



The FCC and the Problem of Diversity

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In 1990, the Supreme Court heard the case of *Metro Broadcasting, Inc. v. Federal Communications Commission* (FCC). The case challenged the constitutionality of the FCC's minority preference policies, in which minority broadcast licenses were given preference if all other relevant factors were roughly equal. The Court ruled that these policies were constitutional; because these policies provided remedies against discrimination and furthered the program objective of diversity, they also furthered Congress' legitimate interest in providing diverse programming options to the public. This case established diversity as a compelling government interest, to be promoted by the FCC, thus establishing a legal precedent for the FCC to proactively advance regulation in this interest.

Twenty-four years later, statistics reveal a disappointing lack of progress. A report released in November 2012 by the FCC, presenting data gathered in 2009 and 2011, reported dismal numbers regarding women and minority owners of broadcast media. The 2011 data revealed that women owned only 6.8% of full-power commercial television stations and 5.8% of FM radio stations; racial minorities owned only 2.2% of full-power commercial television stations and 3.5% of FM radio stations; and Hispanics² owned only 2.9% of full-power commercial television stations and 2.7% of FM radio stations (FCC, 2012).³ What is the FCC's role in improving these statistics, and what movement has been made on that front?

The Federal Communications Commission is an independent U.S. government agency responsible for regulating interstate and international communications by radio, television, wire, satellite, and cable.

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² The FCC, and the federal government in general, consider *Hispanic* to be an ethnicity rather than a race, which is why racial minorities and Hispanics are reported in different statistics.

³ *Ownership* here refers to where the data indicated "majority ownership interest" rather than "controlling ownership interest." Because the FCC could not be sure that various individuals with ownership interests in a particular station actually worked together along the lines of gender, ethnicity, or race, it could not claim that a station with, say, a majority of owners who were women were *controlled* by that majority. Thus, these statistics, which indicate representation but not necessarily power, must be taken with some caution.

In 1996, with the passage of the Telecommunications Act, Congress mandated that the FCC conduct reviews biennially to report to Congress on its ownership rules to determine whether the rules are necessary in the public interest. As established by *Metro Broadcasting, Inc. v. Federal Communications Commission* in 1990, these reports should consider the diversity of ownership as part of this remand. However, the 1995 ruling in the Supreme Court case of *Adarand Constructors, Inc. v. Peña* placed additional requirements on any government action to remove barriers on a race-related basis. In *Adarand v. Peña*, the court ruled that all race-conscious government action had to be analyzed under strict scrutiny review and must be narrowly tailored to further a compelling government interest. Thus, in order to pass regulations or laws that would encourage diversity of ownership of broadcast media, the FCC would have to provide evidence that could pass the strict scrutiny standard.

This commentary piece examines the FCC's history of commissioning and interpreting research aimed at providing such evidence, with an emphasis on the epistemological foundations of this research in regard to diversity. I find that the FCC has acted as its own worst enemy in failing to provide either an adequate, applicable definition of diversity for researchers and policy makers or a rubric that determines what type of evidence would pass the strict scrutiny standard. This article goes on to suggest future steps the FCC could take to produce or commission research that not only satisfies this standard but fulfills the FCC's mission of regulating U.S. communications in the public interest.

In its 2003 Notice of Proposed Rulemaking, the FCC (2003) concluded that there are four types of diversity pertinent to media ownership policy that the agency had a compelling interest in regulating:⁴ (1) minority and female; (2) program; (3) outlet; and (4) viewpoint diversity. In this document, the FCC reaffirmed minority and female diversity as a historical goal of the FCC and admitted that further research was necessary to understand the impact of current and future possible legislation. It defined program diversity as the variety of programming formats and content, specifically acknowledging the importance of programming aimed at minority and ethnic groups. Outlet diversity is simply a multiplicity of independently owned firms. The Commission admitted that outlet diversity was largely seen as a means to the ends of viewpoint diversity but asserted that, particularly in the case of radio, there was compelling evidence to keep it as an ends in itself.

Viewpoint diversity is defined as the "availability of media content reflecting a variety of perspectives," justified as a compelling interest because "a diverse and robust marketplace of ideas is the foundation of our democracy" (FCC, 2003, p. 3). The FCC goes on to state that it is mostly concerned with viewpoint diversity in news and public affairs programming (the issue of entertainment programming is addressed under program diversity instead). It is important to note that in this document, while providing a typology of diversity, the FCC does not precisely define how each form of diversity is to be identified or measured.

Arriving at an operational definition of diversity that is robust enough to meet the strict scrutiny standard set in *Adarand v. Peña* has proven challenging. Early attempts to provide rigorous data for

⁴ The document actually details five forms of diversity but found that one—source diversity—had no evidence behind it showing that should be a policy goal of the FCC's broadcast ownership rules.

the reconsideration of ownership rules applied a wide variety of methods. The 2000 studies, commissioned in the late 1990s by Clinton-appointed FCC chairman William E. Kennard, approached the question of diversity statistically, anthropologically, and historically. On the quantitative side, Ernst & Young, LLP's (2000) study *FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions*, found that women and minorities qualified for participation in the wireless spectrum auctions at lower rates than other applicants. KPMG, LLP (2000) presented a logistical regression of broadcast license awards that found, among other things, that historically minority participation in the broadcast license award process was very low relative to minority representation in the U.S. population and that there was a lower overall probability for an application with minority ownership to win a license than a nonminority application after controlling for various important variables.

Qualitative research also struggled with the lack of a definition for diversity. Bachen, Hammond, Mason and Craft (1999) conducted interviews with news directors and public affairs programming directors in hundreds of radio and television stations to examine whether race or ethnicity of a broadcast station's owner had a meaningful influence on that stations' contribution to broadcast spectrum programming diversity. They found that, despite the fact that minority-owned stations report having fewer resources at their disposal, they report delivering a wider variety of news and public affairs programming and more ethnic and racial diversity in on-air talent. The Ivy Planning Group (2000), also through interviews, explored the history of barriers and discrimination in broadcast and wireless licensing faced by women and minorities over the second half of the 20th century. These interviews revealed the pervasive and continuing obstacles faced by minorities and women in gaining broadcast and wireless licenses.

The qualitative studies in the 2000 FCC research collection were particularly remarkable in their attention to the public interest in broadcast diversity as defined by the public itself. Such approaches were able to work around the lack of an operationalized definition of diversity in the public interest by directly asking the public what kind of diversity best served its communities—getting the definition of diversity from the people affected by its lack. Historically, such approaches have been welcomed at the FCC. In a staff executive summary promoting the applicability of the research it had commissioned for the 2000 review, the FCC pointed out that, "As the Supreme Court has noted, anecdotal evidence may 'bring the cold numbers convincingly to life'" (*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 399 (1977), as quoted in Federal Communications Commission, 2000, p. 12).

Despite this support for multimethod approaches, subsequent FCC administrations, starting with the George W. Bush-era FCC but continuing through the Obama administration, have failed to apply such rigorous approaches. The studies the FCC has commissioned to consider the issue of women and minority ownership of broadcast media and the resultant (or not) diversity of the media have been conducted entirely through market data gathered by the FCC or market analysts such as Arbitron and Nielsen. The result has been batches of studies that provide incomplete and contradictory conclusions, which the FCC is often forced to dismiss. A large part of this problem is the fact that, rather than using a metric that has been developed and tested for the purpose of passing the strict scrutiny standard, each research group has been forced to attempt to both develop an operationalized definition of diversity and then use this untested definition to attempt to achieve rigorous results.

In 2003, then-FCC Chairman Michael K. Powell, a former antitrust lawyer, suggested an algorithm dubbed the "Diversity Index." Based on an adaptation of the Herfindahl-Hirschmann Index, originally designed as an antitrust measure, it worked, essentially, by measuring the squared sums of the market shares of each company in an industry, thus producing a simple, quantified measure of supposed media concentration. This tool was widely decried by a broad, bipartisan range of consumer groups as clumsy and harmfully imprecise and, upon review in the Third Circuit courts, was found to be inadequate and was rejected.

Many scholars have focused on program, or format, diversity as the metric for measuring diversity in a market. A review of studies either commissioned by the FCC or used by the FCC in court that examined the relationship between minority ownership of broadcast stations and content revealed that 13 of the 17 studies found a statistically significant relationship between ownership and content, as measured, for the most part, by station format and program type (Kim, 2011). An analysis of 66 local television markets, prepared for the FCC, used longitudinal evidence to demonstrate that increases in minority-owned stations correlated to increases in minority-targeted programming (Siegelman & Waldfogel, 2001). A study by Turner (2007) found that two-thirds of minority-owned radio broadcasters aired minority-targeted formats, while a study by Sandoval (2009) found that this number had increased to 74.7%. A regression analysis of longitudinal ownership data and station format conducted by Waldfogel (2011) found that, on a market-wide basis, the presence of minority-owned stations increases the amount of minority-targeted programming and that the availability of minority-targeted formats attracts more minorities to listening.

In spite of an earlier commitment to program diversity as a critical form of diversity that should be protected and encouraged, the FCC has rejected format as a satisfactorily rigorous metric, writing in their 2014 Further Notice of Proposed Rulemaking and Report and Order (FNPRM), "We do not believe that evidence regarding program or other forms of diversity is as relevant as evidence regarding viewpoint diversity for the purpose of establishing narrow tailoring to a compelling interest" (FCC, 2014, p. 132) and stating that these approaches to diversity measurement were unlikely to satisfy the level of precision the Court requires in establishing broadcast diversity rules.

According to the FNPRM, "Viewpoint diversity currently is most likely to be accepted as a compelling governmental interest under strict scrutiny" (*ibid.*, p. 132). However, as Rennhoff and Wilbur (2012) pointed out, "viewpoint diversity" (p. 4) has not been explicitly defined by the FCC, forcing researchers to attempt to find for themselves a definition that could pass strict scrutiny in the courts. Rennhoff and Wilbur attempted to measure viewpoint diversity using a market-based analysis and discovered using this approach that there were no statistically significant relationships between minority ownership and viewpoint diversity. Thus, the FCC concluded that "this study does not appear to provide evidence that we could rely upon to justify race-conscious action" (FCC, 2014, p. 131). However, this proposed measure for viewpoint diversity makes several assumptions: a normal distribution of viewpoint preferences, program differentiation along a single dimension, and that viewers know the location of each available station (FCC, 2014). The FCC does not acknowledge these critical limitations of the study.

"Diversity in Local Television News," by George and Oberholzer-Gee (2011), used a different measure of viewpoint diversity, conducting a keyword count in television news broadcast transcripts and analyzing the relationships of these counts to market structures. Although the study found that the variable of minority ownership affected both the diversity in the coverage of health issues and the level of coverage of minority politicians, its overall conclusion was that there was no evidence that minority ownership affects viewpoint diversity. The authors commented that this result may have been due to the fact that "the available policy instruments . . . turn out to be rather blunt" (p. 18). Furthermore, the authors were careful to note that their approach, which simply measured how many times a topic was discussed in the news, could not describe *how* these topics were being discussed. In their methods section, the authors remarked that their approach would be best augmented by additional research considering such characteristics as the delivery and contextualization of these topics. The FCC did not mention these particular constraints of the study in their analysis or propose such a further study, concluding simply that the study did not "provide sufficient evidence to satisfy the requirements of strict scrutiny" (FCC, 2014, p. 131).

Where qualitative researchers have attempted to intervene to fill in these methodological gaps, the FCC has been dismissive. Byerly, Langmia, and Cupid's 2006 ethnographic study of minority communities in Washington, DC, found that ethnic minorities who listen to the radio for their news overwhelmingly prefer minority-owned stations. The FCC, however, criticized the study for not providing statistical analysis and found that "the evidentiary value of this study in the context of a strict scrutiny analysis would be limited" (FCC, 2014, p. 133).

The FCC's interpretation of these studies reveals a critical problem in overcoming the strict scrutiny obstacle: Although the FCC itself identified the need for a definition or rubric for viewpoint diversity in its Notice of Inquiry in 2010, such a definition or rubric has yet to be adopted by the agency. Thus, researchers are left to develop a rubric on their own, without guidance as to how to meet the strict scrutiny standard, resulting in research conclusions that are more easily waved away by the FCC as unable to meet this standard. By not creating an objective set of requirements for researchers seeking to meet the interpretive requirements of the Court, the FCC is setting up its researchers for failure.

One possible solution to this problem is for the FCC to develop and implement a more robust metric—one that combines quantitative and qualitative analyses to provide a more complete picture of the impact of diversity in media ownership. Using format as a metric for diversity does not allow researchers to examine the actual content of the programs, and neither format diversity nor viewpoint diversity allows researchers to consider how important these formats (or their content) are to the public interest. Qualitative studies provide deep, rich data but often have trouble arguing their generalizability. To produce truly rigorous research, a metric needs to be developed that moves beyond the assumptions made by these previous metrics of what the public interest is, and actually go into communities to determine public interest.

Recently, a major effort was made to push beyond the metric of viewpoint diversity and adopt the more vigorous measurement of critical information needs (CIN). Viewpoint diversity only considers the variety of issues covered by the media and the differentiation between stations in a market. CIN, on the

other hand, accounts for fundamental information individual residents need to live full and decent lives, with access to a broad range of basic opportunities for health, education, economic advancement, public safety, and environmental quality, and for the sustainability of communities themselves. An exhaustive study of current literature submitted to the FCC concluded that more research is needed to examine whether and how these basic needs are being met, particularly in communities of minorities, non-English-speakers, people with disabilities, and those with lower incomes (Communication Policy Research Network, 2012). Using CIN as the diversity metric would allow the FCC to move beyond metrics that assume that viewpoint diversity is in the public interest on First Amendment principles, which is difficult to prove, and toward a more concrete, empirical understanding of how and which media actually serve the public interest on the ground.

Above and beyond operational definitions and measurement tools, the FCC must address the fundamental problem of its data-gathering processes. Many researchers tackling the question of ownership diversity have noted that the FCC's databases on broadcast station ownership are incomplete and erroneous. Beresteanu and Ellickson (2007) stated, "The data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis" (pp. 2-3). Sandoval (2009) wrote that these obstacles "create barriers to analysis, particularly for longitudinal studies or efforts to analyze trends within or between large groups of broadcasters," and points out that "the FCC databases are so cumbersome that the Commission itself does not rely on the agency's databases for rulemaking, turning instead to private sources that put that same data in a format more conducive to analysis" (p. 4).

If the FCC is truly interested in serving the public interest, then it must begin to make it possible to do so. The Commission cannot expect rigorous research to be conducted on government databases that are incomplete or full of errors. It also cannot demand research that uses a metric it has not yet defined, that produces research of a quality it has not yet specified. By doing so, the FCC is hampering its own ability to develop and implement regulations that adequately address the needs of the American people. If the FCC agrees with the Supreme Court—that "it has long been a basic tenet of national communication policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" (*Turner Broadcasting System, Inc. v. F.C.C.*, 1994)—then the FCC should stop requiring that researchers also be lawyers, judges, and database managers. It is up to the FCC to create an environment where rigorous research leading to productive change can occur.

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