

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

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## **ABSTRACT**

Current media policy debates today are marred by outdated and ultimately unworkable justifications for government intervention in media markets.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 that promote democratic discourse and social solidarity.

Digital innovations 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. I conclude 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 a practical perspective.

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### I. INTRODUCTION

Federal media policy is in a state of flux. In 2003, the Federal Communications Commission (FCC) relaxed its limits on broadcast media concentration in a controversial ruling that both Congress and the courts later criticized.<sup>1</sup> Now, the FCC will reevaluate these rules amidst heated

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1. See 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. 13,620, 13,634 (2003) [hereinafter *Media Ownership Order*], remanded in part *sub nom.* Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004). Both during and after the FCC deliberations, surprisingly fierce and widespread opposition to media ownership deregulation emerged. See Gal Beckerman, *Tripping Up Big Media*, COLUM. JOURNALISM REV., Nov.-Dec. 2003, at 15; Robert W. McChesney & John Nichols, *Up in Flames*, NATION, Nov. 17, 2003, at 11. Opponents of media consolidation, including such disparate groups as the ACLU, the National Rifle Association, the AFL-CIO, the Parents Television Council, and the Na-

debates about broadcast “indecenty,”<sup>2</sup> public television funding,<sup>3</sup> and public interest obligations for digital television.<sup>4</sup> As these policy disputes unfold, the media landscape is changing dramatically, most notably because of digital innovations. And yet, analysis of how emerging patterns of media use affect policy has been relatively scant.<sup>5</sup> Moreover, neither policy-makers 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 as they relate to video markets in the digital era. It starts from the following premise: government intervention in media markets should seek to influence media consumption in the service of democratic values, as well as to improve the responsiveness of markets to existing consumer demands. Policy should strive to cultivate, not just satisfy, public tastes in

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tional Organization for Women, achieved what was thought to be impossible: a Republican Congress’s roll-back of a Republican FCC’s rule changes within one month. *See Consolidated Appropriations Act of 2004*, Pub. L. No. 108-199 § 629, 118 Stat. 3, 99 (to be codified at 47 U.S.C. § 303).

2. In the aftermath of Janet Jackson’s notorious breast-baring performance at the 2004 Super Bowl Halftime Show, Congress loudly moved to introduce legislation increasing penalties for indecent broadcasts. *See Broadcast Decency Enforcement Act*, H.R. 3717, 108th Cong. (2004); *Broadcast Decency Enforcement Act*, S. 2056, 108th Cong. (2004). Thereafter, the FCC imposed record-high indecency fines for the Super Bowl incident and other allegedly indecent broadcasts. *See, e.g., In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, No. EB-04-IH-0011, 2004 WL 2173447 (Fed. Communications Comm’n Sept. 22, 2004) (proposing a forfeiture in the aggregate amount of \$550,000 for Viacom Inc. owned stations). Moreover, in a possible bid to expand the definition of indecent programming, the FCC recently requested comment, in response to a Congressional directive, on whether some violent programming should be considered “indecent.” *Violent Television Programming and its Impact on Children*, Notice of Inquiry, 19 F.C.C.R. 14,394, 14,404 (2004).

3. The funding of public television will be at issue in the reauthorization of the Corporation for Public Broadcasting, *see The Public Broadcasting Reauthorization Act of 2004*, S. 2645, 108th Cong. (2004), and in initiatives to funnel federal support for public television into a permanently-funded trust fund. *See Completing the Digital Television Transition: Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 108th Cong. (2004) (testimony of John M. Lawson, President and CEO, Association of Public Television Stations), available at [http://commerce.senate.gov/hearings/testimony.cfm?id=1220&wit\\_id=3514](http://commerce.senate.gov/hearings/testimony.cfm?id=1220&wit_id=3514).

4. *See Children’s Television Obligations of Digital Television Broadcasters*, Notice of Proposed Rulemaking, 15 F.C.C.R. 22946 (2000); *Public Interest Obligations of Television Broadcast Licensees*, Notice of Inquiry, 14 F.C.C.R. 21,633 (1999).

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.

ways that build social solidarity and improve democratic debate. In this sense, media policy must be, and to some extent has long been, proactive as well as reactive. An emphasis on the reactive media policy goal—the satisfaction of existing demand in the name of consumer sovereignty—has dominated the discourse since media deregulation gathered speed in the 1980s. Indeed, one of the most powerful critiques of media regulation is that the market is competitive enough to ensure that consumers are well served.<sup>6</sup> To date, the leading commentators have failed to answer such critiques effectively in light of technological change,<sup>7</sup> and policymakers have largely proceeded on the assumption that these critiques are correct.

Throughout the twentieth century, there was little need to distinguish the proactive from the reactive in media policy theory because 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.

Today, the scarce resource is attention, not programming. The spread of digital innovations, in the form of networks, production techniques, and consumer products, has multiplied content and freed audiences from network schedules. Consumers now sit in the eye of a storm of bits surging through cable and satellite channels, DVDs, video games, and websites.<sup>8</sup> Moreover, program guides and search engines allow consumers to con-

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6. See, e.g., Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 MICH. ST. DCL L. REV. 671; Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579 (2003).

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. See *Media Ownership Order*, *supra* note 1, at 13,620, 13,634; see also *Broadcast Ownership Biennial Review: Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 108th Cong. (2003) (testimony of Michael Powell, Chairman, FCC), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235127A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235127A1.pdf); FCC 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*]. The perception of sameness focuses on patterns of ownership of, and programming on, these many channels. See, e.g., BEN BAGDIKIAN, *THE MEDIA MONOPOLY* 3-26 (4th ed. 1992) (showing how the largest media companies dominate the print, broadcast, cable, and film industries); ROBERT W. MCCHESENEY, *CORPORATE MEDIA AND THE THREAT TO DEMOCRACY* 17-22 (1997) (arguing that media conglomeration leads to reuse of material by constituent companies).

struct their own media environment into which the unsought media experience seldom strays. Under these conditions, media policies designed to improve market reactions to existing consumer demand will not advance proactive policy goals as well. 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. Policymakers must resist the facile conclusion that content abundance guarantees consumer satisfaction. As this Article shows, notwithstanding the explosion of media distribution channels, there will remain demand that media producers fail to satisfy. What will change is the degree to which traditional regulatory tools can be effective, particularly in achieving proactive media policy goals. Media subsidies, as opposed to regulations, should be the preferred instrument of proactive media policy under conditions of content abundance and attention scarcity. Subsidies for a range of activities including video content production, distribution, and marketing across digital platforms as well as community activities related to the video programming, can achieve what regulations cannot: they can influence consumer appetites constitutionally, without relying on the shaky First Amendment exceptionalism that underlies much broadcast regulation.<sup>9</sup>

In conceptualizing a new vision for media policy, this Article progresses as follows. Part II distills 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.

Part III shows how digital media affect the pursuit of these 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

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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 261-67 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. TELECOMM. & HIGH TECH. L. 217, 224-28, 231-38 (2002).

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 shed the limitations of the broadcast box to be effective in the digital mediascape, taking advantage of new communicative tools, techniques, and community encounters to bring the public to programming. Recent “out of the box” public broadcasting initiatives in which media content producers team up with local nonprofit institutions hint at some of the possibilities. Although limited by existing legal authority and funding, these initiatives illustrate how the use of multiple distribution platforms and techniques of public engagement might develop demand for and exposure to underproduced content.

## II. MEDIA POLICY, CIVIC LIFE, AND CONSUMER SOVEREIGNTY

Media policy, in the form of broadcast, cable, and satellite regulations and subsidies, 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, media 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 is yoked to consumer sovereignty, striving to make media markets more responsive to consumer demand. Another posture, sometimes evident in policy and required by theory, is proactive. The proactive approach to media policy accepts, as Cass Sunstein has put it, that there “is a large difference between the pub-



lic interest and what interests the public.”<sup>10</sup> Between the reactive and proactive approaches is the tension between satisfying and shaping media experiences—a tension that digital innovations exacerbate. This Part briefly outlines today’s major media policy goals: diversity, localism, and the elusive property of excellence in noncommercial media.<sup>11</sup> It goes on to show how the policies themselves and their theoretical justifications depend on, yet understate, the proactive purposes of government intervention in media markets.

### A. Media Policy Components: Diversity, Localism, and the Noncommercial

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.”<sup>12</sup> Diversity policy is embedded in twentieth century First Amendment jurisprudence.<sup>13</sup> It reflects the instrumentalist

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10. Cass Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 501 (2000). *But cf.* Mark Fowler & Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 202, 210-11 (1982) (“[T]he public’s interest . . . defines the public interest.”).

11. Philip Napoli has made particularly careful study of diversity and localism. *See* Philip M. Napoli, *Access and Fundamental Principles in Communication Policy*, 2002 MICH. ST. DCL L. REV. 797; Philip M. Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM. 7 (1999); Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL’Y STUD. J. 372 (2001); Philip M. Napoli, *The Localism Principle Under Stress*, 2 J. POL’Y, REG. & STRATEGY FOR TELECOMM. INFO. & MEDIA 573 (2000). Another important goal of media policy is to increase competition in media markets. *See, e.g., Media Ownership Order*, *supra* note 1, at 13,643 (stating that increased competition in media markets produces more innovation and improved service). To the extent that competition is desired for noneconomic reasons, it duplicates the diversity goal. To the extent that competition serves economic purposes, it is an objective of most regulatory intervention in markets and does not distinguish media policy.

12. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663-64 (1994) (internal quotation marks omitted) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))). Endorsements of speech diversity as a primary media policy goal abound. *See, e.g., id.* at 663 (upholding policies promoting “access to a multiplicity of information sources”); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567-68 (1990) (upholding minority ownership policies on grounds that they furthered media diversity); *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 795, 814 (1978) (upholding broadcast ownership regulations aimed at diversifying mass media); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002) (recognizing diversity as a legitimate goal of media policy).

13. *See, e.g., Turner Broad. Sys.*, 512 U.S. at 663 (characterizing speech diversity policy as “a governmental purpose of the highest order, for it promotes values central to

free speech tradition that values unfettered expression more for the good it achieves in society than for the good it does the speaker.<sup>14</sup> Specifically, expression, in antagonistic engagement, is expected to produce a healthy democratic culture of “uninhibited, robust, and wide-open debate.”<sup>15</sup> This debate, in turn, fosters the discovery of truths that are important for both public and private life.<sup>16</sup>

The FCC, informed by this instrumentalist free speech tradition and operating largely within the broadcast arena, has tried to foster debate by

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the First Amendment”); *see also Nat'l Citizens*, 436 U.S. at 775 (associating the FCC's public interest mandate with First Amendment goals).

14. *See, e.g., Red Lion Broad. Co.*, 395 U.S. at 390 (“It is the right of the viewers and listeners, not the right of broadcasters, which is paramount.”); *see also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409-11 (1986) (defending the instrumentalist view of the First Amendment); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 275-77 (1992). The Supreme Court has drawn on this instrumentalist view a number of times to uphold media structural regulations. *See, e.g., Nat'l Citizens*, 436 U.S. at 775 (upholding cross-ownership restrictions between local newspapers and broadcast stations); *NBC*, 319 U.S. at 190 (upholding rules governing network and affiliate station relationships). *See generally* C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57. In recent years, lower courts have taken a more essentialist, liberty-oriented view of the First Amendment in communications cases, resulting in the reversal of media regulations held to infringe on media companies' speech rights. *See, e.g., Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) (stating in dicta that cable ownership restrictions interfere with operators' “speech rights by restricting the number of viewers to whom they can speak”); *Comcast Cablevision v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (holding that local regulation requiring cable operators to carry competing broadband providers violated operators' speech rights). *See generally* C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 847-55 (2002) [hereinafter Baker, *Media Concentration*] (criticizing recent lower court decisions on structural media regulations).

15. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

16. *See Red Lion Broad. Co.*, 395 U.S. at 390 (stating that the purpose of the First Amendment is to preserve “an uninhibited marketplace of ideas in which truth will ultimately prevail.”); JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 13-48 (R. McCallum ed., Basil Blackwell 1948) (1859) (extolling a diverse and contentious press as a defense against excessive state power); JOHN MILTON, AREOPAGITICA 126 (J.C. Suffolk ed., University Tutorial Press 1968) (1644) (identifying truth as the outcome of free and open encounters). Contemporary theorists have extended the desired field of informational combat to include cultural as well as narrowly political expression. *See, e.g., BAKER, supra* note 7, at 143-53 (advocating a complex democracy centered on 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.”).



increasing the number of viewpoints, program genres, program sources, and owners of distribution outlets within a market.<sup>17</sup> 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.<sup>18</sup>

Ostensibly distinct from 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.<sup>19</sup> With localism as with diversity, ownership rules now bear the weight of policy goals once encoded in more varied regulations.<sup>20</sup> By restricting ownership of local broadcast stations, the FCC hopes to bolster local control over media content as measured by a poorly defined

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17. *Media Ownership Order*, *supra* note 1, at 13,627 (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).

18. *See, e.g., Media Ownership Order*, *supra* note 1, at 13,633-34. Policymakers have long linked the ownership of media outlets with the viewpoint expressed in programming. *Id.* at 13,629-30 (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 F.C.C. 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 Broad., Inc. v. FCC*, 497 U.S. 547, 571 n.16 (1990) ("[O]wnership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation . . .") (internal quotation marks and citation omitted).

19. For early endorsements of localism policy, *see, for example, FCC v. Allentown Broad. 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"); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 139 (1940) (denying broadcasting application in part because "applicant did not sufficiently represent local interests in the community"). Congress reaffirmed localism as a media policy goal in the legislative history of the 1996 Telecommunications Act. H.R. REP. NO. 104-104, at 221 (1996) ("[Localism] is a vitally important value . . . [and] should be preserved and enhanced as we reform our laws for the next century.").

20. Localism is, in principle, preserved through limitations on network ownership of local stations and restrictions on network contractual requirements of their affiliated stations. 47 C.F.R. § 73.658 (2003). *See generally* *NBC v. United States*, 319 U.S. 190, 218 (1943) (upholding these rules, then referred to as the chain broadcasting rules, as within the FCC's authority). Other localism-based requirements are that broadcast stations maintain a local studio, 47 C.F.R. § 73.1125, maintain a public inspection file including a list of programs concerning community issues, *id.* § 73.3526(e)(11)(i), and give local communities a chance to petition to deny a station's application for renewal or transfer of license, *id.* § 73.3584.

brew of locally-produced content, content on matters of local interest, and local say over content.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

The pursuit of speech diversity and localism extends beyond the regulation of commercial media to support for noncommercial media, through federal subsidies for public broadcast programming and transmission facilities.<sup>24</sup> Public broadcasting was conceived in large part as a means to

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21. On four occasions in the past several years, courts have vacated or remanded challenged localism-oriented regulations on the grounds that they were not sufficiently well defended. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (vacating rules prohibiting broadcast station and cable system ownership in same market and remanding national broadcast ownership cap), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broad. 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 Entm't Co. v. FCC*, 240 F.3d 1126, 1144 (D.C. Cir. 2001) (invalidating cable ownership caps and channel occupancy provisions).

22. See *Media Ownership Order*, *supra* note 1, at 13,624 (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, see Press Release, FCC, FCC Chairman Powell Launches "Localism in Broadcasting" Initiative 2-3 (Aug. 20, 2003), at <http://www.fcc.gov/localism>, and issued a Notice of Inquiry concerning new localism rules. See also Broadcast Localism, Notice of Inquiry, 19 F.C.C.R. 12,425 (2004).

23. See *Fox Television Stations*, 280 F.3d at 1042 ("[T]he public interest has historically embraced . . . localism . . ."); *Media Ownership Order*, *supra* note 1, at 13,644 ("We remain firmly committed to the policy of promoting localism among broadcast outlets."). The FCC adopted localism rules for its new low power radio service. 47 C.F.R. § 73.853(b) (2003) (limiting initial eligibility for licensees to local entities); *id.* § 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); Creation of Low Power Radio Service, 15 F.C.C.R. 2205 (1999). 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 broadcast a minimum amount of programming produced locally as required by 47 U.S.C. § 336(f)(2) (2000)). Congress has also tried to advance localism goals in recent satellite policy. 47 U.S.C. § 338 (establishing a framework for the retransmission of local broadcast television signals on satellite).

24. See Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 368-69 (codified as amended at 47 U.S.C. § 396(a)). Certain rules require satellite broadcasters to reserve four percent of their channel capacity for "noncommercial programming of an

satisfy consumer appetites for diverse and local content that the market overlooked. The public broadcasting system was assembled in the 1960s from scattered local stations, which provided instructional and other educational programming.<sup>25</sup> In 1965, the independent Carnegie Commission issued *Public Television, A Program for Action*, in which it called for a new system of “public television.”<sup>26</sup> This system would retain its local character and its connections with local and regional institutions like universities.<sup>27</sup> It would also be charged with an explicitly diversity-enhancing mission to develop and distribute distinctive national programming.<sup>28</sup> 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.”<sup>29</sup> 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.<sup>30</sup>

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educational or informational nature.” 47 U.S.C. § 335(b)(1); Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992, Direct Broadcast Satellite Public Interest Obligations, 13 F.C.C.R. 23,254, 23,285 (1998). In addition, cable operators may be required, under their local franchise agreements, to devote a certain amount of channel capacity and equipment to noncommercial public, educational, and governmental programming. 47 U.S.C. § 531.

25. See A PUBLIC TRUST: THE REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING 33-35 (1979).

26. THE REPORT AND RECOMMENDATIONS OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION: PUBLIC TELEVISION, A PROGRAM FOR ACTION (1967) [hereinafter CARNEGIE COMMISSION REPORT].

27. 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 hopes, their protests, their enthusiasms, and their will.” *Id.* at 92-99.

28. *Id.* 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”).

29. Letter from E.B. White, to Stephen White, Assistant to Chairman, Carnegie Commission (Sept. 26, 1966), at <http://www.current.org/pbpb/carnegie/EBWhiteLetter.html>.

30. 47 U.S.C. § 396(a)(5) (2000) (providing that to further the general welfare, non-commercial 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.”).

## B. Reactive Policy: Serving the Consumer

Each of the policies discussed above—diversity, localism, and non-commercialism—is implemented through rules and subsidies aimed at enhancing the array of consumer media choices.<sup>31</sup> These policies posit the existence of unsatisfied consumer demand for such media options, to which government then reacts. Indeed, the kernel of a reactive policy set on improving service to the sovereign consumer is embedded in democratic theories that analogize discourse to market exchanges. Both diversity and localism policy, and to a lesser extent noncommercial media policy, are centered upon the “marketplace of ideas” metaphor of speech competition.<sup>32</sup> The FCC’s efforts to diversify speech radiate from this metaphor.<sup>33</sup> In the marketplace, listeners pursue truth much as they might pursue bargains, turning over a wide range of ideas in competition with each other. 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,<sup>34</sup> policymakers seem largely untroubled by its use. 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

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31. See, e.g., *Media Ownership Order*, *supra* note 1, at 13,788 (“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.”).

32. The term “marketplace of ideas” is usually attributed to Justice Holmes. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the 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) (“It would be a barren marketplace of ideas that had only sellers and no buyers.”).

33. See, e.g., *Media Ownership Order*, *supra* note 1, at 13,627 (explaining that the pursuit of a diverse and robust marketplace of ideas is at “the foundation of our democracy”); *id.* at 13,631 (stating that 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 under-girds and sustains our system of government”). The FCC began to use the marketplace of ideas metaphor with regularity in 1967. See PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 109-21 (2001) (reporting results of empirical study).

34. See CASS R. SUNSTEIN, 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); Fiss, *supra* note 14, at 1408-13 (criticizing the dominant free speech tradition which equates freedom from government intrusion with uninhibited and robust debate); Stanley Ingber, *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).

independent ownership of distribution outlets, might actually decrease diversity of other kinds, like program genre.<sup>35</sup> The media giant Clear Channel, for example, takes this position 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.<sup>36</sup> While some listeners might miss the idiosyncratic voice amplified by diverse ownership, most listeners are better satisfied.<sup>37</sup> Interestingly, both Clear Channel and its critics champion consumer satisfaction as the goal, differing only in their valuation of different kinds of diversity as sources of that satisfaction.

The same reactive thrust has dominated localism policy. Local stations are required, in an undefined and largely unenforced way, to satisfy con-

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35. This is because efficient combinations of media outlets may create the conditions for genre diversity. *See, e.g.*, BRUCE M. OWEN & STEVEN S. WILDMAN, 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); Benjamin J. Bates & Todd Chambers, *The Economic Basis for Radio Deregulation*, 12 J. MEDIA ECON. 19, 23 (1999); Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933, 1936-51 (2000) (discussing Steiner's and other economic modeling of the effects of concentrated distribution markets on program diversity).

36. For an account of this debate, see Gregory M. Prindle, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 313-21 (2003). The FCC itself has concluded that more concentrated outlet ownership might produce more genre diversity, stating that

[W]here 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.

*In re* Review of the Commission's Regulations Governing Television Broadcasting, 10 F.C.C.R. 3524, 3551 (1995).

37. Courts have criticized the FCC for failing to make explicit tradeoffs between different kinds of diversity. *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 170 (D.C. Cir. 2002) (Sentelle, J., dissenting) (encouraging the FCC to "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"); *Schurz Communications v. FCC*, 982 F.2d 1043, 1054-55 (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).



sumer demand for difference.<sup>38</sup> 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 national din.<sup>39</sup> Consider, for example, the early requirement that the FCC distribute broadcast licenses to as many communities as possible.<sup>40</sup> 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 responsive government.<sup>41</sup> In media as in politics, the hope was that devolution of control would increase consumer satisfaction.<sup>42</sup> After experimenting with more substantive rules, discussed below,

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38. *Media Ownership Order*, *supra* note 1, at 13,644 (“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.”).

39. *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.”).

40. 47 U.S.C. § 307(b) (2000) (directing the FCC to “make such distribution of licenses, frequencies, hours of operation, and of 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).

41. *See* ROBERT B. HOROWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 174 (1989) (stating that localism was a “surprisingly conscious policy” connected with the Jeffersonian idea of small-town America); Andrew Calabrese, *Why Localism? Communication Technology and the Shifting Scales of Political Community*, in *COMMUNICATION AND COMMUNITY* 251, 253 (Gregory J. Shepherd et al. eds., 2001) (“U.S. communications policy has always been nominally committed to the idea of localism as a Jeffersonian-style means of promoting decentralized public discourse about matters of social and political consequence.”). *But see* OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, *CRITICAL CONNECTIONS: COMMUNICATION FOR THE FUTURE* 148-49 (1992) (noting that America’s early legislators thought that “media subsidies” should sponsor the distribution of post and newspapers to foster the development of a *national* identity through communications).

42. *See* MONROE E. PRICE, *TELEVISION, THE PUBLIC SPHERE, AND NATIONAL IDENTITY* 215 (1995) (stating that localism policies were “designed to reinforce a vision of American life and imagination in which the geographical community had dignity.”). For a discussion of localism as the core value of federalism, see, for example, *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 703 (1999) (Breyer, J., dissenting) (lauding “local control over local decisions”); Frank B. Cross, *The Folly of Federalism*, 24 *CARDOZO L. REV.* 1, 20-25 (2002).



the FCC has returned to this structural approach over the past several decades.<sup>43</sup>

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 unregulated market ensures responsiveness to local consumer demand for such products as local news.<sup>44</sup> Local news, after all, is often the most profitable part of a station's operations.<sup>45</sup> Supporters of the ownership restrictions have fought on the same grounds, arguing that the regulations improve the market's responsiveness to consumer desires.<sup>46</sup> Similarly, the FCC has

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43. See Broadcast Localism, Notice of Inquiry, 19 F.C.C.R. 12,425, 14,245 (2004) (stating that in the 1980s, 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*, 520 U.S. 180, 194 (1997) (emphasizing that cognizable governmental interest was in promoting local control of the broadcast transmission service, not local content *per se*). *But see id.* at 234-35 (O'Connor, J., dissenting) (arguing that the asserted governmental interest was a "content-based preference for broadcast programming" that is local, not a content-neutral preference for local control).

44. See, e.g., Comments by the Coalition for Program Diversity at 35-37, *In re 2002 Biennial Regulatory Review* (Fed. Communications Comm'n) (Nos. 02-277, 01-235, 01-317, 00-244) (filed Jan. 2, 2003), available at [http://www.dga.org/news/v27\\_5/coalition\\_forprogramdiversity\\_hyperlinked.pdf](http://www.dga.org/news/v27_5/coalition_forprogramdiversity_hyperlinked.pdf); see also *Media Ownership Order*, *supra* note 1, at 13,678-93 (discussing results of study); THOMAS C. SPAVINS ET AL., *THE MEASUREMENT OF LOCAL TELEVISION NEWS AND PUBLIC AFFAIRS PROGRAMS* (2002) (finding that network-owned stations air more local news than do independently owned stations), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A12.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.doc). *But see* Reply Comments of the National Association of Broadcasters and the Network Affiliated Stations Alliance at 46-55, *In re 2002 Biennial Regulatory Review* (Nos. 02-277, 01-235, 01-317, 00-244) (filed Feb. 3, 2003) (identifying shortcomings of study).

45. See ROGER G. NOLL ET AL., *ECONOMIC ASPECTS OF TELEVISION REGULATION* 111 (1973) (showing how local news is popular and cheap to produce, making it highly profitable); Vernon Stone, *News Operations at U.S. TV Stations*, at <http://www.missouri.edu/~jourvs/tvops.html> (last visited Dec. 20, 2004).

46. See e.g., Early Submission of the National Broadcasters and the Network of Affiliated Stations Alliance at 39-40, *2002 Biennial Regulatory Review* (Nos. 02-277, 01-235, 01-317, 00-214) [hereinafter *NAB Comments*]. See generally Stuart Minor Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting Is Good for the Country*, 46 WM. & MARY L. REV. (forthcoming 2004) (discussing affiliated stations' arguments that media consolidation discourages them from being more responsive to local tastes), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=605264](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=605264).

equated localism policy with support of programming that has popular appeal within a local market.<sup>47</sup>

The emphasis on consumer sovereignty, so pronounced in diversity and localism policy, is evident even in policies promoting the development of a noncommercial alternative to consumer-driven media. The public television system proposed by the Carnegie Commission was meant to satisfy 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,”<sup>48</sup> the Carnegie Commission thought it was likely to amass audiences by muting, rather than satisfying, differences. The Public Broadcasting Act followed up on this insight by making it a policy goal to serve “unserved and underserved” audiences.<sup>49</sup> 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.

It is in the area of noncommercial television policy that the inadequacy of the reactive consumer sovereignty model is most evident, as discussed below. The problems are exposed whenever the nominally underserved audiences that nonmarket media target are effectively nonexistent. The limitations of the model are evident in diversity and localism policy as well. Policy aspirations require, and policy has sometimes taken, a more proactive approach to the provision and consumption of media products that transcends consumer sovereignty.

### C. Proactive Policy: Altering the Consumer

Most media policy criticism has focused on the technical implementation of diversity, localism, and noncommercial goals.<sup>50</sup> However, there is a

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47. See *Media Ownership Order*, *supra* note 1, at 13,755-60, 13,839-42 (relying heavily on ratings for local news in assessing the impact of television ownership rules on localism). Taken to its extreme, the structural 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. United States*, 319 U.S. 190, 203 (1943) (equating local control with a local program service that is a “vital part of community life”).

48. CARNEGIE COMMISSION REPORT, *supra* note 26, at 13-14.

49. 47 U.S.C. § 396(a)(6) (2000).

50. For a critique of the government’s diffuse approach to diversity, see Ronald J. Krotoszynski & Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democ-*

more important question: to what extent should media policy, however implemented, 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?<sup>51</sup> These needs include common exposure to a broad array of ideas and public elevation through excellence in programming.

### 1. *Common Exposure*

As seen above, both diversity and localism policies pursue greater choice. However, the objectives of the “marketplace of ideas” are not met merely by adding content. Robust debate depends on trade, and trade requires that speech consumers be exposed *in common* to the abundance of ideas the marketplace yields. Trade requires discussion of 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.

The idea that communication should integrate listeners as well as satisfy demand for speech products has 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 common faith.’”<sup>52</sup> 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.”<sup>53</sup>

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*racy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 819 (“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 33, at 135-46. For a critique of localism policy, see HOROWITZ, *supra* note 41, at 155 (calling localism an “ambiguous policy goal” leading to “a kind of mushy policy foundation”); Tom A. Collins, *Local Service Concept in Broadcasting: An Evaluation and Recommendation for Change*, 65 IOWA L. REV. 553, 635 (1980); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 938 (1998). For an economic critique of particular localism regulations, see OWEN & WILDMAN, *supra* note 35, at 123-24; Yoo, *supra* note 6, at 1677-82.

51. This is essentially the question posed in C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317 (1998).

52. 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).

53. *Id.*

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.<sup>54</sup> He wrote that “consensus demands communication” because “communication is the way in which [people] come to possess things in common.”<sup>55</sup> Civic republican theory nests Dewey’s communitarian sentiments within the discourse of free speech. The hallmark of a civic republic, also known as a deliberative democracy, is rational deliberation among citizens, resulting in a consensus that drives public policy.<sup>56</sup>

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54. A number of contemporary media scholars share this perspective. *See, e.g.*, Gigi B. Sohn & Andrew Jay Schwartzman, *Broadcast Licensees and Localism: At Home in the “Communications Revolution”*, 47 FED. COMM. L.J. 383, 388-89 (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 . . . [a]nd to insure that they do not become just another faceless name in a faceless society”). Monroe Price writes:

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.

PRICE, *supra* note 42, at 216.

55. JOHN DEWEY, *DEMOCRACY AND EDUCATION* 4-5 (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 possesses 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, Va., 2003 FCC LEXIS 2010, at \*122 (Fed. Communications Comm’n Apr. 15, 2003) (statement of David Croteau, Professor, Virginia Commonwealth University) (“[I]n its embrace of nationally syndicated personalities to the exclusion of locals, Clear Channel has made it clear that it has no use for [the Richmond] community’s talents, viewpoints and flavor.”); *see also* Comments Filed by the Future of Music Coalition at the Federal Communications Commission at 79-80, *In re* 2002 Biennial Regulatory Review (Fed. Communications Comm’n) (No. 02-277) (filed Nov. 20, 2002).

56. *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, 347-52 (1996) (emphasizing the importance of expression and discussion to democratic culture and civil society); *see also* Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring-in-part and dissenting-in-part) (“[Federal] communications policy seeks to facilitate the public discussion and informed deliberation which . . . democratic government presupposes.”). *But see* Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 748-54 (2001) (arguing that deliberation is an anachronistic concept in our democracy and is not central to our political process).

For such a consensus to emerge, given a free and heterogeneous population, citizens must be exposed to and discuss difference.<sup>57</sup> This kind of discussion, in turn, requires a shared vocabulary and common intellectual heritage, which the media is influential in providing. At the root of civic republican theory, then, is an insistence on 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 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 what is consumed, but does not destroy shared consumption patterns. According to this view, the object of diversity should be to increase exposure to nonsubstitutable speech, thereby increasing tolerance of difference and binding citizens together.<sup>58</sup>

It is not just in communitarian or civic republican traditions that one can locate aspirations for media policy that transcend consumer satisfaction. These aspirations also exist within the liberal traditions more closely associated with the marketplace metaphor. At the surface, the value of

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57. See SUNSTEIN, *supra* note 34, at 241-52; CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 186-87 (1997) (arguing that democracy depends on the exchange of ideas among its citizens from which collective decisions can emerge); JOHN B. THOMSON, THE MEDIA AND MODERNITY 255-58 (1995). For a general exposition of civic republican theory, see CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

58. See SUNSTEIN, *supra* note 7, at 92-96 (discussing media products as “solidarity goods”). For a more detailed discussion, see Cass R. Sunstein & Edna Ullmann-Margalit, *Solidarity Goods*, 9 J. POL. PHIL. 129 (2001). Others have offered similar views in the context of media and online consumption. See, e.g., NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (1985); ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD (1999).



speech diversity is the value of difference, not consensus.<sup>59</sup> And yet, a speech market requires an exchange of speech. Diversity policy can be merely reactive only 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, Edwin Baker exposes the fissures between diversity and debate. Like traditional liberal theorists, Baker embraces the competitive jousting among plural conceptions of the good. He also recognizes the danger of the specialty shop of ideas to democratic debate: consumers may avoid the competitive arena, demanding only 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.<sup>60</sup> 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.

Jürgen Habermas’ depiction of the public space bridges the liberal and civic republican conceptions of speech diversity.<sup>61</sup> Habermas’ public sphere is a space where different viewpoints jostle for public consumption on the basis of their public appeal.<sup>62</sup> In this sense, the public sphere show-

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59. See Robert M. Entman & Steven S. Wildman, *Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the “Marketplace of Ideas”*, 42 J. COMM., Winter 1992, at 5-19.

60. See BAKER, *supra* note 7, at 142-47 (contending that plural conceptions of the good in a complex democracy are best formed through deliberative exchange with others holding similar and competing conceptions).

61. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., MIT Press 1989) (1962). For a theoretical examination of the impact of Habermas’ work on media policy, see generally PETER DAHLGREN, *TELEVISION AND THE PUBLIC SPHERE* (1995).

62. Like the marketplace, the public sphere is a space that caters to public desires, except that it is distinct “from both the economy and the state.” Nicholas Garnham, *The Media and the Public Sphere*, in *COMMUNICATING POLITICS: MASS COMMUNICATIONS AND THE POLITICAL PROCESS* 41 (Peter Golding et al. eds., 1986); see also PRICE, *supra* note 42, at 21-39. Closely related to the public sphere is the concept of civil society, championed by communitarian theorists like Michael Walzer and Amitai Etzioni. The civil society, like the public sphere, is comprised of a web of social relationships and institutions that are neither economic nor political and that serve to strengthen the ties that bind citizens together. See, e.g., Michael Walzer, *The Civil Society Argument*, in *DIMENSIONS OF RADICAL DEMOCRACY* 105-07 (Chantal Mouffe ed., 1992) (arguing for a “critical associationalism” that recaptures the “density of associational life” and supports



cases existing difference and conflict. Yet the public sphere is also a forum for aspiration, for building a consensus by engaging citizens with each other and in the consumption of ideas they might not seek.<sup>63</sup> The public sphere thus becomes a forum for intellectual exchange that at once satisfies an existing diversity of tastes and supports the development of common norms.<sup>64</sup>

Given the First Amendment constraints on policy, it is not surprising that Congress and the FCC have de-emphasized these proactive elements of media theory. At one time, for example, the FCC's erstwhile "fairness doctrine" 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.<sup>65</sup> In other words, it took the supermarket approach to media exposure.<sup>66</sup> Policies directed at increasing independent television produc-

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"what is local, specific, contingent" in a democratic state); *see also* AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* 102 (1996) (arguing that media use should be integrated into, and recognize norms of, community).

63. *See* R. Randall Rainey & William Rehg, *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1957-62 (1996) (showing how Habermas' account of political deliberation includes both the drive for consensus in the common good and bargaining among particular, irreconcilable interests); *see also* BAKER, *supra* note 7, at 147 (suggesting that his own construct of a complex democracy applies Habermas' theory of community in conflict).

64. Some theorists question the vitality of the public sphere concept in contemporary society. *See, e.g.*, Todd Gitlin, *Public Sphere or Public Sphericules?*, in *MEDIA, RITUAL AND IDENTITY* 168, 172 (Tamar Liebes & James Curren eds., 1998) (suggesting that the concept of a unitary public sphere has little relevance for an information culture marked by "secession, exclusion and segmentation . . . targeted markets and consumption subcultures").

65. *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* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), *aff'd on reh'g*, 425 F.2d 543 (D.C. Cir. 1969) (holding that station must air pro-integration programming if it aired pro-segregation programming); *In re* 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).

66. 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)-(b) (2000). 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

tion prior to the mid-1990s reflected a similar concern with exposing viewers to difference on all channels, rather than simply enabling difference across channels.<sup>67</sup>

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 proactive in its reference to “needs” as well as “interests.”<sup>68</sup> If needs and interests are 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.<sup>69</sup> Thus, localism policies adopted between 1960 and the early 1980s required broadcasters actively

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that of his opponent. *See generally* Law of Political Broadcasting and Cablecasting: A Political Primer, 100 F.C.C.2d 1476, ¶¶ 54-56 (1984).

67. 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. 12,165 (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, 400-01 (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).

68. *See Media Ownership Order, supra* note 1 (referring to the “needs and interests” of local communities sixteen 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. *In re* Application of 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”), *rev'd on other grounds*, 37 F.2d 933 (D.C. Cir. 1930).

69. *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).

[T]he 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.

*Id.*

to identify community needs,<sup>70</sup> and established “guidelines” for supplying the “major elements usually necessary to meet the public interest.”<sup>71</sup> Having determined 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.<sup>72</sup> Other policy interventions supported the production of local content for which there was negligible or at least insufficient demand.<sup>73</sup>

Although policy has clearly moved away from the proactive 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 proactive policy and diversity policy may be heading for a revival.<sup>74</sup> Take, for example, the measurement of diversity. In conformity with a procedural, reactive approach, the FCC in the past

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70. Primer on Ascertainment of Cmty. Problems by Broad. Applicants, 27 F.C.C.2d 650, 651 (1971) (requiring broadcasters to follow procedures in ascertaining from community leaders and other members of the public what kind of programming would best serve). The ascertainment requirement was later eliminated. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1075 (1984).

71. Report & Statement of Policy Res: Commission En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) (listing 14 elements including the “opportunity for local self-expression . . . the development and use of local talent . . . [and] public affairs programs”).

72. 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, 6363 n.11 (1989) (identifying service of local needs and local production as factors contributing to the prospects for license renewals).

73. 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).

[O]ur concern with localism . . . may be characterized as a concern with externalities—that is, the true value of local news and public affairs programming 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.

*Id.*; 47 C.F.R. §§ 76.122 to .124 (2003).

74. *See, e.g.*, Broadcast Localism, Notice of Inquiry, 19 F.C.C.R. 12,425, ¶¶ 11-14 (2004) (asking whether the FCC should impose more substantive localism requirements on broadcasters rather than relying on structural controls and market pressure).

simply has counted the stalls in the market, looked at how many independent television stations and other outlets are available to the public, and not inquired into actual media usage and exposure patterns.<sup>75</sup> An alternative would be to assess diversity by the content that people actually consume.<sup>76</sup> The FCC struggled recently to combine the two approaches in constructing a quasi-scientific “Diversity Index” to guide broadcast ownership deregulation.<sup>77</sup> It measured actual consumption patterns, as opposed to mere availability, for some purposes,<sup>78</sup> but not for other purposes.<sup>79</sup> This inconsistency in the treatment of audience exposure was partially responsible for the Third Circuit’s remand of the Diversity Index and associated rules.<sup>80</sup> As the FCC comes to rework these rules and the underlying

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75. See, e.g., 47 C.F.R. § 73.3555 (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.

76. For scholarship endorsing this direction, see Philip Napoli, *Deconstructing the Diversity Principle*, 48 J. COMM. 7 (1999).

77. 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 1, at 13,775-76. 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. *Id.* at 13,789-90; see also *Prometheus Radio Project v. FCC*, 373 F.3d 372, 404 (3d Cir. 2004).

78. 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. See *Media Ownership Order*, *supra* note 1, at 13,778 (“[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.”); see also *Prometheus Radio Project*, 373 F.3d at 405-06 (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).

79. 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 1, at 13,786.

80. *Prometheus Radio Project*, 373 F.3d at 404-10; see also MARK COOPER, ABRA-CADABRA! HOCUS-POCUS! MAKING MEDIA MARKET POWER DISAPPEAR WITH THE FCC’S DIVERSITY INDEX 5 (July 2003) (criticizing the Diversity Index for equalizing market shares among media outlets within each class of media), at <http://www.consumersunion.org/abrafinal721.PDF>; Cheryl A. Leanza, *Monolith or Mosaic: Can the Federal Commu-*

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 also for them to be exposed to content that elevates. 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.<sup>81</sup>

Although too politically incendiary to state baldly, the goal of elevation figured prominently in both the precursors to the Carnegie Commission Report and subsequent policy enactments. 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.<sup>82</sup> 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.”<sup>83</sup> Drawing on civic republican theory, the Commission also located democratic strength in mutual understanding.<sup>84</sup> The media, it concluded, have an obligation to foster such understanding and “to elevate rather than to degrade” the public.<sup>85</sup>

These same ideas formed the intellectual backbone of the Carnegie Commission Report, which envisioned a public service media that would support high quality communication.<sup>86</sup> This emphasis on quality and ex-

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*nations Commission Legitimately Pursue a Repetition of Local Content at the Expense of Local Diversity*, 53 AM. U. L. REV. 597, 607-11 (2004).

81. 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, at [http://www.pbs.org/aboutpbs/aboutpbs\\_corp\\_audience.html](http://www.pbs.org/aboutpbs/aboutpbs_corp_audience.html) (last visited Dec. 20, 2004).

82. COMM’N 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.

83. *Id.* at 91-92.

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

85. *Id.* at 92.

86. See *supra* notes 26-29; see also *Corporation for Public Broadcasting Reauthorization: Hearing on S.R. 253 Before the Senate Comm. on Commerce, Sci., and Transp.*, 108th Cong., ¶ 11 (2004) (statement of Ken Burns, Filmmaker, Florentine Films) (defending the mission of public service media by contending that the “pursuit of happiness”



cellence 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 benefit the public.<sup>87</sup>

Neither the Public Broadcasting Act, nor any subsequent policy, has addressed the irreconcilability between providing merit goods and satisfying public desires, or between “popularity and publicness” in public service media.<sup>88</sup> This tension recapitulates the tension in media policy generally between reactive and proactive goals. Public broadcasting is expected to provide alternatives to the market to bolster democratic aspirations.<sup>89</sup> Yet, it is also expected to mirror the existing preferences of audiences for particular kinds of media products. The attempt to meld audience satisfaction with audience elevation has persistently drawn fire from public television’s critics.<sup>90</sup>

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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”), *available at* [http://commerce.senate.gov/hearings/testimony.cfm?id=1265&wit\\_id=3648](http://commerce.senate.gov/hearings/testimony.cfm?id=1265&wit_id=3648).

87. See DICK NETZER, *THE SUBSIDIZED MUSE* 16 (1978) (arguing for art subsidies because society benefits from artistic production even if such productions only appeals to small audiences); Richard A. Musgrave, *Merit Goods*, in *RATIONALITY, INDIVIDUALISM AND PUBLIC POLICY* 207-10 (Geoffrey Brennan & Cliff Walsh eds., 1990); see also GILLIAN DOYLE, *UNDERSTANDING MEDIA ECONOMICS* 66, 162 (2002). For criticism of the notion of public service media as a merit good, see JOHN KEANE, *THE MEDIA AND DEMOCRACY* 117-26 (1991) (arguing that the term “quality” is controversial and “allow[s] 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 broadcasters’ pursuit of quality presupposes understanding and empathy, but society has now been “coarsened . . . by sheer mediocrity, the flight from excellence, and the enthronement of the trivial, the superficial, the ghoulish in much market-driven television”).

88. Willard D. Rowland, Jr., *The Institution of U.S. Public Broadcasting*, in *PUBLIC TELEVISION IN AMERICA* 34 (Eli M. Noam & Jens Waltermann eds., 1993); see also BARRY DORNFELD, *PRODUCING PUBLIC TELEVISION*, *PRODUCING PUBLIC CULTURE* 42 (1998) (noting “[t]he tension between the market and the ‘nonmarket,’ the hybrid space that public television occupies in the United States”).

89. Rowland, *supra* note 88, at 14.

90. See Chris Johnson, *Federal Support of Public Broadcasting: Not Quite What LBJ Had in Mind*, 8 *COMMLAW CONCEPTUS* 135, 138-40 (2000) (criticizing public television for political bias and a failure to garner a larger audience); Howard A. White, *Fine Tuning the Federal Government’s Role in Public Broadcasting*, 46 *FED. COMM. L.J.* 491, 501-03, 513 (1994) (discussing Congressional attempts to eliminate funding for public television and criticizing public broadcastings’ overreliance on its most popular programming). The development of alternative noncommercial ratings standards to credit 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 alterna-



The need to better theorize the relationship between media policy and the market and between reactive and proactive policy goals is nowhere more important than in the area of media subsidies. The entire enterprise of subsidized media depends on a conception of why the market might fail to deliver what people want or what democracy needs.

#### D. Narrow and Broad Market Failures

Since the marketplace operates 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 call these failures of the market to serve consumer welfare, identified in Part III, "narrow market failures." Media policy interventions seeking to address these kinds of failures are merely designed to correct the market, thereby enhancing consumer sovereignty.

Even a perfectly functioning market will not meet the proactive goals of media policy. It will not serve those public welfare issues external to markets because of what I am calling "broad market failures." These are the failures of markets to account for the value that programming can add to civic life through increased education, political engagement, or social solidarity. 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.<sup>91</sup>

The argument for market supplementation is premised on the ability of certain media products to generate positive externalities.<sup>92</sup> Positive externalities exist whenever A's consumption produces value created by B for which B is not compensated.<sup>93</sup> For example, assume that exposing chil-

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tive 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.

91. This argument might also be characterized, not as one concerning market failure, but as one concerning "market reach" in that the market is not designed to produce democratic debate. See Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987).

92. See, e.g., BAKER, *supra* note 7, at 41-62 (considering positive externalities generated by media including the quality of public opinion and political participation, public interactions, exposing and deterring abuses of power, and audience impact on cultural products available to non-audience members). For a good general discussion of the externalities of information, see Daniel Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558-62 (1991).

93. James T. Hamilton, *Private Interests in Public "Interest" Programming: An Economic Assessment of Broadcaster Incentives*, 45 DUKE L.J. 1177, 1179-80 (1996) (presenting a more complex formula along these lines).

dren to educational television programming produces a range of benefits.<sup>94</sup> 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, both by paying for the programming and by getting their child to consume it, the child's parents 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.

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.<sup>95</sup> The prevalence of positive externalities in media markets is related to the hybrid nature of media products and companies. A video experience is a consumer product that may also become a basis for a political decision or social behavior. A cable operator or broadcaster is simultaneously a commercial operation and a political institution.<sup>96</sup> If these positive externalities 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].”<sup>97</sup>

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94. *See generally* Policies and Rules Concerning Children's Television Programming and Revision of Programming Policies for Television Broadcast Stations, 11 F.C.C.R. 10,660, 10,663-65 (1996) (reviewing positive effects of educational programming on social skills and school preparedness).

95. 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 SCHARRER, TELEVISION: WHAT'S ON, WHO'S WATCHING AND WHAT IT MEANS 274-98 (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). *But cf.* Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954, 958-59 (8th Cir. 2003) (questioning the linkage between exposure to violent video games and harm to minors); MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 243-53 (2001) (criticizing the literature on the negative effects of television violence).

96. The political and commercial components of media entities do not merely coexist, but to some extent are mutually dependent. *See, e.g.*, Garnham, *supra* note 62, at 48 (stating that commercial media serve and reinforce existing political and social structures, and politicians dependent on the media come to “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”).

97. Sunstein, *supra* note 10, at 517.

The external benefits of media products complicate the defense of market supplementation. Unlike typical externalities, these external benefits may not be concentrated in third-party effects.<sup>98</sup> Instead, these benefits may accrue to the individual consumer 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. Yet, she will eschew the programming if she does not value the private benefits it would confer.

The best explanation for why an individual might fail to realize her own best interests is that she has falsely internalized the interests of the market. Market supplementation as a policy goal depends on the notion that commercial interests have the power to distort individual preferences. Individual preferences thus become the product, rather than the creator, of the market. In economic terms, such preferences are endogenous rather than exogenous to market forces.<sup>99</sup> Work in behavioral economics, drawing on cultural studies and psychological theories, emphasizes the susceptibility of personal preference to influence.<sup>100</sup> Thus, commercial media enterprises successfully use various programming and marketing techniques to develop tastes in the kinds of fare that they intend to produce,<sup>101</sup> and consumer desires developed in this way will naturally agitate for more of the same. By understanding this dynamic of preference formation, it becomes possible to square market supplementation with liberalism. The

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98. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 40-42 (3d ed. 2000).

99. See BAKER, *supra* note 7, at 87-95 (arguing that media preferences are endogenous to market dynamics); SUNSTEIN, *supra* note 34, at 73-74.

100. See 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."); 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"); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1145-66 (1986) (reviewing literature on consumer preferences).

101. See COMM'N ON FREEDOM OF THE PRESS, *supra* note 82, 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").

interventions into media markets that might otherwise be tarred as paternalistic become instead efforts to expose the consumer to what she actually, without realizing it, preferred.<sup>102</sup> 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.”<sup>103</sup>

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.”<sup>104</sup> Powell observed that: “We can call it sludge, but it’s the sludge people are watching.”<sup>105</sup> The 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

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102. See BAKER, *supra* note 7, at 97-98, 121 (suggesting that it would be paternalistic to deprive consumers of the choices that media policy promotes); SUNSTEIN, *supra* note 34, at 74 (“When private choice is a product of existing options, . . . the inclusion of better options, through new law, does not displace a freely produced desire . . . . In such a case, the people, acting in their capacity as citizens, are attempting to implement aspirations that diverge from their consumption choices.”). 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 noncoercive).

103. DOYLE, *supra* note 87, at 66 (quoting GAVYN DAVIES, DEPARTMENT FOR CULTURE, MEDIA AND SPORT, THE FUTURE FUNDING OF THE BBC: REPORT OF THE INDEPENDENT REVIEW PANEL 203 (1999)). 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).

104. Broadcast Ownership En Banc, Richmond Va., 2003 FCC LEXIS 2010, at \*48 (Fed. Communications Comm’n Apr. 15, 2003) (statement of Brent Bozell, Chairman and Founder of the Parents Television Council) (criticizing “ultra violence . . . graphic sex . . . [and] raunchy language” in media).

105. *Id.* at \*82 (statement of Chairman Powell).

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.<sup>106</sup>

Given the existence of broad market failures, a proactive media policy must not only correct a poorly functioning market, but also provide diversions around existing media markets and tastes. Proactive policy can do this by changing consumer wants, in ways exemplified at the end of this Article, and then reintroducing a richer consumer palette to the market. 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 media market, if it is to serve democratic purposes, must at once serve and influence the sovereign consumer. Explicitly focusing on digital media, we can see how 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 sections unpack the relationship between media policy and the market, showing how digital innovations at once challenge and support policy interventions in media markets. Section A identifies the major changes that digital technologies effect in the production and consumption of video products. These changes reduce, but do not eradicate, narrow market failures, as demonstrated in Section B, and aggravate broad market failures, as demonstrated in Section C.

#### A. New Media Dynamics

Digital media involve the following phenomena often, but not always, in concert: the digital encoding of video 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 increased degree of consumer control over the consumption and even the production of video content.

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106. *Id.* at \*83 (statement of Brent Bozell); *see also id.* at \*91-\*92 (statement of Andrew Schwartzman) (arguing that media conglomerates use cross-marketing and vertical power to develop appetites for products).



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.<sup>107</sup> Second, interactive technologies allow these distributors to fully exploit increased channel capacity by providing on-demand programming to consumers. 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,<sup>108</sup> and programs from networks.<sup>109</sup> 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.<sup>110</sup> These digital channels may be used to stream content or to facilitate the distribution of DVDs directly to the consumer.<sup>111</sup>

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107. 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. COMM. L.J. 517, 523 (1997) (describing the capabilities of digital broadcast technology). Cable systems that were once limited to thirty-five channels have now joined satellite services in offering several hundred. See *Video Competition Report*, *supra* note 8, at 1624. However, the average cable subscriber only receives sixty-three 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 F.C.C.R. 13,284, 13,286 (2003).

108. A "service tier" is a cable service for which the operator charges a separate rate. 47 U.S.C. § 522(17) (2000).

109. 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 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 through ordinary program networks. *Video Competition Report*, *supra* note 8, at 1638-39.

110. See, e.g., Sarah McBride, *Studios to Set Deals in Bid to Get PCs to Show Movies*, WALL ST. J., July 14, 2004, at D4 (reporting on new partnerships between content companies and hardware and software companies to facilitate delivery of video programming over personal computers).

111. 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. See, e.g., Peter Wayner, *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).

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. This control, in tandem with the spread of viewer attention over more video options, renders attention an increasingly scarce resource. By using digital electronic program guides and search engines, the viewer can filter out content of little interest to her and program digital delivery systems to provide more of what she wants. These search techniques, in combination with personal video recorders, like TiVo, or other digital storage devices enable the viewer to create her own viewing schedule and skip freestanding commercials.<sup>112</sup>

Audiences also can control content by contributing to its production. Digital technologies facilitate such contributions. For example, real time interactive features of television programming can funnel viewer reactions into professionally produced programming. More substantially, digital production techniques and Internet distribution make possible amateur involvement in the production and distribution of video either individually or as part of collaborative peer networks.<sup>113</sup> These contributions can take the form of original productions or of modifications to professionally produced content.<sup>114</sup>

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 to further media policy goals. The sections below approach this question with respect to both narrow and broad market failures.

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

The most modest justification for government intervention in media markets, by regulation or subsidy, is that these markets are imperfect in

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112. See *Video Competition Report*, *supra* note 8, at 1715 (“A [‘personal video recorder’ or ‘PVR’] 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. *Id.* This number will rise precipitously as cable and satellite operators roll out PVRs in their digital set-top boxes. See Stuart Elliott & Ken Belson, *Stop Me if You’ve Seen This One Before*, N.Y. TIMES, Aug. 9, 2004, at C1.

113. See *infra* note 179 and accompanying text; see also F. Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CALIF. L. REV. 1, 14-21 (2004) (illustrating how digital video game participants create virtual worlds online).

114. 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).

their response to consumer preferences. This Section will show why those imperfections exist and the extent to which they will persist in the digital mediascape. 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. The premise of media policy is that media markets are different from other markets in that “[t]ruth and understanding are not wares like peanuts and potatoes.”<sup>115</sup> Media markets deserve special consideration 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. Given the stakes, intervention may be warranted in the market for information where it would not be warranted in the markets for legumes and root vegetables.

Even if media markets were not worthy of special attention, the market for video challenges consumer sovereignty more acutely than do other markets.<sup>116</sup> At least under conditions of channel scarcity, three market features tend to reduce responsiveness to smaller audience groups. First, because video markets remain heavily reliant on advertising revenue, price signaling by consumers is relatively weak. Second, the unusually risky gambles that expensive and mostly unsuccessful programming entail further dilute the force of smaller audience preferences. These gambles pressure 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. Third, the interests of media enterprises concentrated in large, integrated corporations may not align perfectly with consumer choice.

This Section takes each of these features in turn and predicts that digital technologies will improve market responsiveness to some degree, but

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115. *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring).

116. 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 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); Michael Spence & Bruce Owen, *Television Programming, Monopolistic Competition, and Welfare*, 91 Q.J. ECON. 103, 103-06 (1977) (a market with a higher degree of competition in combination with price discrimination (that is, pay television) will increase program diversity); 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). See generally OWEN & WILDMAN, *supra* note 35, at 64-92, 141-42 (summarizing the literature on program distribution and market structure).

less than some have supposed. Government interventions will continue to be an important corrective for narrow market failures. The Article goes on to argue that digital technologies will not correct the broad failures of the market to expose consumers to what they do not currently demand. In addition, digital technologies will tend to decrease the likelihood of such exposure without targeted and creative subsidies for both content production and audience outreach.

### *1. Audience Voice*

The translation of audience desires into programming, whether 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 imprecise signaling 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 for and against consumer sovereignty.

#### a) Analog Mediascape

Advertising's dominance of today's video marketplace results from market responses to the "public good" characteristics of video programming.<sup>117</sup> Like other information products, video 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 the product can only imperfectly control its dissemination to the public.<sup>118</sup> Because of these public good

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117. See C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311, 316 (1997) (distinguishing media products from "typical" products like cars and can openers); Sunstein, *supra* note 10, at 514 (noting that television programming "is not an ordinary product"); John R. Woodbury, Comment, *Welfare Analysis and the Video Marketplace*, in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY 274 (Eli M. Noam ed., 1985) (distinguishing media products from sweaters and cars because of programming's "heavy dose of public-good characteristics").

118. The ability of subscription services to exclude non-payers does not eliminate the nonexcludability aspect of television. 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 increased should the cable and satellite industries shift from tiered services to what are known as à 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 *discussion infra* note 190.

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 an important source of revenue across distribution platforms.<sup>119</sup>

Advertisers, then, are the real consumers of video programming in the case of broadcast and other freely available content, and they are at least co-equal with viewers in the case of subscription television.<sup>120</sup> The advertiser's desire for a large audience means that advertiser and 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.<sup>121</sup>

There are several reasons for the misalignment between advertiser purchases and consumer preferences. To begin with, advertisers have an inexact understanding of audience desires.<sup>122</sup> More profoundly, advertisers

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119. 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 WORLD MEDIA, BROADBAND ADVERTISING No. 331, at 2-3 (Mar. 31, 2003) (cable network advertising revenue); KAGAN WORLD MEDIA, CABLE PROGRAM INVESTOR No. 65, at 3-4 (Apr. 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).

120. 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."); Baker, *supra* note 117, at 319 ("The media enterprise commonly sells media products to audiences and sells audiences to advertisers."); Sunstein, *supra* note 10, at 514 ("[I]t is more accurate to say that viewers are a commodity, or a product, that broadcasters deliver to the people who actually pay them: advertisers.").

121. Economic models of television programming have long noted the biases introduced into programming selection by advertiser support. See generally OWEN & WILDMAN, *supra* note 35, at 91-92. For a governmental perspective, see JONATHAN LEVY ET AL., BROADCAST TELEVISION: SURVIVOR IN A SEA OF COMPETITION 7 (FCC, Office of Plans and Policy, Working Paper No. 37, 2002) (observing that because "[t]he value of the programming to the viewers will differ from the value of the audience to the advertisers," not all audiences will get what they want), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A22.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A22.doc).

122. 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.,



and consumers buy different products. Consumers, of course, buy programming. Advertisers purchase viewer attention (especially the attention of younger viewers) adjusted for the likelihood that the viewer will actually buy the goods and services being advertised. As a result, advertisers place a higher value on those demographic groups associated with the ability and inclination to spend on consumer goods.<sup>123</sup> Advertisers may be willing to sacrifice a larger audience for a more desirable demographic, resulting in a preference for programming skewed to attract the desired demographic.<sup>124</sup>

The gap 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.<sup>125</sup> They can exercise this preference not only after

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Bill Carter, *Young Men are Back Watching TV. But Did They Ever Leave?*, N.Y. TIMES, Aug. 9, 2004, at C1 (reporting on 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 139-45, 176 (2003) (showing how ratings data becomes less accurate with audience fragmentation); COMM. DAILY, Feb. 20, 2004, at 9 (citing report showing that Nielsen Media Research ratings may underestimate Latino viewing of particular programs by 30%). Ratings data for smaller audiences are so poor 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 INC., BENEFITS OF BUNDLING AND COSTS OF UNBUNDLING CABLE NETWORKS (2004), reprinted in Comments of the Walt Disney Company, *In re* Comment Requested on A La Carte and Theme Tiered Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems ex. 1, at 9 (Fed. Communications Comm’n) (No. 04-207) (filed July 15, 2004).

123. The most desirable such group consists of 18- to 34-year-olds, followed by 19- to 49-year-olds. Wayne Friedman, *Cable Jumps Upfront Gun*, TELEVISION WEEK, May 17, 2004, at 1.

124. 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 10, 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.”).

125. See, e.g., Baker, *supra* note 124, at 2153-64 (discussing advertisers’ interests in programming that creates a “buying mood” and avoids controversy); Inger L. Stole, *Advertising*, in CULTURE WORKS: THE POLITICAL ECONOMY OF CULTURE 100 (Richard Maxwell ed., 2001) (stating that advertisers “want the overall media content to complement their commercial messages . . .”); Sunstein, *supra* note 10, at 515 (“[A]dvertisers want programming that will put viewers in a receptive purchasing mood, and hence not

production, through advertising purchases, but also before the fact via intimate consultation with the networks developing program schedules.<sup>126</sup>

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 not correlate with the consumer's valuation of a program.<sup>127</sup> 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 few.<sup>128</sup> So, for example, a program that receives six points out of ten from ten viewers in a focus group might be favored over one that receives three tens and seven zeros, depending on the demographic characteristics of the individuals.<sup>129</sup> 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 lack of precise viewer signaling makes video programming very different from consumer goods whose prices fluctuate depending on the intensity of demand for them.<sup>130</sup>

b) Digital Mediascape

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

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be too 'depressing.' Advertisers also tend to dislike programming that is highly controversial . . .").

126. 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, *The Program Selection Process*, in PROGRAM DIVERSITY AND THE PROGRAM SELECTION PROCESS ON BROADCAST NETWORK TELEVISION 7-8 (FCC Media Ownership Working Group Study No. 5, Sept. 2002) (arguing that media consolidation has not diminished media diversity), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A10.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A10.pdf).

127. See Yoo, *supra* note 6, at 1630-31 (noting that reliance on advertising support undermines any price signaling of intensity).

128. Einstein, *supra* note 126, at 33 (quoting producer Rob Burnett).

129. *Id.*

130. 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 are willing to pay.

that network.<sup>131</sup> Moreover, cable audiences are sold to advertisers by program tier, not by program or network.<sup>132</sup> 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.

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 distributors and producers are able to reduce their reliance on advertising in favor of tailored fee-for-service video packages. The result will be more niche programming desired by audience segments but eschewed by advertisers. At the same time, as audiences splinter and become skilled in avoiding advertising, advertisers will fight back. As discussed below, they will find new ways of reaching audiences, even niche audiences, through video products. These very advertiser responses to digital abundance and consumer control will likely introduce new distortions that contribute to narrow market failures.

As digital technologies fragment audiences and give them greater control over their viewing experiences, the value of the audience to advertisers, and thus the impact of advertising on content, will decline in the digital mediascape. There are two developments to note in this respect. First, audiences are fragmented across more channels of video entertainment and information. Not all advertisers require a mass audience,<sup>133</sup> but the

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131. See OWEN & WILDMAN, *supra* note 35, at 111-17 (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 *infra* note 193.

132. *Video Competition Report*, *supra* note 8, at 1706 (cable advertising revenues are based on the number of potential viewers, that is, the number of subscribers to the service tier on which the network is carried). See generally NAT'L CABLE & TELECOMM. ASS'N, THE PITFALLS OF A LA CARTE: FEWER CHOICES, LESS DIVERSITY, HIGHER PRICES 6 (May 2004) (explaining the relationship between service tiers and advertising rates), available at [http://ncta.com/pdf\\_files/NCTA\\_White\\_Paper\\_-\\_Pitfalls\\_of\\_A\\_La\\_Carte.pdf](http://ncta.com/pdf_files/NCTA_White_Paper_-_Pitfalls_of_A_La_Carte.pdf).

133. 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 ROBERT G. PICARD, THE ECONOMICS AND FINANCING OF MEDIA COMPANIES 135 (2002) ("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.").

largest funders of media products, such as Procter & Gamble and General Motors,<sup>134</sup> value mass audiences much more highly than niche audiences.<sup>135</sup> Audience fragmentation makes it more difficult to 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.<sup>136</sup>

Second, digital consumer technology which enables convenient ad skipping, today most often found in personal video recorders, also devalues audiences to advertisers. Consumers with this technology are likely 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.<sup>137</sup>

At the same time that fragmentation and audience control diminish the value of audiences, advertisers are making technological advances to improve their use of smaller audiences. For example, interactive tools lodged within digital television or Internet receiving devices provide more fine-grained information about the preferences of participating audience mem-

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134. BENJAMIN M. COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 219 (3d ed. 2000) (listing the top advertisers on cable).

135. See W. RUSSELL NEUMAN, THE FUTURE OF THE MASS AUDIENCE 156-57 (1991) (presenting the "Nielsen slope" as a graphic depiction of the increase in the cost per thousand audience members to advertisers as the ratings for a program increase). One advertisement that reaches one million viewers is more valuable than two that reach 500,000 viewers each because the one million constitutes "unduplicated reach." BAUMANN & MIKKELSEN, *supra* note 122, reprinted in Comments of the Walt Disney Company, *In re* Comment Requested on A La Carte and Theme Tiered Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems ex. 1, at 10 (Fed. Communications Comm'n) (No. 04-207) (filed July 15, 2004). 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.

136. TIMOTHY M. TODREAS, VALUE CREATION AND BRANDING IN TELEVISION'S DIGITAL AGE 188 (1999) (stating that 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. CENSUS BUREAU, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, SECTION 27: ACCOMMODATION, FOOD SERVICES, AND OTHER SERVICES 794 (2003), available at <http://www.census.gov/prod/2004pubs/03statab/services.pdf>.

137. See Georg Szalai, *Sales Boom Replays PVR Debate*, HOLLYWOOD REP., Dec. 29, 2003, at 1 (reporting that 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 122, at 173.

bers.<sup>138</sup> The question is whether these technologies can keep pace with fragmentation and control. Early digital audience measurement techniques suggest that it will be some time before even sophisticated polling can eradicate the inaccuracies that result from audience sampling. New digital Nielsen “people meters,” for example, have been criticized for substantially mismeasuring actual audiences due to small audience samples.<sup>139</sup>

The advertising industry might respond in one or more of three ways to the forces that devalue audiences. Advertisers could abandon television and other broadly distributed video media—a course so improbable, we can disregard it. Alternatively, the advertising industry 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 counterproductive, particularly given the spread of ad-skipping technologies. Thus, the most likely advertiser response to fragmentation and viewer flight from advertising is to develop new communication tools that penetrate the audience more effectively to recapture some of the attention television once delivered. These tools will simultaneously increase and decrease the match between audience desires and programming.

Assuming that audience measurement techniques ultimately can provide advertisers with more accurate information about who is watching what, with what constancy of attention, and even with what 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, such as the location of retail outlets for certain products in the viewer’s zip code, or the performance of products for the viewer’s demographic. This tailoring could engender a stronger and more lasting impression, as well as more actual purchases. Better information about the target audience thus might improve the effectiveness of the advertisement and reduce the minimum

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138. See, e.g., Kevin J. Delaney & Robert A. Guth, *Beep. Foosh. Buy Me. Pow: Nielsen Plans a New Service To Assess Audiences for Ads in Hot Videogame Medium*, WALL ST. J., Apr. 8, 2004, at B1 (reporting new measurement techniques to assess video gamers’ exposure to and recall of advertising placed “in game” in console-based videogames).

139. 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.



audience size necessary for programming to attract advertiser support.<sup>140</sup> 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.<sup>141</sup>

Other possibilities for advertising's evolution may decrease the responsiveness of programming to consumer desires, thereby exacerbating narrow market failures. Faced with a fractured and inattentive audience, advertisers are becoming more aggressive in making their messages unavoidable. For example, they are relying more heavily on product placements inserted into the program narrative and are "wrapping" program content with product logos.<sup>142</sup> 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.<sup>143</sup> 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 crash survivor.<sup>144</sup> 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

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140. See Randal C. Picker, *The Digital Video Recorder: Unbundling Advertising and Content*, 71 U. CHI. L. REV. 205, 207-08, 220 (2004). Alternatively, it could lead to increased stratification in programming support as advertisers refined their ability to target high-value, high-income consumers. See Comments of Consumers Union et al. at 60, *In re Cross-Ownership of Broadcast Stations and Newspapers* (Fed. Communications Comm'n) (Nos. 01-235, 96-197) (filed Dec. 3, 2001), available at <http://www.mediaaccess.org/programs/diversity/NBCOExecsummary.pdf>.

141. 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.

142. See, e.g., Daisy Whitney, *A "Tivo-Proof" Ad Model; Ripe TV Will Weave Messages Into Its On-Demand Service*, TELEVISION WK., Mar. 29, 2004, at 25.

143. 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, Inc. 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 ST. J., Dec. 15, 2003, at B5.

144. See NAPOLI, *supra* note 122, at 153.

of the advertiser. Thus, a shift from spot advertising to in-program advertising could increase advertiser influence over content, opening the gap between viewer preferences and programmers' responsiveness.<sup>145</sup>

Recall that, in addition to advertiser interests, the inability of audience members to register preference intensities has disadvantaged niche audiences.<sup>146</sup> 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 mail-order DVDs.<sup>147</sup> 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, thus reducing advertisers' impact on programming, regardless of the 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.<sup>148</sup> These developments, discussed below, will likely amplify the audience voice and result in more programming for niche audiences, although the impact on choice will vary across programming types.

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145. Media policy has been hostile to hidden advertising, requiring broadcasters to make it clear to the public who has paid for programming. *See, e.g.*, 47 U.S.C. §§ 317, 508 (2000); 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 F.C.C.2d 1016, 1017 (1974).

146. *See supra* notes 120-31 and accompanying text.

147. 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*, *supra* note 8, at 1674-75. A recent agreement between TiVo and Netflix to develop a video-on-demand service that would stream video to TiVo subscribers promises to increase the amount of video available for streaming. The content to be made available, and on what terms, will be subject to the desires of the same studios that supply most movie and television programming content. *See* COMM. DAILY, Oct. 4, 2004, at 9.

148. OWEN & WILDMAN, *supra* note 35, at 83 (discussing price discrimination as a way out of the public good problem of television programming).

## 2. *Programming Gambles*

The economics of video production are as responsible as advertisers for the underproduction of certain kinds of programming and attendant narrow market failures. Upfront investments in professional video production are relatively high, while the likelihood that any particular product will achieve market success is relatively low. This combination creates a programming sweet spot that favors the safe over the risky, imitation over experimentation, and experienced insiders over newcomers.<sup>149</sup> 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 labeled the “excessive sameness” of media products is rooted in basic characteristics of video supply and demand.<sup>150</sup> 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 have high first copy costs.<sup>151</sup> The yearly operating expense of a cable network is more than \$125 million, of which 65% consists of programming costs.<sup>152</sup> Recent scholarship has fo-

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149. See BAKER, *supra* note 7, at 37-40 (relating tendency towards homogenization of media products to public-goods characteristics); OWEN & WILDMAN, *supra* note 35, 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); 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); Einstein, *supra* note 126, at 45-49 (citing advertiser pressures and efforts to repackage successful formulas as factors leading to bland, homogeneous programming.); Sunstein, *supra* note 10, at 515-17 (discussing incentives for homogeneity in programming).

150. NEUMAN, *supra* note 135, at 129 (citing Harold Hotelling, *Stability in Competition*, ECON. J. 34, 41-57 (1929)).

151. Some video, like reality and local news programming, is relatively cheap to produce. See DAVID CROTEAU & WILLIAM HOYNES, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* 157 (2001). Dramatic series, professional documentaries, global news, and professional sports, on the other hand, are relatively expensive.

152. Comments of The Progress and Freedom Foundation at 6, *In re A La Carte and Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems* (Fed. Communications Comm'n) (No. 04-207) (filed July 15, 2004) (citing KAGAN WORLD MEDIA, *ECONOMICS OF BASIC CABLE*

cused 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.<sup>153</sup> The cult of celebrity, supported by rights of publicity, increases the cost of talent.<sup>154</sup> 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.<sup>155</sup>

The extent to which the costs of professional video products, while variable at the margins, are largely fixed has received less attention. Good and wide-ranging journalistic capabilities, as well as scripted programs with high production values, for example, entail invariably high labor costs.<sup>156</sup> Video product prices also depend on promotion and brand-

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NETWORKS 25 (2003)). Independent start-up cable networks 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. CENSUS BUREAU, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, SECTION 24: INFORMATION AND COMMUNICATIONS 730 (2004), available at <http://www.census.gov/prod/2004pubs/03statab/inforcomm.pdf>. 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, SUBSCRIBER RATES AND COMPETITION IN THE CABLE TELEVISION INDUSTRY 4, 21-22 (2003), available at <http://www.gao.gov/new.items/d04262t.pdf>.

153. See 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); 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, 401-08 (1999) (arguing that strong copyright protection raises costs for new entrants in the content business and advantages media enterprises with large copyright portfolios); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 27 (2001) (same).

154. In the late 1990s, 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 134, at 361.

155. See Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 895-905, 917-20 (1999) (detailing how permissive antitrust regulation of sports leagues has increased media costs for sports exhibition).

156. 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." William J. Baumol, an economist, 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 87, at 80. Video production has a weaker case of Baumol's disease

development costs, which constitute a large part of programming budgets.<sup>157</sup> Promotion for media brands and programming is particularly important because the value of media products cannot be determined prior to purchase. Such products are known as “experience goods.”<sup>158</sup> Consumers must therefore rely on brand reputation and third party reviews to an unusually high degree.<sup>159</sup> 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.”<sup>160</sup> By appealing to larger audiences, media producers and aggregators can expect larger licensing, subscription, and advertising revenue, without appreciably larger costs.<sup>161</sup> The pursuit of

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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*, in BAUMOL’S COST DISEASE: THE ARTS AND OTHER VICTIMS 169, 191 (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).

157. *See, e.g.*, ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* 24-25 (2000) (discussing relationship between branding and the sale of video products); PICARD, *supra* note 133, at 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).

158. The term “experience goods” was coined by Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970). *See also* JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 106-26 (1993).

159. *Cf.* Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CALIF. L. REV. 817, 825 (1992) (describing the different information requirements for experience goods as contrasted with search goods).

160. Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Further Notice of Proposed Rulemaking, 16 F.C.C.R. 17,312, 17,323 (2001) (discussing cable programming); *see also* Amendment of Section 73.368(g) of the Commission’s Rules—The Dual Network Rules, Notice of Proposed Rule Making, 15 F.C.C.R. 11,253, 11,257-61 (2000) (discussing broadcast programming).

161. *See* OWEN & WILDMAN, *supra* note 35, at 23-25 (discussing incentives to attract the largest possible preference groups); PICARD, *supra* note 133, at 134-35 (same).



these mass audiences, of course, tends to advantage what are perceived to be widely shared tastes.

If video products 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. In particular, video products are not substitutable when consumer preferences are strong. Such preferences are often strong, either for predictable reasons (for example, a preference for a particular sports league or kind of political commentary) or for unpredictable reasons (for example, a preference for one new actor over another). The unpredictability of preferences makes video production highly risky as well as costly. Only two out of every ten feature films, for example, make a profit.<sup>162</sup> Only 5% of television program pilots result in a profitable program series.<sup>163</sup> The unpredictability of programming success, combined with high production and low distribution costs, further strengthens the quest for blockbuster hits.

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 niche audiences. 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.<sup>164</sup> Even where scarcity is reduced, the unpredictabil-

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162. DOYLE, *supra* note 87, at 108. Mining for hit movies is much like exploring for oil. 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).

163. Cynthia Meyers, *Media Consolidation and Product Diversity: A Recontextualization* (Dec. 2003) (unpublished manuscript, on file with 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 87, at 82-83.

164. See 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); Spence & Owen, *supra* note 116, at 103-6, 122-25; see also BAKER, *supra* note 7, 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

ity of public appeal and the investments required to produce high-cost programming tend to support a culture of conformity.<sup>165</sup> The frequency of program failures, and the pressures of cost recovery on programs that succeed, lead to a reliance on heuristics of success. These heuristics 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 United States, or market synergies in non-video product markets would be more innovative.<sup>166</sup> However, the creation of programming that can sell well in many geographic and product markets over an extended period of time is captive to its own dogmas.<sup>167</sup> For example, high action content easily translatable for foreign audiences and content that is not particularly time-sensitive are best suited for extended and broad exploitation.<sup>168</sup> Moreover, content populated by animated (or merely cartoonish)

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with relatively strong, unique appeal—creating a more steeply declining demand curve.”).

165. A cultural explanation for conformity is that audience tastes are in fact largely the same. See NEUMAN, *supra* note 135, at 146 (“[O]n the whole most people within a given cultural setting display remarkably homogeneous tastes. Stories of romance and adventure and news of war and peace are universally valued.”).

166. 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. DOYLE, *supra* note 87, at 84 (“Windowing is a form of price discrimination in that it involves the same product being sold at different prices to different groups of consumers for reasons not associated with differences in costs.”); OWEN & WILDMAN, *supra* note 35, at 26-38.

167. 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. See MCCHESENEY, *supra* note 157, at 22-27, 38-48 (providing examples of media conglomerate cross-selling and intensive commercial explanation).

168. See C. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357, 1384 (2000); C. Edwin Baker, *International Trade in Media Products*, in THE COMMERCIALIZATION OF INFORMATION 280-81 (Niva Elkin Koren & Neil Weinstock Netanel eds., 2002) (arguing that foreign sales supply a prime motive to fill video products with violence and sex); David Kipen, *Offshoring the Audience: If France Makes Movies for the French, and America Makes Movies for the World, Who’s Left to Make Movies for America?*, ATLANTIC, June 1, 2004 (arguing that the prevailing view in Hollywood of domestic movie sales as loss leaders for international box-office revenues results in a loss of films which are highly verbal and focus on distinctly American themes like politics).

characters, music, and highly visible consumer items make product tie-ins especially attractive.<sup>169</sup> 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.<sup>170</sup> As a consequence of these economic forces, we see an overpopulation of sequels, spin-offs, and cross-marketing vehicles that may appeal to audiences aggregated over large areas and markets, but that supplant more diverse productions that would likely create more consumer welfare.<sup>171</sup>

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 or multiple market hits. Such a strategy involves production for niche audiences, 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 smaller audiences.

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169. 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* 165-67 (1999).

170. 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 35, at 47-49 (showing the correlation between motion picture budgets and the sequential release over multiple video platforms).

171. In economic terms, the penchant for derivative programming 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. See BAKER, *supra* note 7, at 20-24; DOYLE, *supra* note 87, at 77.

b) Digital Mediascape

Digital technologies have the potential to remake the programming sweet spot by vastly increasing video distribution channels.<sup>172</sup> It is tempting to settle on the incontestable claim that more content results in greater consumer satisfaction, without looking too closely at the additional flow of bits. A more rigorous analysis asks whether digital abundance and consumer control really change the formula for commercially successful programming. The answer, discussed below, is that digital innovations will promote the production of more varied low-cost programming and of high-cost programming of a certain type that can command premium rates or ancillary revenue. There will be far less change in the production of other kinds of high-cost programming, particularly kinds that either require advertising or entail higher risk.

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 niche. 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.”<sup>173</sup>

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 in the production of video programming.<sup>174</sup> The predict-

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172. See *supra* notes 107-11 and accompanying text (identifying digital compression technologies, interactive capabilities, and new distribution channels as the most important contributors to video quantity).

173. Chad Raphael, *The Web*, in *CULTURE WORKS: THE POLITICAL ECONOMY OF CULTURE*, *supra* note 122, at 204; see also TRACEY, *supra* note 87, at 264-65 (“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 sources of entertainment.”).

174. Production quality, as measured by dollars invested, is likely to decrease as programming volume increases for the simple reason that it 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 DOYLE, *supra* note 87, at 62 (stating that when viewership falls short of a given level, program budgets will

able result is an abundance of relatively low-budget programming.<sup>175</sup> 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.<sup>176</sup> The correlation between channel abundance and responsiveness to niche 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 recouped over extensive product, temporal, or geographic markets, channel abundance will indeed lead to greater consumer satisfaction. However, to the extent that high-cost programming for smaller audiences is desired then channel abundance will have the opposite effect.

Assume now that digital technologies not only increase channel abundance, but also 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.<sup>177</sup> 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 re-

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fall, creating a vicious circle of declining product quality and declining audience share); OWEN & WILDMAN, *supra* note 35, at 145-47 (showing how the marginal return on a dollar invested in programs falls as channel volume increases).

175. See OLIVER & OHLBAUM ASSOC. LTD., UK TELEVISION CONTENT IN THE DIGITAL AGE 12 (2004), at [www.bbc.co.uk/info/policies/ukcontent\\_digital\\_age.pdf](http://www.bbc.co.uk/info/policies/ukcontent_digital_age.pdf). 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 two million. Instead the niche network searches for lower-cost, low-audience programming.” *Id.* at 14. It is unclear how long reality programming will remain low-cost. See, e.g., Brooks Barnes, *Reality Checks: Unscripted Shows Become a Money Pit*, WALL ST. J., July 27, 2004, at A1 (describing increasing salary demands by reality show “actors”).

176. See NAPOLI, *supra* note 122, at 177 (citing Court TV, the History Channel, and Oxygen as examples); NEUMAN, *supra* note 135, 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.”).

177. See *supra* Parts III.B.1, .2.a.

ording media, and post-production equipment, like editing software, democratize the technical process of video production.<sup>178</sup> As broadband networks speed up and proliferate, digital technology will also reduce the cost of distribution. Second, digital networks and technologies provide 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.<sup>179</sup> 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 nonpecuniary rewards and that disaggregated groups rival individuals or organized groups in the quality of content they can produce. I 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 niche audiences. The most promising such distribution model involves more precise price discrimination.<sup>180</sup> A simple example shows how the number of viewers needed 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.<sup>181</sup> A cable channel typically requires a subscriber base of at least 50 million households before most national advertisers will

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178. Low budget films like *BLAIR WITCH PROJECT* (Artisan Entm't 1999) demonstrate this. DOYLE, *supra* note 87, at 116-17. It should be noted that digital distribution and reproduction techniques also threaten investments in content by increasing the risks of unauthorized and uncompensated consumption.

179. 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 an online encyclopedia project, the opportunities for "radically decentralized collaborative production"); Benkler, *supra* note 153, at 401-05 (describing five different organizational forms for the production of media products ranging from corporate media to non-market actors).

180. 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, *Essay: On Television Regulation: All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation*, 53 EMORY L.J. 233, 234-35 (2004) (perfect price discrimination results in no consumer surplus because no buyer pays less than the maximum price he is willing to pay); 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).

181. This assumption is probably unsound. See *infra* note 193.



purchase time on it.<sup>182</sup> 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 costs \$1,000,000 (including distribution and marketing costs).<sup>183</sup> Reducing the 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.<sup>184</sup> 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.<sup>185</sup> 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,

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182. BAUMANN & MIKKELSEN, *supra* note 122, *reprinted in* Comments of the Walt Disney Company, *In re* Comment Requested on A La Carte and Theme Tiered Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems ex. 1, at 9 (Fed. Communications Comm'n) (No. 04-207) (filed July 15, 2004). General entertainment and sports cable channels reach an average of 86.5 million subscribers and emerging niche channels reach an average of 34.2 million subscribers. The average audience delivered is 842,000 for general entertainment and sports and 311,000 for emerging niche channels. BOOZ ALLEN HAMILTON, INC., NAT'L CABLE & TELECOMMUNICATIONS ASS'N, *THE A LA CARTE PARADOX: HIGHER CONSUMER COSTS AND REDUCED PROGRAMMING DIVERSITY* 41 (2004).

183. This would be a relatively meager sum for a video program. By the mid-1990s 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 136, at 23.

184. 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.

185. 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).

production.<sup>186</sup> 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.<sup>187</sup> 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 that labor is not the largest cost component. Products like professional sports, professional journalism, and certain kinds of scripted dramas that have invariably high labor costs are less likely to benefit from these advances.<sup>188</sup>

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.<sup>189</sup> 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 niche programming that has no proven market, a limited market life,

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186. See Neil Weinstock Netanel, *The Commercial Mass Media's Continuing Fourth Estate Role*, in *THE COMMODIFICATION OF INFORMATION*, *supra* note 168, 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 *VAND. L. REV.* 1879, 1917-26 (2000); see also Baker, *Media Concentration*, *supra* note 14, at 896 (“[D]igital technology significantly reduces the cost or difficulty of making some media content. Largely, however, the Internet is a distribution system . . . . It does not itself create content.”).

187. See RYAN & WENTWORTH, *supra* note 169.

188. See OLIVER & OHLBAUM ASSOCS. LTD., *supra* note 175, 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. Such activities are fixed-cost, labour-intensive endeavors.”).

189. 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 1990s showed that consumers prefer to pay a flat fee rather than pay 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.L. & 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).

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 is a documentary that an audience would pay to see once, but that cannot aggregate an audience over time, geography, or product categories. Such programming, if sold directly to consumers, will still have to draw relatively large audiences if it is to be produced.<sup>190</sup>

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.<sup>191</sup> 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.<sup>192</sup> The easily located program also requires advertising, previews, or product tie-ins in high volumes to reach a sustaining audience.<sup>193</sup> Such marketing efforts increase the costs of pro-

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190. The impact of on-demand sales on the programming market is in effect being debated in the context of *à la carte* pricing for cable services. Cable programming is 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 Distribution on Cable Television and Direct Broadcast Satellite Systems, 19 F.C.C.R. 9291 (2004). Cable operators and many networks argue that mandatory *à 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., Video Competition Report, supra* note 8, at 1705-06; NAT'L CABLE & TELECOMM. ASS'N, *supra* note 132 (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); *see also* OWEN & WILDMAN, *supra* note 35, 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).

191. 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 for unbundled programming.

192. *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).

193. 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. Unbundling would also substantially increase in network marketing

gramming and thus the audience size (or premium price) necessary to support it.<sup>194</sup> 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 low-cost video products, and high-cost video products that can command premium rates, 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 overstated. 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, create narrow market failures that interfere with 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.<sup>195</sup> As

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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 revenues on marketing. See BOOZ ALLEN HAMILTON, INC., *supra* note 182, at 27-28, 35; see also *Escalating Cable Rates: Causes and Solutions: Hearing on S.R. 253 Before the Senate Comm. on Commerce, Sci., and Transp.*, 108th Cong. (2004) (statement of George Bodenheimer, President, ESPN, Inc. and ABC Sports) (“A la carte will force all channels to expend millions of dollars in marketing . . .”), available at [http://commerce.senate.gov/hearings/testimony.cfm?id=1127&wit\\_id=2836](http://commerce.senate.gov/hearings/testimony.cfm?id=1127&wit_id=2836)

194. 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, INC., *supra* note 182, at 34.

195. See NEUMAN, *supra* note 135, 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 J. MEDIA ECON. 41, 43 (1996) (identifying diversification, repurposing of content, and repurposing of talent as three examples of economies of multiformity).

a result, the media industry is organized into “oligopoly market structures and large scale multiproduct firms” with multiple distribution and product assets.<sup>196</sup> This subsection shows how this industry structure can skew the production of video products, contributing to narrow market failures. To be clear, the question pursued here is not whether concentration in the media industry is anticompetitive such that regulatory intervention is warranted—the principal inquiry of a lively economic debate—but whether industry structure undermines the responsiveness of video content to consumer demand.<sup>197</sup>

a) Analog Mediascape

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. First, the vertically integrated firm has incentives to engage in strategic behavior to disadvantage competitors and exploit efficiency gains to increase consumption of affiliated product.<sup>198</sup> Second, the culture of risk aversion and revenue-maximization that

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196. DOYLE, *supra* note 87, 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) (“[T]he 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.”).

197. 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 Entm’t 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 anticompetitive). 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 take on the new orthodoxy and support 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 & 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).

198. *See generally* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1934). An example of strategic behavior would be if Time Warner Cable used an upstream asset,



permeates large and diversified corporations favors certain kinds of programming, without regard to consumer tastes.

Today, both the cable and broadcast industries are far more concentrated than they were just a decade ago. The cable industry is dominated by Comcast and Time Warner Cable.<sup>199</sup> 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.<sup>200</sup> 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.<sup>201</sup> The horizontal concentration of the cable industry is complemented by a fairly high degree of vertical integration. The largest cable operators have significant holdings in much of the content that they distribute.<sup>202</sup> In 2003, 80% of the networks with significant national penetration were owned or co-owned by only six companies, of which five also

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like 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.

199. *Video Competition Report*, *supra* note 8, at 1687 n.561 (reporting that together, these companies serve more than 34% of all those subscribing to a video service).

200. *Id.*; *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. 19,098, 19,104 (1999) (“In most markets, a single incumbent cable operator is likely to have more than 80% of the multichannel video distribution market.”).

201. George Anders, *Want to Start a TV Channel? See Amy Banse*, WALL ST. J., 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 consists of cable-only subscribers, numbering about 65 million households, or includes all multichannel video subscribers, numbering about 94 million households. *Video Competition Report*, *supra* note 8, at 1609, 1622.

202. 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 (2003). This rule was reversed and remanded as arbitrary and capricious. *Time Warner Entm't Co.*, 240 F.3d at 1137-38.

dominate the broadcast network program marketplace.<sup>203</sup> The acquisition of a controlling interest in DirecTV by News Corp., owner of the Fox Entertainment Group, increases vertical integration within the programming distribution sector.<sup>204</sup>

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).<sup>205</sup> These top four markets cover about 17% of all television households and are essential to any national advertising campaign.<sup>206</sup> All of the major networks have also engaged in vertical integration, combining with or creating in-house production studios.<sup>207</sup> Walt Disney Co., Viacom, Fox Entertainment Group, and General Electric have come to control the production and distribution of most content broadcast in prime

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203. Joint Comments of Writers Guild of America et al. at 2, *In re* 2002 Biennial Regulatory Review of the Commission's Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (Fed. Communications Comm'n) (Nos. 02-277, 01-235, 01-317, 00-244) (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 8, at 1690 (identifying 110 of 339 networks). Another statistic suggests slightly less concentration. Eighteen of the top twenty programming networks in terms of subscribership (excluding C-Span and the Weather Channel) are owned by one or more of thirteen media companies. These are: Time Warner, Cablevision, Comcast, Cox, Disney, E.W. Scripps Co., General Electric, Hearst, Liberty Media, Advance Newhouse, News Corp., Viacom, and Vivendi. *Id.* at 1693.

204. *See* Public Notice, Subject to Conditions, Fed. Communications Comm'n, Commission Approves Transaction Between General Motors Corporation, Hughes Electronics Corporation and The News Corporation Limited (Dec. 19, 2003), <http://hraunfoss.fcc.gov/edocs/public/attachmatch/FCC-03-328A1.pdf>. DirecTV currently has 12.32 million subscribers. *Video Competition Report*, *supra* note 8, app. B, tbl. B-3.

205. *NAB Comments*, *supra* note 46, at 32.

206. COMPAINÉ & GOMERY, *supra* note 134, at 222; Nielsen Media Research Local Universe Estimates (US), *available at* <http://www.nielsenmedia.com/DMA.html> (last visited Dec. 20, 2004).

207. *See* Einstein, *supra* note 126, 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 67 for citations to rules and their repeal. 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 126, at 30-32.

time. As of 2002, producers unaffiliated with the networks accounted for only 6% of prime time content.<sup>208</sup>

In both cable and broadcast industries, programming distributors and aggregators stand to benefit from strategic carriage choices that favor affiliated content.<sup>209</sup> The principal check on such favoritism is that the vertically integrated firm that discriminates in the content market will experience revenue losses in the distribution market, assuming the distribution market is competitive.<sup>210</sup> 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 revenue losses as subscribers switch to satellite.<sup>211</sup> But most programming channels are not “must have” networks that, if dropped or made inconvenient to access, would alienate downstream subscribers.<sup>212</sup> 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

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208. Einstein, *supra* note 126, at 26; *see also* Comments by The Coalition for Program Diversity, at 4-5, *In re* 2002 Biennial Regulatory Review (Fed. Communications Comm’n) (Nos. 02-277, 01-235, 01-317, 00-244) (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), *available at* [http://www.dga.org/news/v27\\_5/coalitionforprogramdiversity\\_hyperlinked.pdf](http://www.dga.org/news/v27_5/coalitionforprogramdiversity_hyperlinked.pdf).

209. *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. 102-628, at 42 (1992) (“[V]ertically 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 (daily ed. 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 (Feb. 20, 1991) (statement of Sen. Howard Metzenbaum) (“[V]ertical integration has led some operators to discriminate in favor of programming in which they have equity interests.”).

210. *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).

211. *See* WATERMAN & WEISS, *supra* note 209, at 130 (“[T]he lack of more than one or two of the most well-known networks would seriously handicap a multichannel competitor to an established cable system.”).

212. *See* TODREAS, *supra* note 136, at 53.

consumer's decision to subscribe.<sup>213</sup> This is particularly true where competition in the 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.<sup>214</sup> Thus, a cable operator may well be able to reap benefits from privileging affiliated programming without suffering penalties in the downstream distribution market.

Efficiency gains in the form of increased revenue in related markets provide additional 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 distribution market.<sup>215</sup> A vertically integrated 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 to defray the costs of content acquisition over a lar-

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213. A favorable position may be characterized by the service tier (for example, the analog service tier which is available to all subscribers or the digital service tier available only to some), the channel number (for example, 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, at 41 (identifying "discriminating against rival programming services with regard to price, channel positioning, and promotion" as examples of undesirable practices by vertically integrated cable operators).

214. 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 at 34-35, *In re* Application of Am. Online, Inc. et al. (Fed. Communications Comm'n) (No. 00-30) (filed July 25, 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.").

215. *See supra* notes 167-70 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 126, at 30; *cf. id.* app. 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 46, at 35; *see also* Einstein, *supra* note 126, at 23 ("The television executives interviewed for this report agreed that networks would continue to increase their level of program ownership in the coming years.").

ger audience base.<sup>216</sup> If they own content, they can more easily and cheaply reuse that content for video-on-demand, multiple cable channels, and online channels.<sup>217</sup> 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 corporate culture of most 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.<sup>218</sup> Emblematic of this Wall Street-driven approach to media production is the view of General Electric CEO Jack Welch. Shortly after his company's acquisition of NBC, Welch stated that the news 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.<sup>219</sup> These financial pressures

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216. See generally RYAN & WENTWORTH, *supra* note 169, at 164-67. The desire to exploit synergies in ancillary markets was an explicit motive in Comcast's failed bid for Disney in February 2004. See, e.g., Brigitte Greenberg, *Roberts Says Comcast will Stay Committed to its Core Business*, COMM. DAILY, Mar. 9, 2004, at 9 (quoting Comcast CEO Brian Roberts as saying that Comcast "can help take [Disney's] content and the libraries and the portfolio of the . . . company and help them to accelerate its growth rate" by combining distribution with content). The desire to exploit synergies in ancillary markets was also an explicit motive in Comcast's acquisition of an interest in MGM in September 2004. See Claudia Eller & James Bates, *Deal for MGM Includes Cash from Comcast*, L.A. TIMES, Sept. 24, 2004, at C2 (reporting on Comcast's equity partnership with Sony Corp. to acquire Metro-Goldwyn-Mayer Inc. in order to distribute movies through Comcast's video-on-demand systems).

217. 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 136, at 151.

218. See, e.g., PICARD, *supra* note 133, at 182 ("New pressures for increased company performance have been placed upon managers because of the obligations to 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." COMM'N ON FREEDOM OF THE PRESS, *supra* note 82, at 55. See generally LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 29-34 (1991).

219. DEAN ALGER, *MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY* 169 (1998) (quoting former NBC News President Lawrence Grossman quoting Jack Welch).



to satisfy Wall Street are made more acute by the debt that many large diversified public corporations carry after a major merger.<sup>220</sup>

Aggressive earnings targets tend to reduce the range of media products that are produced. In some cases, earnings pressure has led to explicit corporate influence over journalistic output in ways that may elevate corporate interests over consumer interests.<sup>221</sup> But earnings pressure is typically exerted in more subtle ways. Among the most important effects is an unduly heavy reliance on official sources and canned reporting to produce content quickly.<sup>222</sup> These shortcuts have contributed to influential media mistakes like the early misreporting of the 2000 presidential election results,<sup>223</sup> the uncritical acceptance of government rationales for the 2003 invasion of Iraq,<sup>224</sup> and the passing off of third party advocacy pieces or

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220. *See id.* at 156.

221. There is considerable anecdotal and empirical evidence that ownership of newspapers and television outlets influences editorial decisions and news coverage more generally. *See, e.g.*, Comments of Consumer Federation of America et al. at 41-48, *In re* 2002 Biennial Regulatory Review (Fed. Communications Comm'n) (Nos. 02-277, 01-235, 01-317, 00244) (filed Jan. 2, 2003) (sampling such evidence), *available at* <http://www.consumersunion.org/pdf/CFA-CU-Jan2002.pdf>; Jim Rutenberg, *Disney Is Blocking Distribution of Film That Criticizes Bush*, N.Y. TIMES, May 5, 2004, at A1 (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's tax breaks). *See generally* MCCHESENEY, *supra* note 157, 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).

222. *See, e.g.*, Brent Cunningham, *Re-thinking Objectivity*, in *OUR UNFREE PRESS: 100 YEARS OF RADICAL MEDIA CRITICISM* 287, 292 (Robert W. McChesney & Ben Scott eds., 2004) (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* 105-37 (1994) (showing the effects of the limited pool of experts consulted on television public affairs programs like *Nightline* and what was then the McNeil/Lehrer News Hour).

223. 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, for example, Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 6-12 (2004).

224. *See, e.g.*, SHELDON RAMPTON & JOHN STAUBER, *WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH'S WAR ON IRAQ* 161-88 (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); Cunningham, *supra* note 222 (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 et al., *Misperceptions, The Media and the Iraq War*

press releases as reported news.<sup>225</sup> These tendencies to sacrifice quality for time and money savings, apparent in formulaic entertainment programming as in journalism, can contribute to narrow failures of media markets to deliver the kinds of products the public demands. 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. Favored content is content in which the distributor or aggregator has an interest and that maximizes short-term economic returns. Conceivably, the public does not in fact demand products free from the influences and pressures discussed above, although the vocal grassroots objections to media consolidation suggest that at least a portion of the public *is* dissatisfied with the current media environment.<sup>226</sup> Research revealing public loss of faith in media as a truth-teller suggests the same thing.<sup>227</sup>

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.<sup>228</sup> 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, where distribution choke points will remain in the hands of broad-

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118 POL. SCI. Q. 569, 580-86 (2003) (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), *available at* [http://www.psqonline.org/cgi-bin/99\\_article.cgi?byear=2003&bmonth=winter&a=02free&format=viewganp](http://www.psqonline.org/cgi-bin/99_article.cgi?byear=2003&bmonth=winter&a=02free&format=viewganp).

225. This happened, for example, when more than forty 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*, WASH. POST, May 20, 2004, at A1.

226. *See supra* note 1 and accompanying text.

227. *See, e.g.*, DAVIS MERRITT, PUBLIC JOURNALISM AND PUBLIC LIFE: WHY TELLING THE NEWS IS NOT ENOUGH, at 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 1988 and 1993).

228. *See, e.g.*, COMPAINE & GOMERY, *supra* note 134, at 135, 159 (stating that the Internet has reduced the power of concentrated media by creating the possibility for "diversity, accessibility and affordability").

band facilities owners like cable.<sup>229</sup> In the aggregate, digital technology will not revolutionize the structure of the media industry just as it will not radically remake the economics of media production and promotion.

Because production and promotion costs will remain high, the benefits of scale and incumbency will continue to exist in the digital world. Media companies will still want to spread the risks of program production over bigger taste and geographic markets.<sup>230</sup> Moreover, the composition of companies best able to exploit economies of scale and scope will not change much. Open network architecture does not 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 DVDs, those at the top of the media hierarchy have appropriated them.<sup>231</sup> 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.<sup>232</sup> This prediction is intended not to minimize the importance of new entrants, but simply to suggest that the phenomenon of 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 same big media companies that dominate cable and broadcast television.<sup>233</sup> Even if the barriers to entry in

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229. In order to prevent these facilities-based broadband distributors from discriminating against content they do not own, a number of commentators have argued for policy reforms to ensure the free flow of data over broadband pipes. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 34-48 (2001); Mark Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks*, 71 U. COLO. L. REV. 1011 (2000); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001). These issues are joined in the pending FCC proceeding, *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, Notice of Inquiry, 16 F.C.C.R. 1321 (2001).

230. 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.

231. See COMPAINE & GOMERY, *supra* note 134, at 378-80.

232. The 2000 AOL-Time Warner merger is an example of this, although there the new media company acquired the old media company. Smaller, but perhaps ultimately more successful, acquisitions going the other way seem to be the trend today. See, e.g., Shelley Solheim, *Comcast Buys Tech TV*, PC MAG., 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- to 34-year-olds).

233. See, e.g., James G. Webster et al., *The Internet Audience: Web Use as Mass Behavior*, 46 J. BROAD. & ELEC. MEDIA 1, 1-12 (2002); NIELSEN MEDIA RESEARCH, CON-

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 18 of them.<sup>234</sup> 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.<sup>235</sup> In addition, well-branded networks are able to extend their brands through the launch of additional affiliated networks, like ESPN2 and ESPNNews. By increasing their dominance within a niche through channel proliferation and cross-selling, incumbent providers can reduce channel space or interest in rival networks.<sup>236</sup>

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-

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SUMER SURVEY ON MEDIA USAGE question 9 (FCC Media Ownership Working Group, Study, 2002) (reporting that 60% of survey respondents reported using web-based news sources affiliated with major television and newspaper outlets), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A17.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A17.pdf). For a similar point concerning weblogs, see Clay Shirky, *Power Laws, Weblogs, and Inequality* (2003) (reporting research results showing that 50% of weblog traffic is directed to the top 12% of the blogs), at [http://www.shirky.com/writings/powerlaw\\_weblog.html](http://www.shirky.com/writings/powerlaw_weblog.html). 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 eds., 2002) (describing big media dominance in cyberspace).

234. Peter Grant, *Manage TV-Channel Clutter*, WALL ST. J., 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 222, at 30 (predicting that the same viewer concentration patterns will hold for Internet media sources).

235. See DOYLE, *supra* note 87, at 145 (stating that “the additional scale economies made possible by digitization” may increase big media’s advantage in branding); see also TODREAS, *supra* note 136, 182-87 (discussing power of incumbent brands in digital environment).

236. See, e.g., Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Further Notice of Proposed Rulemaking, 16 F.C.C.R. 17,312, 17,323-25 (2001).

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 niche tastes. 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 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 demonstrated, is largely reactive and conceives of the consumer as sovereign. 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, the 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. *Content Drift 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 the availability of content naturally leads to its consumption—a process that I call “content drift.” Policy interventions into the market, whether to correct narrow market failures or to provide a diversion around broad ones, have encouraged or sponsored media products that are simply made available. If the products are meant only to satisfy consumer demand, availability is perhaps all that is required.<sup>237</sup> But content drift is a far less reliable means of addressing broad market failures by bringing audiences to content that they have not demanded.

To be sure, some kinds of media products could produce classic third-party positive externalities, even if content drift fails to expose the audience to such products.<sup>238</sup> 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.<sup>239</sup> Weblogs be-

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237. 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 that is dominated by proprietary digital portals and search engines and that is heavily dependent on promotion.

238. 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).

239. For arguments about the importance of the press as a surrogate for the public in the policing of the powerful, see DAVID L. PROTESS ET AL., *THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA* (1991); Justice Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631 (1975).

have this way by circulating reports read by relatively few that are then picked up by other media organs for more general consumption.<sup>240</sup>

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 value conferred is the experience of the media product itself, rather than 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 and affect the newsmakers. Content has no power to increase social solidarity or to expose citizens to diverse viewpoints without amassing an audience.

The analog world of channel scarcity and audience passivity did not tax content drift as an instrument of media policy. 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. *Content Drift in the Digital Mediascape*

Digital abundance and consumer control undermine content drift as an instrument of media policy in two ways. They create an attention deficit by taking attention away from content responsive to proactive media policy goals and they dilute the quality of attention even when the audience is “tuned in.” Thus, while market segmentation and interactive tools may produce more satisfaction of existing tastes, they likely forge less common exposure to different tastes, less communion over shared tastes, and less provocation to change tastes.

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.<sup>241</sup> Whatever its drain on real-space activities,

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240. See, e.g., SHAPIRO, *supra* note 58, at 133-41 (discussing the catalytic effect of the Drudge Report’s website report on the sex scandal involving President Clinton and Monica Lewinsky, leading to an explosion of mainstream media coverage).

241. Robert Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 28 POL. SCI. & POLITICS 664, 665 (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 42, at 28

however, there is evidence that video products once had the power to expose the public to difference and forge consensus simply by being available.<sup>242</sup> This power was created by, and largely dependent on, conditions of channel scarcity and 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.<sup>243</sup>

Today, as the 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.”<sup>244</sup> By taking advantage of interactive tools or being 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 media experiences that would build solidarity.<sup>245</sup> Others have observed that personal video recorders and digital program guides operating in traditional televi-

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(“[B]roadcasting 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). *But cf.* Pippa Norris, *Does Television Erode Social Capital? A Reply to Putnam*, 29 *POL. SCI. & POLITICS* 474 (1996) (arguing on the basis of empirical research that it is not the amount, but the type, of television watched that diminishes social and political involvement).

242. See, e.g., Elihu Katz, *And Deliver Us From Segmentation*, in Roger G. Noll & Monroe E. Price, *A COMMUNICATIONS CORNUCOPIA* 99, 106 (1998) (“[T]he shared experience of viewing [a single channel in Israel] often made for conversation across ideological divides.”).

243. See *supra* Part III.A; see also IEN ANG, *DESPERATELY SEEKING THE AUDIENCE* 154-55 (1991) (“[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*, 407-10 (4th ed. 2003).

244. Katz, *supra* note 242, at 101.

245. 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 7, 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 (Jay Black ed., 1997) (raising earlier the dangers of tailored news in cyberspace in the form of a *Daily Me* news service). *But cf.* Dan Hunter, *Philippic.com*, 90 *CALIF. L. REV.* 611, 627-37 (2002) (book review) (arguing that there is no such thing as perfect filtering and fears on this score are greatly exaggerated).

sion 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.<sup>246</sup> Given quantity and control, viewers may deprive themselves of the shared experiences that are important to careful deliberation in a democracy.

Digital technologies weaken the effectiveness of content drift as a way to overcome broad market failures even when content reaches the public. The potency of any particular program to fulfill media policy goals will diminish with overexposure and a reduction of quality attention. One of the most striking statistics about media usage is that the increased use of one medium 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.<sup>247</sup> 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.<sup>248</sup> This amount of total and simultaneous screen time tends to result in an information flow that “exceeds the interpretative capacity of the subject.”<sup>249</sup> An overexposed and restless audience, even in the currents of content drift, may not be reached in a meaningful way.<sup>250</sup>

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 exer-

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246. NAPOLI, *supra* note 122, 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 eds., 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.”).

247. U.S. CENSUS BUREAU, *supra* note 152, at 720.

248. *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.*

249. STEVENSON, *supra* note 103, at 157.

250. The postmodern theorist Jean Baudrillard developed what was one of the most influential theories about the dangers of information overload. *See, e.g.*, JEAN BAUDRILLARD, *Mass Media Culture*, in REVENGE OF THE CRYSTAL: SELECTED WRITINGS ON THE MODERN OBJECT AND ITS DESTINY 1968-1983, at 63-97 (Paul Foss & Julian Pefanis eds. & trans., 1990). *See generally* STEVENSON, *supra* note 103, at 157-61.

cised by content providers.<sup>251</sup> 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.<sup>252</sup> News and information producers also tend to privilege the sensational and fast-moving over nuanced analysis.<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup> 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.<sup>256</sup> 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.<sup>257</sup> At the same time, it burdens the audience's already strained attention to make sense of information.

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251. See KEANE, *supra* note 87, at 182-83 (discussing the danger "highlighted in the recent analyses by Jean Baudrillard . . . 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").

252. See, e.g., CROTEAU & HOYNES, *supra* note 151, 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 deWolf Smith, *Slices of Life*, WALL ST. J., 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).

253. LARRY SABATO, *FEEDING FRENZY* 6 (1991) (arguing that ratings pressures lead to press obsession with "gossip rather than governance" and "titillation rather than scrutiny").

254. 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 & ANDREI SHLEIFER, *MEDIA BIAS* (MIT Dep't of Econ., Working Paper No. 02-33, 2002), at [http://ssrn.com/abstract\\_id=335800](http://ssrn.com/abstract_id=335800).

255. GITLIN, *supra* note 252, at 72.

256. See GANS, *supra* note 222, at 49-54 (describing the various tactics news organizations employ to mass produce news); GITLIN, *supra* note 252, at 96-97 (describing the affects of the sound bite on news production).

257. 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.").



Although digital technology undermines content drift as a means for pursuing the proactive agenda of media policy, it opens up new possibilities for such pursuits as well.

#### IV. OUT OF THE BOX PUBLIC SERVICE MEDIA

The vulnerability of content drift as a way to correct broad market failures in the digital era impacts all facets of media policy, including regulations and subsidies. But it is in the realm of media subsidies that media policy can make the most substantial strides in supplementing the market in the digital environment. The current system of federal media subsidies centers upon fairly meager support for public broadcasting<sup>258</sup> and even more limited support for media production outside of the broadcasting system.<sup>259</sup> These subsidy programs are flawed in manifold ways.<sup>260</sup> The object here is not to propose specific institutional reforms, although institutional and legal reforms are necessary, but to show how media subsidies might 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.

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258. Federal appropriations for public broadcasting activities were about \$378 million in 2003, constituting approximately 15% of public broadcasting revenues. CPB Appropriation History, Corp. for Public Broad., at <http://www.cpb.org/about/funding/appropriation.html> (last visited Dec. 20, 2004).

259. These funds are made available primarily through the National Endowment for the Humanities (NEH). 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. CENSUS BUREAU, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, SECTION 26: ARTS, ENTERTAINMENT, AND RECREATION 772 (2003), available at <http://www.census.gov/prod/2004pubs/03statab/arts.pdf>. 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.*

260. 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 eds., 1995) (including essays arguing that public television has been captured by the left).

### 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. Content-based broadcasting regulations, even if they succeed in expanding content choices, respond only to narrow market failures and not to broad ones. Moreover, the constitutional justification for such regulations—that the scarcity of broadcast channels justifies reduced First Amendment protection—is now discredited. Content-based subsidies, because they lack the force of government compulsion, are subject to far less exacting constitutional review. As importantly, subsidies are flexible enough to support outreach as well as mere availability, thus tackling consumption patterns in addition to supply patterns.

To see the difference between regulation and subsidy, consider the following: in order 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. Such a rule might satisfy underserved audience segments, although even the achievement of this reactive goal is questionable given the resources it would take to develop compelling programming. But the rule would probably not involve audiences that did not have a 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.<sup>261</sup> Content-based regulations will generally pass muster under the First Amendment only if they are narrowly tailored to serve a compelling governmental interest.<sup>262</sup> Although the Supreme Court

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261. 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 (1989). 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).

262. *See, e.g., Police Dept. v. Mosley*, 408 U.S. 92 (1972). *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 212-17 (2d 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, 642 (1994); *United States v. O’Brien*, 391 U.S. 367 (1968).

has applied a less stringent standard to content-based regulations of broadcasting on the grounds that broadcast frequencies are scarce,<sup>263</sup> this relaxed scrutiny has not been extended to other electronic media.<sup>264</sup> Moreover, the scarcity rationale's continued vitality with respect even to broadcast media is in considerable doubt.<sup>265</sup> The consensus opinion is that it is just a matter of time before the Supreme Court buries the scarcity rationale, subjecting broadcast regulation to the same scrutiny as other types of speech regulation.<sup>266</sup> The result will be an even heavier reliance on content-neutral structural regulations (for example, ownership restrictions), which are themselves being subjected to more rigorous constitutional scrutiny as courts grow more solicitous of corporate speech.<sup>267</sup> The bottom line is that the "minority programming regulation" will be constitutional, if at

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263. *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).

264. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870 (1997) (rejecting *Red Lion's* First Amendment approach for Internet regulations); *Turner Broad. Sys.*, 512 U.S. at 637-41 (rejecting *Red Lion's* First Amendment approach for cable television regulations); *cf. Eugene Volokh, Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 146 (stating that *Red Lion* has had "rather little gravitational force").

265. The First Amendment exceptionalism for broadcasting has been criticized in both the courts and the academic literature. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984) (acknowledging criticism of the scarcity doctrine in light of new communications technologies, but asserting the Court's unwillingness "to reconsider [its] longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required"); *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from the denial of rehearing en banc) (criticizing scarcity as basis of special First Amendment treatment for broadcasting); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 151-52; Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1103, 1106 (1993); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 266-92 (2003).

266. *See, e.g., Phil Weiser, Promoting Informed Deliberation and a First Amendment Doctrine for a Digital Age: Toward a New Regulatory Regime for Broadcast Regulation*, in *DELIBERATION, DEMOCRACY, AND THE MEDIA* 11 (Simone Chambers & Anne Costain eds., 2000). The FCC itself repudiated the scarcity rationale when it abrogated large parts of the Fairness Doctrine. *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

267. *See Baker, Media Concentration, supra* note 14, at 847-55.

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. For example, 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.<sup>268</sup> 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.<sup>269</sup> This is not to say that the 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,<sup>270</sup> copyright policy,<sup>271</sup> and, of course, broadcast policy.<sup>272</sup> In the context of public service

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268. See Goodman, *supra* note 9, at 231-38.

269. *NEA 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 also are themselves government entities. In such cases, the media content choices they make may constitute government speech, which is subject to even more permissive First Amendment standards. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (striking down public university’s policy forbidding the use of subsidies for student publications by those that promote or manifest religious belief and clarifying that viewpoint discrimination is only permissible when government itself is the speaker); *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). *But cf.* *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673-74 (1998) (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).

270. See *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down state sales tax that exempted particular kinds of magazines for unconstitutional content-based discrimination within a class of media).

271. See *Satellite Broad. & Communications Ass’n v. FCC*, 275 F.3d 337 (4th Cir. 2001) (upholding copyright subsidies, in the form of a compulsory copyright license, for

media, these tensions have been addressed to some extent by interposing institutional buffers, like the Corporation for Public Broadcasting, between producers and government.<sup>273</sup> Given the inherently political process of subsidizing media, these buffers will always be under pressure.<sup>274</sup> Steps that make media subsidies more effective will intensify constitutional scrutiny, but they need not increase constitutional infirmity.

## B. Possibilities for Reform

If media policy is to address broad market failures as well as narrow ones, broaden exposure to difference, increase social integration, and provide meaningful nonmarket content alternatives, it can only be by reducing reliance on content drift as the primary tool of a proactive policy. That is, media policy can address these issues only by taking more seriously the patterns of 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.<sup>275</sup> Several scholars have urged in general terms,<sup>276</sup> or in more specific ones,<sup>277</sup> 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

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satellite broadcasters that carry local broadcast stations against a claim that such subsidies unconstitutionally discriminate on the basis of local content).

272. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating federal statutory prohibition on editorializing by noncommercial broadcast stations receiving public funds as unconstitutional content-based restriction on speech).

273. 47 U.S.C. § 396 (2000) (authorizing the establishment of a nonprofit Corporation for Public Broadcasting to funnel federal funds to noncommercial television and radio stations and producers).

274. For example, public broadcasting is continually subject to political attack for its performance of the statutory objective of “objectivity and balance” in CPB-funded programming. 47 U.S.C. § 396(g)(1)(A). See, e.g., Ken Auletta, *Big Bird Flies Right*, *NEW YORKER*, June 7, 2004, at 42 (reporting on political pressure exerted on PBS for allegedly left-leaning programming).

275. See, e.g., NAPOLI, *supra* note 33, at 146-52 (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).

276. See, e.g., BAKER, *supra* note 7, at 116; MCCHESENEY, *supra* note 157, at 305-07.

277. See, e.g., SHAPIRO, *supra* note 58, at 205 (proposing a PublicNet domain to showcase underrepresented artists and activists, whose icon would appear on desktops and browsers); SUNSTEIN, *supra* note 7, at 170-72 (making a similar proposal). Sunstein also proposed that government subsidize cyberspace content to encourage public debate. SUNSTEIN, *supra* note 7, at 180-82.



scarcity. Additional screen clutter, without more, will not achieve proactive media policy goals.<sup>278</sup>

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 service media on the grounds that niche channels like Discovery and CSPAN now provide adequate commercial substitutes miss this point.<sup>279</sup> As we have seen, digital networks will reduce, but not eliminate, narrow market failures. Thus, underproduction of programming that is high-risk and high-cost and that appeals to smaller audience segments will likely continue.<sup>280</sup>

Second, public service media should look beyond mere content drift in supplementing the market. If media subsidies are to advance both proactive and reactive policy agendas, they must boost consumption of and

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278. 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.” Hunter, *supra* note 245, at 664; *see also* TRACEY, *supra* note 87, 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”).

279. *See, e.g.*, John Motavalli, *PBS Facing Crisis: Infighting, Low Ratings, Lack of Hits Put Added Pressure on Public TV*, TELEVISION WK., Oct. 20, 2003, at 1 (discussing “serious challenge” to public television posed by niche cable channels).

280. 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 to 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). UNIV. OF GA., GEORGE FOSTER PEABODY AWARD WINNERS 83-94, <http://www.peabody.uga.edu/media/PeabodyWinnersBook.pdf> (last visited Dec. 20, 2004). 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. The Alfred I. duPont-Columbia University Awards-2005, Columbia University Graduate School of Journalism, at <http://www.jrn.columbia.edu/events/duPont> (last visited Dec. 20, 2004). For an enlightening study of how the goals and methods of public television production differ from those of commercial television, see DORNFELD, *supra* note 88, 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”).

critical engagement with the content they support. The achievement of these goals might involve outreach to promote content using the navigational tools of digital media, the production of new forms of content such as virtual reality games, or the sponsorship of peer-produced content, as well as the use of all media platforms, including broadband. Most centrally, a subsidy policy that takes aim at broad market failures will have to foster meaningful exposure to content, of whatever type and distributed by whatever means.

Scholars like Cass Sunstein who recognize the need for media policy to adjust to digital innovation are too wedded to old models of broadcast regulation.<sup>281</sup> Thus, the remedies they propose, such as mandatory carriage of opposing viewpoints on websites, do not address the problems of attention scarcity and broad market failures. When confronted with material that they do not demand, why would Internet users be more likely to click on the opposing viewpoint than they would to watch the unwanted content that broadcast regulations have made available? Media subsidy policy in particular can and must do something different.

### C. Real World Beginnings

Digital technologies, such as personal video recorders and search engines, provide new tools as well as new challenges for a proactive policy agenda. Policy interventions aimed at exposing viewers to programming with positive externalities could proactively use the same digital tools that commercial media use to aggregate audiences.<sup>282</sup> It turns out, for example, that people tend to watch what other people are watching.<sup>283</sup> Digital technologies exploit these bandwagon effects by alerting viewers to content they might share with others.<sup>284</sup> Public service media might enlist these

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281. One proposal is to revive and extend erstwhile broadcast regulations, like the Fairness Doctrine, into cyberspace, for example by requiring linking to contrasting perspectives. SUNSTEIN, *supra* note 7, at 186-89.

282. 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 58, at 120 (“[O]ne 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.”).

283. *See* Pessach, *supra* note 101, at 1084-85 (discussing cultural network effects and distinguishing them from economic network effects on the grounds that having more users really do increase value for the latter, but only the perception of value for the former).

284. 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

same technologies to promote and draw consumers to content that furthered media policy goals, particularly social solidarity. In doing so, the concept of community need not be limited to the geographically proximate as it has been in localism policy.<sup>285</sup> The use of interactive tools and distributed digital networks to produce and disseminate content can strengthen communities of aspiration or occupation that were not possible in the analog world.

The construction of a detailed subsidy policy is beyond the scope of this Article, but it is worth looking at how some of these concepts are being implemented in the existing public television community.<sup>286</sup> 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 greater impact and exploiting and enhancing new production and distribution capabilities.

The examples identified below arise in a traditional public broadcasting context and are limited by the existing constraints of the Public Broad-

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be able to tell viewers what others are watching, perhaps furthering at least the centripetal impulse. See Peter Grant, *Manage TV-Channel Clutter*, WALL ST. J., Nov. 17, 2003, at R6.

285. 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 of media policy. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 942-43 (1998) (“[I]n 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 6, 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. eds., 2001) (calling for a “revised concept of, and renewed commitment to, localism” aimed at enhancing democratic participation in the “translocal community”).

286. See Richard Somerset-Ward, *Public Television in the Digital Age: A Community Partner*, in LAWRENCE K. GROSSMAN & NEWTON N. MINOW, A DIGITAL GIFT TO THE NATION: THE 2001 REPORT 239 (2001) (providing examples of and recommendations for public television community partnerships in developing and disseminating video content and exploiting digital technologies), available at [http://www.digitalpromise.org/about/digital\\_gift/backgroundpapers/17\\_somerset-ward.pdf](http://www.digitalpromise.org/about/digital_gift/backgroundpapers/17_somerset-ward.pdf); see also DAVID W. KLEEMAN, ONE MISSION, MANY SCREENS: A PBS/MARKLE FOUNDATION STUDY ON DISTINCTIVE ROLES FOR CHILDREN’S PUBLIC SERVICE MEDIA IN THE DIGITAL AGE 52-68 (2002) (identifying and proposing successful community partnerships in the development and dissemination of children’s programming), available at [http://www.markle.org/downloadable\\_assets/omms.pdf](http://www.markle.org/downloadable_assets/omms.pdf).

casting Act, public television funding, and political pressures.<sup>287</sup> 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 videoconference on the conduct of town meetings, the staffing of hotlines, and the delivery of professional training.<sup>288</sup>
- *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 leadership and economic development.<sup>289</sup> In

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287. 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 broadcasting entities." 47 U.S.C. § 396(k)(1)(C) (2000).

288. See Geneva Collins, *Lightning in the Sky: A Call to Confront Death*, CURRENT, Oct. 30, 2000, at <http://www.current.org/outreach/out020dying.html>. In Iowa alone, at least seventy-three 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 seventy-five 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/wh-caring.html> (last visited Dec. 20, 2004). See generally *PBS Series On Our Own Terms: Moyers on Dying Attracts High Ratings and Fosters National Dialogue*, PDIA NEWSLETTER, Mar. 2001, at <http://www.soros.org/death/newsletter8/onourown/terms.html>.

289. See National Center for Outreach, Outreach Pipeline, Jan. 16, 2004, at <http://www.nationaloutreach.org/PIPELINE/Pipeline.pdf>; see also Making Connections

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."<sup>290</sup>

- In Kentucky in the spring of 2001, a public broadcasting station encouraged all readers in the state to read 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 simulcasted 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.<sup>291</sup>
- 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 nonprofit partners' most valuable content.<sup>292</sup> The partners help provide the content and pay production costs, but the station provides production assistance and quality control, assuring that the

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Media Outreach Initiative: Breaking the Cycle, at [http://www.aecf.org/initiatives/mc/communications/mcmoi/btc\\_about.htm](http://www.aecf.org/initiatives/mc/communications/mcmoi/btc_about.htm) (last visited Dec. 18, 2004).

290. See Making Connections Media Outreach Initiative: Breaking the Cycle, *supra* note 289; National Center for Outreach, *supra* note 289.

291. See PENN STATE PUBLIC BROAD., DIGITAL ALLIANCES: PARTNERS IN PUBLIC SERVICE, MODELS FOR COLLABORATION 12 (2002), available at <http://www.benton.org/publibrary/partners/pips.pdf>.

292. 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); see also *About MN Channel*, available at <http://www.tpt.org/mnchannel/about.html> (last visited Dec. 20, 2004).



product is of high quality.<sup>293</sup> 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 *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 seventy-eight programs, including a quiz show combining academic knowledge and street smarts.<sup>294</sup> 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.<sup>295</sup>

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. Moreover, they are limited by the failure of media policy to take an explicitly proactive approach and provide funding for projects without regard to ratings. Nevertheless, from these 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 overexposed and discriminating audience. If we take seriously the dependence of consumer wants on actual consumption patterns—a notion at the heart of media policy aspirations—then it is important to understand how

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293. 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. Telephone Interview with James R. Pagliarini, *supra* note 292.

294. Ned Kandel, General Manager, WNYE TV, Address Before the Conference on Media Diversity and Localism: Meaning, Metrics, and the Public Interest (Dec. 2003).

295. *Id.*

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 increase consumption of programming that exposes viewers to difference, forges community, and elevates discourse in the face of content abundance and attention scarcity.

The invigoration of public service media as a more powerful instrument of media policy would implicate a number of existing communications rules. Exploiting public service media 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. Such efforts would also require an expansion of funding to entities and activities beyond broadcasting. Perhaps most significantly, a coherent and express statement of purpose for structuring congressional appropriations and standards of accountability for public service media would be necessary. 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.