming with mass appeal.


150 For example, Disney’s ESPN2 presented a documentary about boxing champion Roy Jones Jr., which was created by an advertising agency on behalf of its client, Nike. The boxer, who is also a pitchman for Nike, wore the company’s apparel throughout the program. The program cost twice as much as a commercial would have ($650,000), but ran during prime time free of charge. Other examples of this new trend whereby advertising agencies produce video featuring their clients include Interpublic Group’s co-production of the reality program The Restaurant, which aired on NBC and featured clients such as Coors and Mitsubishi. See Suzanne Vranica, Hollywood Goes Madison Avenue, WALL STREET JOURNAL, Dec. 15, 2003, at B5.
While this trend is probably neutral with respect to the audience size necessary to support a program, it intensifies advertisers’ interest in the kind of programming with which they are associated. When spots are discrete breaks in a program, the tenor of the program is at some remove from the product. This distance closes markedly when the product is in the hand of an actor or, indeed, when the actor is in the hands of the advertiser. Thus, a shift from spot advertising to in-program advertising could well increase advertiser influence over content, opening the gap between viewer preferences and programmers’ responsiveness.\textsuperscript{152}

Recall that, in addition to advertiser interests, the inability of audience members to register preference intensities has disadvantaged minority tastes.\textsuperscript{153} By increasing transmission capacity and interactivity, digital technology enables distributors to sell programming directly to consumers through such services as video on demand, broadband streaming, or even simply mail-order DVDs.\textsuperscript{154} To the extent that consumers are willing to pay for programming delivered in this way, programmers of at least some kinds of video products will rely less on advertising, reducing advertisers’ impact on programming whatever strategies they may develop to address audience fragmentation and control. More importantly, greater price discrimination in the sale of video programming could increase the availability of programming that is in high demand by relatively small audience segments.\textsuperscript{155} These developments, discussed below, will

\textsuperscript{151} See \textsc{Napoli}, \textit{supra} note xx [Audience Economics] at 153.

\textsuperscript{152} There is a long policy tradition of requiring broadcasters to make it clear to the public who has paid for programming. \textit{See, e.g.}, 47 U.S.C. §§ 317, 508 (2003); 47 C.F.R. § 73.1212(a) (2003) (requiring identification of sponsor of any material “for which money, service or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station…”). The FCC has found that the use of subliminal advertising, defined as an attempt “to convey information to the viewer by transmitting messages below the threshold level of normal awareness,” is “contrary to the public interest” because such advertisements are “intended to be deceptive.” Public Notice Concerning the Broadcast of Information by Means of “Subliminal Perception” Techniques, 44 FCC 2d 1016, 1017 (1974).

\textsuperscript{153} See \textsc{supra} notes xx and accompanying text.

\textsuperscript{154} As of July 2003, an average of 12\% of all Americans had watched some form of Internet video in the past month, up from an average 8\% as of July 2002. There is a significant amount of streaming video available for viewing in real-time as well as other video, like movies made available through Movielink, a joint venture of five major movie studios, available for storage and playback. Notably, however, most of this video is not original and is otherwise available through other media organs. Video Competition Report, \textit{supra} note xx at 1674-75.

\textsuperscript{155} \textsc{Owen} & \textsc{Wildman}, \textit{supra} note xx at 83 (discussing price discrimination as a way out of the public good problem of television programming).
likely amplify the audience voice and result in more programming for
niche audiences, although the impact on choice will be complex and
variable across programming types.

2. Programming Gambles

The economics of video production are as responsible as
advertisers for the underproduction of certain kinds of programming.
Upfront investments in professional video production tend to be
relatively high, while the likelihood that any particular product will
achieve market success is relatively low. This combination creates a
programming sweet spot favoring the safe over the risky, imitation
over experimentation, and experienced insiders over newcomers. 156
At least where distribution channels are scarce, as the first subpart
below shows, it is a spot contoured for the satisfaction of expressed
majority tastes over expressed minority, or unexpressed, tastes. The
second subpart examines the degree to which these patterns will
persist in a digitally networked environment.

a) Analog Mediascape

What economist Harold Hotelling in 1929 labeled the
“excessive sameness” of media products is rooted in basic
characteristics of video supply and demand. 157 Expensive production
and volatile consumption patterns, combined with low variable
distribution costs and imperfect price discrimination, motivate media
producers to aggregate large audiences for any given video product.

On the supply side, video products are characterized by high
first copy costs. 158 The yearly operating expense of a cable network is

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156 See ROBERT W. MCCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 29-48 (2000) (discussing incentives to produce homogenous content); BAKER, supra note xx [media markets] at 37-40 (relating tendency towards homogenization of media products to public-goods characteristics); OWEN & WILDMAN, supra note xx at 99-100 (showing how satisfaction of majority tastes tends to be excessive because it is more profitable to carve up large audiences than to risk smaller ones); Einstein, supra note xx at 45-49 (citing advertiser pressures and efforts to repackage successful formulas as factors leading to bland, homogeneous programming.); Yochai Benkler, Siren Songs and Amish Children: Autonomy, Information, and Law, 76 N.Y.U. L. REV. 23, 92-98 (2001) (arguing that mass media markets shortchange diverse content); See Sunstein, supra note xx [television] at 515-17 (discussing incentives for homogeneity in programming).


158 Some video, like reality and local news programming, is relatively cheap to produce, while dramatic series, professional documentaries, global news, and professional sports are relatively expensive. See DAVID CROTEAU & WILLIAM
more than $125 million, of which 65% consists of programming costs. Much recent scholarship has focused on the mutability of these first copy costs, suggesting that they are heavily influenced by policy choices. Extended copyright terms, for example, drive up video costs by reducing the availability of public domain works for inclusion in media products and distribution over media networks. The cult of celebrity, supported by rights of publicity, increases the cost of talent. Even the legal rights enjoyed by the major professional sports leagues, affording them control over competition to and exhibition of their games, contribute to the expense of video products.

While it is true that policy choices can impact the cost of content production, the expense of producing professional video products is largely independent of policy discretion. Good and wide-ranging journalistic capabilities, as well as scripted programs with


159 KAGAN WORLD MEDIA, ECONOMICS OF BASIC CABLE NETWORKS 25 (2003), cited in Comments of The Progress and Freedom Foundation in A La Carte and Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, MB Docket No. 04-207, at 6 (F.C.C. filed July 15, 2004). Independent start-up cable network have average costs of $10-30 million annually. Id. For the cable operator, as opposed to the network, programming costs account for about one third of operating expenses. U.S. Bureau of Census, supra note xx at 730. And these costs are rising. The General Accounting Office recently found that programming costs have risen on average by as much as 34% in the last three years, with sports programming costs increasing on average by 59%. See U.S. General Accounting Office, Issues Related to Competition and Subscriber Rates in the Cable Television Industry, GAO-04-8, 4, 21-22 (Oct. 2003), available at http://www.gao.gov/new.items/d04262t.pdf [hereinafter 2003 GAO Report].

160 See Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 STAN. L. REV. 1, 27 (2001) (arguing that strong copyright protection raises costs for new entrants in the content business and advantages media enterprises with large copyright portfolios); Benkler, supra note xx [Free as Air] at 401-08 (same); RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996) (arguing that copyright ownership enables media companies to exploit economies of scale and scope through phased release and product expansion).

161 In the late 1990’s, the average film cost approached $60 million, plus an additional $20 million for marketing. Substantially contributing to these costs were the salaries of movie stars like Gwyneth Paltrow and Tom Cruise who could command $20 million a film. COMPAINÉ & GOMERY, supra note xx at 361.

high production values, for example, entail invariably high labor costs. Video product prices depend too on promotion and brand-development costs, which constitute a large part of programming budgets. Promotion for media brands and programming is particularly important because media products are experience goods whose value cannot be determined prior to purchase. Consumers must therefore rely on brand reputation and third party reviews to an unusually high degree. While word of mouth, weblogs, and other forms of distributed promotion can help to reduce promotion costs after a video product is first released, extensive marketing may be necessary to bring consumers to the product in advance of its release, particularly for video products with short shelf lives.

The second notable characteristic of video economics on the supply side is that distribution costs do not vary appreciably with audience size. It costs scarcely more to distribute a video product by means of broadcast, cable or broadband networks to one hundred million than to one million people. Because of these low variable costs, at least in markets with poor price discrimination, “video program packagers will always prefer to transmit to larger audiences.” By appealing to larger audiences, media producers and

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163 Such products, like other labor-intensive creative products, are excluded from the most significant technology-related efficiency gains that accrue to the production of other goods because of what has been called “Baumol’s disease” after the economist William J. Baumol. Baumol showed that, because labor costs tend to rise more quickly than other costs, the costs of cultural production tend to increase faster than the costs of other products. Doyle, supra note xx at 80. Video production has a weaker case of Baumol’s disease than live artistic endeavors if audience numbers increase. See William J. Baumol & Hilda Baumol, On Finances of the Performing Arts During Stagflation: Some Recent Data, 169, 191 (1980) in Baumol’s Cost Disease: The Arts and Other Victims (Ruth Towse ed., 1997) (noting that the cost per person served by mass media may remain relatively stable if the audience per broadcast or movie rises at a rate faster than the cost of performance increases).

164 See, e.g., Picard, supra note xx 67 (estimating that the costs of marketing as a percentage of costs of media operations range from 20% for television to 70% for motion pictures); McC Chesney, supra note xx [Rich Media] at 24-25 (discussing importance of branding to the sale of video products).


aggregators can expect larger licensing, subscription, and advertising revenue, without appreciably larger costs. The pursuit of these mass audiences, of course, tends to advantage what are perceived to be widely shared tastes.

If video product were merely expensive to produce, but fairly certain to sell, the impact on market outputs might not be so profound. Demand side characteristics are important too. The most significant of these is that video products are not substitutable whenever consumer preferences are strong. Such preferences are often strong, either for predictable reasons (e.g., a preference for sports or tendentious political commentary) or for unpredictable reasons (e.g., a preference for one new actor over another). The unpredictability of preferences makes video production highly risky as well as costly. Only one out of every ten feature films, for example, makes a profit. Only 5% of television program pilots result in a profitable program series. The unpredictability of programming success, combined with high production and low distribution costs, further strengthens the quest for blockbuster hits.


169 DOYLE, supra note xx at 108. Mining for hit movies is much like exploring for oil. And like the oil business, the media industry tends to privilege companies that involve themselves in the whole cycle of production and distribution from development (exploration) to production and distribution (refining and retail).

170 Cynthia Meyers, Media Consolidation and Product Diversity: A Recontextualization, delivered to Conference on Media Diversity and Localism: Meaning, Metrics, and the Public Interest, Fordham University (December 2003) (unpublished manuscript on file with the author). The practice in U.S. media markets of deficit financing exacerbates these risks of failure. Cable and broadcast networks typically underfund the production of programming, requiring producers to share in the financial risk. If they cannot find other financing, producers then have to bear this risk, sharpening the bite of programming failure. DOYLE, supra note xx at 82-3.

171 It is fairly well documented that this strategy results in the loss of “consumer surplus” because the competitive success of some products will cause the failure of other products that would produce more value to consumers than they cost to produce. Thus, hits that spin off ancillary musical or durable goods produce gross consumer welfare, but may damage net consumer welfare by eliminating more
This pursuit of the widely popular creates biases in favor of programming that mimics existing programming successes and/or that holds out the promise of a long and extended life in various media and ancillary markets. In either case, the programming produced may systematically shortchange minority tastes. The first proposition – that producers and aggregators will pursue programming that duplicates existing media options – conflicts with expectations of market differentiation. Economists have explained this conflict, showing how poaching a fraction of an existing audience may be preferable to developing a new audience where media outlets are scarce.\textsuperscript{172} Even where scarcity is reduced, the unpredictability of public appeal and the investments required to produce high-cost programming tends to support a culture of conformity.\textsuperscript{173} The frequency of program failures, and the pressures of cost recovery on programs that succeed, lead naturally to a reliance on heuristics of success. These will include proven program formats, formulae, and stars.

It might be supposed that a producer that foregoes large audiences for initial release, hoping instead for market longevity, market breadth outside of the U.S., or market synergies in non-video product markets would be more innovative.\textsuperscript{174} But the creation of diverse alternatives – alternatives that will be valued more highly by some segment of the viewership than either the hit or what is left in its wake. \textit{Baker, supra} note xx at 20-24; \textit{Doyle, supra} note xx at 77.\textsuperscript{172} See \textit{Bruce M. Owen, Economics and Freedom of Expression: Media Structure and the First Amendment} 18-20 (1975) (explaining why, in the absence of perfect price discrimination, the market will under-produce welfare-enhancing programs, particularly those that are intensely desired by smaller populations); Michael Spence & Bruce Owen, \textit{Television Programming, Monopolistic Competition, and Welfare}, 91 Q. J. Econ. 103, 122-25 (1977) (same). See also \textit{Baker, supra} note xx at 24 (”[T]he competitively successful but economically unjustified material will have relatively uniform but broad appeal – a comparatively flat demand curve. In contrast, the economically justified, audience-satisfying material that a free market fails to produce often is material with relatively strong, unique appeal-creating a more steeply declining demand curve.”).

\textsuperscript{173} A cultural explanation for conformity is that audience tastes are in fact largely the same. \textit{Neuman, supra} note xx at 146 (“On the whole most people within a given cultural setting display remarkably homogeneous tastes . . . . [favouring s]tories of romance and adventure and news of war and peace…”).

\textsuperscript{174} The goal at least for high-cost productions is sale over temporal windows, for example first in theatrical release, then on a premium cable channel, then video on demand, then on basic cable or broadcast. For television series, the syndication or re-run market is also critical. \textit{Owen & Wildman, supra} note xx at 26-38; \textit{Doyle, supra} note xx at 84 (“Windowing is a form of price discrimination in that it
programming that can sell well in many geographic and product markets, over an extended period of time is captive to its own dogmas. For example, high action content easily translatable for foreign audiences and content that is not particularly time-sensitive is best suited for extended and broad exploitation. Moreover, content populated by animated (or merely cartoonish) characters, music, and highly visible consumer items make product tie-ins especially attractive. The result is that audience preferences for a video product without ancillary marketing opportunities and with limited geographic appeal must compete against audience preferences that are aggregated over multiple direct and ancillary markets. Programming resources can be expected to flow in disproportionate amounts into video products with broad and extended appeal.

involves the same product being sold at different prices to different groups of consumers for reasons not associated with differences in costs.”).

Companies with cable as well as cinematic and broadcast properties are better able to wring value out of their investments in programming over temporal and product windows. Thus, for example, Viacom’s Paramount film division was able to reap a substantial profit on its Beavis and Butt-Head Do America film based on Viacom’s MTV cartoon series. Disney is perhaps most renowned for this kind of cross-selling, exploiting the popularity of its 1994 hit film The Lion King on television, Broadway, and through all sorts of merchandise. McClesney, supra note xx [Rich Media] at 22-27, 38-48 (providing examples of media conglomerate cross-selling and intensive commercial exploitation).


The integrated marketing strategy typical of media products that are exploited most broadly and successfully can be seen in such films as Warner Brothers’ Batman & Robin. The studio’s promotional campaign included partnerships with Taco Bell, Kellogg’s, Amoco, and Apple Computer as well as more than 250 licenses and tie-in with outlets like Toys ‘R’ Us, Wal-Mart and Target as well as, of course, Warner Bros. Studio Stores around the world. JOHN RYAN & WILLIAM M. WENTWORTH, MEDIA AND SOCIETY: THE PRODUCTION OF CULTURE IN THE MASS MEDIA 165-7 (1999).

Whether it is because successful windowing provides the support necessary for big-budget investments or because big-budget investments are necessary to produce this kind of programming, there is a clear correlation between windowing and programming budgets. See, e.g., OWEN & WILDMAN, supra note xx at 47-49.
The relaxation of channel constraints facilitates a strategy for coping with the high costs and high risks of video production that is altogether different from the pursuit of mass market, multiple market hits. Such a strategy involves production for minority tastes, with the hopes of a more secure, albeit smaller, audience base. Cable and satellite networks have pursued this strategy, but, on the basic service tiers, only for relatively low cost programming. Even when supported by the dual revenue stream of advertising and subscriptions, high-cost programming requires a large audience in the absence of either more perfect price discrimination or premium subscription rates. The question for the digital era is whether new modes of price discrimination, combined with new production and distribution models, will substantially augment the production of programming for taste minorities.

b) Digital Mediascape

Digital technologies have the potential to remake the programming sweet spot by vastly increasing video distribution channels. It is tempting to settle on the incontestable claim that more distribution results in greater consumer satisfaction, without probing what constitutes the additional flow of bits. A more rigorous analysis asks whether digital abundance and consumer control change the formula for commercially successful programming. The answer, discussed below, is “maybe, in some cases.”

Technological optimists herald the end of an age in which the mass audience is an economic necessity. Relying on the ability of digital technologies to shift power to consumers from producers, program aggregators, and distributors, they envision a collection of media products that satisfy even the smallest taste constellations. In the words of one commentator, these optimists see “a world in which technology, consumer demand, corporate strategy, and industrial policy are pushing companies away from standardized production for national mass markets and toward flexible production of customized products that better serve individual needs on a global scale.”

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179 See supra notes xx and accompanying text (identifying digital compression technologies, interactive capabilities, and new distribution channels as the most important contributors to video quantity).

180 Chad Raphael, The Web in CULTURE WORKS: THE POLITICAL ECONOMY OF CULTURE, supra note xx at 204. See also TRACEY, supra note xx at 264-5 (1998) (“The rhetoric of broadband culture is that...it offers...authentic virtual communities and relationships formed along paths of new ways of speaking to each other; access to unbounded sources of information; new forms of political praxis; unlimited
To test this vision, I first assume that digital technologies do nothing but increase channel abundance. Under these circumstances, unless consumers are willing to invest more in video consumption or media industry profit margins fall substantially, increased abundance will tend to drive down investment at the front end in units of video programming. The predictable result is an abundance of relatively low-budget programming. Decreased investment in any given channel, as the number of channels grows, can be seen in the near abandonment by many niche cable channels of original dramatic programming in favor of reruns, syndicated programming, and cheaper reality programming. The correlation between channel abundance and responsiveness to minority audience preferences, therefore, may be only as strong as is the substitutability of low and high budget programming. To the extent that program investment is either unimportant in satisfying the particular audience or can be

sources of entertainment.”) The shine of technological optimism on new communications technologies is familiar. In a 1970 article heralding the introduction of cable technology, a commentator gushed that “the stage is being set for a communications revolution … there can come into homes and business places … forms of information too numerous to specify … [making] every home and office … a communications center of a breadth and flexibility to influence every aspect of private and community life”. Streeter, supra note xx at 309 (quoting Ralph Lee Smith).

Production quality is likely to decrease as programming volume increases for the simple reason that it is becomes more difficult for any single channel to grow its audience by showing higher quality programs. As a result, programmers will simply produce or buy less expensive programs. See Owen & Wildman, supra note xx at 145-147 (showing how the marginal return on a dollar invested in programs falls as channel volume increases); Doyle, supra note xx at 62 (When viewership falls short of a given level, program budgets will fall, creating a vicious circle of declining product quality and declining audience share).

See Oliver & Ohlbaum Associates Limited, UK Television Content in the Digital Age, at 12 (2004), at www.bbc.co.uk/info/policies/ukcontent_digital_age.pdf [hereafter Television Content in the Digital Age]. Taking a documentary as an example of a high-budget genre of appeal to a niche audience, the authors write that even if a network “targets a lower audience of two or three million… the cost of the documentary can probably not be financed by the advertisers’ value of [such an audience]. Instead the niche network searches for lower-cost, low-audience programming.” Id. at 14. It is unclear for how long reality programming will remain low-cost. See, e.g., Brooks Barnes, Reality Checks: Unscripted Shows Become a Money Pit, WALL STREET JOURNAL, July 24, 2004, at A1 (describing increasing salary demands by reality show “actors.”).

See Napoli, supra [Audience Economics] note xx at 177 (citing Court TV, the History Channel, and Oxygen as examples); Neuman, supra note xx at 162 (“[A]n increased diversity of channels … will [produce] an increase in the number of channels providing mass-appeal content – as before, primarily action and comedy entertainment, sports, and brief news headlines.”).
recouped over extensive product, temporal, or geographic markets, then channel abundance will indeed lead to greater consumer satisfaction. But to the extent that what is desired is high-cost programming for smaller audiences, channel abundance will have the opposite effect.

Let us now assume that digital technologies not only increase channel abundance, but fundamentally change the economics of video production. In the analog world, large audiences are required because of the high risks and high costs associated with video products, combined with imperfect price discrimination. If video markets are to satisfy a greater range of tastes, then audience aggregation requirements must relax. For this to happen, the costs of production must plummet or the per-viewer revenue captured by producers must increase, thereby relieving them from amassing audiences over large geographic, temporal, and product markets.

Digital technology can lower the costs of content creation in two different ways. First, digital production equipment like cameras and recording media, and post-production equipment like editing software, democratize the technical process of video production. As broadband networks speed up and proliferate, digital technology will also reduce the cost of distribution. Second, digital networks and technologies enable new ways to exploit creative talent that may reduce creative costs. Peer production techniques, like those used in open-source software, allow multiple creators to collaborate on media product development. These techniques hold out the promise that talented individuals, working for little or no compensation, can come together to produce high quality content fairly cheaply, and then distribute that content without the intermediation of media conglomerates. Of course this scenario assumes that talent is plentiful and responsive to non-pecuniary rewards, and that

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184 See supra notes xx and accompanying text.
185 Low budget films like the 1999 Blair Witch Project demonstrate this. DOYLE, supra note xx at 116-117. It should be noted that digital distribution and reproduction techniques also threaten investments in content by increasing the risks of unauthorized and uncompensated consumption.
186 See Yochai Benkler, Freedom in the Commons: Towards a Political Economy of Information, 52 DUKE L. J. 1245, 1254 (2003) (arguing that the digitally networked environment increases the impact of nonmarket enterprises in cultural production and, pointing to open software, a Mars mapping project, and online encyclopedia project, the opportunities for “radically decentralized collaborative production”); Yochai Benkler, Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. REV. 354, 401-405 (1999) (describing five different organizational forms for the production of media products ranging from corporate media to non market actors).
disaggregated groups rival individuals or organized groups in the quality of content they can produce. I will question these assumptions below.

Independent of production models and associated costs, digital distribution models can alleviate the pressure on producers to aggregate large audiences, thus increasing service of taste minorities. The most promising such distribution model involves more precise price discrimination. A simple example shows how the number of viewers that must be aggregated in order to support the production and distribution of a program should fall with the introduction of better price discrimination, assuming that marketing and distribution costs remain constant. A cable channel typically requires a subscriber base of at least 50 million households before most national advertisers will purchase time on it. If that channel is disaggregated and the programming sold directly to consumers, an audience of 500,000 willing to pay $2 each to access a particular program should suffice to support a program that cost $1,000,000 (including distribution and marketing costs). Reducing the

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187 The likely economic effects of price discrimination on the video market are contested. For a debate on the utility of price discrimination in television programming, see Thomas W. Hazlett, *All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo’s Model of Broadcast Regulation*, 53 *Emory L.J.* 233, 234-5 (2004) (perfect price discrimination results in no consumer surplus because no buyer pays less than the maximum price he is willing to pay) and Christopher S. Yoo, *The Role of Politics and Policy in Television Regulation*, 53 *Emory L.J.* 255, 267 (2004) (perfect price discrimination will result in consumer surplus as measured by product characteristics in addition to price).

188 This assumption is probably unsound. See infra notes xx and accompanying text.


190 This would be a relatively meager sum for a video program. By the mid-1990’s the average price for a half-hour comedy was $750,000 to $1 million and the price for an hour-long drama was $1.5 to $2 million. *Todreas*, *supra* note xx at 23.
minimum audience size even more, a program might be marketed to 100,000 eager viewers for $4 the first day of release and then to another 300,000 viewers for $2 a week later. Thus, a video product distributed on-demand might well require a smaller audience than would a product distributed on a cable network.

These two developments – lower production costs and greater per-program revenue – may indeed change the economics of programming gambles and lead to greater consumer satisfaction, but only for some kinds of product categories. These are the very same low-cost or mass audience productions that are already plentiful. As even the greatest enthusiasts of peer production point out, decentralized production works best for modular content. Examples would be games, reality programming, and current events reporting that can reasonably be assembled from individual segments. Scripted dramatic series, branded sports events, video involving professional talent compensated at market rates, and well-researched, comprehensive and accredited news compilations, are quite different. These products require sizeable upfront investments and are not modular in form. They are likely to remain the province of hierarchical, not peer, production. As such, they will benefit little from the cost savings associated with distributed creation.

Whether working through peer networks or not, the ability of video producers to make content cheaply depends heavily on labor costs. Production cost savings will be concentrated within programming genres that can economize on labor. Products like reality or animated programming, in addition to amateur works, will benefit most from digital advances in video production to the extent

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191 For such a model to work, the first release would have to include copy protection technology to limit the ability of the first group to share the programming with the second group.
192 See Yochai Benkler, Coase’s Penguin, or Linux and The Nature of the Firm, 112 YALE L. J. 369, 391 (2002) (arguing that peer production works so long as the projects are modular, granular and easily integrated).
193 See Neil Weinstock Netanel, The Commercial Mass Media’s Continuing Fourth Estate Role, in THE COMMODIFICATION OF INFORMATION supra note xx at 320-23, 330-38 (2002) (identifying the positive contributions to democracy of corporate media and the limitations of peer-produced media in making the same contributions); Neil Weinstock Netanel, Market Hierarchy and Copyright in Our System of Free Expression, 53 VANDERBILT L. REV. 1879, 1917-1926 (2000). See also Baker, supra note xx [media concentration] at 244 (“digital technology significantly reduces the cost or difficulty of making some media content...[but in the main,] the Internet is a distribution system...[that] does not itself create content.”).
194 See supra note xx.
that labor is not the largest cost component. Products like professional sports, professional journalism, and certain kinds of scripted dramas that have high labor costs are less likely to benefit from these advances.\footnote{See Television Content in the Digital Age, supra note xx at 28 (“digitisation ... is unlikely to change fundamentally the cost structure of the major forms of creative endeavor – the action adventure film, the narrative TV drama, the original situation comedy or the in-depth documentary [because] ... [s]uch activities are fixed-cost, labour-intensive endeavors.”).}

Like digital production techniques, digital distribution models will not necessarily result in the production of programming that was under-produced in the analog world. The effects of per-program, direct-to-consumer sales will vary depending on program type and audience size.\footnote{The impact of on-demand programming will depend, in the first instance, on public tolerance for paying for programming on a per-program basis. Experiments with Internet pricing models of the early 1990’s showed that consumers prefer to pay a flat fee than for metered usage. See, e.g., Bruce Abramson, From Investor Fantasy to Regulatory Nightmare: Bad Network Economics and the Internet's Inevitable Monopolists, 16 HARV. J. LAW & TECH. 159, 168 n.15 (2002). See also Loretta Anania & Richard Jay Solomon, Flat-The Minimalist Price, in INTERNET ECONOMICS, 91, 114-16 (Lee W. McKnight & Joseph P. Bailey eds., 1997) (suggesting that a flat fee is the most economically efficient option for the Internet and similar networks). While the on-demand supplier of DVD’s, Netflix, provides subscription rates to its customers, subscribers are only allowed to rent three DVDs at a time and cannot obtain the next three until the first three have been returned. http://www.netflix.com. A subscription to this trickle of content is entirely unlike a cable subscription. Services like Netflix, although significant improvements over the real space video rental market in terms of consumer convenience, are unlikely to supplant the market for cable and broadcast programming which is either free to the viewer or part of a flat fee subscription.} High-cost programming that can command a premium price either at one time, like sports events, or in the aggregate over multiple temporal, product, or geographic windows, like feature films or series with a well-developed market, may be produced even for small audiences. But high-cost minority taste programming that has no proven market, a limited market life, or limited geographic appeal, will be much less likely to attract investment even in an on-demand world. An example of this type of programming would be a documentary an audience would pay to see once, but that would have difficulty aggregating an audience over time, space, or product categories. Such programming, if sold directly to consumers, will still have to attract relatively large audiences if it is to be produced.\footnote{The impact of on-demand sales on the programming market is in effect being debated in the context of á la carte pricing for cable services. Cable programming is}
small audience or high-cost programming for large audiences will benefit from on-demand sales.

Thus far, we have viewed the cost of programming as independent of the distribution model. In fact, setting aside production savings associated with digital technologies, the cost of programming may increase with channel abundance and on-demand sales. This is because program promotion becomes even more critical and more expensive in a channel-rich environment. For a program to attract even the smaller audience that might suffice in a world of perfect price discrimination, it will need to be easily found. This may entail obtaining a preferential place on an electronic program guide or search portal. It will also require advertising, previews, or product tie-ins in high volumes to reach a sustaining audience. Such

typically sold to the consumer on the basis of program tiers, each tier containing multiple cable and broadcast networks. Prompted by a Congressional request, the FCC has opened an inquiry into whether it should require cable and satellite operators to unbundle their programming either by network or by theme to give consumers better prices and more control over programming. Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, 19 F.C.C.R. 9291 (2004). Cable operators, and many networks argue that mandatory á la carte pricing would decrease cable programming choice, and increase programming costs, because network bundling subsidizes less popular cable channels with more popular ones. See, e.g., National Cable & Telecommunications Association, The Pitfalls of A La Carte: Fewer Choices, Less Diversity, Higher Prices (May 2004), available at http://ncta.com/pdf_files/NCTA_White_Paper_-_Pitfalls_of_A_La_Carte.pdf (arguing that bundled programming greatly increases diversity and that unbundled networks would require substantial consumer investment in addressable digital devices that make selective delivery possible); Video Competition Report, supra note xx at 1705-06. See also OWEN & WILDMAN, supra note xx at 134 (program bundling, by aggregating the demands of viewers who differ in their willingness to pay for different services, supports some services that would not survive on a stand-alone basis).

Promotion has a special importance for unbundled programming sold directly to consumers. So long as consumers have already paid for the programming as part of a subscription service, or the programming is included in a free broadcast service, the stakes in selecting programming are relatively low. These stakes rise considerably if the consumer must pay before viewing.

See Nondiscrimination in the Distribution of Interactive Television Services Over Cable, 16 F.C.C.R. 1321, 1325 (2001) (discussing importance of electronic program guides to the future of video programming).

Industry experts have predicted that unbundling cable networks for individual sale would result in advertising losses of 20% to 60% as cable becomes a less efficient advertising medium, and a substantial increase in network marketing expenses. Today, networks bundled on cable tiers expend about 6% of revenues on marketing, while stand-alone networks like HBO expend as much as 25% of
marketing efforts increase the costs of programming and thus the audience size (or premium price) necessary to support it. Increased promotional costs put more pressure on audience aggregation, especially for high-cost productions, and undermine some of the benefits of price discrimination for smaller audiences.

In sum, the channel abundance and price discrimination that digital technologies make possible are likely to make some kinds of video production more responsive to smaller audience groups. New efficiencies in video production could also help to correct narrow market failures by increasing consumer satisfaction. But the impact of these innovations on the overall makeup of video content must not be over-stated. Because much video content will remain expensive, and on-demand programming will not support all programming types, some content will not be produced at optimal levels even as distribution constraints relax. Expensive content that is demanded by smaller audiences and that is either high-risk, or difficult to market, will probably continue to be under-produced.

3. Industry Structure

The economics of video production have produced an industry structure that, together with advertising and audience aggregation pressures, can disrupt consumer sovereignty. The companies best positioned to aggregate audiences and spread the risks of video products are those that can exploit economies of scale at all stages of the media production, distribution and promotion process. As a result, the media industry is organized into “oligopoly market

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See Booz Allen Hamilton, supra note xx at 27-28, 35. See also of George Bodenheimer, President, ESPN Inc. & ABC Sports, before the Senate Comm. on Commerce, Science and Transp. (March 25, 2004), available at http://commerce.senate.gov/hearings/testimony.cfm?id=1127&wit_id=2836 (“A la carte will force all channels to expend millions of dollars in marketing…”).

In the context of unbundled cable networks, one study predicts that cable operators would price average cable channels at $4-$5 each per month. Booz Allen Hamilton, supra note xx at 34.

See NEUMAN, supra note xx at 147 (“The returns to scale are dramatically higher in information and communications than in most industries.”). The economies that media industries pursue are more accurately described as economies of scale and “economies of multiformity” which are realized from corporate operations in two or more industries. Alan B. Albarran & John Dimmick, Concentration and Economies of Multiformity in the Communication Industries, 9(4) J. OF MEDIA ECON. 41, 43 (1996) (identifying diversification, repurposing of content, and repurposing of talent as three examples of economies of multiformity).
structures and large scale multiproduct firms” with multiple distribution and product assets.  

The impact of this market structure on competition is subject to a lively economic debate.  
The economic inquiry focuses on whether vertical efficiencies outweigh any potential anticompetitive effects, taking into account any market dominance of the vertically integrated firm, such that integration should be permitted. We need not enter into that debate to understand how the organization of media enterprises into large publicly traded, vertically and horizontally integrated corporations might skew the production of video products, contributing to narrow market failure.  

This section undertakes that examination first in the analog sphere and then in the digital.

a) Analog Mediascape

Today, both the cable and broadcast industries are far more concentrated than they were just a decade ago. The cable industry is

203 DOYLE, supra note xx at 29. This consolidation has been international in scope. See, e.g., GILLIAN DOYLE, MEDIA OWNERSHIP: THE ECONOMICS AND POLITICS OF CONVERGENCE AND CONCENTRATION IN THE UK AND EUROPEAN MEDIA 4-5 (2002) (“the trend that exists in the media – of increased concentration of ownership and power into the hands of a few very large transnational corporations – clearly reflects the overwhelming advantages that accrue to large scale firms.”).

204 According to today’s reigning economic theory, vertical integration should not result in anticompetitive leveraging between downstream and upstream markets, or in foreclosure in either market. See Christopher S. Yoo, Vertical Integration and Media Regulation in the New Economy, 19 YALE J. ON REG. 171, 187-205 (2002). The D.C. Circuit has evinced just this skepticism over the dangers of vertical concentration in relation to cable programming. See Time Warner Entertainment Co., v. FCC, 240 F.3d 1126, 1138 (D.C. Cir. 2001). See generally HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 377 (2d ed. 1999) (citing Richard Posner and Frank Easterbrook as authorities for the position that vertical integration is not generally anti-competitive). This is as conventional a view today as it once was heretical. The older orthodoxy was highly suspicious of vertical integration. See, e.g., Louis Kaplow, Extension of Monopoly Power Through Leverage, 85 COLUM. L. REV. 515, 516-17 (1985). Some recent economic scholarship takes on the new orthodoxy and supports this older suspicion. See, e.g., Tanseem Chipty, Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry, 91 AM. ECON. REV. 428 (2001) (arguing that vertically integrated cable operators are more likely to carry affiliated networks); Daniel L. Rubinfeld and Hal J. Singer, Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger, 16 BERKELEY TECH. L. J. 631 (2001) (arguing that the merger between AOL and Time Warner created the incentive and ability to engage in discrimination in favor of affiliated content).

205 To be clear, the question pursued here is not whether integration is anticompetitive such that regulatory intervention is warranted – the principal inquiry of the economic literature -- but only whether integration influences video content in ways that may not be responsive to consumer demand.
dominated by Comcast and Time Warner Cable.\textsuperscript{206} The carriage
decisions of either of these companies, given their dominance overall
and in major markets, will often be sufficient to make or break a
programming network.\textsuperscript{207} A cable network granted carriage on
Comcast, which is dominant in 12 of the top 20 markets, has “the
equivalent of a full scholarship to Harvard,” as one journalist has put
it.\textsuperscript{208} The horizontal concentration of the cable industry is
complemented by a fairly high degree of vertical concentration. The
largest cable operators have significant holdings in much of the
content that they distribute.\textsuperscript{209} In 2003, 80% of the networks with
significant national penetration were owned or co-owned by only six
companies, of which five also dominate the broadcast network
program marketplace.\textsuperscript{210} The acquisition of a controlling interest in

\textsuperscript{206} Video Competition Report, supra note xx at 1687, n. 561 (together, these
companies serve more than 34% of all those subscribing to a video service).
\textsuperscript{207} Video Competition Report, supra note xx at 1687; In re Implementation of
Section 11(c) of the Cable Television Consumer Protection and Competition Act of
1992: Horizontal Ownership Limits, Third Report and Order, 14 F.C.C.R. 19098,
19104 (1999) (“In most markets, a single incumbent cable operator is likely to have
more than 80% of the multichannel video distribution market.”).
\textsuperscript{208} George Anders, Want to Start a TV Channel? See Amy Banse, WALL STREET
JOURNAL, Jan. 19, 2004, at B6 (commenting on Comcast investments in new
channels). The importance of the top cable operators lies in the fact that most
programming channels require distribution to thirty to fifty million households in
order to earn sufficient advertising revenue. See In re Time Warner, Inc., 123
F.T.C. 171, 207 (1997) (statement of Chairman Robert Pitofsky and Commissioners
Janet D. Steiger and Christine A. Varney) (estimating that any new cable channel
must reach at least 40-60% of all subscribers in order to have a chance of
surviving). The range in numbers depends on whether the denominator can consist
of cable-only subscribers, numbering about 65 million households, or must include
all multichannel video subscribers, numbering about 94 million households. Video
Competition Report, supra note xx at 1609, 1622.
\textsuperscript{209} Until recently, the FCC had channel occupancy rules that limited cable operators
from owning more than 40% of the national video programming services that they
carry on the first 75 channels of their systems. 47 C.F.R. § 76.504. This rule was
reversed and remanded as arbitrary and capricious. Time Warner Entm’t Co., v.
\textsuperscript{210} Comments of The Writers Guild of America, et al. in 2002 Biennial Regulatory
Review – Review of the Commission’s Broadcast Ownership Rules and Other
Rules Adopted Pursuant to Section 202, MB Docket No. 02-277, at 2 (F.C.C. filed
Jan. 2, 2003) (identifying 73 of 91 most popular cable networks). About 33% of all
national cable networks are vertically integrated. Video Competition Report, supra
note xx at 1690 (110 of 339 networks). Another statistic suggests slightly less
concentration. Eighteen of the top twenty programming networks in terms of
subscriberhip (excluding C-Span and the Weather Channel) are owned by one or
more of thirteen media companies. These are: Time Warner, Cablevision,
DirecTV by News Corp., owner of the Fox Entertainment Group, increases vertical integration within the programming distribution sector.\(^{211}\)

As with the cable industry, the broadcast industry has consolidated in both the distribution and programming markets. In the distribution market, the largest four national networks own almost all of the major local stations in the top four media markets (New York, Los Angeles, Chicago and Philadelphia).\(^{212}\) These top four markets cover about 17% of all television households and are essential to any national advertising campaign.\(^{213}\) All of the major networks have also engaged in upstream integration, combining with or creating in-house production studios.\(^{214}\) Walt Disney Company, Viacom, Fox Entertainment Group, and General Electric have come to control the production and distribution of most content broadcast in prime time. As of 2002, producers unaffiliated with the networks accounted for only 8.7% of prime time content.\(^{215}\)

There are two reasons why the concentration of economic control over the production and distribution of video products, even if not anticompetitive, might frustrate consumer choice. The first concerns the incentives of a vertically integrated firm to engage in strategic behavior to disadvantage competitors and to exploit


\(^{212}\) Network ownership of stations in the top 24 television markets is heavy as well.

\(^{213}\) COMPaine & Gomery, supra note xx at 222.

\(^{214}\) See Einstein, supra note xx at 15. This consolidation succeeded repeal of the financial interest and syndication rules, which had prohibited broadcast networks from holding financial interests in the television programs they aired beyond first-run exhibition and restricted the creation of in-house syndication units. See supra note xx. Between 1990, when these rules were in full force, and 2002, seven years after they had been repealed, the percentage of prime time programming supplied by the networks themselves increased by more than 450% to nearly 75% of all prime time programming. Einstein, supra note xx at 30-32.

\(^{215}\) Einstein, supra note xx at 26. See also Comments of Coalition for Program Diversity in 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202, MB Docket No. 02-277, at 4-5 (F.C.C. filed Jan. 2, 2003) (contending that 68% of prime time programming on the three largest broadcast networks used to be independently produced versus 24% today.).
efficiency gains to increase consumption of affiliated product. The second relates to the culture of risk aversion and revenue-maximization that tends to permeate large and diversified corporations.

In both cable and broadcast industries, programming distributors and aggregators stand to benefit from strategic carriage choices that favor affiliated content. The principal check on such favoritism is that the vertically integrated firm that discriminates in the upstream content market will experience downstream revenue losses, assuming a competitive downstream market. Notably, in the market for television programming, these losses will be blunted by the way in which programming is bundled. The vertically integrated distributor, such as Time Warner Cable, that forecloses a channel like ESPN or ABC will indeed stand to experience downstream revenue losses as subscribers switch to satellite. But most programming

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216 See generally, Ronald H. Coase, The Nature of the Firm, ECONOMICA 4, 386 (1934). An example of strategic behavior would if Time Warner Cable used an upstream asset, like its owned service, HBO, to raise the costs of distribution for a downstream competitor like Echostar. Alternatively Time Warner could use its downstream cable distribution asset to disadvantage upstream competitors, like Showtime, by depriving Showtime of carriage or favorable carriage terms. Efficiency gains might include “transaction efficiencies,” such as the costs Time Warner saves in contracting for HBO, and economies of scale that the distributor and programmer can realize by sharing creative or financial resources that are difficult to contract for on an arms length basis.

217 See, e.g., DAVID WATERMAN & ANDREW A. WEISS, VERTICAL INTEGRATION IN CABLE TELEVISION 88 (1997) (“[C]able television systems do tend to favor their affiliated cable networks . . . [sometimes] at the expense of rival, unaffiliated networks.”). Fear of this kind of discrimination motivated Congress in the 1992 Cable Act to limit vertical integration. H.R. Rep. No. 862, 102nd Cong., 2d Sess. 56 at 42 (1992) (“vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services” and “have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services.”). See also 138 Cong. Rec. S400, S418 (Jan. 27, 1992) (“The danger of this kind of vertical integration is that a big cable company has a financial incentive to carry the channels it owns on its many systems while denying exposure to channels that might compete against it.”); 137 Cong. Rec. S2011, S2012 (1991) (“[V]ertical integration has led some operators to discriminate in favor of programming in which they have equity interests.”).

218 See RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 172-73, 197-98 (1976) (arguing that the vertically integrated firm cannot leverage power from one market into another or deter entry into either market unless it has market power in both and there are barriers to entry by new competitors).

219 See WATERMAN & WEISS, supra note xx at 130 (“the lack of more than one or two of the most well-known networks would seriously handicap a multichannel competitor to an established cable system.”).
channels are not “must have” networks that, if dropped or made inconvenient to access, would alienate downstream subscribers. Whether a cable operator carries BBC America or Oxygen, or carries them in a favorable position on the cable system, is unlikely to be decisive in a consumer’s decision to subscribe. This is particularly true where competition in the downstream distribution market is marred by the failure of satellite to effectively substitute for cable for many subscribers and by the barriers to new entrants in the distribution market. Thus, a cable operator may well be able to reap benefits from privileging affiliated programming without suffering the downstream market costs that would ordinarily be predicted.

Efficiency gains augment the incentives for vertically integrated distributors to favor affiliated programming. Much of the money to be made on affiliated programming comes from markets that are ancillary to the downstream market. A vertically integrated


221 A favorable position may be characterized by the service tier (e.g., the analog service tier which is available to all subscribers or the digital service tier available only to some), the channel number (e.g., in a channel neighborhood with other popular programming), or the program guide (favorable display on the guide). See e.g., H.R. Rep. No. 102-628, Cable Television Consumer Protection and Competition Act of 1992 at 41 (identifying “discriminating against rival programming services with regard to price, channel positioning, and promotion” as examples of prohibited acts by vertically integrated cable operators).

222 Although the two direct broadcast satellite companies, EchoStar and DirecTV, control 20% of the subscription television market, satellite service is not yet substitutable for cable for the growing number of broadband cable subscribers because it does not offer integrated broadband service. Broadband subscribers and would-be subscribers have strong disincentives to switch to satellite even if they are dissatisfied with cable programming, allowing cable operators a great deal of competitive freedom to make programming decisions. See Written Ex Parte Filing of the Walt Disney Company in CS Docket No. 00-30, at 34-35 (F.C.C. filed July 27, 2000) (“Cable . . . networks are the only distribution platforms capable of delivering the full Interactive Television experience, and this is not likely to change for the foreseeable future.”).

223 See supra notes xx and accompanying text. The empirical evidence supports the contention that networks, whether in order to exploit the syndication market or to recover costs of affiliated studios, do favor affiliated programming. See Einstein, supra note xx at 30. Cf. id. at Appendix 3 at 24 (“It is generally believed that some shows are being maintained on the network schedule for longer than they might be if the network did not have an interest in the show.”). These same incentives lead to the acquisition of network equity interests in unaffiliated programming that gains a slot in the network schedule as a condition of airing. See NAB Comments, supra note xx at 35. See also Einstein, supra note xx at 23 (“The television executives
cable operator, for example, that carries, or merely promotes, its own content at the expense of competitors’ content may be able to shore up the market for tie-in merchandise, music, or DVDs. One need only look at the pattern of media mergers and proposed mergers to see that vertical integration is highly valued by distributors seeking synergies through backward integration to defray the costs of content acquisition over a greater audience base. If they own content, they can more easily and cheaply repurpose that content over video-on-demand, multiple cable channels, and online channels. This is especially true if vertically integrated distributors prominently feature and heavily promote their affiliated content.

The absorption of the most prolific media companies into large public corporations has an impact on video products that goes beyond content decisions related to affiliation. The particular corporate culture characteristic of large media conglomerates tends to reinforce risk aversion and homogeneity in media products. Journalism research suggests that the demands of the parent corporation and its shareholders to meet quarterly earnings targets affect the production and selection of media content. Emblematic interviewed for this report agreed that networks would continue to increase their level of program ownership in the coming years.”).


225 For example, one of the benefits Time Warner saw in merging with Turner was better coordination of program distribution and retailing strategies to boost retail revenues from Time Warner’s cartoon characters. Todreas, supra note xx at 151. See also Larry Collette & Barry R. Litman, The Peculiar Economics of New Broadcast Network Entry: The Case of United Paramount and Warner Bros., 10(4) J. OF MEDIA ECON. 3, 10 n.5 (1997) (noting that Warner Bros. had been frustrated in its attempts to cross promote its cartoon characters over multiple platforms so long as the Fox television network distributed its cartoons because, for example, Fox proposed eliminated the Batman series just when Warner Bros. was preparing to release its Batman Forever movie and related product tie-ins).

226 See, e.g., Picard, supra note xx at 182 (“New pressures for increased company performance have been placed upon managers because of the obligations to
of this Wall Street-driven approach to media production is the view of General Electric’s Chairman, shortly after his company’s acquisition of NBC. News, he said, would be treated as “a commodity or service no different from ‘toasters, light bulbs or jet engines’ [and NBC News would be expected] to make the same profit margins as every other GE division” even at the expense of journalistic standards. These financial pressures to satisfy Wall Street are made more acute by the debt that many large diversified public corporations carry after a major merger.

Although aggressive earnings targets have led to explicit corporate influence over journalistic output, such influence tends to be more subtle and less easily policed. Among the most important effects is an unduly heavy reliance on official sources and canned reporting to produce content quickly, with minimal detectible error.

shareholders ... These market pressures have led to short-term thinking in some media companies…”). This observation is not new. More than fifty years ago, the Hutchins Commission bemoaned the commercial pressures on the media, resulting in speech that “emphasizes the exceptional rather than the representative, the sensational rather than the significant.” COMMISSION ON FREEDOM OF THE PRESS, supra note xx at 55. See generally, LEE C. BOLLINGER, IMAGES OF A FREE PRESS 29-34 (1991).


See Alger, supra note xx at 156.

228 See Alger, supra note xx at 156.

Parent firms of newspapers have told editors and publishers that the news must bend to advertiser interests. See, e.g., Comments of Consumer Federation of America, et al. in 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules, MB Docket No. 02-277, at 41-48 (F.C.C. filed Jan. 2, 2003). Electronic media journalists have experienced the same kinds of interference. See id. at 41-48 (citing call from GE CEO to NBC news division, asking that there be nothing in the nightly news broadcast that might depress GE stock prices); Jim Rutenberg, Disney Is Blocking Distribution of Film That Criticizes Bush, N.Y. TIMES, May 5, 2004 at 1 (reporting on Disney’s blocking of Michael Moore’s film Fahrenheit 9/11 allegedly out of concern that the negative portrayal of President Bush could jeopardize Disney tax breaks). See generally, McC Chesney, supra note xx [Rich Media] at 53-63 (providing examples of editorial choices influenced by corporate commercial interests and the enlisting of journalists in support of the parent corporation’s business).

See, e.g., Cunningham, supra note xx at 292 (identifying the nonstop news cycle, and the reliance on public officials, public relations entities, and other research short cuts as causes of soft reporting). For an excellent discussion of the pitfalls of journalism’s top-down reporting based on official statements, see Herbert J. Gans, DEMOCRACY AND THE NEWS 45-68 (2003). See also DAVID CROTEAU & WILLIAM HOYNES, BY INVITATION ONLY 105-137 (1994) (showing the effects of the limited
These tendencies have contributed to influential media mistakes like the early mis-reporting of the 2000 presidential election results and the uncritical acceptance of government rationales for the 2003 invasion of Iraq. Journalistic shortcuts that save time and money, taken to their extreme, result in the passing off of third party advocacy pieces or press releases as reporting, leaving the public in the dark as to the actual source of seemingly objective news.

What the foregoing suggests is that media market structure, itself a reaction to the costs and risks of cultural production, tends to favor certain kinds of content. This is content in which the distributor or aggregator has an interest and content that maximizes short-term economic returns. It requires a leap from this observation to the claim that, therefore, the media industry is not optimally responsive to public demand. Empirical evidence that there is indeed public demand for media products free from the influences and pressures discussed above is lacking. Yet, the vocal grassroots objections to media consolidation suggest that at least a portion of the public is dissatisfied with the current media environment. Research pool of experts consulted on television public affairs programs like Nightline and what was then the McNeil/Lehrer News Hour).

231 The media relied on efficient, but monolithic, polling data for the 2000 election making it difficult for any media outlet to independently predict election outcomes. For a catalog of media shortfalls with respect to the 2000 presidential election, see, e.g., Blake D. Morant, Electoral Integrity: Media, Democracy, and the Value of Self-Restraint, 55 ALLR 1, 6-12 (2004). For a critique of the media’s war coverage, see, e.g., SHENDEL RAMPION & JOHN STAUBER, WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH’S WAR ON IRAQ 161-188 (2003) (criticizing the news media for lack of critical coverage of the events leading up to, and the onset of, the 2003 U.S. invasion of Iraq); Brent Cunningham, Re-thinking Objectivity, in OUR UNFREE PRESS: 100 YEARS OF RADICAL MEDIA CRITICISM 287, 294-295 (Robert W. McChesney & Ben Scott ed., 2004) (cataloging media failures to challenge official statements on purpose and expected aftermath of preemptive strike in Iraq). The relationship between public misperceptions about the war in Iraq and media exposure is explored in Steven Kull, Misperceptions, The Media and the Iraq War 12-19 (2003), at http://www.knowledgenetworks.com/ganp (finding that the majority of survey respondents reported misperceptions concerning the discovery of weapons of mass destruction, world public opinion about the war and/or links between Iraq and al-Qaeda; viewers of Fox, CBS, ABC, CNN, and NBC evinced the highest concentration of misperceptions in that order; and higher exposure to television news compounded the effect of political positions on the frequency of misperceptions).

232 This happened, for example, when more than 40 television news stations aired videos produced by the Department of Health and Human Services lauding recent changes to Medicare. Amy Goldstein, GAO Says HHS Broke Laws With Medicare Videos, WASHINGTON POST at A1 (May 20, 2004).

233 See supra note xx.
revealing public loss of faith in media as a truth-teller suggests the same thing.\textsuperscript{234}

\textbf{b) Digital Mediascape}

How might digital innovations affect media industry structure in order to improve responsiveness to public demand? Digital technologies certainly facilitate the emergence of new challengers in the competition for the viewer’s attention.\textsuperscript{235} Because distributed digital networks allow an ordinary webcaster to attain the reach of an NBC or Comcast, the Internet can loosen the bottleneck that has existed in the upstream production and packaging of programming. There will be less flex in the downstream market. Distribution choke points will remain in the hands of broadband facilities owners like cable. But even here, principles of nondiscrimination fashioned on a common carrier model might well prevent such owners from favoring their own content.\textsuperscript{236}

Notwithstanding these changes, digital technology is as unlikely to remake media industry structure as it is to remake the economics of media production and promotion. Indeed, because production and promotion costs will remain high, the benefits of scale and incumbency will remain in the digital world. It will remain attractive for media companies to spread the risks of program production over bigger taste and geographic markets.\textsuperscript{237} Moreover, the composition of companies best able to exploit economies of scale and scope will not change much. Open network architecture does not

\textsuperscript{234} See, e.g., \textsc{Davis Merritt}, Public Journalism and Public Life: Why Telling the News Is Not Enough xv (1995) (citing study that shows that citizens with “great confidence” in television news and newspaper news fell from 55\% to 25\% and from 50\% to 20\% respectively between 1998 and 1993).

\textsuperscript{235} See, e.g., \textsc{Compaine & Gomery}, supra note xx at 135, 159 (the Internet has reduced the power of concentrated media by creating the possibility for “diversity, accessibility and affordability.”).

\textsuperscript{236} It is to achieve this free flow of data over broadband pipes that a number of commentators have argued for media policy reforms that prevent broadband distribution facilities from discriminating against content they do not own. See \textsc{Lawrence Lessig}, The Future of Ideas 34-48 (2001); Mark A. Lemley and Lawrence Lessig, The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era, 48 U.C.L.A. L. Rev. 925 (2001); Mark Cooper, Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks, 71 U. Colo. L. Rev. 1011 (2000). These issues are joined in the pending FCC Notice of Inquiry, Nondiscrimination in the Distribution of Interactive Television Services Over Cable, 16 F.C.C.R. 1321 (2001).

\textsuperscript{237} The continuing value of distribution capacity to content companies is clear from the News Corp.-DirecTV merger, while the continuing value of content to companies with distribution capacity can be seen in the NBC-Universal merger.
disempower the giants of content production, aggregation, and distribution to the same degree that it empowers new content producers. As new opportunities in media have arisen over the past century, such as broadcasting and DVD’s, those at the top of the media hierarchy have appropriated them. Given the logic of capitalism, which restlessly pursues new markets, the very same companies that control cable, satellite, broadcasting, and broadband delivery will come to acquire significant holdings in the digital mediascape. This is not to minimize the importance of new entrants, but simply to suggest that big media is here to stay.

Audience behavior may be as important as internal industrial logic in limiting the movement of media audiences to vanguard providers. The most popular websites are provided by the big media of cable and broadcast television. Even if the barriers to entry in video markets fell, the willingness of consumers to spread their attention over multiple outlets is relatively limited. Data show that consumers with 100 or more channels typically watch only about

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238 See COMPaine & GOMery, supra note xx at 378-80.
239 The 2000 AOL-Time Warner merger was an example of this, although there the new media company acquired the old media company. Smaller, but perhaps ultimately more transformative, acquisitions going the other way seem to be the trend today. See, e.g., Shelley Solheim, Comcast Buys Tech TV, PC MAGAZINE, Mar. 26, 2004 at 1 (reporting on Comcast’s acquisition of Tech TV, which it has merged with G4, both gaming channels aimed at male 12-34 year olds).
240 See, e.g., James G. Webster, et al, The Internet Audience: Web Use as Mass Behavior, 46 J. BROAD. & ELEC. MEDIA, 1-12 (2002); Federal Communications Commission, Study 8, Consumer Survey on Media Usage, prepared by Nielsen Media Research, September 2002, Question 9, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A17.pdf (reporting that 60% of survey respondents reported using web-based news sources affiliated with major television and newspaper outlets); TVKey Facts About Media Markets in America, Consumer Federation of America and Consumers Union at http://www.democraticmedia.org/resources/filings/senatecom.pdf (May 2003) (reporting survey results showing that those who rely on online sources for news tend to use the web sites of major television or newspaper outlets); Mathew Hindman and Kenneth Neil Cukier, Measuring Media Concentration Online and Offline, at http://www.cukier.com/writings/webmedia-jan04.htm (reporting on large-scale study of online political information, showing that high-traffic sites benefit from a “winners-take-all” pattern absorbing the vast majority of hits). For a similar point concerning weblogs, see Clay Shirky, Power Laws, Weblogs, and Inequality (2003), at http://www.shirky.com/writings/powerlaw_weblog.html (reporting research results showing that 50% of weblog traffic is directed to the top 12% of the blogs). See generally Niva Elkin-Koren, It’s All About Control: Rethinking Copyright in the New Information Landscape, in THE COMMODIFICATION OF INFORMATION 79 (Niva Elkin-Koren & Neil Weinstock Netanel ed., 2002) (describing big media dominance in cyberspace).
To the extent that promotion and branding are important in retaining this audience loyalty, it is the large integrated media company that has the resources to invest in and fully exploit strong brands, allowing it to stabilize audience habits. In addition, well-branded networks are able to extend their brands through the launch of additional affiliated networks, like ESPN2 and ESPNews. By increasing their dominance within a niche through channel proliferation and cross-selling, incumbent providers can reduce channel space or interest in rival networks.

The impact of digital technologies on media industry structure, as on other market features, will be mixed. Digital networks create opportunities for new players to reach audiences, but the costs of content development and promotion will remain barriers to entry. Moreover, big media will be attentive to these opportunities, exploiting them to retain consumer attention in the new media environment.

4. Conclusion

This Section identified three related aspects of the production and sale of video products that disturb the satisfaction of consumer desires, resulting in narrow market failures. First, the very nature of advertiser-supported media muffles the audience voice. Second, programming costs and risks create pressures to aggregate large audiences and to develop programming with proven broad appeal, thus blunting the impact of distinct taste communities. Third, these same pressures promote a market structure in which barriers to entry are fairly high, vertical and horizontal scale is rewarded, and programming choices are made with a view to satisfying short-term corporate goals.

While new media dynamics in the form of digital abundance and audience control may ameliorate some of the narrow market failures, they will not correct them and may create new friction for the

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241 Peter Grant, Manage TV-Channel Clutter, WALL STREET JOURNAL, Nov. 17, 2003, at R6 (citing Nielsen Media Research estimates that the average viewer watches 15 out of 41-50 channels and 18 out of 121 or more channels). See also GANS, supra note xx at 30 (predicting that the same viewer concentration patterns will hold for Internet media sources).

242 See DOYLE, supra note xx at 145 (“the additional scale economies made possible by digitization” may increase big media’s advantage in branding). See also TODREAS, supra note xx 182-187 (discussing power of incumbent brands in digital environment).

Media Policy Out of the Box

sovereign consumer. Audience control over advertising exposure may reduce advertisers’ power over program content, thereby amplifying the consumer’s voice in content choices. More perfect price discrimination, especially when combined with new production efficiencies, may make media more responsive to the tastes of small audiences. As for industry structure, big media will probably have to share the audience with new content originators and distribution channels.

This said, innovations resulting from new revenue and distribution models and new entry will be limited, benefiting some audience constituencies, but not others. In particular, product gaps will remain in entertainment and news programming that is expensive to produce and unlikely to aggregate large audiences across product, temporal, and geographic markets. Examples include documentary films and investigative journalism requiring significant research and upfront investment, news commentary and reporting not unduly reliant on government or commercial official statements, and certain kinds of scripted dramatic series or films. Given these continuing gaps, market correction will continue to be a valid objective of media policy where narrow market failures persist.

C. Broad Market Failures and Market Supplementation

The market correction justification for media policy, as Part II showed, conceives of the consumer as sovereign and is largely reactive. Media policy fashioned along these lines is, like the imperfect market, at the service of existing consumer wants. As Part II also suggested, the achievement of media policy goals depends on aspirations that extend beyond consumer satisfaction. Even if the market could give consumers exactly what they wanted, our media would not necessarily deliver what a strong democracy and civil society needs in terms of exposure to diversity, the forging of solidarity, and elevation outside of market exchanges. That is because there are broad failures of the market to internalize the value of these goods. These aspirations thus call for supplementation of even well-functioning markets. Yet digital networks challenge the efficacy of supplementation efforts. The following subsections identify past responses to broad market failures and show how digital technologies undermine these responses.

1. Availability Mechanism in the Analog Mediascape

Market supplementation assumes that: (1) policy interventions can increase the production and distribution of media products that further media policy goals; (2) if such increases take place, individuals will consume and be affected by these products; and (3)
this consumption has social and political salience that transcends the value of consumer sovereignty. As an instrumental matter, the second link in this chain is the most critical, and it is the weakest. It is weakest because it assumes that consumption flows naturally from the availability of content – a process that I call the “availability mechanism.” Policy interventions into the market, whether to correct narrow market failures or provide a diversion around broad ones, have encouraged or sponsored media products that are simply made available. If the products are meant simply to satisfy consumer demand, availability is perhaps all that is required. But the availability mechanism is far less reliable in addressing broad market failures by bringing audiences to content that they have not demanded.

To be sure, it is possible for some kinds of media products to produce classic third-party positive externalities even if the availability mechanism fails and there is very little audience exposure. Prime examples of this kind of product are investigative reporting and even the passive filming of public bodies. The press may serve a “watchdog” function of exposing and deterring abuses simply by documenting proceedings, even if no one is watching. Weblogs behave this way by circulating reports read by relatively few, but then picked up by other media organs for more general consumption.

However, most media products will not produce benefits without being consumed. Even if reporting has some impact without an audience, an audience will be necessary to maximize the rhetorical power of a report. An audience will also be required whenever the positive value inheres in the experience of the media product itself.

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244 It should be noted that even if a consumer would choose a product if he knew about it, the consumer might remain ignorant of such products in a cluttered digital mediascape dominated by proprietary digital portals and search engines and heavily dependent on promotion. 245 Civic republican theory, for example, holds that even those not directly exposed will benefit from those who are because well-informed people are likely to improve social, cultural, and political interactions. See Cass Sunstein, A New Deal for Free Speech, 17 HASTINGS COMM. & ENT. L. J. 137, 155-56 (1994).


and in the content conveyed, rather than in the raw information or the mere fact of production. This will be true, for example, for films, commentary, cultural events, dramas, satire, and sporting events, as well as news productions that seek to inform the public as well as affect the newsmakers. Content has no power to increase social solidarity or to expose citizens to diverse viewpoints without amassing an audience.

In the analog world of channel scarcity and audience passivity, the problems with the availability mechanism were muted. Consumers could be expected to stumble across and consume content they did not initially demand because they were hungry for video content. Channel abundance and audience control make these expectations unreasonable and, as discussed below, require new approaches to market supplementation.

2. Availability Mechanism in the Digital Mediascape
Digital abundance and consumer control undermine the availability mechanism in two ways. They create an attention deficit by taking eyes away from content responsive to proactive media policy goals and they dilute the quality of attention even when the audience is “tuned in.”

The claim that video consumption might yield solidarity or exposure to difference has always been fragile. Theorists like Robert Putnam are suspicious of the media’s role in strengthening civic life and even blame television for destroying the social ties that existed when people spent leisure time on community pursuits. However, there is evidence that television had the power to expose the public to difference and forge consensus simply by being available. This power was created by, and largely dependent on, under conditions of channel scarcity and

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248 Robert Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 28 POL. SCI. AND POLITICS [cite] (1995) (defining social capital as “features of social life – networks, norms, and trust – that enable participants to act together more effectively to pursue shared objectives.”). Similar views are common in relation to the destruction of Habermas’ public sphere. See, e.g., PRICE, supra note xx at 28 (“broadcasting has become, at best, irrelevant to the operation of a democratic society and, at worst, so implicated in the harmful transformation of culture that the possibility of recuperation for an effectively institutionalized public sphere is dim indeed.”). See also ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS* 17-30 (1989).

attention abundance. The increase in content options over digital media, by fragmenting the audience and fraying attention, reduces audience exposure to products responsive to broad market failures.\textsuperscript{250} Thus, while market segmentation may mean more satisfaction of existing tastes, it likely means less common exposure to different tastes, less communion over shared tastes, and less provocation to change tastes.

Today, as the late media scholar Elihu Katz lamented, television “no longer serves as the central civic space; one can no longer be certain that one is viewing together with everybody else or even anybody else”.\textsuperscript{251} Taking advantage of interactive tools or distracted by a multitude of video options, consumers can easily choose not to be exposed to content that furthers media policy goals. Cass Sunstein’s book, Republic.com, expresses concern that Internet services reduce exposure to solidarity goods.\textsuperscript{252} Others have observed that personal video recorders and digital program guides operating in traditional television media reduce the likelihood that consumers will be exposed to media content they did not seek or will converge on the same programming in a democratically significant way.\textsuperscript{253} Given

\textsuperscript{250}See supra notes xx and accompanying text. See also ANG, supra note xx at 154-5. (“[W]hen ‘anarchic’ viewer practices such as zapping and zipping became visible, when viewing contexts and preferences began to multiply, … the industry … had to come to terms with the irrevocably changeable and capricious nature of ‘watching television’ as an activity.”); DENIS McQUAIL, McQUAIL’S MASS COMMUNICATION THEORY, 407-410 (4th ed. 2003).

\textsuperscript{251}Katz, supra note xx at 101.

\textsuperscript{252}Sunstein’s stalking horse, drawn from the online context, is the Daily Me news service that speaks to the user’s existing tastes and filters out information with which he does not agree or does not care about. SUNSTEIN, supra note xx[republic] at 206 (“To the extent that numerous people are ‘personalizing’ … their experience through the creation of specifically tailored communications packages, there may well be a problem from the democratic point of view.”). See also James W. Carey, Community, Public, and Journalism in MIXED NEWS, 1, 14 (in Jay Black ed., 1997)(earlier raising the dangers of tailored news in cyberspace in the form of a “Daily Me” news service). But cf. Hunter, supra note xx at 627-637 (arguing that there is no such thing as perfect filtering and fears on this score are greatly exaggerated).

\textsuperscript{253}NAPOLI, supra note xx at 150 (“[I]ncreases in the diversity of content can lead to decreases in the diversity of exposure … [such that] the objectives inherent in the marketplace of ideas metaphor may actually be undermined, rather than fulfilled, by policies designed to increase the diversity of content options available.”) See also J.G. Webster & P. F. Phalen, Victim, Consumer, or Commodity? Audience Models in Communications Policy in AUDIENCEMAKING: HOW THE MEDIA CREATE THE AUDIENCE 35 (J.S. Ettema & D.C. Whitney ed., 1994) (“If increasing diversity of content means that each individual is actually exposed to less diversity of expression, it’s hard to see how such a result facilitates the marketplace of ideas.”).
quantity and control, viewers may deprive themselves of the shared experiences that are important to careful deliberation in a democracy.

Digital technologies weaken the availability mechanism even when content penetrates information blizzards and information shields to reach the public. The potency of any particular program to fulfill media policy goals will diminish with over-exposure and a reduction of quality attention. One the most striking statistics about media usage is that the increased use of one media tool does not result in a corresponding decrease in others. For example, average television viewing increased between 1998 and 2001 from 1,551 to 1,661 hours per year. Over the same period, average annual consumer Internet usage increased from 54 to 134 hours and average annual video game usage increased from 43 to 78 hours. Some of the gain in screen time came at the expense of books and other leisure activities, but much of the increase was due to simultaneous usage of video media and a net increase in screen time. This amount of total and simultaneous screen time tends to result in an information flow that “exceeds the interpretative capacity of the subject.” The overexposed and restless audience, even when reached by the availability mechanism, may not be reached in a meaningful way.

It is not just the amount of information that is taxing, but also the degree to which viewers are responsible for the critical functions once exercised by content providers. Knowing the fragility of their audience’s attention, entertainment producers emphasize the sexy, violent, profane, graphic, and fast, sometimes at the expense of the more enduringly provocative. News and information producers

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255 U.S. Bureau of Census, supra note xx at 720.

256 Id. Video game usage and Internet usage are projected to increase by about 40% and 60% respectively by 2006. Even television viewing is expected to increase along with the total number of hours per person per year devoted to media consumption. Id.

257 STEVENSON, supra note xx at 157.

258 See KEANE, supra note xx at 182-3 (discussing Jean Baudrillard’s theory “that citizens will become trapped in a never-ending blizzard of information, without adequate free time to digest or make sense of the information flows which envelop them.”).

259 See, e.g., CROTEAU & HOYNES, supra note xx at 157-62 (citing proliferation of programming with shock value, including wild animal attacks, tabloid gossip, dysfunctional families, reality programming, sex, violence, and spectacle); Nancy
too tend to privilege the sensational and fast-moving over nuanced analysis.\textsuperscript{260} One of the consequences of channel proliferation is that news services are under growing pressure to reach an audience first, and to reach it audaciously.\textsuperscript{261} Viewers click remote control devices between 36 and 107 times an hour and three-quarters of Americans under thirty watch the news with a remote in hand.\textsuperscript{262} Producers cannot afford to tarry over content, whether by delaying release pending additional fact-gathering or by composing a slower story with greater critical nuance.\textsuperscript{263} More and more information reaches the viewer in a fairly undigested form. This sort of stream-of-consciousness reportage has the benefit of reducing the editor’s control over public opinion.\textsuperscript{264} At the same time, it burdens the audience’s already strained attention to make sense of information.

Although digital technology undermines the availability mechanism as a means for pursuing the proactive agenda of media policy, it opens up new possibilities for such pursuits as well. It is with these that I conclude in the next section.

**IV. Out of the Box Public Service Media**

The vulnerability of the availability mechanism in the digital era impacts all facets of media policy, including both regulations and subsidies. But it is in the realm of media subsidies that media policy can make the most substantial strides in addressing broad market failures in the digital environment. The current system of federal

deWolf Smith, *Slices of Life*, WALL STREET JOURNAL, June 25, 2004, at W2 (noting the popularity of plastic surgery programs like *The Swan* and *Nip/Tuck*, the latter of which was the top rated new series on basic cable in 2003). See also Todd Gitlin, *Media Unlimited: How the Torrent of Images and Sounds Overwhelms Our Lives* 87-95 (2003) (discussing the increase in frames per second and cutaway shots in film and video products).

\textsuperscript{260} Larry Sabato, *Feeding Frenzy* 6 (1991) (arguing that ratings pressures lead to press obsession with “gossip rather than governance” and “titillation rather than scrutiny”).

\textsuperscript{261} New research on the implications of the rush to “firstness” identifies a “spin bias” in the news that emerges from news outlets that ride on, and magnify, the spin created by other news outlets without independent deliberation or perspective. Sendhil Mullainathan and Andrei Shleifer, Media Bias (MIT Department of Economics Working Paper No. 02-33), at http://ssrn.com/abstract_id=335800).

\textsuperscript{262} Gitlin, *supra* note xx at 72.

\textsuperscript{263} See Herbert J. Gans, *Democracy and the News* 49-54 (2003) (describing the various tactics news organizations employ to mass produce news); Gitlin, *supra* note xx at 96-97 (describing the affects of the sound bite on news production).

\textsuperscript{264} See, e.g., Ithiel de Sola Pool, *Direct-Broadcast Satellites and Cultural Integrity* in *Television in Society* 231 (Arthur Asa Berger ed., 1987) (“Simultaneous radio coverage of war, a moon walk or whatever absorbs and fascinates the mass audience directly, cuts out traditional local purveyors of information and interpretation.”).
Media Policy Out of the Box

media subsidies centers upon fairly meager support for public broadcasting and even more limited support for media production outside of the broadcasting system. These subsidy programs are flawed in manifold ways. The object here is not to propose specific institutional reforms, although institutional and legal reforms are necessary, but to show how media subsidies can further the proactive media policy agenda amid content abundance and attention scarcity. The first step is a commitment to subsidies as a major, not marginal, instrument of media policy.

A. Subsidy Policy and The First Amendment

Subsidies for the creation and dissemination of content that supplements the market are the most effective and constitutionally sound way to further proactive media policy goals.

Consider the following regulation. To enhance speech diversity, the FCC orders television broadcasters to devote some of their digital transmission capacity to entertainment or informational programming “concerning issues related to minority audiences within the broadcaster’s community.” At the outset, we can observe that even if such a rule were constitutional, it would not necessarily have the effect of enhancing robust and antagonistic exchange in a marketplace of ideas. It might satisfy under-served audience segments, although even the achievement of this reactive goal is questionable given the resources it would take to develop compelling

265 Federal appropriations for public broadcasting activities were about $378 million in 2003, constituting approximately 15% of public broadcasting revenues. CPB Appropriation History, at http://www.cpb.org/about/funding/appropriation.html.

266 These funds are made available primarily through the National Endowment for the Humanities. NEH funding for all projects, including video media, has fallen precipitously over the last decade from $140.6 million and 2195 grants awarded in 1990 to $106.8 million and 1290 grants awarded in 2001. U.S. Bureau of Census, supra note xx at 772. Funds made available through the National Endowment for the Arts, typically for non-video media, have fallen even more dramatically from $170.8 million and 4475 grants awarded in 1990 to $94 million and 2093 grants awarded in 2001. Id.

267 The public broadcasting system is famously troubled and beset by controversy as to its organization and output. See, e.g., QUALITY TIME? THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON PUBLIC TELEVISION (1993) (reviewing the problems, and recommending reform, of the public broadcasting system). Critiques of public broadcasting have come from both the left, see, e.g., JAMES LEDBETTER, MADE POSSIBLE BY...: THE DEATH OF PUBLIC BROADCASTING IN THE UNITED STATES (1997) (arguing that public television has adopted commercially-driven strategies), and the right, see, e.g., PUBLIC BROADCASTING & THE PUBLIC TRUST (David Horowitz & Laurence Jarvik ed., 1995) (including essays arguing that public television has been captured by the left).
programming. But it would not involve audiences without preexisting interest in such minority issues.

Even if the regulation were effective, it would encounter serious constitutional problems. Policies that seek to promote particular types of media content, like the “minority programming regulation,” will in many cases be content-based.\(^{268}\) Content-based regulations will generally only pass muster under the First Amendment if they are narrowly tailored to serve a compelling governmental interest.\(^{269}\) Although the Supreme Court has applied a less stringent standard to content-based regulations of broadcasting on the grounds that broadcast frequencies are scarce,\(^{270}\) this relaxed scrutiny has not been extended to other electronic media.\(^{271}\) Moreover, its continued vitality with respect even to broadcast media is in considerable doubt.\(^{272}\) The consensus opinion is that it is just a

\(^{268}\) Speech regulations that the government has adopted “because of [agreement or] disagreement with the message it conveys” are content-based. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1980). By contrast, speech regulations that favor or disfavor speech without reference to the ideas or views such speech expresses are content-neutral. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

\(^{269}\) See, e.g., Police Dept. v. Mosley, 408 U.S. 92 (1972). See generally, KATHLEEN M. SULLIVAN & GERALD GUNThER, FIRST AMENDMENT LAW 212-217 (2nd ed. 2003). Content-neutral regulations are subjected to an intermediate level of scrutiny, and are permissible if they are narrowly tailored to further an important or substantial governmental interest. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); United States v. O’Brien, 391 U.S. 367 (1968).

\(^{270}\) Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390-92 (1969) (upholding Fairness Doctrine requirement that broadcasters provide opposing viewpoints on matters of controversy on grounds that broadcasting required access to physically scarce airwaves licensed by government); NBC v. United States, 319 U.S. 190, 213 (1943) (upholding broadcast ownership regulations on grounds of the scarcity of broadcast airwaves).


matter of time before the Supreme Court buries the scarcity rationale, subjecting broadcast regulation to the same scrutiny as other types of speech regulation.\textsuperscript{273} The result will be an even heavier reliance on content-neutral structural regulations (\textit{e.g.}, ownership restrictions), which themselves are being subjected to more rigorous constitutional scrutiny as courts grow more solicitous of corporate speech.\textsuperscript{274} The bottom line is that the “minority programming regulation” will be constitutional, if at all, only for broadcasting – a diminishing component of the digital mediascape – and only for the near term.

The use of subsidies, in the form of cash or non-cash incentives, permits government to pursue media policy goals across all media and with far less formidable First Amendment constraints. Moreover, subsidies are most effective in advancing a proactive media policy agenda. Let us replace our minority programming regulation with a subsidy in the form of a grant for multi-media content concerning minority populations. Suppose that grant criteria include indicia of content quality and a compelling outreach program using such techniques as search engines, community screenings and events, school curricula, blogs, and marketing to increase exposure.

Government grants are subject to far less exacting First Amendment review than are government regulations.\textsuperscript{275} The “minority programming subsidy” would almost certainly be constitutional, even though it discriminates on the basis of content, so long as a preference for “minority programming” was not a cover for invidious viewpoint discrimination.\textsuperscript{276} This is not to say that the


\textsuperscript{274} See \textit{Baker, supra} note xx [Media Concentration].

\textsuperscript{275} See Goodman, \textit{supra} note xx at 231-38.

\textsuperscript{276} National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (upholding against facial challenge federal art subsidies conditioned on artistic merit and general standards of decency). Some public broadcasting entities today are not only subsidized by the federal government, but are themselves government entities.
value judgments involved in selecting media projects to subsidize will never call for constitutional scrutiny. The tensions between policy goals and the free speech interests of grantees are evident in the implementation of tax policy, copyright policy, and of course broadcast policy. In the context of public service media, these tensions have been addressed to some extent by interposing institutional buffers like the Corporation for Public Broadcasting between producers and government. Given the inherently political process of subsidizing media, these buffers will always be under pressure. Steps that make media subsidies more effective will intensify constitutional scrutiny, but they need not increase constitutional infirmity. It is to these steps that we now turn.

In such cases, the media content choices they make may constitute government speech, which is subject to even more permissive First Amendment standards. See Rust v. Sullivan, 500 U.S. 173 (1991) (upholding federal subsidies that discriminate on the basis of viewpoint on the grounds that the government is not penalizing speech, but ensuring that public funds be spent for authorized purposes); Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 833 (1995) (in striking down public university’s policy forbidding the use of subsidies for student publications by those that promote or manifest religious belief, clarifying that viewpoint discrimination is only permissible when government itself is the speaker). But cf. Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 673-4 (1998) (in upholding right of state-owned public television station to exclude qualified candidate from station-sponsored political debate, relying on the fact that the station’s selection criteria were viewpoint neutral). See generally, Randall P. Bezanson & William G. Buss, The Many Faces of Government Speech, 86 IOWA L. REV. 1377, 1437-45 (2001).


278 See Satellite Broadcasting and Communications Ass’n v. FCC, 275 F.3d 337 (4th Cir. 2001) (upholding copyright subsidies, in the form of a compulsory copyright license, for satellite broadcasters that carry local broadcast stations against a claim that such subsidies unconstitutionally discriminate on the basis of local content).


281 For example, public broadcasting is continually subject to political attack for its performance on the statutory goal that CPB-grantees pursue “objectivity and balance” in their programming. 47 U.S.C. § 396(g)(1)(A) (2003). See, e.g., Ken Auletta, Big Bird Flies Right, The New Yorker, June 7, 2004, at 42 (reporting on political pressure exerted on PBS for allegedly left-leaning programming).
B. Possibilities for Reform

If media policy is to address broad market failures as well as narrow ones, to broaden exposure to difference, increase social integration, and provide meaningful non-market content alternatives, it can only be by taking more seriously the availability mechanism’s limitations. It can only be by tackling content consumption as well as content availability in the digital mediascape. Scholars are beginning to recognize the importance of consumer exposure, as well as media supply, to the achievement of media policy goals. Several have urged in general terms, or in more specific ones, that government should invest more in public service media content. These proposals, although headed in the right direction, do not adequately address the implications of content abundance and attention scarcity. Additional screen clutter, without more, will not achieve proactive media policy goals.

The “more” that is needed is a public service media agenda focused on two clear goals. First, subsidies should be targeted to respond to narrow market failures by supporting the production of content that will be under-produced even in the digital era. These products were identified in Part III. Persistent challenges to public

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282 See, e.g., Napoli, supra note xx [Foundations] at 146-152 (arguing that “exposure diversity” or patterns of media consumption by individuals (vertical) and across fragmented media offerings (horizontal) ought to be taken into account in formulating diversity policy).
284 Some have proposed the creation of new deliberative Internet domains Sunstein, supra note xx at 170-72; Andrew Shapiro, The Control Revolution 205 (1999) (proposing a PublicNet domain to showcase underrepresented artists and activists, whose icon would appear on desktops and browsers). They have also proposed that government subsidize cyberspace content to encourage public debate. Sunstein, supra note xx at 180-2. These proposals are on top of proposals to revive and extend erstwhile broadcast regulations, like the Fairness Doctrine, into cyberspace, for example by requiring linking to contrasting perspectives. Sunstein, supra note xx at 186-9.
285 As Dan Hunter has noted wryly with respect to Sunstein’s proposals: “This is Cass as Kevin Costner: ‘If you build it, they will come.’ The sad truth is that they will not come. They will not even know it exists. And even if they did, the people about whom we should be concerned will filter it out.” Dan Hunter, Philippic.com, 90 Cal. L. Rev. 611, 664 (2002) (book review). See also Tracey, supra note xx at 280 (making a similar point about public broadcasting whose “heady optimism about ordinary folk … [is a] ‘field of dreams’ optimism: build the institution as a vehicle for superior entertainment, quality journalism, insight and boldness, excellence in all that is done – construct that architecture – and they will come.”).
286 See supra notes xx and accompanying text.
service media on the grounds that niche channels like Discovery and CSPAN now provide adequate commercial substitutes miss this point. 287 As we have seen, digital networks will reduce, but not eliminate, narrow market failures. There is likely to continue to be an underproduction of programming that is high-risk and high-cost, and that appeals to smaller audience segments. 288

Second, public service media should look beyond the availability mechanism in supplementing the market. If media subsidies are to advance both proactive and reactive policy agendas, they must boost consumption of, and critical engagement with, the content they support. This may involve outreach to promote content using the tools of digital media, such as program guides and search engines. It may involve the production of new forms of content such as virtual reality games or the sponsorship of peer-produced content and the use of all media platforms, including broadband. Most centrally, it requires efforts to foster meaningful exposure to content, of whatever type and distributed by whatever means.

The public journalism movement shows how some segments of the commercial press are attempting to respond to information abundance and attention scarcity. In the early 1990’s, print journalists began to develop a theory of journalism that challenged the conception of journalists as dispassionate observers. Instead, what came to be called civic or public journalism vested journalists with a responsibility to promote active deliberation over issues of common


288 One need only compare the critical awards garnered by public television and commercial television documentaries to perceive that the two kinds of product perform different functions. From 1998-2002, public television received 40 Peabody awards, widely considered the most prestigious award for excellence in television. This is nearly twice as many as any other television programmer (HBO received 21 in this period) and four times more than any of the commercial broadcast networks (ABC received 10). Data gathered from http://www.peabody.uga.edu. Between 1999 and 2003, public broadcasting was the only television winner of the duPont-Columbia gold baton for news excellence, winning for a documentary on the rise of Islamic terrorism, a documentary about post-apartheid South Africa, and for the Nova series’ excellence in science reporting. Data gathered from http://www.jrn.columbia.edu/events/dupont/. For an enlightening study of how the goals and methods of public television production differ from those of commercial television, see DORNFIELD, supra note xx at 181 (describing a producer’s struggle “to traverse the gap between the popular sensibilities historically attributed to and expected from television … and the demands of ‘enlightened’ educational enrichment – with its scientific authenticity and substantiality, verbal exposition, and extractable intellectual conclusions.”).
concern and enhance the problem-solving capabilities of citizens.\textsuperscript{289} According to one of the public journalism movement’s leaders, the movement “is about forming as much as informing a public.”\textsuperscript{290} In what others have called an effort to increase “social capital,” those engaged in public journalism seek to further exposure to difference and consensus over the common.\textsuperscript{291} Here is the aspirational aspect of media policy laid bare.\textsuperscript{292} In order to satisfy these aspirations, public journalism has pioneered the use of digital tools and real space events to capture audience attention.\textsuperscript{293}

Digital technologies provide new tools as well as new challenges for a proactive policy agenda. In the spirit of the public journalism movement, policy interventions aimed at exposing viewers to programming with positive externalities could use the same digital tools that commercial media use to aggregate audiences.\textsuperscript{294} It turns out, for example, that consumers are drawn to the same content that others are consuming.\textsuperscript{295} Digital technologies exploit these


\textsuperscript{292} Although some non-commercial media entities have engaged in public journalism, the movement has been concentrated in commercial newspapers.

\textsuperscript{293} See, e.g., Friedland & Nichols, supra note xx at 12-14 (describing public journalism’s sponsorship of public deliberative events and the use of “explanatory framing” to draw readers into an issue in all its complexity by stressing the relevance and impact on community and personal lives).

\textsuperscript{294} Scholars have recognized the power of digital tools to foster social integration in virtual settings or through real time networked communication. See, e.g., SHAPIRO, supra note xx at 120 (“one of the wondrous qualities of [a digital network] is the way it allows users to break down boundaries, erase distances, and build alliances.”). See also id. at 203 (“With its potential for individual empowerment and unfettered citizen interaction, the Internet has been a harbinger of a society in which citizens will engage one another in the vital conversations of a democracy.”).

\textsuperscript{295} See Pesach, supra note xx at 1084-85 (discussing cultural network effects and distinguishing them from economic network effects on the grounds that more users
bandwagon effects by alerting viewers to content they might share with others. Personal video recorders typically recommend programming that is similar to what the consumer routinely views or that media companies have paid to promote, reinforcing personal preferences and market hierarchies. But the same technology will also be able to tell viewers what others are watching, perhaps furthering at least the centripetal impulse. See Peter Grant, *Manage TV-Channel Clutter*, WALL STREET JOURNAL, Nov. 17, 2003, at R6.

Public service media might enlist these same technologies to promote and draw consumers to content that furthered media policy goals, particularly community-building content. In doing so, the concept of community need not be limited to the geographically proximate as it has been in localism policy. The use of interactive tools and distributed digital networks to produce and disseminate content can produce community in ways that were not possible in the analog world.

C. Real World Beginnings

Some of these concepts are being implemented in the existing public television community. These approaches take media out of the box and put it online, in schools, libraries, museums, and the workplace, leveraging investments in high quality content to achieve really does increase value for the latter, but only the perception of value for the former).

47 C.F.R. § 73.1120 (2003) (defining the location broadcast licensees are to serve as “a principal community (city, town or other political subdivision)). Glen Robinson, among others, has criticized the localism principle for its fidelity to the physical community as the object to media policy. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L. J. 899, 942-43 (1998) (“in a world where information can be pulled or pushed from every corner of the planet, there is something almost quaint about the idea of linking localism and modern information services.”). See also Yoo, supra note xx at 1668. For support, but reformulation, of the localism principle, see Andrew Calabrese, *Why Localism? Communication Technology and the Shifting Scales of Political Community*, in COMMUNICATION AND COMMUNITY 251, 267 (Gregory J. Shepherd et al. ed., 2001) (calling for a “revised concept of, and renewed commitment to, localism” aimed at enhancing democratic participation in the “translocal community”).

greater impact and exploiting and enhancing new production and distribution capabilities.

The examples identified below arise in a traditional public broadcast context and are limited by the existing constraints of the Public Broadcasting Act, public television funding, and political pressures. As a result, they address a relatively narrow range of topics and focus heavily on the broadcast medium. However, they illustrate ways in which public service media might forge exposure to media content, in the service of proactive media policy goals, and develop desired content that would otherwise not be produced, in the service of reactive goals.

- The production of Bill Moyers’ 2002 documentary on humane dying, *On Our Own Terms*, involved $2.5 million and two years of outreach work to accompany the program. Months before the program aired, 350 hospitals, universities, community organizations and local public television stations had already enrolled to participate in a 90-minute training conference on the conduct of town meetings, the staffing of hotlines, and the delivery of professional training.

- *Breaking the Cycle*, a documentary on the working poor, provides another example of this multimedia, multi-institutional approach to video programming. Filming over a two-year period for release in the fall of 2005, producers are developing a sophisticated outreach program in connection with the film to target families, workers, and employers, to offer workplace training, and to provide media resources in family

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299 In addition to a severe shortage of funds, one of the chief impediments to more innovative content development and dissemination within the existing public service media structure is that the Public Broadcasting Act limits the expenditure of funds to “public telecommunications services.” 47 U.S.C. § 396(k)(1)(C).

300 See Geneva Collins, Outreach Complements Moyers’ *On Our Own Terms*, CURRENT (Oct. 30, 2000), at http://www.current.org/outreach/out020dying.html. In Iowa alone, at least 73 towns and cities, with the assistance of Iowa Public Television, held events related to the series. *Id.* Similarly ambitious efforts were undertaken in Philadelphia. The local public television station, WHYY, formed Caring Community, a volunteer coalition comprised of experts from more than 75 partners representing non-profit organizations, academic institutions, government agencies, faith-based organizations and health care systems in the region. Among Caring Community’s efforts was a 15-part follow on series called *Finding Our Way: Living with Dying in America*, which WHYY and its partners supplemented with related resources. Interview with William J. Marrazzo, President and CEO, WHYY-TV in Philadelphia, PA (July 2003). See also WHYY’s Caring Community Coalition, http://www.whyy.org/about/report03/whycaring.html. See generally, PDIA Newsletter: PBS Series *On Our Own Terms: Moyers on Dying* Attracts High Ratings and Fosters National Dialogue (Mar. 2001), at http://www.soros.org/death/newsletter8/onourownterms.html.
leadership and economic development. In addition, national and local partners, including the Children’s Defense Fund and the Urban Institute, have lined up to provide resources “to strengthen community and neighborhood services for low income workers to improve their job skills.”

- Exploiting connections with schools and online resources, *Lost Children of Rockdale County* developed exposure to a 1999 documentary about an outbreak of syphilis among teenagers in an affluent, suburb of Atlanta. The Peabody-award winning documentary, reviewed as “[s]hocking and explicit without sensationalizing,” probed adolescent disaffection, sexual promiscuity, and substance abuse. Because of outreach efforts, including an online teacher’s guide for introducing the program to adolescent students, and an interactive website with expert guidance on various teenage problems, the program had lasting impact.

- In Kentucky in the spring of 2001, a public broadcasting station encouraged all readers in the state to consume and discuss the same book, Kentucky author Barbara Kingsolver’s *The Bean Trees*. More than 130 educational institutions, bookstores, schools, businesses, media outlets, and civic and social service organizations participated. Materials about the book and promotions were distributed through book club electronic networks, and the public station devoted a month to the book, offering a profile of the author, live call-in programs, and an on-air panel discussion. Public radio stations simulcast or repeated the programming. In the end, the book was distributed throughout classrooms and adult education centers, bookstores and libraries, and close to 10,000 readers registered to participate in online discussions.

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302 See id.

303 See *The Lost Children of Rockdale County*: Press Reaction, at http://www.pbs.org/wgbh/pages/frontline/shows/georgia/etc/press.html. The reviews also recognized that *The Lost Children of Rockdale County* is the type of show that would be unlikely to air on commercial television. See id. (The program “makes the way NBC uses the phrase ‘must-see TV’ seem a mockery. It is also a welcome reminder of the special thing that is ‘Frontline.’” (quoting Chicago Tribune review)).


305 See *The Lost Children of Rockland County*: Interviews, at http://www.pbs.org/wgbh/pages/frontline/shows/georgia/interviews/.

• In Minnesota, public television’s efforts to leverage its own technology and resources to partner with local organizations resulted in distinctly local content and community-oriented public service. A Minneapolis public station has dedicated a substantial part of its broadcast channel to an initiative called the Minnesota Channel Partners’ Collaborative, which produces, promotes, and broadcasts non-profit partners’ most valuable content.\textsuperscript{307} The partners help provide the content and pay production costs, but the station provides production assistance and quality control, assuring that the product is of high quality.\textsuperscript{308} The content is frequently used in community events, performances, and presentations.

• WNYE-TV, a public station owned by the New York City Department of Education, used just $750,000 to create \textit{School Night}, a weekly primetime program engaging more than 3000 public school students in the production of programming geared to their peers. The station produced 78 programs, including a quiz show combining academic knowledge and street smarts.\textsuperscript{309} It enlisted a prominent local documentary filmmaker to help more than 150 New York City public school kids to produce and narrate their own documentaries. Exploiting other local talent, the station employed more than 3000 students in creating a talk show, featuring famous graduates from New York City high schools, including Tim Robbins, Al Sharpton, Harvey Keitel, astronauts, and physicists.\textsuperscript{310}

These projects are merely prototypes of what might be a far more robust and extensive public service media. They are bound by yesterday’s analog technologies and real space encounters, with limited use of digital technologies beyond the Internet. Moreover, they are limited by the failure of media policy to set a course for public service media that would reduce reactive ratings pressures in favor of explicitly proactive media policies. Nevertheless, from these

\textsuperscript{307} Through the initiative, the station has worked with the St. Paul Chamber Orchestra, the Mayo Clinic, the University of Minnesota, and the Minnesota Department of Agriculture among others. These collaborations have resulted in a six-hour block of exclusively Minnesota-related programming. Telephone interview with James R. Pagliarini, President & CEO Twin Cities Public Television (July 2, 2003). \textit{See also} About MN Channel, http://www.tpt.org/mnchannel/about.html.

\textsuperscript{308} Once production of a program is completed, the station, Twin Cities Public Television, retains local broadcast rights (at least three broadcasts within one year of production) and the partner is free to use the program for other educational, promotional or fund-raising purposes. \textit{Id.}

\textsuperscript{309} Statement of Ned Kandel, General Manager, WNYE TV, delivered to Conference on Media Diversity and Localism: Meaning, Metrics, and the Public Interest, Fordham University (December 2003) (unpublished manuscript on file with the author).

\textsuperscript{310} \textit{Id.}
examples emerge some basic ingredients for a future public service media. These include community outreach, widespread talent development and exploitation, synergistic partnerships with other non-market actors, the leveraging of content over multiple platforms, and, perhaps most importantly, a focus on media consumption as well as production.

V. Conclusion

Digital media demand a new precision in defining policy goals and new means for achieving them. Theories about the democratic significance of media that are premised on audience exposure must contend with an over-exposed and discriminating audience. If we take seriously the contingent quality of consumer wants – a notion at the heart of media policy aspirations – then it is important to theorize more deeply about how media policy might influence the consumption as well as supply of media content in the public interest. Subsidies for a robust public service media, as opposed to media regulations, are the most promising and constitutionally acceptable way to affect consumption patterns.

The invigoration of public service media as a more powerful instrument of media policy would implicate a number of existing communications rules. It would require an expansion of funding to entities and activities beyond broadcasting. It would require the reorganization of public broadcast facilities and institutions, shifting resources from passive distribution of video content to production and more active models of engagement. Perhaps most significantly, it would demand a coherent and express statement of purpose for structuring Congressional appropriations and standards of accountability for public service media. The purpose would be to respond to both narrow and broad market failures with content that is judged not only by the audience it pulls in, but by the audience to which it is pushed out.