

PROMETHEUS SERVING: INCUBATING DIVERSE AND INCLUSIVE MEDIA IN THE PUBLIC INTEREST THROUGH DATA DEMOCRACY

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ABSTRACT

This Article invites Congress to expand data requirements for the National Telecommunications and Information Administration (NTIA) and Federal Communications Commission (FCC) so that minority and female ownership in telecommunications can be better understood. This Article calls for action to end the “data darkness” created by the FCC’s failure to publish decades of its licensing records in a digital format that supports rigorous analysis. The U.S. Supreme Court’s 2021 *FCC v. Prometheus Radio Project* decision countenanced under the Administrative Procedure Act the FCC’s decision to shift to the public the burden of gathering and analyzing FCC broadcast licensing records for the Commission’s quadrennial media ownership rule reviews required by the Telecommunications Act of 1996. While *Prometheus* leaves the FCC wide discretion to determine how to gather rulemaking data, it fails to address the

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FCC's public interest duties under the Communications Act. This Article contends that the FCC's poor data jurisprudence disserves the public interest and contributes to the dearth of minority and female broadcast licensees. This Article offers a taxonomy of the FCC's licensing and data jurisprudence, identifying four distinctive periods: the Nascent Era (1934–1968), the Civil Rights Era (1969–1978), the Opportunity Era (1978–1995) and the Consolidation Era (1995–present). For each era, this Article examines the expansion or contraction of minority and female ownership within the telecommunications sphere. This socio-legal-historical examination highlights the nexus between the FCC's licensing, data jurisprudence, and the public interest.

This Article urges Congress to order the FCC to digitize its archival data and create a free, public-facing, machine-readable database that supports longitudinal analysis. Ending the FCC's tolerance of data darkness will inform public policy, enable service to all Americans, foster opportunity, and spur equity in the public interest.

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I. INTRODUCTION: FROM DATA DARKNESS TO DATA DEMOCRACY

I Led Men On The Road

Of Dark And Riddling Knowledge; And I Purged

The Glancing Eye Of Fire, Dim Before,

And Made Its Meaning Plain. These Are My Works.

-Aeschylus, Prometheus Bound, 430 B.C.E.¹

A. FCC LICENSING AND DATA JURISPRUDENCE

Just as the mythical god Prometheus changed the course of history when he gave fire to humankind, harnessing the electromagnetic spectrum created new means of communication that transformed society and enabled the information age. To ensure that the electromagnetic spectrum serves the public interest, Congress created the Federal Communications Commission (FCC) through the Communications Act of 1934 ('34 Act), with the goal of promoting a worldwide and nationwide system of wireless and wireline communication.² Thirty-three years later, the Telecommunications Act of 1996 ('96 Act, or Telecom Act) raised the limits on the number of FCC broadcast licenses that an entity could hold, ushering in a massive consolidation of FCC broadcast licensing holdings. Section 202(h) of the '96 Act directed the FCC to biennially review its media ownership rules, a requirement later changed to quadrennial review.³ As the '96 Act reached its twenty-fifth anniversary, the U.S. Supreme Court's 2021 *FCC v. Prometheus Radio Project* decision⁴ countenanced under the Administrative Procedure Act (APA) the FCC's decision to shift to the public the burden of gathering and analyzing FCC broadcast licensing records for the Commission's quadrennial media ownership rule reviews.⁵ This Article rejects the *Prometheus* decision's invitation

1. AESCHYLUS, PROMETHEUS BOUND, (Daniel C. Stevenson ed., The Internet Classics Archive 1994) (430 B.C.E), <http://classics.mit.edu/Aeschylus/prometheus.html>.

2. 47 U.S.C. § 151 (2018).

3. *See* *Prometheus Radio Project v. FCC*, 652 F.3d 431, 462 (3d Cir. 2011) (*Prometheus II*) (determining that evidence presented by the FCC of significant radio consolidation at the national level (as opposed to within local markets) was properly considered under the APA in the FCC's review of media ownership rules).

4. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (overturning *Prometheus Radio Project v. FCC*, 939 F.3d 567, 573, 584 (3d Cir. 2019) (*Prometheus IV*)).

5. *See* *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1152 (2021). Consistent with FCC practice, this Article adopts the nomenclature of "media ownership" to mean control of FCC licenses by an individual or entity; *see also* *FCC v. Sanders Bros. Radio Station*, 309 U.S.

to defer to the “data darkness”⁶ created by the FCC’s failure to publish decades of its licensing records in a digital format that supports rigorous analysis. This Article contends that the FCC’s poor data jurisprudence disserves the public interest and contributes to the dearth of minority and female broadcast licensees by confounding tracking, analysis, and reform proposals.

This Article adds to communications and administrative jurisprudence⁷ by examining FCC data jurisprudence—administrative and legal decisions about data access and analysis—as a driver of FCC licensing jurisprudence and the dearth of minority licensees. This Article introduces to legal jurisprudence the term “data darkness” to mean decisions that obscure information and analysis. Maintaining unanalyzed records in analog format inaccessible through modern databases perpetuates data darkness. That policy choice yields an incomplete record that undermines administrative decision-making and the public interest. Data darkness frustrates comparative and longitudinal analysis that would inform FCC review of its media ownership rules and promote access to FCC licenses.

This Article distinguishes data jurisprudence from data governance or management. Data jurisprudence is developed by judicial, regulatory, and agency decision-making about data. Data theory and practice influence legal and regulatory decision-making. While agencies such as the FCC proclaim a commitment to data access and openness, administrative practice reveals the “unrules” shaping data and regulatory decisions. “Unrules” are unwritten actions, practices, and decisions that drive rules and rulemaking.⁸ “Unrules” are often spoken of in lore, not law, despite their outsized and persistent influence and ability to perpetuate data darkness.

470, 475 (1940) (“The policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.”).

6. See FERAS BATARSEH & RUIXIN YANG, DATA DEMOCRACY: AT THE NEXUS OF ARTIFICIAL INTELLIGENCE, SOFTWARE DEVELOPMENT, AND KNOWLEDGE ENGINEERING 14 (2020) (discussing “early [technology] adopters who helped to fuel the rise of data and grew a small flame lighting the ‘data darkness’ into raging fires ready to consume the world.”).

7. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994) (declining to question the validity of the spectrum scarcity rationale “as support for our broadcast jurisprudence.”); *id.* at 640 (observing that “the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.”) (citations omitted); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1987 (2015) (identifying principles of administrative jurisprudence “(1) authorization, (2) notice, (3) justification [the requirement for reasoned decision-making], (4) coherence, and (5) procedural fairness.”).

8. Cf. Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 889 (2021) (analyzing unrules as “carveouts and dispensations” from rules).

The FCC's data jurisprudence obscures its licensing jurisprudence and confounds analysis of the effects of its licensing and programmatic decisions. After its establishment in 1934, the FCC did not award its first radio license to an African American until 1949. By 1971, the FCC had awarded only ten radio licenses to minorities.⁹ The FCC did not award a television license to a minority until 1973, and did not adopt policies to promote minority license access until 1978.¹⁰ The FCC reported in 2017 that non-minority/non-Hispanic individuals controlled over 94% of FCC full-power television licenses and 92% of commercial radio licenses.¹¹ Most FCC radio and television licensees were men.¹²

Despite its professed commitment to data transparency, the FCC collected no data about many of its broadcast licensing actions and left other data languishing in analog obscurity. In 2011, the Third Circuit in *Prometheus II* emphasized that the Commission's media ownership decision "referenced *no* data on television ownership by minorities or women and *no* data regarding commercial radio ownership by women. This is because, as the Commission has since conceded, it has no accurate data to cite."¹³ In 2016, the Third Circuit in *Prometheus III* faulted the FCC's media ownership review including its 2008 Diversity Order. A "large part of the problem was inadequate data. An independent review concluded that 'all the researchers (and the peer reviewers) agree that the FCC's databases on minority and female ownership are inaccurate and incomplete and their use for policy analysis would be fraught with risk.'"¹⁴

9. *TV 9, Inc. v. FCC*, 495 F.2d 929, n.28 (D.C. Cir. 1973).

10. Ivy Group, *Whose Spectrum is it Anyway, Historical Study of Market Entry Barriers, Discrimination, and Changes in Broadcast and Wireless Licensing, 1950 to Present*, Submitted to the F.C.C., 7–8 (Dec. 2000); Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 (1978) [hereinafter *Minority Ownership Policy Statement*].

11. FCC, *Fourth Report on Broadcast Stations, FCC Form 323 and Form 323-E Ownership Data as of October 1, 2017*, 2–4 (Feb. 2020), <https://docs.fcc.gov/public/attachments/DA-20-161A1.pdf> [hereinafter, *FCC, Fourth Report on Ownership of Broadcast Stations*]. (Note, 2017 is the most recent year for which the FCC reported data. This Article's recommendations will improve the FCC's capacity to conduct and publish more timely data analysis.)

12. *Id.* (reporting that in 2017 men controlled the voting interests for 53.7% of full power commercial television stations and over 80.9% of AM and FM radio licenses).

13. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 470 (3d Cir. 2011) (*Prometheus II*).

14. *Prometheus Radio Project v. FCC*, 824 F.3d 33, 44 (3d Cir. 2016), *as amended* (June 3, 2016) (*Prometheus III*).

The Supreme Court's 2021 *Prometheus* decision concluded that the APA did not require the FCC "to conduct or commission their own empirical or statistical studies" or to create or publish databases.¹⁵ That decision allows the FCC to make decisions based on data acknowledged to be incomplete, even when relevant data can be found in the agency's archives.

The central issue in *Prometheus* was whether the FCC engaged in reasoned decision-making under the APA when it relied on a record, largely created by third parties through the notice-and-comment process, with acknowledged "gaps in the data."¹⁶ Reliable data on minority and female FCC license ownership was missing, particularly for the years from the FCC's founding until the '96 Act. Data gaps remain in the FCC forms and databases created for post-'96 Act licensees. Rather than digitize the FCC's analog database to make it available for longitudinal analysis and comment, the FCC "repeatedly ask[ed] [third-party commenters] for data on the issue [and] received no other data on minority ownership and no data at all on female ownership levels."¹⁷

The Court determined that neither the '96 Act, nor any other statute, obligated the FCC to create its own data or to conduct studies.¹⁸ The "APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *Prometheus* concluded.¹⁹ "And nothing in the Telecommunications Act (or any other statute) requires the FCC to conduct its own empirical or statistical studies before exercising its discretion under Section 202(h)."²⁰ "The Commission further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three [media ownership] rules at issue here was not likely to harm minority and female ownership. The APA requires no more," the Court concluded.²¹

Prometheus marks a fork in the FCC decision-making road. For its quadrennial media ownership rule reviews, including its assessment of initiatives to increase access to FCC licenses for minorities and women, the FCC can take the Promethean path and ask third parties to provide for free studies and data, even the FCC's own data. *Prometheus* determined that the FCC could use its predictive judgment based on record data submitted by third parties, even if the record remains incomplete, without violating the APA.

15. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1152 (2021) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 518–20 (2009); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

16. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1159 (2021).

17. *Id.*

18. *Id.* at 160.

19. *Id.* (citing *Fox Television*, 556 U.S. at 518–520; *Vermont Yankee*, 435 U.S. at 524).

20. *Id.*

21. *Id.*

The FCC's twentieth century paper records are kept in archives reminiscent of the final scene of *Raiders of the Lost Ark*.²² *Prometheus* leaves latitude for the FCC, Congress, the Administration, and the public to choose a different path. The FCC can end its Promethean cycle of data darkness and flawed analysis of its media ownership rules based on shoddy or absent data. Digitization of analog FCC data would enable longitudinal analysis that supports reasoned decision-making and serves the public interest. The FCC and Congress face a decision-making problem, not a technical issue.

This Article urges Congress, the FCC, and the National Telecommunications and Information Administration (NTIA) to reject *Prometheus's* invitation to remain in data darkness for decades to come and continue decision-making based on incomplete data. Congress should require the FCC to use twenty-first century technology to make its public data publicly accessible to support effective regulation, access to FCC licenses, and serve the public interest. NTIA should also build on the Agency's decade of research and reports on minority access to FCC licenses²³ and develop a methodology to study FCC licensing data to establish a baseline for longitudinal analysis. The data democracy initiative this Article recommends builds on the principles of the 2019 Foundations for Evidence-Based Policymaking Act (Evidence Act) and the Open, Public, Electronic, and Necessary Government Data Act (OPEN Act).²⁴

There is a rich and growing literature on data democracy and open government which this Article's limits do not provide room to explore.²⁵ Instead, this Article's socio-legal-historical analysis focuses on *why* the FCC's

22. See KPMG LLP, *Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC, Part II*, F.C.C. at 11–12 (Dec. 2000) [hereinafter *KPMG Utilization Rates*].

23. See, e.g., NTIA, 1997 COMMERCIAL BROADCAST OWNERSHIP FINDINGS, <https://www.ntia.gov/legacy/reports/97minority/findings.htm> (last visited Apr. 26, 2021); NAT'L TELECOMM. AND INFO. ADMIN., <https://www.ntia.doc.gov/> (last visited Mar. 9, 2021).

24. Pub. L. No. 111–435 (Jan. 14, 2019), 5 U.S.C. § 101. The Open Act applies to independent agencies such as the FCC while the Evidence Act applies to Executive Agencies and a limited number of other agencies, not including the FCC.

25. See, e.g., BATARSEH & YANG *supra* note 6, at 29; Max Cragliaa & Lea Shanley, *Data democracy – increased supply of geospatial information and expanded participatory processes in the production of data*, 8 INT'L J. DIGITAL EARTH 679 (2015), <http://dx.doi.org/10.1080/17538947.2015.1008214>; Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government,"* 59 UCLA L. REV. DISCOURSE 178, 182, 208 (2012) (citing IM DAVIES, OPEN DATA, DEMOCRACY, AND PUBLIC SECTOR REFORM: A LOOK AT OPEN GOVERNMENT DATA USE FROM DATA.GOV.UK (2010), <http://practicalparticipation.co.uk/odi/report/wp-content/uploads/2010/08/How-is-open-government-databeingused-in-practice.pdf>); Tiago Peixoto, *The Uncertain Relationship Between Open Data and Accountability: A Response to Yu and Robinson's the New Ambiguity of "Open Government,"* 60 UCLA L. REV. DISCOURSE 200, 207 (2013).

licensing and data jurisprudence, and the lopsided distribution of licenses that resulted, make data democracy imperative.

This Article deploys a socio-legal-historical framework to analyze FCC licensing and data jurisprudence. Socio-legal research examines “how law, legal phenomena and/or phenomena affected by law and the legal system occur in the world, interact with each other and impact upon those who are touched by them.”²⁶ This Article’s socio-legal-historical framework identifies missing FCC data as if they were empty folders in the *Library of Missing Datasets*.²⁷ Identification of missing datasets provides a roadmap to address neglected issues and underserved populations and improve data jurisprudence and administrative practice.

To analyze FCC licensing and data jurisprudence, this Article offers a novel socio-legal taxonomy that identifies and examines four distinct FCC licensing and administrative jurisprudential eras. These eras are the FCC’s: (1) Nascent Era from 1934 to 1968, when technology and regulation developed in the context of *de jure* and *de facto* segregation in many parts of American life; (2) Civil Rights Era between 1969 to 1978 following the Civil Rights Act of 1968²⁸ and the assassination of Dr. Martin Luther King; (3) Inclusive Opportunity Era between 1978 and 1995 when the FCC adopted programs to promote minority access to broadcast licenses, affirmed by the Supreme Court in *Metro Broadcasting v. FCC* under an intermediate scrutiny standard,²⁹ and; (4) Media Consolidation Era during the internet’s expansion following the ’96 Act and the Supreme Court’s 1995 shift in *Adarand v. Peña*’s to a strict scrutiny standard in 1995 for programs that took race into account.³⁰ FCC data jurisprudence throughout the FCC’s Nascent, Civil Rights, Inclusive Opportunity, and Media Consolidation Eras shaped Commission licensing policies, license distribution, the informational matrix carried on the airwaves since 1934.

26. Lisa Webley, *The Why And How To Of Conducting A Socio-Legal Empirical Research Project* in ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS 59 (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie, eds.) (2020).

27. See Mimi Onuoha, *The Library of Missing Datasets* (2016), <https://mimionuoha.com/the-library-of-missing-datasets#>.

28. Pub. L. No. 90–284, 82 Stat. 73 (adopting the Indian Civil Rights Act making many provisions of the bill of rights applicable to Native American tribes, adopting the Fair Housing Act, and making it made it a federal crime to “by force or by threat of force, injure, intimidate, or interfere with anyone . . . by reason of their race, color, religion, or national origin, handicap or familial status.”).

29. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564–65 (1990) (upholding FCC programs that took race and ethnicity into account on an intermediate scrutiny standard), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (regarding the standard of review).

30. *Adarand Constructors, Inc.*, 515 U.S. at 235.

This Article's nine sections analyze the nexus of FCC data jurisprudence and the Commission's professed policies to promote diversity in FCC licensing and broadcast service. Section II of this Article examines the development of the FCC's media ownership rules that limit how many broadcast licenses an entity can control in a local market or nationally. This Section also examines the legal framework for FCC regulation under the Communications Act and the FCC's reliance on broadcasters to determine what to air. Those decisions influence the media matrix, access to the airwaves, and society.

Section III examines the Supreme Court's 2021 *Prometheus* decision's textualist interpretation of the Communications Act to countenance under the APA FCC predictive judgements based on a record with obvious and acknowledged gaps. It argues that *Prometheus* perpetuates the regulatory stalemate that undermines FCC analysis of its professed policies to promote minority and female access to FCC licenses. Yet, *Prometheus* also leaves the FCC with discretion to break that stalemate by choosing a different path for its data maintenance and analysis. This Section also examines the constitutional standard of review applicable to minority or female ownership initiatives in the context of FCC media ownership review.

Section IV analyzes broadcast licensing during the FCC's Nascent Era between 1934 and 1968 through a socio-legal-historical framework that highlights the nexus between the FCC's licensing and data jurisprudence. It adds to the literature by analyzing the role of Congress's 1952 Communications Act in shaping FCC license access. That amendment prohibited the FCC from considering whether other parties would better serve the public interest in a proposed broadcast license transfer. The 1952 Communications Act amendment transformed incumbent broadcasters into gatekeepers of secondary market FCC licensing deals. This Section also analyzes the FCC's adoption of non-discrimination policies beginning in 1960. Those policies did not meaningfully increase the ranks of minority broadcast licensees during an era in which *de facto* and *de jure* segregation were prevalent in many parts of American life.

Section V analyzes FCC licensing jurisprudence during the Civil Rights Era between 1969 to 1978. It examines FCC initiatives to promote service to diverse American communities including minorities and prohibit discrimination by broadcasters. It analyzes the FCC's 1978 Minority Ownership Policy Statement and programs to promote minority access to FCC licenses adopted forty-four years after the FCC's founding.

Section VI examines the Inclusive Opportunity Era at the FCC between 1978–1996. It explores the FCC's analysis of the nexus between minority license access and its media ownership rules from 1983 through the Telecom

Act of '96. This analysis refutes government and industry petitioners' claims at the *Prometheus* oral argument that the FCC did not consider minority or female license access in the development of its media ownership rules.

Section VII discusses the Consolidation Era following the '96 Act during the internet's expansion. The '96 Act lifted the cap on radio ownership nationally and increased the number of stations an entity could control locally. *Adarand*, decided in the year before the Telecom Act's adoption, applied a strict scrutiny standard to race-conscious measures.³¹ The FCC's poor data jurisprudence undermines analysis required to meet *Adarand's* standard and contributes to the stagnation of minority and female FCC broadcast license ownership at low levels.

Section VII also argues that the FCC has underexamined safety in its media ownership rule reviews despite the '34 Act's mandate that the FCC advance America's public safety through its regulation of wireless and wireline service to all Americans.³² Broadcasting remains important source of public and safety information even as internet use has expanded.

Section VIII recommends data democracy initiatives the FCC and Congress should adopt. It suggests Executive Branch action to order NTIA to develop methodologies for FCC broadcasting data analysis. It argues that consistent with the Communications Act and the Open Act, the FCC should make its public data, including its archival, analog broadcast licensing and rulemaking data, publicly accessible in a machine-readable database to facilitate longitudinal analysis that serves the public interest.

Finally, Section IX summarizes this Article's data democracy recommendations. It contends that digitization and publication of FCC broadcast data will inform media ownership rule evaluation, promote diverse access to FCC licenses, and serve America's information, safety, and communications needs. This Article urges Congress to act as the modern Prometheus and require the FCC to digitize and bring to light data long kept in analog darkness.

II. FCC STRUCTURAL MEDIA OWNERSHIP RULES CONSTRUCT THE MEDIA MATRIX

"The matrix is everywhere. It is all around us even now in this very room. You can see it when you look out your window or when you turn on your television."

31. *Id.*

32. *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir. 2019).

Lawrence Fishburne (as Morpheus) – *The Matrix*, 1999

Lana Wachowski, *The Matrix: The Shooting Script*³³

A. FCC BROADCAST REGULATION CREATES THE FUTURE

The FCC's licensing and regulatory decisions since its founding in 1934 reverberate in today's media environment, influencing regulation and society. Those decisions form the legal and regulatory matrix driving what is seen on television screens, heard on the radio, and the circulation of information between broadcasting, print journalism, and the internet. Broadcasting shapes America's narratives, perspectives, and the future.

FCC licensing and structural ownership rules animate the legal and regulatory issues analyzed in *Prometheus* and FCC media ownership reviews under § 202(h) of the '96 Act. "Structural" media ownership rules dictate how many licenses an entity could control in a market nationally or locally and have also been applied to limit cross-ownership of distinct types of media.

FCC licensees decide what is aired, whose viewpoints are represented, who is hired, and which editorials or commercials reach the public through the airwaves, subject to the requirement to serve the public interest.³⁴ It is "upon [license] ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news."³⁵ The D.C. Circuit's 1973 *TV 9* decision emphasized the central role of media ownership in promoting first amendment values.³⁶

Both the public and broadcasters have speech rights at stake in broadcast regulation.³⁷ "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,"³⁸ the Supreme Court determined in *Red Lion Broadcasting Co. v. FCC* The public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" from broadcasters is crucial in FCC spectrum regulation.³⁹ "The public, not some private interest, convenience, or necessity governs the issuance of licenses under the [Communications] Act."⁴⁰

33. LANA WACHOWSKI, *THE MATRIX: THE SHOOTING SCRIPT* (Newmarket Press 2001).

34. *See* CBS Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973) ("Congress chose to leave broad journalistic discretion with the [FCC] licensee.").

35. *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973).

36. *See id.*

37. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

38. *Id.*

39. *Id.*

40. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).

Red Lion grounded its recognition of the value of broadcast licensing diversity to first amendment values on the marketplace of ideas theory recognized in the 1945 *Associated Press* antitrust law case.⁴¹ *Red Lion* did not address the creation of an inclusive marketplace. The metaphor of the marketplace of ideas often overlooks who is allowed to speak in the marketplace, relegated to the audience, or remains unserved or underserved.

The FCC created a broadcast marketplace of ideas in which only ten radio licenses were awarded to minorities by 1971, and no minority was awarded a television license until 1973.⁴² It took more than forty-four years after the Communications Act's passage in 1934 for the FCC to adopt programs to promote inclusion of minorities in the ranks of FCC licensees.⁴³

B. FCC STRUCTURAL MEDIA OWNERSHIP RULES

The Communications Act of 1934 requires the FCC to grant broadcast licenses in the public interest and regulate as the 'public convenience, interest, or necessity requires.'⁴⁴ In *NBC v. FCC*, the D.C. Circuit emphasized the electromagnetic spectrum "is not the private property of any individual or group,"⁴⁵ but is regulated in the public interest to benefit all Americans. Communications Act § 307(b) requires the FCC to "provide 'a fair, efficient and equitable distribution' of broadcast facilities to each of the States and communities."

The Supreme Court observed in *Federal Communications Commission v. Pottsville Broadcasting Co.* that in adopting the '34 Act, "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this, Congress provided for a system of permits and licenses."⁴⁶ The Commission grants a licensee the right to "the use of" the spectrum for a set period of time "but not the ownership thereof."⁴⁷ The FCC refers to its regulations on license control and consolidation as "media ownership rules," although licensees do not technically "own" FCC licenses.

41. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

42. *TV 9, Inc. v. FCC*, 495 F.2d 929, n.28 (D.C. Cir. 1973); Ivy Group, *supra* note 10.

43. *Minority Ownership Policy Statement*, *supra* note 10, at 13.

44. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1155 (2021); 47 U.S.C. §§ 151, 303, 309(a) (2006).

45. *NBC v. FCC*, 516 F.2d 1101, 1191 (D.C. Cir. 1975) (citing 47 U.S.C. § 301) ("No such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.").

46. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940).

47. 47 U.S.C. § 301 (2018); *see also* *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

In 1938, the FCC first adopted rules limiting control of FCC licenses by an individual or entity. FCC media ownership rules regulate issues including how many television or radio licenses an entity can control in a local market or nationally. These structural regulations include voting and equity interest thresholds that trigger application of those rules, known as attribution rules.

In *Genesee Radio Corp.*, the FCC adopted a strong presumption against granting licenses which would create duopolies, defined as ownership of two broadcast stations in a market by one entity.⁴⁸ *Genesee Radio Corp.* set a high standard for approval of a local duopoly, requiring the applicant to show “it overwhelmingly appears that the facility, apart from any benefit to the business interests of the applicant, is for the benefit of the community, fulfilling a need which cannot otherwise be fulfilled.”⁴⁹

The FCC’s presumption against radio duopoly ownership became a prohibition when the Commission adopted rules governing commercial FM service in June 1940.⁵⁰ For FM radio, the FCC in 1940 set a six-station national ownership limit threshold presumed to reflect concentration of control over broadcast licenses.⁵¹ Reaching the six-station limit raised questions about whether the public interest should permit that owner to acquire more broadcast station licenses. The purpose of the FCC’s six FM station national limit was “[t]o obviate possible monopoly, and encourage local initiative.”⁵²

In *National Broadcasting Corporation v. U.S.* and *U.S. v. Storer Broadcasting Co.*, the Supreme Court upheld FCC rules imposing limits on the number of FCC licenses a single entity could control.⁵³ The Court found these rules consistent with the FCC’s duty to ensure that broadcasting operates in the public interest. The Court has consistently recognized that the Communications Act empowers the FCC to regulate in a dynamic field, allowing it to consider a variety of factors that affect spectrum regulation in the public interest.

48. *In re Genesee Radio Corp.*, Flint, Michigan, 5 F.C.C. 183, 187 (1938); see also *In re Louisville Times Co.*, Louisville, Kentucky S. O. Ward & P. C. Ward, Louisville Broad. Co., Louisville, Kentucky, 5 F.C.C. 554, 559 (1938). The FCC uses duopoly to refer to control by an entity of two stations in a market, in contrast to the definition of duopoly used in antitrust law to mean market control by two competitors. Cf. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 (D.C. Cir. 2001) (“In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger.”).

49. *Genesee Radio Corp.*, 5 F.C.C. at 187.

50. See FCC, *Sixth Annual Report Fiscal Year 1940*, 68 (1941), <https://docs.fcc.gov/public/attachments/DOC-308656A1.pdf> [hereinafter *FCC, Sixth Annual Report*].

51. Rules Governing High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940).

52. *FCC, Sixth Annual Report*, *supra* note 50.

53. *NBC v. United States*, 319 U.S. 190 (1943); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956).

In 1946, a year after the conclusion of World War II, the FCC effectively limited AM station ownership to seven stations nationally. The FCC denied CBS's application to buy an AM station in San Jose, California on the grounds that the applicant had reached its full complement of licenses.⁵⁴ The Commission's denial of the transfer of control application found "that in AM, as in FM, it is against the public interest to permit a concentration of control of broadcasting facilities in any single person or organization. Such concentration of control— particularly in AM—is not a factor of the absolute number of stations alone but depends also upon the character of the facilities involved, e.g., the powers and the frequencies of the stations."⁵⁵ The Commission determined that "public interest in broadcasting is better served by entrusting the operation of radio stations to a maximum number of qualified people rather than by having a large number of stations controlled by a single person or organization."⁵⁶

Television was an "experimental" service in the 1930s and grew after the FCC approved standards for black and white television in 1941.⁵⁷ After World War II, television evolved from an experimental service to a growing platform that served millions of Americans. As AM radio expanded, FM radio technology improved, and radio listening increased, the FCC reviewed its broadcast ownership limits. It also considered cross-media limits to constrain broadcast and newspaper holdings in the same market.

C. FCC NATIONAL LICENSE OWNERSHIP LIMITS PROMOTE DIFFUSION OF LICENSE CONTROL IN THE PUBLIC INTEREST

To promote a diversity of voices and viewpoints, the FCC adopted national ownership limits beginning in 1955. From 1953 to 1954, the FCC set a national ownership limit of seven AM, seven FM, and seven Television stations, only 5 of which could be Very High Frequency (VHF) stations.⁵⁸ FCC Commissioner Mark Fowler and Dan Brenner commented that the FCC "arrived at the 7-7-7 figure by taking as a ceiling the largest number of stations

54. *In re Brunton*, 11 F.C.C. 407, 412–13 (1946).

55. *Id.*

56. *Id.*

57. FCC, *The Technology of Television* 4 (Summer 2003), https://transition.fcc.gov/omd/history/tv/documents/76years_tv.pdf.

58. Amendment of Section 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations, 43 F.C.C. 2d 2797, 2801–02 (1954); Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM, and Television Broadcasting Stations, 18 F.C.C. 2d 288 (1953); *see also* 47 C.F.R. §§ 73.240(a)(2), 35(b)(1), 636(a)(2) (1981). The Commission arrived at the 7-7-7 figure by taking as a ceiling the largest number of stations held by any one licensee at the time of the rule's adoption.

held by any one licensee at the time of the rule's adoption."⁵⁹ FCC Commissioner Henry Rivera explained at the 1984 D.C. Circuit Judicial Conference that the 7-7-7 rule "was, and remains, rooted in the notion of maximizing media ownership diversity."⁶⁰

The 7-7-7 national ownership limit remained in place from 1953 until 1985 when the FCC reconsidered that limit in the context of its 1978 minority ownership policies. In 1978, the FCC adopted a Statement of Policy on Minority Ownership of Broadcasting Facilities.⁶¹ That Policy Statement recognized that FCC non-discrimination policies adopted in the wake of the civil unrest following the 1968 assassination of Dr. Martin Luther King had proved insufficient to promote access to FCC licenses for minorities.⁶² The FCC adopted its 1978 Minority Ownership Policy Statement one month before the Supreme Court's *Bakke* decision recognized diversity as a permissible factor to consider in order to promote educational dialogue and first amendment values.⁶³

The 1978 Minority Ownership Policy Statement adopted programs to promote minority ownership—including a "tax certificate" to incentivize incumbent broadcasters to sell their licenses to minorities by allowing sellers to defer the tax gain on the license sale. Congress' 1952 amendment to the Communications Act gave broadcast licensees discretion to determine who would be the parties to a broadcast license transfer application. That amendment, codified as Communications Act Section 310(d), forbid the FCC from considering whether another party would better serve the public interest. The Tax Certificate sought to expand the pool of players brought into deals by incumbent broadcasters.

During the regulatory proceedings to evaluate whether to lift the national limit to 12-12-12, the FCC considered minority ownership for the first time in the context of its structural licensing ownership limits.⁶⁴ In 1983, FCC

59. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 257, n.166 (1982).

60. Proceedings of the Forty-Fifth Judicial Conference of the District of Columbia Circuit, 105 F.R.D. 251, 351 (N.D. Tex., 1984).

61. *Minority Ownership Policy Statement*, *supra* note 10.

62. *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C. 2d 240 (1969); NAT'L ADVISORY COMM'N ON CIV. DISORDERS, SUMMARY OF REPORT (Bantam Books 1968), <http://www.eisenhowerfoundation.org/docs/kerner.pdf>.

63. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

64. *In re Corp. Ownership Reporting & Disclosure by Broad. Licensees. Amendment of Sections 73.35, 73.240, & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, Fm, & Television Broad. Stations. Amendment of Sections 73.35, 73.240, 73.636, & 76.501 of the Commission's Rules Relating to Multiple Ownership of Am, Fm, & Television*

Chairman Fowler led the charge during the Reagan Administration to increase the limit to 12-12-12 radio and television stations an entity could control nationally.⁶⁵ That proceeding also examined the effects of the FCC's media ownership rules on minority groups' access to FCC licenses.

In 1984, the FCC recognized "that a relaxation of the benchmark [for triggering application of multiple ownership rules] might serve the public interest by increasing investment in the industry and by promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities."⁶⁶ In 1985, the FCC again tied its evaluation of structural media ownership rules to its consideration of initiatives to promote minority access to FCC licenses. Concomitant with its increase of the national ownership limits from 7-7-7 to 12-12-12, the FCC determined "we believe that both the audience reach and numerical station limits should be adjusted to promote minority ownership of broadcast facilities."⁶⁷

For more than forty-three years since its 1978 Minority Ownership Policy statement, the FCC has intertwined consideration of its structural media ownership rules and its minority ownership initiatives. Academic literature and the Courts have underrecognized the depth and length of this linkage between the FCC's media ownership policies and its minority license access initiatives.

In 1993, the FCC suspended the comparative hearing process used from 1945 to 1993 to award FCC licenses after the Supreme Court's *Ashbacker v. FCC* decision required a comparative process to award FCC licenses.⁶⁸ The FCC abandoned comparative hearings after the D.C. Circuit's 1993 decision in *Bechtel v. FCC* upheld a challenge to the "integration" factor used in comparative hearings to consider the license owner's proposed involvement in

Stations & CATV Sys. Reexamination of the Commission's Rules & Policies, 97 F.C.C.2d 997, 1002 (1984) [hereinafter *1984 Multiple Ownership Rule Review*].

65. The FCC initiated Gen. Docket No. 83-1009 in 1983 to evaluate whether to change its 7-7-7 media ownership rule.

66. *Id.*

67. *In re* Amendment of Section 73.3555 (Formerly Sections 73.35, 73.240, & 73.636) of the Commission's Rules Relating to Multiple Ownership of Am, Fm & Television Broad. Stations, 100 F.C.C.2d 74, 76 (1985) (decided upon reconsideration of Report and Order in Gen. Docket No. 83-1009, FCC 84-350, 49 Fed. Reg. 31877 (Aug. 9, 1984), *appeal docketed sub nom.* Black Citizens for Fair Media v. FCC, No. 84-1503 (D.C. Cir. filed Oct. 9, 1984)) [hereinafter *1985 Multiple Ownership Rule Review*].

68. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).

daily station management.⁶⁹ After 1995, contested license applications could be obtained through an FCC auction.⁷⁰

The '96 Act removed limits on the number of radio licenses a single entity could nationally hold. That Act also imposed a tiered limit on the number of radio stations that a single entity could own locally based on market size. In 2004 Congress set by statute the number of television station licenses an entity could control nationally at 39% of U.S. television households.⁷¹ These laws and FCC rulemakings allowed license holding consolidation to increase. Professor Akilah Folami observed that following the '96 Act, “radio consolidation enhance[d] a station’s ability to control what the public hears on the radio or at a live concert.”⁷²

License transfer applications enabled by the '96 Act were subject to broadcaster deals and FCC reviews under § 310(d). Per the Communications Act’s 1952 amendment, the licensee determines who would have the opportunity to participate in the license transfer deal. For large transactions involving multiple stations and high dollar values U.S. Department of Justice antitrust review and approval is also required.

To address the FCC’s more than half-century late start in promoting license access for minorities,⁷³ Congress directed the FCC through §§ 309(h)-(j) and § 257 of the '96 Act to promote access for small, minority, and women-owned businesses to FCC licenses allocated through competitive bidding. Sections 309(h)-(j) require the FCC to promote access for s

mall, minority, and women-owned businesses through its auction process. Congress adopted those directives to “promot[e] economic opportunity and

69. Allen S. Hammond IV, Catherine J.K. Sandoval & Leonard Baynes, *COMMUNICATIONS LAW IN THE PUBLIC INTEREST* 214 (Wolters Kluwer 2020) (citing *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993)).

70. See *How to Apply for a Radio or Television Broadcast Station*, FCC, <https://www.fcc.gov/media/radio/how-to-apply#NCE> (last visited Apr. 16, 2021).

71. See Oral Argument, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (No. 19–1231), <https://argument2.oyez.org/2021/fcc-v-prometheus-radio-project/> [hereinafter *Sandoval, Prometheus Oral Argument Comment*].

72. Akilah N. Folami, *From Habermas to “Get Rich or Die Tryin’”: Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235, 298 (2007); see also Adam J. Van Alstyne, *Clear Control: An Antitrust Analysis of Clear Channel’s Radio and Concert Empire*, 88 MINN. L. REV. 627, 640 (2004).

73. *Minority Ownership Policy Statement*, *supra* note 10. Consistent with FCC definitions of minorities, this Article defines minorities’ ownership of an FCC license as de jure or de facto voting control of the entity which holds an FCC license by one or more persons who are Latino/Hispanic, African American, Native American/Alaska Native, Asian, Native Hawaiian/Pacific Islander. See 47 CFR § 73.3555 (FCC ownership attribution rules); see also FCC, *Fourth Report on Ownership of Broadcast Stations*, *supra* note 11 at 2–4.

competition and ensur[e] that new and innovative technologies are readily accessible to the American people.”⁷⁴

The ’96 Act also set in motion FCC media ownership rule reviews. Section 202(h) of the ’96 Act directed the FCC to biennially review its media ownership rules, a requirement later switched to quadrennial review.⁷⁵

Beginning with the FCC’s media ownership rule review concluded in 2004, the Third Circuit obtained jurisdiction through a judicial lottery after litigants appealed the FCC’s decisions in multiple jurisdictions. The Third Circuit retained jurisdiction over the *Prometheus* docket until the Supreme Court heard and decided an appeal of *Prometheus IV* in 2020–2021.

The *Prometheus* Court ultimately recognized that minority ownership was a longstanding FCC policy considered in the context of its media ownership rules. The legal issue became what, if any, record the FCC was required to develop to support its § 202(h) analysis of media ownership rules.

III. TO STUDY OR NOT TO STUDY: THE PROMETHEUS DOCKET ANALYZES FCC MEDIA OWNERSHIP REVIEW

A. PROMETHEUS RISING, THE PROMETHEUS DOCKET, 2004–2021

The Third Circuit’s *Prometheus* docket reviewed the appeal of FCC media ownership decisions from 2004 to 2019. The Third Circuit’s four decisions in the *Prometheus* docket repeatedly criticized the FCC’s failure to rationally consider the impact of its media ownership rule decisions on minorities and women, despite the FCC’s insistence that license ownership diversity remained a policy priority.⁷⁶

The FCC orders at issue before the Supreme Court in *Prometheus* involved three decisions adopted as presidential administrations changed. In 2016, when Tom Wheeler was FCC Chair and Barack Obama was President, the FCC adopted a decision that retained many of its media ownership rules including the newspaper-broadcast cross-ownership rule, the local television ownership rule, and the local radio ownership rule. The FCC did so, based in part on its

74. 47 U.S.C. § 309(j)(4)(C) (2018).

75. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 462 (3d Cir. 2011) (*Prometheus II*) (determining that evidence presented by the FCC of significant radio consolidation at the national level, as opposed to within local markets, was properly considered under the APA in the FCC’s review of media ownership rules).

76. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 382–89 (3d Cir. 2004); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 438–44 (3d Cir. 2011) (*Prometheus II*); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 49 (3d Cir. 2016), *as amended* (June 3, 2016) (*Prometheus III*); *Prometheus Radio Project v. FCC*, 939 F.3d 567, 584 (3d Cir. 2019) (*Prometheus IV*).

determination that this action would not harm its goal of promoting minority and female ownership of broadcast television and radio stations.⁷⁷

In 2017, following the inauguration of Donald Trump as President and the appointment of Ajit Pai as FCC Chair, the FCC decided upon reconsideration to repeal the newspaper-broadcast ownership rule, though it conducted no new fact-finding. The FCC's 2018 Incubator Order sought to promote opportunities for small businesses, including those owned by minorities and women, by allowing broadcasters to invest in and "incubate" eligible entities in exchange for relief from some of the FCC's structural ownership limits on the number of broadcast stations that could be owned locally.

The Third Circuit's decision in *Prometheus II* criticized the FCC for the lack of data and analysis supporting its incubator proposals, a factual and analytical gap persisting at the time of the 2020 *Prometheus* appeal. The Third Circuit in *Prometheus II* criticized the lack of reasoned explanation underlying its proposal for a revenue-based "eligible entity" definition to support broadcast diversity goals. *Prometheus II* found the FCC "offered no data attempting to show a connection between the definition chosen and the goal of the measures."

The Third Circuit in *Prometheus IV* faulted the FCC for relying on incompatible datasets (NTIA data gathered before 2000 and FCC Form 323 reports gathered after 1998) to analyze the effect of its media ownership rules on minority and female license ownership. "Attempting to draw a trendline between the NTIA data and the Form 323 data is plainly an exercise in comparing apples to oranges, and the Commission does not seem to have recognized that problem or taken any effort to fix it," the Third Circuit concluded in *Prometheus IV* in 2019.⁷⁸

After the Third Circuit vacated the FCC's 2016, 2017, and 2018 decisions for APA violations, the U.S. Government and National Association of Broadcasters petitioned the U.S. Supreme Court to review the case. Petitioners argued that the Third Circuit's *Prometheus IV* decision did not properly apply the APA and should have deferred to the FCC's decisions under the *Chevron* standard of review which gives agencies latitude to interpret ambiguous statutes under their jurisdiction. The central issue in *Prometheus* was whether the FCC was required to do more analysis to compensate for its incomplete record and address its professed policy commitment to promote FCC licensing opportunities for minorities and women.

77. *In re* 2014 Quadrennial Regulatory Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 31 FCC Rcd. 9864, n.830 (2016) [hereinafter *FCC, 2016 Media Ownership Review Order*].

78. *Prometheus Radio Project v. FCC*, 939 F.3d 567, 586 (3d Cir. 2019) (*Prometheus IV*).

B. APA STANDARD OF REVIEW

The Communications Act gives the FCC broad power to regulate in the public interest, “so long as [its] view is based on consideration of permissible factors and is otherwise reasonable.”⁷⁹ The reasonableness of the FCC’s or a federal agency’s decision-making is reviewed under the APA.

Chevron’s two-step framework is deployed to review agency reasoning involving statutory interpretation.⁸⁰ Per *Chevron*, a reviewing court first examines whether the relevant statute is ambiguous, and Congress charged the administrative agency with responsibility for interpreting it. “If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”⁸¹

As the Court explained in *Prometheus*, the “APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency.”⁸² “A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.”⁸³

The APA “requires agencies to engage in ‘reasoned decisionmaking,’” and “directs that agency actions be ‘set aside’ if they are ‘arbitrary’ or ‘capricious.’”⁸⁴ An agency’s action is arbitrary and capricious if the reasons for its decisions are not “logical and rational.”⁸⁵ An “arbitrary and capricious” regulation receives no *Chevron* deference to an administrative agency’s statutory analysis or interpretation.⁸⁶

79. *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978).

80. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

81. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843–44).

82. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

83. *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

84. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992); 5 U.S.C. § 706(2)(A) (2018)).

85. *See Michigan v. EPA*, 576 U.S. 743, 750 (2015).

86. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

Administrative decision-making must rest on a reasoned explanation that does not “run[] counter to the evidence before the agency.”⁸⁷ To ensure that agencies have engaged in reasoned decisionmaking as required by the APA, courts “examin[e] the reasons for [an] agency decision[.]” and assess “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”⁸⁸

The APA requires that an agency must “articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts.”⁸⁹ “[I]n order to permit meaningful judicial review, an agency must ‘disclose the basis’ of its action.”⁹⁰

At issue in *Prometheus* was whether the requirement for reasoned decision-making obligated the agency to acquire and analyze data or conduct studies to examine the issues within the proceeding’s scope. Years earlier, the Court concluded in *State Farm*, when “available data do not settle a regulatory issue,” an agency “must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.”⁹¹ The Third Circuit in *Prometheus III* directed that if the Commission, “needs more data” to analyze the eligible entity issue relevant to its proposed incubator program, the FCC “must get it.”⁹²

In 2009, the D.C. Circuit’s *Stilwell* decision, written by then Judge Kavanaugh, concluded that the “APA imposes no general obligation on agencies to produce empirical evidence,” rather, an agency only has to justify its rule with a reasoned explanation.⁹³ Consistent with the logic of *Stilwell* and using a textualist interpretation of the APA and the Communications Act as amended, *Prometheus* determined that the FCC was not required to obtain relevant data or conduct studies. Instead, *Prometheus* allows the FCC to rely on third-party commentators to decide whether to produce relevant and timely studies and data, even if doing so results in an incomplete record with obvious data gaps.⁹⁴

87. *State Farm*, 463 U.S. at 43.

88. *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (internal quotation marks omitted).

89. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

90. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 167–69).

91. *State Farm*, 463 U.S. at 52.

92. *Prometheus Radio Project v. FCC*, 824 F.3d 33, 49 (3d Cir. 2016), *as amended* (June 3, 2016) (*Prometheus III*).

93. *Stilwell v. Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009).

94. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1152 (2021) (citing *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 518–20; *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U. S. 519, 524 (1978)).

C. PROMETHEUS PERPETUATES THE REGULATORY STALEMATE

The Supreme Court's 2021 *Prometheus* decision overturned the Third Circuit's determination in *Prometheus IV* that the FCC violated the APA. The Court determined that as long as the FCC's decision reflected a rational analysis of the record before it, the APA requires no more, even for an admittedly deficient record.⁹⁵

Prometheus determined that the "APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies."⁹⁶ The Court emphasized that "nothing in the Telecommunications Act (or any other statute) requires the FCC to conduct its own empirical or statistical studies before exercising its discretion under Section 202(h)."⁹⁷

The Court in *Prometheus* found the FCC's decision based on incomplete data was "a reasonable predictive judgment" based on the record.⁹⁸ *Prometheus* defers to an agency's judgment under the APA, even when based on a sparse and admittedly incomplete record. The FCC "relied on the data it had (and the absence of any countervailing evidence) to predict that changing the rules was not likely to harm minority and female ownership."⁹⁹ "In light of the sparse record on minority and female ownership and the FCC's findings with respect to competition, localism, and viewpoint diversity, we cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA," the Court concluded.¹⁰⁰

Respondents' merits brief in the *Prometheus* appeal highlighted that "Congress confirmed the breadth of the public-interest mandate and its commitment to race and gender diversity. *See* 47 U.S.C. §§ 151, 257."¹⁰¹ Respondents emphasized, "[o]ften at Congress's direction, the Commission has adopted rules to foster diverse ownership opportunities," citing to Section 309(j).¹⁰² The Supreme Court's *Prometheus* decision was silent about these provisions of the Communications Act and their implications for FCC quadrennial review of its media ownership rules required by Section 202(h) of the '96 Act.

95. *Prometheus Radio Project*, 141 S. Ct. at 1160.

96. *Id.* at 1152 (citing *Fox Television*, 556 U. S. at 518–20; *Vermont Yankee*, 435 U. S. at 524).

97. *Id.*

98. *Id.* at 1160 (citing *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

99. *Id.* at 1159.

100. *Id.* at 1160.

101. Brief for the Respondents, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (Nos. 19–1231, 19–1241) [hereinafter *Respondents Brief*].

102. *Id.*

The Supreme Court's *Prometheus* decision ignored the Court's own canon of statutory construction that instructs "[w]e do not, however, construe statutory phrases in isolation; we read statutes as a whole."¹⁰³ "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."¹⁰⁴ "And beyond context and structure, the Court often looks to 'history [and] purpose' to divine the meaning of language."¹⁰⁵

The *Prometheus* Court's reading of the '96 Act effectively says: § 202(h) does not *expressly* require the FCC to conduct empirical or statistical studies before making decisions about its media ownership reviews, leaving it to the FCC's discretion to do so or to shift that burden to the public. That interpretation ignores other statutory provisions that direct the FCC to regulate in the public interest, identify and remove barriers to licenses for small business, minorities, and women, and promote opportunities for licensing by a diverse range of Americans.¹⁰⁶

Prometheus let stand what it characterized as the FCC's predictive decision-making in its 2017 order on reconsideration in its 2010 and 2014 media ownership review combined proceeding.¹⁰⁷ That 2017 order repealed the FCC's Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule, and modified the Local Television Ownership Rule, based in part on the FCC's determination that doing so would not harm FCC license access opportunities for minorities and women.¹⁰⁸ *Prometheus* found that the Commission "explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue

103. *United States v. Morton*, 467 U.S. 822, 828 (1984).

104. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019), *reh'g denied* (2019) (citing *Nat'l Assn. of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007)); *see Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) ("[R]easonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole" (internal quotation marks omitted)).

105. *Gundy*, 139 S. Ct. at 2126. (citing *Maracich v. Spears*, 570 U.S. 48, 76 (2013)).

106. *See* 47 U.S.C. §§ 151, 257, 309(j) (2018). In 2018 following the adoption of the orders at issue in *Prometheus*, Congress amended section 257 of the Telecom Act to remove the requirements for reporting to Congress on FCC efforts to identify and remove market entry barriers.

107. *In re* 2014 Quadrennial Review, Reconsideration Order, and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9803 ¶ 2 (2017); *see also In re* Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, Report and Order, 33 FCC Rcd. 7911 (2018); *cf.* FCC, *2016 Media Ownership Review Order*, *supra* note 77.

108. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1154, 1160 (2021).

here was not likely to harm minority and female ownership. The APA requires no more.”¹⁰⁹

Prometheus excused the FCC from a legal duty to cure its poor data jurisprudence, concluding that the APA allows an agency to rely on the record presented to it, even if that record has acknowledged gaps. *Prometheus* leaves the FCC’s record-gathering, including its decisions about whether to make agency records available in digital format, a matter of administrative and congressional discretion. *Prometheus* allows the FCC to relegate to the public data gathering and analysis of the Commission’s longstanding policy priorities, even if doing so creates a Swiss cheese record marred by information holes.

Under the data deference standard *Prometheus* sets, the FCC can proclaim adherence to its policy of promoting license access for minorities and women while failing to effectively manage its data to advance that policy. *Prometheus* limited use of the APA as a yardstick to measure the adequacy of FCC decisions about gathering and maintaining data. The Communications Act and the Open Act, however, require more from the FCC.

The FCC’s failure to modernize its data jurisprudence and make its paper archives available through digital databases harms the public interest and undermines the democratic First Amendment values broadcasting serves. The FCC’s poor data practices may also contribute to findings that remedial action is warranted to compensate for agency decisions that created and perpetuate low levels of access to FCC licenses for minorities and women.

D. *PROMETHEUS* ON THE SHOALS OF STRICT SCRUTINY

The Supreme Court’s *Prometheus* decision effectively allows the FCC—and potentially other administrative agencies—to leave the development of a proceeding’s administrative record to third parties or to agency discretion unless statute directs the agency to do otherwise. Programs and policy initiatives may run aground on Promethean shoals unless a third-party develops and submits record comments the agency may consider, or the agency uses its discretion to develop an informative record.

The ’96 Act imposes on the FCC an ongoing duty to review its media ownership rules quadrennially. If the FCC chooses to advance its Incubator program adopted in the FCC’s 2017 media ownership rules, the FCC must develop program rules including defining which entities are eligible for incubation services that result in credits to sponsoring broadcasters. If the

109. *Id.* at 1158.

Incubator program, or any other FCC program considers race/ethnicity or gender, the FCC must develop a record sufficient to meet the strict or intermediate scrutiny legal standard, respectively, applicable to such factors.

Adarand v. Peña's shift to a strict scrutiny standard in 1995 for programs that take race into account made data gathering and analysis critical for efforts to promote access to licenses for minorities.¹¹⁰ Initiatives to promote license access for women are subject to an intermediate scrutiny standard.¹¹¹

In its 1990 *Metro Broadcasting v. FCC* decision the Court relied heavily on Congressional findings about underrepresentation of minorities in the media to uphold FCC programs that took race into account using an intermediate scrutiny standard.¹¹² *Metro* recognized that Congress' "broad remedial powers" derive from its express constitutional authority "to enforce equal protection guarantees,"...and because of its competence to find as a factual matter the existence of past identifiable discrimination.¹¹³ Such Congressional findings were found to be "of overriding significance" to the Court's 1990 decision to affirm FCC minority ownership programs in 1990 under an intermediate scrutiny standard.¹¹⁴ Those more than twenty-year old findings would need to be updated by Congress or facts developed in an FCC record to support contemporary consideration of race/ethnicity or gender in FCC programs.

The FCC's 2008 Diversity Order recognized that evidence and analysis are necessary to meet the legal standard of review for any proposals that consider race/ethnicity or gender.¹¹⁵ That order recognized that after *Adarand*, "racial classifications imposed by the federal government are subject to strict scrutiny, and thus may be upheld as constitutional "only if they are narrowly tailored measures to further compelling governmental interests.""¹¹⁶ The FCC Diversity Order advised:

[P]arties who contend that a race-conscious classification would be the best approach, or indeed even a permissible approach, to

110. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

111. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (establishing an intermediate standard of scrutiny for programs that consider gender).

112. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 588 (1990).

113. *Fullilove v. Klutznick*, 448 U.S. 448, 481, 506 (1980); *see also* *W. Mich. Broad. Co. v. FCC*, 735 F.2d 601, 615–16 (D.C. Cir. 1984).

114. *Fullilove*, 448 U.S. at 547, 563.

115. *In re Promoting Diversification of Ownership in the Broad. Services 2006 Quadrennial Regulatory Review—Review of the Commissions Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 2002 Biennial Regulatory Review—Review of the Commissions Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act*, 23 FCC Rcd. 5922, 5937–38 (2008) [hereinafter *FCC Diversity Order*].

116. *Id.*

encourage ownership diversity and new entry must explain specifically, using empirical data and legal analysis, how such a classification would not just be tailored, but narrowly tailored, to advance a governmental interest that is not simply important, but compelling.¹¹⁷

The FCC invited empirical data in 2008 to determine whether *Adarand's* strict scrutiny standard could be met. The FCC's failure to make its own data practically available through a digitized database that facilitates longitudinal analysis frustrates research on this topic and achievement of the FCC's longstanding professed priorities. This poor data jurisprudence may also be a factor in adopting remedial measures to address FCC practices which created and perpetuated low levels of minority and female FCC license ownership.

In 2011, the Third Circuit upheld the FCC's proposals in the Diversity Order to conduct longitudinal research on minority and women ownership trends.¹¹⁸ The Third Circuit's *Prometheus* docket recognized the contradictions in the FCC's call for data to support its rulemakings and the Commission's lack of effort to acquire any such data. In *Prometheus II*, the Third Circuit remanded several of the FCC's media ownership decisions based on the lack of reasoned analysis to support its conclusion.¹¹⁹

The FCC's poor data jurisprudence frustrates analysis of whether there is a remedial or forward-looking basis to adopt programs that take race/ethnicity or gender into account. While *Prometheus* affirmed agency discretion to determine how data is gathered or analyzed, data remains essential to meeting the constitutional standard for any FCC programs that take race, ethnicity, or gender into account.

In the higher education context, the Supreme Court has upheld the forward-looking rationale of promoting diversity to improve education, understanding, and training to support a compelling state interest in considering race or ethnicity as a factor in admissions decisions. "[A] university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'"¹²⁰ "The Supreme Court in *Grutter v. Bollinger* held that race may be a factor in admitting law students to promote diversity in the educational setting and better

117. *Id.*

118. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 (3d Cir. 2011) (*Prometheus II*).

119. *Id.* at 470 (emphasis in original).

120. *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (citing *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 298 (2013)); see also *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

prepared students for the workforce and the world ahead.”¹²¹ Such a “forward-looking compelling state interest, promoting diversity of dialogue, is fundamental to the purpose of broadcasting.”¹²²

The Supreme Court will scrutinize these precedents in 2022–2023 in the consolidated cases, *Students For Fair Admissions v. President and Fellows of Harvard* (docket 20–1199) and *Students For Fair Admissions v. University of NC, et al.* (docket 21–707).¹²³ The decision in those consolidated cases may influence the FCC’s ability to adopt programs that consider race/ethnicity based on a forward-looking rationale to promote first amendment values through more diverse broadcast licensing.

In *Red Lion* the Supreme Court recognized the FCC’s role in fostering a “marketplace of ideas” that supports speech “concerning public affairs...the essence of self-government.”¹²⁴ On multiple occasions, the FCC and scholars including this author have examined and found a nexus between minority ownership of FCC licenses and viewpoint diversity that serves the public interest and first amendment values.¹²⁵ Dam Hee Kim’s 2016 analysis found a

121. Christine M. Bachen, Allen S. Hammond, IV & Catherine J.K. Sandoval, *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership, in MEDIA DIVERSITY AND LOCALISM: MEANINGS AND METRICS* 288 (Philip Napoli, ed., L. Erlbaum Assoc. 2007).

122. *Id.*

123. U.S. SUP. CT., ORDER LIST 595 U.S., (Jan. 24, 2022), https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf; *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (granting cert.).

124. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

125. *See, e.g.*, Christine Bachen, Allen Hammond, Laurie Mason & Stephanie Craft, *Content/Ownership Study, Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?*, FCC (Dec. 2000) (finding that minority-owned stations tended to have more minorities in news and public affairs staff positions than white-owned stations, and as racial and ethnic minorities on staff increase, greater attention is paid to minority issues. Minority-owned radio stations, on average, focused more of their news and public affairs programming on issues and events of presumed interest to minority communities); Cong. Rsch. Serv., *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988) (On file with the Library of Congress, Washington D.C.); Jeffrey A. Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841, 869 (1995); Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities*, in *ADVERTISING AND DIFFERENTIATED PRODUCTS*, 73, 73–108 (M.R. Baye & J.P. Nelson eds., 2001); S. Derek Turner, *Off the Dial: Female and Minority Radio Ownership in the United States, How FCC Policy and Media Consolidation Diminished Diversity on the Public Airwaves, Review of Current Status and Comparative Statistical Analysis*, FREEPRESS (2007), https://www.freepress.net/sites/default/files/legacy-policy/off_the_dial.pdf; Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and The FCC’s Incubator Program*, 24 COMM. L. & POL’Y 403 (2019) (“Racial and ethnic minority owners are more likely to produce minority

positive correlation between minority media ownership, minority employment, and content targeted to minorities (the “Triangle”).¹²⁶

Two FCC-Commissioned studies in 2008 found no linkage between minority ownership and viewpoint diversity, though their research methodologies were questionable. One study, labeled by the FCC as study 8a, presumed diversity could be measured by following television viewing choices, while study 8b based its analysis on a limited set of words used in television programming broadcast in English.¹²⁷ Study 8a’s methodology effectively presumed diversity had already been achieved and merely needed to be selected by viewers, while Study 8b failed to consider broadcast context or non-English language programming.

The record would need to be updated to determine whether any FCC program that takes gender or race/ethnicity into account would contribute to viewpoint diversity, a long-held value recognized by the FCC.¹²⁸ Digitizing FCC licensing and administrative decision-making data will provide an important foundation to inform that analysis.

“The FCC’s judgments about the value of promoting viewpoint diversity or how to measure those contributions” were not at issue in *FCC v. Prometheus*.¹²⁹ Viewpoint diversity studies do not examine the issues at the heart of the sixteen-year *Prometheus* docket and FCC media ownership reviews—how

targeted content, and more than eight out of ten owners providing minority programming are operating six or fewer stations.”); cf. Adam D. Rennhoff & Kenneth C. Wilber, *Local Media Ownership and Viewpoint Diversity in Local Television News* (2011), <https://www.fcc.gov/general/2010-media-ownership-studies> [hereinafter *Study 8a*]; Lisa M. George & Felix Oberholzer-Gee, *Diversity in Local Television News* (2011), <https://www.fcc.gov/general/2010-media-ownership-studies> [hereinafter *Study 8b*].

126. Dam Hae Kim, *Diversity Policies in the Media Marketplace: A Review of Studies of Minority Ownership, Employment, and Content*, 10 INT’L J. COMM. 2201 (2016), <https://ijoc.org/index.php/ijoc/article/viewFile/2458/1647>.

127. Rennhoff & Wilber, *supra* note 125; George & Oberholzer-Gee, *supra* note 125.

128. See, e.g., *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1154 (2021) (“In conducting its public interest analysis under Section 202(h), the FCC considered the effects of the rules on competition, localism, viewpoint diversity, and minority and female ownership of broadcast media outlets.”); *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (“In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.”); *In re Applications of Comcast Corp.*, 26 FCC Rcd. 4238, 4316 (2011) (approving the proposed Comcast/NBC Universal license transfers and merger in part by awarding credit for contributions to viewpoint diversity through Telemundo’s programming and Comcast’s allocation of some of its channel capacity to independent broadcasters).

129. Brief as Amicus Curiae Professors of Communications Law, Policy, and Administrative Law, and Drs. of Economics and Social Science in Support of Respondents, at 36, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021) [hereinafter *Amicus Brief, Professors of Communications Law*].

do the FCC's media ownership rules, FCC consolidation policies and programs, affect opportunities for market entry, expansion, and service for minorities and women? Analyzing this question requires analysis of past FCC licensing, programs, and consolidation policies, including those in place prior to the '96 Act.

The Supreme Court has also recognized that governmental entities have a compelling interest in remedying the effects of discrimination.¹³⁰ In *Adarand* the Supreme Court observed, “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”¹³¹

“To establish such a compelling interest, the governmental actor must show ‘a strong basis in evidence for its conclusion that remedial action [i]s necessary.’”¹³² The “government must show that it is remedying either its own discrimination, or discrimination in the private sector in which the government has become a ‘passive participant,’ as distinguished from ‘general societal discrimination.’”¹³³ The role of data jurisprudence in creating and perpetuating discrimination and creating barriers to license access has been underexamined.

Dean and Professor Leonard Professor Baynes observed that the study by KPMG commissioned by the FCC for its first Section 257 report found that with respect to financial “liabilities, applicants with minority participation were treated less favorably than those applicants with lesser or no minority participation.”¹³⁴ The KPMG study found that a disparity existed in the implementation of the comparative hearing process towards the minority applicants.²³⁰ Conversely, “applicants with minority participation received extra credit for assets relative to applicants with lesser or no minority participation.”¹³⁵ “KPMG stated that the results can be interpreted to suggest ‘that financial weakness may have been judged more harshly when minorities were present in applications and financial strength may have been judged more favorably when minorities were present.’”¹³⁶

130. Leonard M. Baynes, *Making the Case For A Compelling Governmental Interest And Re-Establishing FCC Affirmative Action Programs For Broadcast Licensing*, 57 RUTGERS L. REV. 235, 261 (2004) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)).

131. *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

132. *Id.* (citing *Croson*, 488 U.S. at 500).

133. *Id.* (citing *Croson*, 488 U.S. at 492, 500).

134. *Id.* at 265 (citing KPMG, FINAL REPORT: LOGISTIC REGRESSION MODELS OF THE BROADCAST LICENSE AWARD PROCESS FOR LICENSES AWARDED BY THE FCC 24 (Nov. 2002), https://transition.fcc.gov/opportunity/meb_study/broadcast_lic_study_pt3.pdf).

135. *Id.*

136. *Id.* at 265–66.

KPMG's findings raise questions about the FCC's conduct of Comparative Hearings and its consequences for license access. Those findings merit more study. Yet, the FCC has not returned to its archives to study those findings in depth. Neither has the FCC made those archives readily available to analysis in digital format.

David Honig argued that “[w]hether characterized as ratification, validation, permissiveness, benign neglect, or passive participation, the agency's acts and omissions were a very significant reason why minority ownership is so palpably inadequate.”¹³⁷ Honig contends that the FCC's “assistance to segregated state universities, its licensing of segregationists and discriminators, its use of irrationally stringent financial and other attributes as licensing criteria, and its failure to enforce its equal employment regulations” evidence the FCC's active role in creating low levels of minority access to FCC licenses.¹³⁸

“Agencies do not like to confess error, and thus it is unsurprising that only *once* has the FCC acknowledged its own history of systemic discrimination,” Honig emphasized.¹³⁹ The FCC's 1996 Notice of Inquiry for the Section 257 proceeding recognized “that a good case could be made that “[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and . . . special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum.”¹⁴⁰

The FCC created the world where predominantly non-minority/non-Hispanic men, controlled more than 90% of FCC broadcast licenses in 2017. This situation did not grow organically but was created by FCC administrative decision-making. The FCC's poor data jurisprudence contributed to this skewed license distribution.

The FCC's record-keeping and data availability, particularly for broadcast data from 1934–2009, is so deficient that the FCC's data practices constitute a barrier to minority and female license access. In conjunction with the FCC's licensing practices that awarded few licenses to minorities or women, the FCC's poor data jurisprudence may be a factor that supports a remedial basis for programs that consider race/ethnicity or gender to remedy the agency's

137. David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused*, 12 S.J. POL'Y & JUST. 44, 60 (2018).

138. *Id.*

139. *Id.*

140. Proceeding for Identifying and Eliminating Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd, 6280, 6306 (1996) (citing *Southland Television Co.*, at 159); Statement of David Honig, Executive Director, Minority Media and Telecommunications Council, *En Banc* Advanced Television Hearing, MM Docket No. 87–268 (Dec. 12, 1995) at 2–3 and n.2)).

discriminatory conduct.¹⁴¹ The FCC's poor data practices should not remain an excuse to shroud the FCC's role in creating and perpetuating this skewed license distribution.

Analyzing four eras of FCC administrative and data jurisprudence introduced in this Article—the Nascent Era from 1934–1968, the Civil Rights Era from 1969–1978, the Opportunity Era from 1978–1995, and the Consolidation Era following the Telecom Act of 1996 during the internet's expansion—unveils the nexus between FCC media ownership rules, poor data jurisprudence, and limited minority and female access to FCC licenses. This analysis highlights the importance of gathering and publishing FCC data in a digital format to support FCC media ownership rule reviews, access to licenses by a diversity of Americans, and to serve the public interest.

IV. THE FCC'S NASCENT ERA, CONSTRUCTION OF THE MEDIA MATRIX, 1934–1968

A Time Present of Things Future,

St. Augustine of Hippo, Augustine 397, p. XI, 20

A. FCC LICENSING AND DATA JURISPRUDENCE CONSTRUCTS THE FUTURE

The roots of the FCC's media ownership decisions at issue in *Prometheus* stem from FCC licensing, regulatory, and data jurisprudence decisions beginning in the FCC's Nascent Era from 1934 to 1968. The FCC's Nascent Era planted the pillars for the twenty and twenty-first century media marketplace and shifted control to incumbent broadcasters for access to secondary market license deals. Yet, many of those decisions remain shrouded in data darkness due to the FCC's licensing and data practices during and since this era.

Socio-historical analysis of FCC decision-making reveals the FCC's role as an agent shaping the times in which it regulates—and decades thereafter—and as an agency working within a broader social and legal context.¹⁴² Segregation

141. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (discussing adoption of race-conscious policies as remedial action for government or private sector discriminatory conduct).

142. Cf. Carole J. Buckner, *Realizing Grutter v. Bollinger's "Compelling Educational Benefits of Diversity" – Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877, 884 (2004) (“A combination of critical theoretical analysis and “sociohistorical/sociocultural theories” focuses attention on the social context of learning and “emphasizes the importance of understanding the individual as part of a social and historical context.”).

and discrimination under color of law, both *de jure* and *de facto*, were prevalent in many American communities and economic fields when the FCC was founded in 1934.¹⁴³ President Roosevelt maintained segregation in the military until 1941 when he initiated steps toward desegregation as the U.S. entered World War II.¹⁴⁴ Not until 1948 did President Truman desegregate the Army through Executive Order 9981.¹⁴⁵ Would segregation have ended sooner had there been a minority radio or television licensee during this time?

The FCC approved the first African-American owned radio license “in 1949, when Jesse B. Blayton purchased WERD in the secondary market in Atlanta,” and the FCC approved the license transfer application.¹⁴⁶ The Ivy Group reported to the FCC that the “first Hispanic station opened in the middle 1950s,” though it was not able to identify information about that FCC license.¹⁴⁷ The FCC-commissioned study *Whose Spectrum is it Anyway, Historical Study of Market Entry Barriers, Discrimination, and Changes in Broadcast and Wireless Licensing, 1950 to Present*, reported that in “1960, Andrew Langston, a Black man, started his more than 13-year process of acquiring a radio broadcast license from the FCC through a comparative hearing,” resulting in the award of a radio license directly from the FCC in 1974.¹⁴⁸

The FCC kept no data about its licensing decision rationale from its inception in 1934 until the development of a comparative process to allocate licenses after the Supreme Court’s 1945 *Ashbacker* decision. *Ashbacker* required the FCC to use a hearing process to decide between competing applications.¹⁴⁹ The Court determined that “where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.”¹⁵⁰ *Ashbacker* supports the

143. See, e.g., *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (holding segregation of Mexican-American school children unlawful); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (holding segregated education, though claimed to be “separate but equal,” violated the U.S. Constitution). Many *de jure* segregation statutes passed in the late nineteenth and early twentieth century perpetuated *de facto* segregation decades into the twentieth century. See, e.g., California Stats. 1893, ch. 193, p. 253 (authorizing school districts to establish “separate schools for Indian children” in addition to children of “Mongolian or Chinese descent”); California Stats. 1921, ch. 685, p. 1160 (extending authority to establish separate schools to include children of Japanese parentage).

144. Michael Waters, *A Look Back at the Desegregation of the U.S. Military*, ATLAS OBSCURA (Jul. 26, 2017), <https://www.atlasobscura.com/articles/desegregation-us-military>.

145. Exec. Order No. 9981, 3 C.F.R. 722 (1943–1948).

146. Ivy Group, *supra* note 10, at 8.

147. *Id.*

148. *Id.*

149. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 329–30 (1945).

150. *Id.* at 333.

principle that “an agency must provide adequate explanation before treating similarly situated parties differently, or else be in violation of the APA.”¹⁵¹

Prior to *Ashbacher*, the Commission did not hold comparative hearings to determine who should become the licensee. Nor was the FCC’s reasoning for granting those early licenses explained in the absence of a hearing process. This decision-making and data jurisprudence leaves more than a decade of FCC licensing and administrative jurisprudence in data darkness. Poor FCC record-keeping throughout the twentieth and early twenty-first century perpetuates the lopsided license distribution the FCC initiated during its Nascent Era.

“In 1945 there were 6 commercial television stations operating within the continental United States, all VHF,” all of which were awarded prior to *Ashbacher’s* comparative hearing requirements.¹⁵² “By September, 1948, the number of VHF stations had increased to 108, at which point a period of time known in the industry as ‘the freeze’ began.”¹⁵³ The FCC imposed a “freeze” on processing applications for new television stations licenses from September 1948 until mid-1952, to reallocate spectrum to make room for this emerging medium. “From September 1948 to July 1, 1952, the freeze period, the FCC processed no applications for television broadcasting licenses.”¹⁵⁴

After the freeze was lifted in 1952, “the vast majority of television licenses [were] awarded by the Eisenhower-appointed Commission.”¹⁵⁵ Professor Schwartz’s analysis found that most television licenses awarded to newspapers during that time were given to those who endorsed Eisenhower over his democratic rival.¹⁵⁶ The FCC awarded no television license to a racial minority until 1973.¹⁵⁷

During the decades following its founding in 1934, the FCC awarded licenses to parties known to practice segregation.¹⁵⁸ From 1945 to 1969, the

151. 5 Space Law § 40:26 (analyzing *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005) (citing *Burlington Northern & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776–77 (D.C. Cir. 2005)); *Chadmoore Commc’ns. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997).

152. *Comm’r v. Ind. Broad. Corp.*, 350 F.2d 580, 583 (7th Cir. 1965).

153. *Id.*

154. *Id.*

155. Bernard Schwartz, *Comparative Television and the Chancellor’s Foot*, 47 GEO. L.J. 655, 665 (1959).

156. *Id.* (“some nine Democratic newspapers have been denied television licenses, while eight papers which have been Republicans or Eisenhower Democrats have been awarded channels. No newspaper which supported Stevenson at the election before its case was decided has received a channel, except in one case where such paper was a co-applicant with a leading Eisenhower paper.”).

157. *Ivy Group*, *supra* note 10, at 7.

158. *See, e.g., In re Applications of Southland Television Co., Shreveport, Louisiana* T. B. Lanford, R. M. Dean, Mrs. Mary Jewel Kimbell Lanford & Viola Lipe Dean Tr., A Partnership d/b/a Radio Station KRMD, Shreveport, Louisiana Don George, Henry E. Linam, Ben

FCC did not view a license applicant's practice of discrimination as a barrier to award of an FCC license. Honig notes that from the FCC's founding through the late 1960s, "the FCC routinely provided, then routinely renewed broadcast licenses for these segregated educational institutions, guaranteeing that a generation of trained broadcast employees would be Whites only."¹⁵⁹

In 1955, the FCC in *Southland Television Co.* awarded a television license to Shreveport Television Company whose principals included operators of the Don George theaters, which practiced racial discrimination. George was responsible for building Louisiana's first one story theaters while operating the state's only exclusively white drive-ins. Honig reports that "Louisiana law then governing movie theaters assumed that theaters had two stories, like the 19th century opera houses on which they were modeled. The law required the admission of all races to theaters so long as the theater owners restricted each story to members of a particular race."¹⁶⁰

As a federal agency, the FCC was not required to defer to state segregation laws. Instead, the Communications Act of 1934 required the FCC to regulate and grant licenses in the public interest to serve all Americans.¹⁶¹ Yet, in a Comparative Hearing, the FCC dismissed concerns about awarding a television license to George on the grounds that segregation in theaters was the law of the State of Louisiana.¹⁶² Seven months *after* the U.S. Supreme Court's decision in *Brown v. Board of Education* declared segregation in education unconstitutional, the FCC's *Southland Television* decision awarded the television license to George, despite the facts on the record regarding his segregationist business practices.¹⁶³

The FCC's poor data jurisprudence makes it extraordinarily difficult to answer this question: did the FCC ever decline to issue a license due to the applicant's known practice of racial segregation? Answering that question would require analysis of *all* FCC licenses awarded by a Comparative Hearing or similar procedure for which there is a paper record.

Beckham, Jr. & Carter Henderson, A Partnership d/b/a Shreveport Television Co., Shreveport, Louisiana, 20 F.C.C. 159, 163 (1955) [hereinafter *Southland Television Co.*]; Chapman Radio and Television, 24 F.C.C. 2d 282 (1971).

159. Honig, *supra* note 137, at 67.

160. *Id.* at 70–71 (citing *Southland Television Co.*, at 163).

161. 47 U.S.C. §§ 151, 303, 309 (2018).

162. *Southland Television Co.*, at 163 ("our conclusion that there was no basis for adverse reflection upon the qualifications of Don George or of Shreveport Television was founded upon the fact that it had not been demonstrated that George could admit Negroes to his theatres without violating the laws of the State of Louisiana.").

163. *Id.*; *cf.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

The FCC's decisions also determined who would control subsequent license deals. The 1952 Congressional amendment to the Communications Act allowed broadcasters to determine the parties to an FCC license transfer deal and prohibited the FCC from considering whether others would better serve the public interest.¹⁶⁴ This amendment allowed broadcasters to determine who can access licenses on the secondary market, subject to FCC approval of the transaction upon a finding that it serves the public interest. Addressing barriers to broadcast license entry created by the 1952 amendment has been a primary objective of the FCC's minority ownership diversity policies.

B. The 1952 Congressional Amendment to the Communications Act Made Broadcasters Dealmakers and Gatekeepers

The secondary market where existing licensees sell or transfer licenses remains an important spectrum and license access source. FCC media ownership rules govern license holdings, whether these holdings are acquired in the secondary market or directly from the FCC. Congress's 1952 amendment to the Communications Act made incumbent broadcasters gatekeepers for secondary market deals and limited the factors the FCC could consider in determining whether those transactions served the public interest.

In 1952, Congress adopted an amendment to the Communications Act that prohibited the FCC from considering whether another party in a license transfer proposal would better serve the public interest.¹⁶⁵ That amendment allowed licensees to decide who would be their counterparty in an FCC license transfer application. While the FCC must review and determine whether to approve an application for a license transfer, incumbents determine which parties will be invited to the deal.

The 1952 Communications Act amendment displaced the "AVCO procedure" developed by the FCC in 1945 to evaluate petitions to transfer a license under Communications Act § 310 (as in effect at the time). Consistent with *Ashbacker*, the AVCO procedure established a process whereby upon the expiration of the license term, other parties could file to obtain the FCC license, in lieu of renewing the license holder's term, if the Commission determined the public interest, convenience, and necessity would be served thereby.¹⁶⁶

Through the AVCO procedure, the Commission considered "all competing bids filed in cases for consent to assignments or transfers of control

164. 47 U.S.C. § 310(d) (2018).

165. 47 U.S.C.A. § 310(b), 66 Stat. 716 (1952) (amending 48 Stat. 1086 (1934)).

166. *See, e.g., In re Applications of Royal Miller*, 11 F.C.C. 236, 236 (1946).

of licenses.”¹⁶⁷ “If it appears that the transferee selected by the licensee is the best qualified, and that the transfer is otherwise in the public interest, the Commission will grant such application without a hearing.”¹⁶⁸ The FCC would designate the application for a comparative hearing if it could not make such a determination on the basis of the application, under the then-existing AVCO procedure.¹⁶⁹

In 1952 Congress amended § 310 of the ’34 Act to proscribe the AVCO procedure.¹⁷⁰ As amended, Communications Act § 310(d) prohibits the FCC from considering whether the “public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”¹⁷¹ Through this amendment, Congress required the FCC to determine if a license transfer application served the public interest, convenience, and necessity consistent with § 308 of the ’34 Act, but limited that consideration to the parties to the application.

The 1952 amendment prohibited the FCC from engaging in a “comparative analyses between the transferee and others, including the existing licensee,” in deciding whether to approve such an application.¹⁷² The D.C. Circuit observed in 1958 in *St. Louis Amusement Co. v. FCC* that the 1952 amendment operates to allow a private entity to decide who shall receive the permit, without regard to which one of these applicants the Commission has selected on a comparative basis.¹⁷³

Brenner highlighted the lack of legislative history to support or explain the 1952 amendment. “It is difficult to explain the origin of this provision,” Brenner observed, “other than as a reflection of broadcasters’ efforts to insulate the transfer process—the event at which the accreted capitalized value of a broadcast property is realized—from the competitive forces that come into play with regard to the issuance of other broadcast licenses.”¹⁷⁴

167. *Id.*

168. *Id.*

169. *Id.*

170. 47 U.S.C.A. § 310(b), 66 Stat. 716 (1952) (amending 48 Stat. 1086 (1934)); *In re Applications of MMM Holdings, Inc. for Transfer of Control of Lin Broad. Corp.*, 4 FCC Rcd. 6838 (1989) (citing S. Rep. No. 44, 82d Cong., 1st Sess. 8, 9 (1951)).

171. June 19, 1934, c. 652, Title III, § 310, 48 Stat. 1086; S. Rep. No. 44, 82d Cong., 1st Sess. 8 (1951); Hearings Amending Communications Act of 1934, House Interstate & Foreign Commerce Committee, 82d Cong., 1st Sess. 280, 305–06, 354 (1951).

172. *In re Applications of MMM Holdings*, 4 F.C.C. Rcd. 6838.

173. *St. Louis Amusement Co. v. FCC*, 259 F.2d 202, 204 (D.C. Cir. 1958).

174. Daniel L. Brenner, *Government Regulation of Radio Program Format Changes*, 127 U. PA. L. REV. 56, 110 (1978).

This 1952 amendment codified a system that contributed to the small number of minority and female broadcasters persisting more than sixty-nine years later. Nineteen years after that amendment's adoption, the FCC's 1978 Minority Ownership Policy Statement attempted to expand access to secondary market FCC broadcast license deals limited by the 1952 amendment.

The Ivy Group's FCC-commissioned study for the FCC's Section 257 analysis of market entry barriers identified an "old boy's network" that controlled access to FCC license transfer deals.¹⁷⁵ Broadcaster Don Cornwell stated, "Look, it's a club...I work pretty hard to get at least on the periphery of the club so I know most of the broadcasters. ... And when you're in the club, then you hear about things, okay? You hear about what's for sale, what it isn't, et cetera."¹⁷⁶ "The brokers and large lenders interviewed [for the Ivy Group's study] indicated that they had worked with very few or no women and minorities. The women and minorities, however, all observe examples of exclusion from this 'old-boy's' network."¹⁷⁷ The 1952 amendment to the Communications Act empowered that old-boy network by putting incumbent broadcasters in charge of determining who would get access to licensing deals on the secondary market.

The Tax Certificate program sought to broaden the circle of opportunity and the marketplace of ideas. The FCC's Tax Certificate program "provided incentives to broadcast owners who sold their properties to minorities (a minority buyer with 50.1% of voting control and 20.1% equity interest). The seller could then defer any gain realized on the sale of that broadcast property provided it was sold to a minority, and the gain was rolled over into a qualified replacement broadcast property within 2 years."¹⁷⁸ "During the tax certificate program's tenure, minority broadcast ownership increased from 40 radio and TV stations in 1978, to 288 radio and 43 TV stations in 1995."¹⁷⁹

The FCC's Tax Certificate program, in effect from 1978 until its repeal by Congress in 1995,¹⁸⁰ created incentives for sellers to reach out to a more diverse

175. Ivy Group, *supra* note 10; *see also* FCC *Creating Opportunity: Policy Forum on Market Entry Barriers*, FCC (2000), <https://www.fcc.gov/fcc-creating-opportunity-policy-forum-market-entry-barriers-december-12-2000> (collecting five FCC Section 257 studies) [hereinafter *FCC Sec. 257 studies*].

176. Ivy Group, *supra* note 10, at 46.

177. Ivy Group, *supra* note 10, at 47.

178. Ivy Group, *supra* note 10 (citing *Minority Ownership Policy Statement*, *supra* note 10).

179. Erwin G. Krasnow & Lisa M. Fowlkes, *The FCC's Minority Tax Certificate Program: A Proposal for Life After Death*, 51 FED. COMM. L.J. 665, 670 (1999).

180. Self-Employed Persons Health Insurance Act of 1995, Pub L. No. 104-7, § 2, 109 Stat. 93 (1995).

pool of buyers.¹⁸¹ “In an appropriations rider to the Self Employed Persons Health Care Extension Act of 1995, Congress repealed the tax certificate program for minorities.”¹⁸² “The legislative history suggests that the FCC repealed the tax certificate program because no showing of past discrimination was made, Congress was of the opinion that the program had no standards, and the program had evolved beyond its original intent.”¹⁸³ In fact, the Tax Certificate program had many rules and standards, and a showing of a remedial basis was not required to adopt it.

In the aftermath of Tax Certificate’s repeal, the FCC lost the ability to execute one of its most successful programs to expand minority ownership. Bills introduced in several sessions of Congress have urged the program’s renewal.

The author’s January 2020 testimony to Congress urged support for H.R. 3957 which proposed to revive the FCC Tax Certificate program to incentivize transfers of FCC licenses to small, women, and minority owned businesses.¹⁸⁴ The author’s oral testimony emphasized that since Communications Act 310(d) prohibits the FCC from considering whether another party would better serve the public interest than the transferee in an FCC license application, it is critical to create incentives for licensees to enter transactions with a diversity of parties.¹⁸⁵ Making more data available about FCC licensing and decision-making prior to the tax certificate, during its implementation, and following its abolition would inform Tax Certificate proposals, the development of programs to promote licensing diversity, and reviews of media ownership rules.

C. FCC LICENSING POLICIES IN THE SEGREGATED SPACE AGE, 1960–1968

During the segregated space age from 1960 to 1968,¹⁸⁶ the FCC adopted policies prohibiting discrimination by broadcasters and requiring service to

181. Ivy Group, *supra* note 10, at 14.

182. Baynes, *supra* note 130, at 246–47.

183. *Id.*

184. Catherine Sandoval, *Media Diversity Protects Democracy and the Public Interest*, Testimony to the United States Congress, House Energy & Commerce Committee, Communications and Technology Subcommittee, Hearing on Diversity in the Media Market, Jan. 15, 2020, 20, HHRG-116-IF16-Wstate-SandovalC-20200115.pdf [hereinafter *Sandoval Congressional Testimony*] (urging support for H. R. 3957, Congressman Butterfield, sponsor, Congressmembers Clarke, Cardenas, Rush, Hastings, and Veasy, co-sponsors, 116th Congress First Session, July 25, 2019).

185. *Id.*

186. See, e.g., Margot Shelly Lee, *Regarding segregation during the 1960’s space age*, in HIDDEN FIGURES (2016); Elizabeth Howell, *The Story Of Nasa’s Real “Hidden Figures,” African-American Women Working Behind The Scenes As “Human Computers” Were Vital To The Space Race*,

minority groups. In 1960, the FCC began to consider service to racial and ethnic minority groups as a factor in its licensing decisions.

The FCC's policies during this era bore little fruit for minority broadcast license ownership opportunities, most of which would not emerge until the Opportunity Era from 1978 to 1995. Quadrennial review of FCC media ownership decisions (such as those at issue in *Prometheus*) still considers whether non-discrimination policies are sufficient to promote media ownership diversity and service in the public interest.

The FCC's 1960 Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960 Programming Statement) determined that service to minority groups was one of the fourteen elements of public service that the Commission expected of broadcasters.¹⁸⁷ The FCC's 1960 Programming Policy Statement adopted guidelines to assess whether a broadcast licensee's programs served the public interest.¹⁸⁸ Those standards became a means of "ascertainment" to guide service in the public interest and required broadcasters to meet with and provide "service to minority groups," as part of fourteen criteria.¹⁸⁹

In 1965, the FCC adopted a Policy Statement On Comparative Broadcast Hearings, outlining two primary objectives to determine who should receive a broadcast television and radio station license: (1) providing the best practicable service to the public, and; (2) maximum diffusion of control of the media of mass communications.¹⁹⁰ "The basic criteria relating to the determination of which applicant will provide the best service to the public are listed as full-time

SCIENTIFIC AMERICAN (Jan. 24, 2017), <https://www.scientificamerican.com/article/the-story-of-nasas-real-hidden-figures-rdquo/>.

187. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (1960) [hereinafter *1960 Programming Statement*].

188. *Id.*

189. *Id.* (requiring that broadcasters ascertain the interests of their community of license regarding: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programs); *see also* Carolyn M. Byerly, Professor, Dep't of Journalism, JHJ Sch. Of Comm., Howard Univ., Statement to Participants and Audience at Media Ownership Workshop on Diversity Issues: Gender and Race Conscious Research Toward Egalitarian Broadcast Ownership Regulation 2 (Jan. 27, 2010), <http://www.fcc.gov/ownership/workshop-012710/byerly.pdf>.

190. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965).

participation in station operation by owners, proposed program service, past broadcast record, efficient use of frequency, and character.”¹⁹¹

Those criteria favored applicants with prior broadcast license or employment experience, few of whom were racial or ethnic minorities. Gaining experience through broadcast employment would have been challenging for many people of color and women as *de jure* and *de facto* segregation and discriminatory practices persisted.

Despite the 1960 policy statement making service to minority groups an element of broadcaster’s public service obligation, in 1963, the FCC initiated a license revocation hearing for WIXX radio on the grounds “that the station had changed its programming plans from the 100% “general audience” format originally proposed in its licensing application” by devoting “17% of the station’s broadcast day to black-oriented news, public affairs, and music.”¹⁹² After the licensee dropped its black-oriented programming, the FCC dropped the license revocation hearing and challenges to the character of the licensee.¹⁹³

After threatening to revoke a station license for airing minority-oriented programming, within a few years the FCC confronted challenges to licensees who failed to serve minorities through their programming. In 1966, the FCC considered a petition to deny the renewal of television station WLBT’s license to serve the Jackson Mississippi market. The non-profit organization, the United Church of Christ, Office of Communications (UCC), challenged WLBT’s license renewal, arguing that the licensee failed to serve the public interest and violated the FCC’s then-existing “fairness doctrine” which required licensees to cover important issues of public interest and to cover “both sides.”¹⁹⁴ UCC’s Office of Communication was founded by Dr. C. Everett Parker and others after Dr. Martin Luther King asked Dr. Parker whether he could “do something about TV stations in the South?”¹⁹⁵

The UCC alleged that beginning in 1955, NBC affiliate WLBT posted a sign saying “Sorry Cable Trouble” instead of airing a network broadcast featuring Thurgood Marshall, then the General Counsel of the National Association for the Advancement of Colored People (NAACP), discussing the

191. *Citizens Commc’ns Ctr. v. FCC*, 447 F.2d 1201, 1207–08 (D.C. Cir. 1971), *opinion clarified*, 463 F.2d 822 (D.C. Cir. 1972).

192. Honig, *supra* note 137, at 72 (citing Broward Cnty. Broad., F.C.C. 63–817 (1963)).

193. *Id.*

194. *Office of Commc’n of the United Church of Christ v. FCC*, 359 F.2d 994, 998 (1966) [hereinafter *UCC I*]; *Office of Commc’n of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) [hereinafter *UCC II*].

195. Cheryl Leanza, *Martin Luther King and UCC, 60 Years Later*, in *SOUTHWEST CONFERENCE, UNITED CHURCH OF CHRIST* (Jan. 17, 2020), <http://www.swcucc.org/faith-in-action-blog/2020/1/17/martin-luther-king-jr-and-ucc-media-justice-60-years-later>.

landmark Supreme Court desegregation case *Brown vs. Board of Education*.¹⁹⁶ “In 1957 another complaint was made to the Commission that WLBT had presented a program urging the maintenance of racial segregation and had refused requests for time to present the opposing viewpoint. Since then, numerous other complaints have been made,” the FCC reported.¹⁹⁷

WLBT claimed it refused to carry “inflammatory” programming and declined to air “any program dealing with civil rights, racial issues, or integration.”¹⁹⁸ Despite its purported policy to eschew these topics, WLBT aired programming supporting segregationist viewpoints. “Shortly after the outbreak of prolonged civil disturbances centering in large part around the University of Mississippi in September 1962, the Commission again received complaints that various Mississippi radio and television stations, including WLBT, had presented programs concerning racial integration in which only one viewpoint was aired.”¹⁹⁹

The 1966 D.C. Circuit’s *UCC v. FCC* decision (*UCC I*) directed the FCC to treat UCC, the petitioner, as a party in FCC proceedings with rights to challenge on behalf of the local public WLBT’s application for license renewal.²⁰⁰ *UCC I* directed the FCC to determine after a hearing whether WLBT had served the public interest to justify license renewal or whether to revoke its license.

The FCC renewed WLBT’s license through a hearing in which the FCC treated the UCC, representing the public, with hostility.²⁰¹ The D.C. Circuit derided the FCC for inappropriately shifting the burden to the UCC to support license revocation, rather than placing the burden on the broadcaster to support its application for license renewal.²⁰² The D.C. Circuit in 1969 ordered that decision vacated, the WLBT license revoked, and the FCC to invite applications for that license.²⁰³

The landmark 1966 and 1969 *UCC* cases opened the door to public participation in FCC decision-making and helped defined service in the public interest. Those cases established the right of the public and public interest organizations to participate in FCC proceedings as full parties due the same rights and respect as other parties. The *UCC* cases also established a line in the

196. *UCC I*, 359 F.2d at 998; see also Bachen, Hammond & Sandoval, *supra* note 121, at 272.

197. *UCC I*, 359 F.2d at 998.

198. Bachen, Hammond & Sandoval, *supra* note 121, at 272.

199. *UCC I*, 359 F.2d at 998.

200. *Id.*; *UCC II*, 425 F.2d at 543.

201. *UCC II*, 425 F.2d 543.

202. *Id.*

203. *Id.*

sand delineating broadcast service falling so far below the standard for serving the public interest that license revocation by the D.C. Circuit was merited.

Denial of FCC license renewals remains relatively rare. Licensees bear the burden of showing they served the public interest during their license term and that renewal would serve the public interest. The '96 Act codified “renewal expectancy,” a longstanding FCC practice that encouraged broadcasters to expect license renewal to incentivize investment in programming, staff, equipment, capital, and other resources.²⁰⁴

Renewal expectancy heightens the importance of the initial license grant. FCC licensing policy allows broadcasters to pass their license to their children or other close family members or associates by holding a license in a corporate form. The 1952 Communications Act amendment allows licensees, including those whose license was renewed multiple times, to determine the parties in a license transfer deal. Each FCC license may be held for years or decades if the broadcaster can show it meets the public interest and other standards to hold a license.

Standing of the public and public interest organizations in FCC proceedings following the 1966 *UCC* case was critical as the FCC examined the impact of its media ownership rules and other policies in the aftermath of Dr. Martin Luther King’s assassination in 1968. Public interest organizations played a vital role in the development of the FCC’s minority ownership policy in 1978, review of media ownership rules, consideration of minority, and later female ownership as a policy priority, and analysis of consolidation and media ownership policy following the '96 Act.

V. THE CIVIL RIGHTS ERA: FOSTERING BROADCAST SERVICE TO DIVERSE COMMUNITIES, 1969–1978

I feel the weight

Of Atlas’ woes, my brother in the west

Aeschylus, *Prometheus Bound*, 430 BCE²⁰⁵

The next era of FCC administrative jurisprudence, the Civil Rights Era from 1969 to 1978, saw judicial impatience with the FCC’s lack of progress in awarding more than a handful of licenses to minorities. Following the assassination of Dr. Martin Luther King in 1968, the National Advisory Commission on Civil Disorders issued what is known as the Kerner Commission Report analyzing the roots of the ensuing civil disorder and

204. See 47 U.S.C. § 309(K)(1) (2018).

205. Aeschylus, *supra* note 1.

protests.²⁰⁶ The Kerner Commission identified the media's role in the absence or stereotyping of minorities as a factor contributing to civil unrest and dissatisfaction, and recommended steps to promote equity and opportunity.²⁰⁷

In 1969, the FCC adopted its first policy prohibiting FCC licensees from engaging in employment discrimination.²⁰⁸ In 1971, the U.S. Civil Rights Commission found the "FCC has no rule prohibiting racial or ethnic discrimination in the sale of radio or television stations. Nor has the Commission recommended legislation requiring broadcast station owners who desire to rid themselves of their franchise to turn in their license to the Commission rather than selling it on the open market."²⁰⁹

In *TV 9*, the D.C. Circuit emphasized that as of 1971, "of the approximate 7,500 radio stations throughout the country, only 10 are owned by minorities. Of the more than 1,000 television stations, none is owned by minorities."²¹⁰ FCC Commissioner Benjamin Hooks, who later became General Counsel of the NAACP, led FCC efforts to examine policies that limited minority access to licenses and service to diverse communities.

Commissioner Hooks cited the Kerner Commission's report which highlighted the link between the absence of minority ownership or radio licenses and "attitudes of racial injustice" in America:

The importance of this almost total absence of minorities from ownership of radio and television stations lies not only in the lost opportunities for minority entrepreneurship, but also in the significance of radio and television stations in shaping the Nation's attitudes of racial injustice. The National Advisory Committee on Civil Disorders, for example, reported that the communications media had 'not communicated' to the majority of their audience — which is a majority group — a sense of degradation, misery and hopelessness of living in the ghetto. Greater representation in these

206. *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240; *Report of the National Advisory Commission on Civil Disorders*, N.Y. TIMES 1 (1968), <https://www.hsdl.org/?abstract&did=35837> (reporting on the aftermath of the assassination of Dr. Martin Luther King and the roots of the civil disorder and protests that occurred, including the media's role in the absence or stereotyping of minorities and recommending steps to promote American equity and opportunity).

207. *Id.*

208. *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240; *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970) (adding "sex" as an impermissible basis for discrimination).

209. FEDERAL CIVIL RIGHTS EFFORT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 276 (1971), <https://files.eric.ed.gov/fulltext/ED062452.pdf> (recommending legislation that would have repealed or modified the 1952 amendment that adopted Sec. 310(d) of the Communications Act).

210. *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973).

important communications industries of people who are familiar with ghettos and barrios and who are sensitive to the feelings of hopelessness and frustration of those who live there and could contribute significantly to greater understanding on the part of majority white Americans.²¹¹

In his concurring statement in an FCC proceeding that led to the D.C. Circuit's *TV 9* decision, Commissioner Hooks emphasized "[a]s new interest groups and hitherto silent minorities emerge in our society they should be given more stake in and chance to broadcast on our radio and television frequencies."²¹²

Section 309(a) of the Communications Act "requires a Commission determination that the grant of a license for facilities will serve 'the public interest, convenience and necessity.'"²¹³ Commissioner Hooks noted that of "the 697 commercial television stations operating in the country as of this date, none of those stations are owned by blacks. Whether or not this fact, ipso facto, reflects a 'fair' and 'equitable' distribution of television facilities in the eyes of the black community is beyond reasonable argument."²¹⁴

Communications Act § 307(b) requires the FCC to "provide 'a fair, efficient and equitable distribution' of broadcast facilities to each of the States and communities."²¹⁵ This statute promotes "localism," service to local communities and the Communications Act's directive to "make available, so far as possible, to all the people of the United States, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."²¹⁶ Fairness, equity, localism, and the public interest require service to all of the people of the United States including communities of color, tribal, rural, and disadvantaged communities.

In 1973, the D.C. Circuit in *TV 9* heard an appeal from a Comparative Hearing where the FCC declined to consider the minority group membership of a license applicant as a factor in determining the license award, and determined that minority ownership was "a consideration relevant to a choice among applicants of broader community representation and practicable service to the public."²¹⁷ *TV 9* held "that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should

211. *In re Applications of Mid-Florida Television Corp.* 37 F.C.C.2d 559, 560 (1972) (Commissioner Hooks, concurring) (citing FEDERAL CIVIL RIGHTS EFFORT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 209, at 188).

212. *Id.*

213. Section 309(a) of the Communications Act, as amended, 47 U.S.C. § 309(a).

214. *In re Applications of Mid-Florida Television Corp.* 37 F.C.C.2d at 560.

215. *Id.*

216. 47 U.S.C. § 151 (2018).

217. *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973).

be awarded.”²¹⁸ “The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.”²¹⁹

In response to *TV 9* and the D.C. Circuit’s 1975 decision *Garrett v. FCC*, the FCC began to analyze minority ownership as a factor in licensing awards.²²⁰ “In 1973, the FCC issued a construction permit to WGPR-TV (UHF) in Detroit, the first Black owned television station.”²²¹ In 1981, the FCC approved a settlement between parties applying for a television license in Orlando, Florida that resulted in minority group members having a license ownership interest.²²² The application which initiated that Comparative Hearing began in 1967.²²³

Sadly, little progress in promoting FCC license access for minorities was made until 1978. Baynes contrasted the FCC’s process of awarding a license when only one applicant applied (the singleton process) to comparative hearings.²²⁴ Under the singleton process, “the FCC would deem the solitary applicant qualified once meeting the FCC’s basic qualifications.”²²⁵ KPMG’s FCC-commissioned study found that “[d]uring the period 1970–1993, only 2,437 licenses were awarded by comparative hearing’ whereas 6,178 licenses were awarded through singleton applications.”²²⁶ Accordingly, “minority enhancements were unavailable for the vast majority of licenses that were distributed by the FCC.”²²⁷

Honig emphasized that through FCC “comparative hearings, or through grants of (rare) unopposed applications, the FCC gave minority owned companies, for free, *two* out of about 1,700 full power television licenses.”²²⁸ “Only about 100 minority owned applicants won construction permits for new

218. *Id.*

219. *Id.*

220. *Id.* at 938; *Garrett v. FCC*, 513 F.2d 1056, 1062–63 (D.C. Cir. 1975).

221. *See In re Application of W.G.P.R., Inc.*, 42 F.C.C.2d 836, 838 (1973) (denying a petition for reconsideration of the grant of the WGPR construction permit).

222. *In re Application of Mid-Florida Television Corp. Orlando*, 87 F.C.C.2d 203, 210 (1981).

223. *Id.*

224. Baynes, *supra* note 130, at 245.

225. *Id.*; 47 U.S.C. § 308(b) (2004) (requiring an applicant for an FCC license to demonstrate “citizenship, character, and financial, technical, and other qualifications”).

226. Baynes, *supra* note 130, at 245. (citing *KPMG Utilization Rates*, *supra* note 22, at 6).

227. *Id.*

228. Honig, *supra* note 137, at 76 (emphasis in the original) (citations omitted).

radio facilities.”²²⁹ “How different a nation we would be if the FCC had drawn straws for spectrum instead?” Honig asks.²³⁰

The FCC’s more than half-century late start in promoting license access for minorities and women shapes the media matrix and democracy. It influences images seen on television, voices heard on the radio, information accessible or received, and access to FCC licenses.

The United States Commission on Civil Rights’ 1977 report *Window Dressing on the Set* examined the dearth of minority broadcast ownership that resulted from FCC licensing and effect on the American public.²³¹ That report found a pattern that would be repeated for decades. Minorities “are underrepresented on network dramatic television programs and on the network news. When they do appear they are frequently seen in token or stereotyped roles.”²³²

More than forty years later, the lessons of *Window Dressing on the Set* still resonate. Its conclusion about the absence or stereotyping of people of color on broadcast television continues to animate policy debates at issue in FCC media ownership rule reviews and in other proceedings following *Prometheus*. Although *Prometheus* defers to FCC judgment to determine how to gather proceeding records, data is needed to study the effect of FCC programs and data jurisprudence on license access and service in the public interest.

VI. THE OPPORTUNITY ERA FOR MINORITY LICENSEES AND THE DIVERSE AMERICAN PUBLIC, 1978–1995

A. PROGRAMS TO PROMOTE FCC LICENSE ACCESS FOR MINORITIES, THE 1978 MINORITY OWNERSHIP POLICY STATEMENT

During the Opportunity Era from 1978 to 1995, the FCC initiated programs to promote access to licenses for minorities, and later for women. Beginning in 1984, the FCC interlaced consideration of policies to promote minority broadcast license access and FCC media ownership rules. As Justices Sotomayor and Kagan pointed out at the *Prometheus* oral argument, counsel for the FCC contradicted at oral argument the FCC’s briefs which recognized the

229. *Id.*

230. *Id.*

231. U.S. Comm’n on Civil Rights, *WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION* (1977), <https://www.loc.gov/item/77603555/> [hereinafter *WINDOW DRESSING ON THE SET*]

232. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 588 (1990) (citing *WINDOW DRESSING ON THE SET*, at 3).

longstanding relationship between media ownership and media licensing diversity policies.²³³

Analysis of FCC policies and licensing during the Opportunity Era requires access to records, which remain in analog darkness in FCC archives. The FCC's data jurisprudence continues to frustrate policy analysis and development, access to FCC licenses, and service to diverse American communities.

The FCC's 1978 Policy Statement on Minority Broadcast Ownership recognized that FCC non-discrimination policies adopted in the wake of the Kerner Commission Report had proved insufficient to promote access to FCC licenses for minorities.²³⁴ The FCC observed the views of racial minorities continued to be inadequately represented in the broadcast media as the number of minority radio or television licensees remained low.²³⁵ Dearth of control of FCC licenses by minorities "is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience."²³⁶ License holding diversity also "enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment,"²³⁷ the FCC concluded.

The 1978 Minority Ownership Policy Statement adopted several programs to encourage license sales to minorities, including tax certificates, distress sale rules, and the failed station solicitation rule.²³⁸ The FCC selected these tools in part because the 1952 Communications Act amendment prohibited the FCC from considering whether an application to transfer an FCC license would be better served by a different transferee.²³⁹ Incentivizing deals between minorities and licensees remains a predicate to the FCC's ability to approve a license transfer to a minority or female.

Tax Certificates were a key mechanism to increase minority license ownership diversity at a time when the FCC awarded fewer original licenses.

233. Oral Argument at 11:50, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021), https://www.supremecourt.gov/oral_arguments/audio/2020/19-1231 [hereinafter *FCC v. Prometheus, Oral Argument Transcript*].

234. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 62.

235. *Minority Ownership Policy Statement*, *supra* note 10, at 980–81.

236. *Id.* at 981.

237. *Id.*

238. *Id.*

239. 47 U.S.C.A. § 310(b), 66 Stat. 716 (1952) (amending 48 Stat. 1086 (1934)); *In re Applications of MMM Holdings*, 4 FCC Rcd. 6838 (citing S. Rep. No. 44, 82d Cong., 1st Sess. 8, 9 (1951)).

Congress ended the FCC's tax certificate program in 1995,²⁴⁰ less than one year before the '96 Act initiated more secondary license transfers and market consolidation.

The FCC approved "distress sales" to minority transferees for "licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated," subject to confirmation that the proposed assignee meets other FCC qualifications.²⁴¹ The 1978 Minority Ownership Policy assumed the FCC's longstanding limit on station ownership, the 7-7-7 rule, adopted in 1953.

In 1984, the D.C. Circuit in *West Michigan Broadcasting Co. v. FCC* upheld the FCC's consideration of race as a factor in an FCC comparative hearing used to award an FCC license.²⁴² The D.C. Circuit emphasized the importance of Congressional approval of policies that take race into account in FCC licensing to address the underrepresentation of minorities the FCC's decisions created.

West Michigan Broadcasting Co. cited Congressional findings of "extreme underrepresentation of minorities and their perspectives in the broadcast mass media" resulting from "past inequities stemming from racial and ethnic discrimination."²⁴³ "Congress had explicitly found that the award of significant preferences to minority-controlled broadcast entities" was an appropriate way of "remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications."²⁴⁴

The Supreme Court's 1990 *Metro Broadcasting v. FCC* decision upheld FCC programs that took race into account using an intermediate scrutiny standard.²⁴⁵ *Metro Broadcasting* emphasized that it was "of overriding

240. Self-Employed Persons Health Insurance Act of 1995, Pub L. No. 104-7, 109 Stat. 93 (1995).

241. *Minority Ownership Policy Statement*, *supra* note 10, at 983.

242. *W. Mich. Broad. Co. v. FCC*, 735 F.2d 601, 615-16 (D.C. Cir. 1984).

243. *Id.* (citing H.R. Conf. Rep. No. 97-765, U.S. Code Cong. & Admin. News 1982, p. 2287).

244. *W. Mich. Broad. Co.*, 735 F.2d at 613.

245. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (upholding several FCC programs that took race and ethnicity into account on an intermediate scrutiny standard considering the record and Congressional recognition of FCC programs that took race into account through a prohibition on the FCC spending any funds to examine or change its minority ownership policies).

significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress.”²⁴⁶ “Congress enacted and the President signed into law the FCC appropriations legislation for fiscal year 1988. The measure prohibited the Commission from spending any appropriated funds to examine or change its minority ownership policies,” a prohibition that was twice renewed through appropriations bills.²⁴⁷ The Appropriations Committee report explained “Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.”²⁴⁸

Legal challenges to FCC initiatives to promote minority ownership, which began in 1978, were dismissed in 1990 after the Supreme Court's *Metro Broadcasting* decision.²⁴⁹ The FCC cited *Metro Broadcasting* in its dismissal of a petition to reconsider its 1985 decision to permit an exception to the national multiple ownership rules to allow incentives for minority ownership.²⁵⁰

The FCC began to consider the overlap between minority ownership and its media ownership rules in 1983 during the Reagan Administration. The FCC considered and ultimately adopted rules in 1984 to increase the national ownership limit to 12-12-12. In the rulemaking docket that evaluated that change, the FCC considered the proposal's impact on diversity and the public interest including minority license ownership opportunities.

B. INTEGRATING MEDIA OWNERSHIP RULE REVIEW WITH POLICIES TO PROMOTE MINORITY OWNERSHIP, 1983 TO 1996²⁵¹

At oral argument in *FCC v. Prometheus*, Chief Justice Roberts and Justices Thomas, Sotomayor, Kagan, Kavanaugh, and Barrett asked whether the FCC was required to consider minority or female ownership in its media ownership rules or had a history of doing so. In their briefs and at oral argument, respondents emphasized that the FCC has considered the effect of its structural media ownership rules on minorities and women throughout its

246. *Id.* at 547, 563.

247. *Id.* at 560, 578.

248. *Id.* at 578 (citing S. Rep. No. 100–182, p. 76 (1987); S. Rep. No. 100–182, p. 76 (1987)).

249. *In re* Amendment of Section 73.3555 (Formerly Sections 73.35, 73.240, & 73.636) of the Commission's Rules Relating to Multiple Ownership of Am, Fm & Television Broad. Stations, 5 FCC Rcd. 5338 (1990).

250. *Id.*

251. This section draws from the author's analysis in *Sandoval, Prometheus Oral Argument Comment*, *supra* note 71.

media ownership reviews, making this an important issue the FCC must properly analyze under the APA.²⁵² The FCC's interlacing of media ownership rules and policies to promote license access for minorities and women began more than thirteen years prior to the '96 Act. These issues continue to be intertwined.

At multiple points during the *Prometheus* oral argument, Malcolm Stewart for Government Petitioners and Helgi Walker for Industry Petitioners overlooked the 35-year record of FCC consideration of minority and later female FCC license access in the development and analysis of FCC media ownership rules. Mr. Stewart incorrectly argued that the FCC had “historically looked at enhanced female and minority ownership as a goal to be achieved through some means, [but] it ha[d] not historically looked at that criteria as a basis for its cross-ownership restrictions and other structural media ownership rules.”²⁵³

Stewart's oral argument contradicted Government Petitioners' brief that recognized promoting minority license ownership as a longstanding FCC policy priority developed in the context of analysis of media ownership rules. “Although the statute does not specifically identify minority or female ownership as a criterion the FCC must consider in applying Section 202(h), the agency has traditionally treated this form of broadcast diversity as an element in its multi-factor public-interest analysis,” the Government's brief recognized.²⁵⁴

Ms. Walker, the lawyer for Industry Petitioners in *FCC v. Prometheus*, argued the Court should overrule the Third Circuit's decision in *Prometheus IV* on the grounds that analyzing minority and female ownership was required neither by the APA nor by § 202(h).²⁵⁵ Ms. Walker's argument ignored the fact that the FCC has consistently made consideration of minority and female ownership a policy priority when reviewing media ownership rules. The FCC did so in the thirteen years prior to the Telecommunications Act and in each media ownership review under § 202(h).

In 1983, the FCC initiated Gen. Docket No. 83–1009 to evaluate whether to change its 7-7-7 media ownership rule in place since 1955. That rulemaking considered the effect of the FCC's media ownership rules on minority groups' access to FCC licenses. It sought to foster license ownership diversity, service to the public, and the public interest. The FCC's 1984 decision in Gen. Docket

252. *FCC v. Prometheus, Oral Argument Transcript, supra* note 233, at 42:40; Brief of Petitioner, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

253. *FCC v. Prometheus, Oral Argument Transcript, supra* note 233, at 11:50.

254. Brief of Petitioner, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

255. *FCC v. Prometheus, Oral Argument Transcript, supra* note 233, at 21:57–22:32.

No. 83–1009 noted “that the Commission has long been dedicated to expanding minority participation in broadcasting.”²⁵⁶

In 1984, the FCC’s review of attribution rules which determine when ownership limits apply sought to allow expansion of license holdings while simultaneously promoting minority ownership opportunities. The FCC determined in 1985 that relaxing the attribution-rule benchmark “might serve the public interest by . . . promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities.”²⁵⁷

In 1985, the FCC issued an order recognizing “that our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership.”²⁵⁸ This order adopted incentives known as the “Mickey Leland rule,” which permitted a group owner to increase its television license holding above the 12-12-12 cap to thirteen or fourteen if the additional stations in which the group owner invested were minority controlled.²⁵⁹ The FCC determined that a “group owner having cognizable interests in minority-controlled television stations should be allowed to reach a maximum of thirty percent of the national audience, provided that at least five percent of the aggregate reach of its stations is contributed by minority controlled stations.”²⁶⁰

In 1993, the FCC extended its multiple ownership incentive rules to promote minority ownership of cable systems by including an exception “whereby an individual or entity may reach an additional five percent of the nation through cable systems that are minority-controlled.”²⁶¹ To “promote the presentation of a diversity of viewpoints on cable” the FCC also allowed “carriage of vertically integrated video programming services, on two additional channels or up to 45% of a cable system’s channel capacity, whichever is greater, provided such additional video programming services are minority-controlled.”²⁶²

256. *In re* Amendment of Section 73.3555, (Formerly Sections 73.35, 73.240, & 73.636) of the Commission’s Rules Relating to Multiple Ownership of Am, Fm & Television Broad. Stations, 100 F.C.C.2d 17, 46–49 (Gen. Docket No. 83–1009) (1984).

257. *1984 Multiple Ownership Rule Review*, *supra* note 64, at 1002.

258. *1985 Multiple Ownership Rule Review*, *supra* note 67, at 94–95.

259. 47 C.F.R. § 73.3555(d)(1)(i)–(ii) (2022).

260. *1985 Multiple Ownership Rule Review*, *supra* note 67, at 94–95.

261. *In re* Policies & Rules Regarding Minority & Female Ownership of Mass Media Facilities, 10 FCC Rcd. 2788, 2789 n. 9 (1995) (citing Second Report and Order, MM Docket No. 92–264, 8 FCC Rcd. 8565, 8578 (1993)) [hereinafter *1995 Minority & Female Ownership Broadcast Ownership Policies*].

262. *Second Report and Order*, MM Docket No. 92–264, 8 FCC Rcd. at 8596.

In 1994, the FCC modified its national radio ownership rules to permit a group owner to take “a non-controlling but attributable interest in an additional five AM and five FM stations if those stations are controlled by minorities and small businesses.”²⁶³ In 1995, the year before Congress passed the ’96 Act, the FCC considered the consequences for minority ownership that might arise from changing multiple ownership rules for television station ownership.²⁶⁴ The FCC’s Further Notice of Proposed Rulemaking (FNPRM) expressed the FCC’s concern that relaxing local ownership limits could increase the price of broadcast television stations and “may pose a concern with respect to the ability of minorities and other new entrants to acquire TV stations.”²⁶⁵ It proposed a framework to consider competition and diversity issues, including the effect on minorities, raised by increasing the national television ownership limit.²⁶⁶

Concomitantly, the FCC adopted Rulemaking MM Docket 94–150 to examine issues facing “minorities and women in obtaining access to capital,” recognizing that the FCC’s multiple ownership rule changes might lead station license prices to rise and exacerbate this barrier.²⁶⁷ This proposal followed rulemaking MM Docket 92–51 initiated in 1992 to examine reforms to multiple ownership attribution rules with the goal of promoting minority, female, and new entrant license access and investment in broadcasting.²⁶⁸

The FCC’s 1995 Notice of Proposed Rulemaking (Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities) declared: “We believe that the public interest is served by increasing economic opportunities for minorities and women to own communications facilities.”²⁶⁹ That 1995 rulemaking proposed to create an incubator program to “enable a broadcast licensee or other entity to own and control an additional facility in return for incubating an unrelated facility (or a number of unrelated

263. *In re* Revision of Radio Rules & Policies, 9 FCC Rcd. 7183 (1994).

264. *In re* Review of the Commission’s Regulations Governing Television Broad., 10 FCC Rcd. 3524 (1995).

265. *Id.* (“The increased prices of broadcast TV stations may pose a concern with respect to the ability of minorities and other new entrants to acquire TV stations.”)

266. *Id.* at 3531 (providing “a statement of frameworks for the economic and diversity analyses of these rules within which we solicit additional comment.”)

267. *In re* Review of the Commission’s Regulations Governing Attribution of Broad. Interests; Review of the Commission’s Regulations & Policies Affecting Inv. in the Broad. Industry; Reexamination of the Commission’s Cross-Interest Policy, 10 FCC Rcd. 3606 (1995).

268. Capital Formation Notice, 7 FCC Rcd. 2654 (1992).

269. *1995 Minority & Female Ownership Broadcast Ownership Policies*, *supra* note 261, at 2788–89.

facilities).²⁷⁰ In considering alternative attribution rules and the creation of an incubator program, the FCC observed that its “existing minority and small business ownership incentive . . . has not been particularly effective.”²⁷¹

This record demonstrates that for more than thirteen years before the ’96 Act, the FCC considered minority access to FCC licenses an important diversity and public interest goal and factor in evaluating and adopting its structural media ownership rules—including its attribution rules that determine when ownership limits apply. Since 1983, the FCC has consistently made the nexus between female and minority ownership and media ownership rules an important aspect of its media ownership proceedings. A federal agency cannot fail “to consider an important aspect of the problem” or offer “an explanation for its decision that runs counter to the evidence before it.”²⁷²

The FCC continued to embrace its longstanding policy of promoting minority ownership after the passage of the ’96 Act when it added promoting female license access as a policy priority. Contrary to Petitioners’ arguments, the record shows the nexus of these critical issues, requiring the FCC to analyze this longstanding and continuous policy goal to satisfy the APA.

The records of these post-’96 Act media ownership proceedings are available electronically. Meanwhile, many Comparative Hearing and other licensing records from this time remain in paper records in FCC archives. The FCC’s poor data jurisprudence stymies access to information about FCC licensees, contested license proceedings, and FCC policy.

VII. THE CONSOLIDATION ERA DURING THE INTERNET’S EXPANSION, 1995–PRESENT

A. THE JURISPRUDENTIAL TIDE SHIFTS FROM INTERMEDIATE TO STRICT SCRUTINY FOR PROGRAMS THAT CONSIDER RACE OR ETHNICITY

Jurisprudential standards shifted in the seventeen years between the FCC’s 1978 Minority Ownership Policy Statement, the Supreme Court’s 1990 *Metro Broadcasting* decision, and the 1995 *Adarand v. Peña* decision—the last of which raised the level of scrutiny for programs which take race into account to strict scrutiny.²⁷³ Shortly after *Adarand*, the FCC froze its programs that took race into account, citing the need to determine if the Commission could meet the strict scrutiny standard adopted in *Adarand* for programs or policies that take

270. *Id.* at 2792.

271. *Id.*

272. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

273. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

race into account.²⁷⁴ The strict scrutiny standard under *Adarand* requires the FCC to analyze data and show through a “*Croson*” or *Adarand* study that it could meet that standard.²⁷⁵ *Adarand*, the Telecom Act’s Section 202(h) requirements for quadrennial FCC media ownership rule reviews, and the ’96 Act’s directives for the FCC to promote license holding diversity increase the importance of gathering and analyzing data to support evidence-based decision-making.

“[O]ver the past 25 years, the FCC has failed to commission an *Adarand* study, despite four remands from the Third Circuit ordering it to analyze the effects of its media ownership policies on minority and female ownership.”²⁷⁶ “The lack of an *Adarand* study has undermined the FCC’s ability to comply with the four remands in the *Prometheus* proceeding. This is a problem of the FCC’s own making.”²⁷⁷

Neither has the FCC gathered or made publicly accessible the FCC data necessary for such a report. Much of that data concerns the first three eras of FCC licensing jurisprudence prior to 1996, and those records are largely kept as paper archives. The data initiatives this Article recommends would inform an *Adarand* study, the FCC’s analysis of media ownership rules under Sec. 202(h), and other dockets before the FCC.

B. IDENTIFYING AND ELIMINATING MARKET ENTRY BARRIERS AND PROMOTING LICENSE ACCESS FOR DIVERSE AMERICANS DURING THE CONSOLIDATION ERA

Less than a year after *Adarand* was decided, the ’96 Act amended the Communications Act of 1934 and spurred consolidation in FCC broadcast licensing. The ’96 Act also added the requirement that the FCC carry out its mission “without discrimination on the basis of race, color, religion, national origin, or sex.” As amended, 47 USC § 151 established the FCC:

274. *In re* Section 257 Proceeding to Identify & Eliminate Mkt. Entry Barriers for Small Businesses, Report, 12 FCC Rcd. 16802, 16809 (1997) [hereinafter *1997 Section 257 Report*] (“we must fully evaluate the Section 257 record according to the constitutional requirements that govern action by the federal government based on race (strict scrutiny) or gender (intermediate scrutiny)”); *FCC Diversity Order*, *supra* note 115, at 5950 ¶ 83. (“Race-based classifications subject to strict scrutiny may be upheld ‘only if they are narrowly tailored measures that further compelling governmental interests.’”); FCC, *2016 Media Ownership Review Order*, *supra* note 77, at 9986, ¶ 291.

275. *2016 Media Ownership Review Order*, *supra* note 77 at 132 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), “Less evidence is required for gender-based measures, although an ‘exceedingly persuasive justification’ is still necessary.”).

276. *Sandoval Congressional Testimony*, *supra* note 184, at 20.

277. *Id.*

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the “Federal Communications Commission,” which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Honig emphasized that the Telecom Act’s “non-discrimination provision is not self-executing,”²⁷⁸

Section 257 of the Telecom Act adds requirements that go beyond the ’96’s Act’s non-discrimination mandate. § 257 required the FCC to promote access to FCC licenses by “favoring diversity of media voices.” It directed the FCC to identify and take steps to eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.”²⁷⁹

The FCC initiated studies between 1997 and 2000 to support its first Section 257 reports to Congress.²⁸⁰ As former Director of the FCC’s Office of Communications Business Opportunities (OCBO), the author led development of the scope of work for six studies conducted between 1997–2000 that gathered and analyzed FCC and other data on minority and small business ownership for the FCC’s first report to Congress required by § 257 of the ’96 Act.²⁸¹ To inform the § 257 studies, the FCC sent researchers from

278. Honig, *supra* note 137, at 47.

279. *1997 Section 257 Report*, *supra* note 274, at 16804.

280. *Id.* at 16809.

281. See Kofi Ofori & The Civil Rights Forum on Communications Policy, *When Being Number One Is Not Enough, The Impact of Advertising Practices On Minority-Owned & Minority-Formed Broadcast Stations*, FCC (Jan. 1999), https://transition.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/; Ivy Group, *supra* note 10; Bachen, Hammond, Mason & Craft, *supra* note 125; William D. Bradford, *Capital Markets Study Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes*, FCC (Dec. 2000); KPMG *Utilization Rates*, *supra* note 22; Ernst & Young LLP, *FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority-and Women-Owned Companies in FCC Wireless Spectrum*

KPMG to the national archives to gather FCC data on minority ownership and use that sample to analyze minority underutilization in FCC license awards.²⁸²

In May 1997, the FCC issued its first report to Congress on its efforts to eliminate identify and market entry barriers as required by § 257(c).²⁸³ The FCC's 1997 report on § 257 market entry barriers informed Congress that the FCC's studies were designed to facilitate examination of "the role of small businesses and businesses owned by minorities or women in the telecommunications industry and the impact of our policies on access to the industry for such businesses."²⁸⁴

Those studies, were also intended to inform the FCC analysis of its media ownership rules under § 202(h), the first of which was conducted in 1998.²⁸⁵ The FCC's 1997 § 257 report stated that the FCC expected to examine through its § 202(h) review "issues related to the changes and consolidation that have resulted in the market since the passage of the 1996 Act, including the impact on small businesses and small businesses owned by minorities or women, resulting from the industry and regulatory changes during the past several years."²⁸⁶

Five of the § 257 studies were issued on the eve of the change in administration from President Clinton to President Bush.²⁸⁷ "The FCC did not initiate a request for comments or a rulemaking concerning the studies' evidence and findings."²⁸⁸

It was not until 2008 that the FCC acted on some of the findings in the FCC-commissioned study published in January 1999: *When Being Number One Is Not Enough, The Impact of Advertising Practices On Minority-*

Auctions, FCC (Dec. 2000) https://transition.fcc.gov/opportunity/meb_study/auction_utilization_study.pdf.

282. *1997 Section 257 Report*, *supra* note 274, at 16804 (citing 47 U.S.C. § 257(a) (2018)); *KPMG Utilization Rates*, *supra* note 22, at 11–12.

283. *See generally 1997 Section 257 Report*, *supra* note 274.

284. *Id.* at 16934.

285. *Id.* at 16908.

286. *Id.*

287. *See FCC Sec. 257 studies*, *supra* note 175; *Ivy Group*, *supra* note 10; *Bachen, Hammond, Mason & Craft*, *supra* note 125; *Bradford*, *supra* note 281; *KPMG Utilization Rates*, *supra* note 22; *Ernst & Young LLP*, *supra* note 281.

288. Catherine J.K. Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity, and Service in the Public Interest*, in COMMUNICATIONS RESEARCH IN ACTION: SCHOLAR-ACTIVIST COLLABORATIONS FOR A DEMOCRATIC PUBLIC SPHERE 19–20 (Minna Aslama & Philip M. Napoli, eds., Fordham University Press, 2010) [hereinafter *Sandoval, Minority Commercial Radio Ownership in 2009*].

Owned & Minority-Formatted Broadcast Stations.²⁸⁹ The FCC’s 2008 media ownership rule review observed that “[f]or over 20 years, the Commission has been aware of the insidious practices of certain advertisers, rep firms and advertising agencies of imposing written or unwritten “no urban/no Spanish” dictates.”²⁹⁰

Twenty years after the FCC became aware of these practices and nine years after the 1999 study shed light on their harmful effects as market entry barriers for minority-owned and minority-serving broadcasters—the FCC’s 2008 order required broadcasters to certify when applying to renew their licenses “that their advertising sales contracts do not contain discriminatory clauses.”²⁹¹ The FCC also required broadcasters to certify that “they did not discriminate on the basis of race, color, religion, national origin, or sex in the sale of their station.”²⁹² These requirements particularize the Communications Act’s directives for the FCC to promote wireless and wireline communications to all Americans without discrimination on the basis of race, color, religion, national origin, or sex.²⁹³

To inform its twenty-first century media ownership reviews, the FCC has occasionally funded small, relatively short studies on various issues regarding minority or female ownership.²⁹⁴ The FCC has not replicated the scale, scope, depth, archival, qualitative, or quantitative research of the § 257 studies.

Congress eliminated the § 257(c) triennial reporting requirement in 2018 during the Trump Administration.²⁹⁵ That amendment left in place §§ 257(a)-(b), which directed the FCC to complete a proceeding to identify and eliminate market entry barriers for entrepreneurs and small businesses within 18 months of the ’96 Act’s passage and in so doing consider media ownership “policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”²⁹⁶ Section 309(j)(3)(b) of the ’96

289. Ofori & the Civil Rights Forum on Communications Policy, *supra* note 281.

290. *FCC Diversity Order*, *supra* note 115, at 5950 ¶ 49.

291. *Id.* at Appendix A, ¶ 1 (adding to 47 C.F.R. Part 73 § 73.2090 (2022), “Ban on discrimination in broadcast transactions. No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV or international broadcast stations.”)

292. *Id.*

293. Nondiscrimination Principle, Pub. L. No. 104, § 104, 110 Stat. 86 (1996).

294. FCC, 2010 MEDIA OWNERSHIP STUDIES, <https://www.fcc.gov/general/2010-media-ownership-studies> (Oct. 7, 2021); FCC, MEDIA OWNERSHIP 2006 RESEARCH STUDIES ARCHIVE, <https://www.fcc.gov/media/media-ownership-2006-research-studies-archive> (Jun. 19, 2020).

295. 132 Stat. 1089 (2018).

296. 47 U.S.C. § 257 (c) (2018), *amended by* Pub. L. No. 115–41 (2018).

Act echoes those policies, as do §§ 309(a) and 310's requirements that licenses be issued in the public interest.

The six studies the FCC initiated between 1997 and 2000 remain the most searching review of FCC archival data on minority media ownership policies prior to the '96 Act. To inform its § 202(h) media ownership rule reviews, other FCC reports, and meet the Telecom Act's public interest mandates, this Article recommends the FCC gather and publish its data, including analog records lingering for decades in boxes at the national archives.

C. PROMOTING MINORITY AND FEMALE FCC LICENSE ACCESS REMAINS AND AVOWED POLICY PRIORITY

The FCC made promotion of minority and female access to FCC licenses a priority in each § 202(h) rulemaking since the '96 Act's passage.²⁹⁷ "Encouraging minority and female ownership historically has been an important Commission objective, and we reaffirm that goal here," declared the FCC's 2003 media ownership review decision.²⁹⁸

The FCC media ownership review initiated in 2006, concluded that its "media ownership rules are designed to foster the Commission's longstanding policies of competition, diversity, and localism" as set out in its *2002 Biennial Review Order*, which made minority and female ownership an important goal that served the public interest.²⁹⁹ The 2006 media ownership review order reaffirmed those goals.³⁰⁰ In 2008, the FCC adopted several "measures modifying certain of our rules and policies to encourage

297. *See, e.g., In re 1998 Biennial Regulatory Review—Review of Commission's Broad. Ownership Rules*, 15 FCC Rcd. 11058, 11073 (2000).

298. *See, e.g., In re 2002 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13634 (2003) [hereinafter *2003 Media Ownership Review*] (citing *Minority Ownership Policy Statement*, *supra* note 10); *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 10 FCC Rcd. 2788 (1995); *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Report and Order, (1998) (adopting competitive bidding rules consistent with 47 U.S.C. § 309(j)(3)(B)); *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 11 FCC Rcd. 6280 (1996); *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd. 16802 (1997).

299. *In re 2006 Quadrennial Regulatory Review—Review of the Commissions Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 23 FCC Rcd. 2010, 2016–17 (2008).

300. *Id.*

ownership diversity and new entry in broadcasting”³⁰¹ including changes to attribution rules, and invited comment on proposals to promote those goals.³⁰²

Notwithstanding its long-professed policy priority to promote minority and female access to FCC licenses, control of FCC radio licenses by minorities was lower in 2017 than in 2009. The FCC’s most recent media licensing report published in 2017 stated that non-minority and non-Hispanic individuals controlled over 94% of FCC full-power television licenses and 92% of commercial radio licenses.³⁰³ Most FCC radio and television licensees at that time were men.³⁰⁴

The FCC’s analysis of its 2017 Form 323s reported that racial minorities and Hispanics controlled 789 commercial AM and FM radio station licenses in 2017, approximately 8% of the 8,806 AM and FM radio licenses.³⁰⁵ The FCC report does not clarify if some Hispanics were also classified as racial minorities. Accordingly, the total number of stations controlled by minorities including Hispanics in 2017 may be smaller than the FCC’s Fourth Report and Order indicates. This Article recommends the FCC report its data to clarify any overlap such as Hispanics who are also a racial minority.

D. BROADCASTING IN THE INTERNET AGE

The paucity of licenses the FCC awarded to minorities or women prior to 1978 continues to shape the media environment and analysis of FCC regulation in the twenty-first century. PEW’s 2010 study of the news ecosystem in Baltimore found that most local news was generated by newspapers, television, and radio, while the internet primarily recycled news produced from local broadcasters and newspapers.³⁰⁶ Broadcasting, cable, traditional print sources such as newspapers, and the internet complement each other, and often retransmit news originated in a different format.

More than two decades after the twenty-first century dawned, broadcasting remains an important source of information, especially for local news and public affairs. Even as the internet increasingly mediates access to resources—from COVID-19 vaccination appointments to education, work, and services—’96 Act broadcast television and radio remain critical sources of news twenty-five years after the ’96 Act.

301. *FCC Diversity Order*, *supra* note 115, at 5924.

302. *Id.* at 5937.

303. FCC, *Fourth Report on Ownership of Broadcast Stations*, *supra* note 11, at 2–4.

304. *Id.* (reporting that in 2017 men controlled the voting interests for 53.7% of full power commercial television stations and over 80.9% of AM and FM radio licenses).

305. *Id.*, at 4–5.

306. *How News Happens, A Study of the News Ecosystem of One American City*, PEW RSCH. CTR. (Jan. 11, 2020), <https://www.journalism.org/2010/01/11/how-news-happens/>.

In 2018, Americans watched almost six hours of video a day, primarily through “live or time-shifted traditional television viewing.”³⁰⁷ “Similarly, more than 90 percent of Americans still listen to the radio each week.”³⁰⁸ PEW research reported in 2019 that “local TV stations are the top type of source for local news. About four-in-ten Americans (38%) say they often get news from local TV stations (86% ever do so). Radio stations (from which 20% often get news) and daily newspapers (17%) serve as the next most popular providers of local news.”³⁰⁹ “[T]elevision remains a common place for Americans to get their news and some evidence suggests that broadcast television outlets produce a significant portion of the video news content published on websites and social media platforms,” the FCC’s 2018 media ownership review order recognized.³¹⁰

During the COVID-19 pandemic’s first year, 37% of adults got their political news primarily through radio and television, the largest news source among adults surveyed.³¹¹ Cable television, which primarily covers national news, was the primary political news source for 16% of adults PEW surveyed. 43% of adults surveyed cited internet sources as their primary news source.³¹² Local Broadcasting remained the primary source for local political news.³¹³

Consideration of the link between media ownership rules and public safety, including the safety of diverse communities, is a statutory requirement. *Mozilla v. FCC* emphasized that when, as here, “Congress has given an agency the responsibility to regulate a market such as the telecommunications industry that it has repeatedly deemed important to protecting public safety,” agency decisions “must take into account its duty to protect the public.”³¹⁴ The “Commission is ‘required to consider public safety by * * * its enabling act.’”³¹⁵

307. *In re* 2018 Quadrennial Regulatory Review of the Commission’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 33 FCC Rcd. 12111 (2018) [hereinafter *2018 Media Ownership Review Order*].

308. *Id.* at ¶ 3.

309. *Nearly as many Americans prefer to get their local news online as prefer the TV set*, PEW RSCH. CTR. (Mar. 26, 2019), <https://www.journalism.org/2019/03/26/nearly-as-many-americans-prefer-to-get-their-local-news-online-as-prefer-the-tv-set/#local-tv-stations-remain-the-most-relied-on-individual-source-despite-having-little-online-presence>.

310. *2018 Media Ownership Review Order*, *supra* note 307.

311. Amy Mitchell, Mark Jurkowitz, J. Baxter Oliphant & Elisa Shearer, *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CTR. (July 30, 2020), <https://www.journalism.org/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable/>.

312. *Id.*

313. *Id.*

314. *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir. 2019) (citing *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006)).

315. *Id.*

The statutory mandate for the FCC to promote “safety of life and property through the use of wire and radio communication”³¹⁶ applies to *all* the people of the United States. The FCC’s 2002 media ownership review determined “that one benefit of outlet diversity is the promotion of public safety . . . by ensuring that multiple owners control the broadcasting outlets in any market.”³¹⁷ That safety nexus has seldom been addressed in FCC media ownership reviews and consideration of minority and female licensing initiatives.³¹⁸ Under the APA, failure to rationally consider a statutory requirement is arbitrary and capricious.³¹⁹

Broadcasting becomes even more crucial during emergencies when cell phone networks may fail due to power loss, maintenance, or other issues. Serving public information needs is critical to public safety, particularly during hazards such as wildfires, floods, hurricanes, blizzards, power blackouts, chemical incidents, and severe weather. In California, broadcasting remained an information lifeline during elevated wildfire risk periods, preemptive power shutoffs, and communications network outages.³²⁰ “Understanding

316. See *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006) (discussing the FCC’s statutory duty to promote public safety); *Mozilla*, 940 F.3d at 60, 61, 63. The *Mozilla* court cites Professor, and former California Public Utilities Commission (CPUC) Commissioner, Sandoval’s comments—about the Internet’s role in public safety, energy reliability and safety, natural gas leak detection, and critical infrastructure protection—as well as the CPUC and the County of Santa Clara, which urge the court to remand the FCC’s net neutrality repeal order to consider public safety issues; see also Wireless Communication and Public Safety Act of 1999, 47 U.S.C. § 615 (2018) (requiring the FCC to promote safety through its regulation of wireless communications).

317. See, e.g., *2003 Media Ownership Review*, *supra* note 298, at 13634 (“In an emergency, the separation of broadcast facilities and personnel among multiple independent broadcast companies in a given market will avoid any possibility that the failure of one broadcast company to transmit critical public safety information will not leave that area without other broadcast owners to perform that service.”).

318. FCC, *2016 Media Ownership Review Order*, *supra* note 77, at 116 n.839 (noting comments that “some Native communities depend on radio to provide not only cultural information but also news and public safety and health announcements.”)

319. *Nuvio Corp.*, 473 F.3d at 307.

320. Catherine J.K. Sandoval & Patrick Lanthier, *Connect the Whole Community; Leadership Gaps Drive Disaster Vulnerability and the Digital Divide in TECHNOLOGY VS GOVERNMENT: THE IRRESISTIBLE FORCE MEETS THE IMMOVABLE OBJECT* (Lloyd Levine, ed., Emerald Publishing forthcoming, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766610 (“In 2020 the CPUC adopted a ‘72-hour backup power requirement for the wireless providers’ facilities, to ensure minimum service coverage is maintained during disasters or commercial grid outages.”) (citing CPUC, D. 20-07-011, *Decision Adopting Wireless Provider Resiliency Strategies*, Rulemaking 18-03-011 (July 16, 2020)).

community information needs and gearing emergency alerts to platforms communities use (in languages appropriate to the locality) will save lives.”³²¹

The author and Patrick Lanthier discussed in *Connect the Whole Community: Leadership Gaps Drive the Digital Divide and Fuel Disaster and Social Vulnerabilities* the failure of leaders to provide timely safety information accessible through platforms used by communities in danger. The 2017 San Jose flood overtopped the Anderson Dam above the city and led to the evacuation of more than 14,000 people and extensive flooding.³²² That urban flood afflicted a mix of low-income, predominantly Latinx and Vietnamese, communities and affluent predominantly white communities.³²³ Despite the diversity of the communities at risk, “local officials sent out alerts to an imagined community, highly connected to the internet, and capable of filtering warnings from the detritus of Twitter feeds, Facebook posts, and Nextdoor notices. In the process, officials failed to inform the community they served of the coming danger.”³²⁴

“Regulatory decision-making can exacerbate or mitigate community and infrastructure vulnerability as we face climate change, pandemics, and other disasters.”³²⁵ While the world battles the coronavirus pandemic and other diseases, climate change accelerates threats to communities including severe weather swings, drought, floods, and fire.³²⁶ Many communities of color, tribal, rural, and disadvantaged communities, as well as the disabled, elderly, and low-income community members, are highly vulnerable to safety risks including the coronavirus pandemic, violence, racism, climate change, toxins, flooding, and fire.³²⁷

321. *Id.* at 17. See Steven Waldman, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, FCC (July 2011) (“Several studies have indicated that mainstream media do not adequately cover African-American and other minority communities.”); Brief for the District of Columbia and Several States as Amicus Curiae Supporting Respondents at 5, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2020) (“Credible coverage of issues affecting diverse communities is also crucial to good governance.”)

322. Sandoval & Lanthier, *supra* note 320, at 2, 16.

323. *Id.* at 9.

324. *Id.* at 16.

325. *Id.* at 2.

326. *Id.*

327. N’dea Yancey-Bragg & Rick Jervis, *Texas’ winter storm could make life worse for Black and Latino families hit hard by power outages*, USA TODAY, Feb. 20, 2021, <https://www.usatoday.com/story/news/nation/2021/02/20/texas-ice-storm-blackouts-minorities-hardest-hit-recovery/4507638001/>; *Media Statement from CDC Director Michelle Walensky, MD, MPH, on Racism and Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 8, 2021), <https://www.cdc.gov/media/releases/2021/s0408-racism-health.html> (“racism is a serious public health threat that directly affects the well-being of millions of Americans.”).

The Communications Sector is deemed critical infrastructure due to its vital interest to the U.S. economy and national security.³²⁸ The Critical Infrastructure Protection Act (CIPA) of 2001 defines critical infrastructure as those “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”³²⁹ CIPA “defines critical infrastructure *not* with reference to the identity of the target, but by the consequences of an attack on it.”³³⁰

In 2013, President Obama issued Presidential Policy Directive-Critical Infrastructure Security and Resilience (PPD-21) which designated 16 sectors as critical infrastructure including the Communications Sector.³³¹ PPD-21 identifies “energy and communications systems as uniquely critical due to the enabling functions they provide across all critical infrastructure sectors.”³³² “Energy and communications systems are key drivers for the U.S. economy, democracy, and national security, underlying the operations of nearly all businesses, public safety organizations, healthcare providers, education, and government.”³³³ The 2015 Communications Sector Specific Plan required for Critical Infrastructure recognizes that “[b]roadcasting has been the principal means of providing emergency alert services to the public for six decades.”³³⁴

Despite the Communications Act’s statutory mandate requiring the FCC to consider public safety in its regulatory decisions, the FCC has not analyzed the link between media ownership diversity and public safety. The FCC’s duties under the Communications Act require development of rules in public interest. Publishing FCC data too long kept in analog darkness will promote public safety, serve the public interest, and facilitate fulfillment of the FCC’s Communications Act duties.

328. See The White House, *Presidential Policy Directive-Critical Infrastructure Security and Resilience* (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>; Dept. of Homeland Security, *Critical Infrastructure Sectors*, <https://www.dhs.gov/critical-infrastructure-sectors> (last visited Nov. 5, 2022).

329. Catherine J.K. Sandoval, *Net Neutrality Powers Energy and Forestalls Climate Change*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 1, 81 (2018) (citing 42 U.S.C. § 5195c(e) (2018)).

330. *Id.*

331. The White House, *supra* note 328; Dept. of Homeland Security, *supra* note 328.

332. The White House, *supra* note 328.

333. Sandoval, *supra* note 329, at 8.

334. *Communications Sector-Specific Plan*, U.S. DEP’T. HOMELAND SEC. (2015), <https://www.cisa.gov/publication/nipp-ssp-communications-2015>.

VIII. THE MODERN PROMETHEUS: BRING DATA DEMOCRACY TO THE FCC

A. DATA DARKNESS STALKS FCC DECISION-MAKING

FCC data jurisprudence undermines realization of the FCC's longstanding policy commitments to promote minority and female FCC ownership. The mismatch between the FCC's professed priorities and its limited data gathering and analysis reveals fault lines that feed the Promethean cycle of analytical and policy failure. This process disservices democracy and the public interest.

The *Library Of Missing Datasets* “lists datasets not collected because of bias, lack of social and political will, and structural disregard.”³³⁵ Curator Mimi Onuoha observed “(t)hat which we ignore reveals more than what we give our attention to. It’s in these things that we find cultural and colloquial hints of what is deemed important. Spots that we’ve left blank reveal our hidden social biases and indifferences.”³³⁶

Catherine D’Ignazio and Lauren F. Klein in *Data Feminism* observe a risk “incurred when people from dominant groups create most of our data products—is not only that datasets are biased or unrepresentative, but that they never get collected at all.”³³⁷ “Identifying information as data,” rather than as evidence or fact “convert[s] otherwise debatable information into the solid basis for subsequent claims.”³³⁸

Etymologically, data is “a fact given or granted,” derived from the Latin word datum “[thing] given,” or “something given.”³³⁹ Caryn Devins, *et. al* observe that “data are not given once and for all; rather, they are not only interpreted but *constructed* by the coding process and inherently symbolic nature of some underlying reality.”³⁴⁰ Failure to collect data or make it practically available for analysis—to transform analog files into searchable, digital databases that support longitudinal and comparative analysis—fortifies constructed realities and limits opportunities. The FCC’s faulty data jurisprudence undermines development of a factual basis for its media

335. CATHERINE D’IGNAZIO & LAUREN F. KLEIN, *DATA FEMINISM* 33, Figure 1.4 (2020) (discussing the Library of Missing Datasets in the context of “data science for whom.”); *Id.* (noting the risk “incurred when people from dominant groups create most of our data products—is not only that datasets are biased or unrepresentative, but that they never get collected at all.”).

336. Onuoha, *supra* note 27.

337. *Id.* at 11, Figure 1.4.

338. D’IGNAZIO & KLEIN, *supra* note 335.

339. *data*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=data> (last visited Feb. 5, 2022).

340. Caryn Devins, Teppo Felin, Stuart Kauffman & Roger Koppl, *The Law and Big Data*, 27 CORNELL J.L. & PUB. POL’Y 357, 379 (2017).

ownership reviews and achievement of its longstanding stated priority of promoting license ownership diversity.

The FCC's electronic databases largely do not include the licensing, application, and program data from the first three eras of FCC licensing regulation from its inception through the '96 Act. The Library of Missing Datasets should have filing cabinets labeled for FCC licensing decisions involving minority or female applicants, from 1934 to 2000. Another filing cabinet should be marked for unreliable data about FCC licensing decisions involving minorities or women, 2000–present.

Current “FCC datasets create barriers to analysis, particularly for longitudinal studies or efforts to analyze trends within or between large groups of broadcasters,” and were “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.”³⁴¹ Professors Terry and Ring Carlson argue that “[a]t least part of the FCC’s struggle to resolve minority ownership policy can be explained with a simple reality: Like much of the FCC’s flawed approach to media ownership regulation, quality empirical evidence to support a minority ownership policy has been in short supply.”³⁴² “Researchers using the FCC’s ownership data have suggested that data on minority and female ownership, ‘is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.’”³⁴³

Prometheus noted that the FCC’s 2006, 2010, and 2016 media ownership reviews solicit[ed] evidence on minority and female ownership.³⁴⁴ The FCC knew from its previous attempts to analyze FCC records that it was asking the public to provide for free to the government on short timelines, evidence and studies requiring analysis of hundreds of thousands (if not millions) of FCC records that are difficult to access, let alone analyze. The FCC also knew that gaps pervade the system it developed to collect data on minority and female

341. *Sandoval, Minority Commercial Radio Ownership in 2009*, *supra* note 288; *see also* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021).

342. Terry & Ring Carlson, *supra* note 124, at 420–21.

343. *Id.* (citing Aric Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises* (June 2007), <http://hraunfoss.fcc.gov/edocspublic/attachmatch/DA-07-3470A8.pdf>).

344. *Id.* (citing *In re* 2006 Quadrennial Regulatory Review—Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834, 8837 (2006); *In re* 2010 Quadrennial Regulatory Review—Notice of Inquiry, 25 FCC Rcd., at 6106, 6108–09 (2010); *In re* 2014 Quadrennial Regulatory Review—Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd. 4371, 4460, 4470, n.595 (2014)).

license ownership following the '96 Act. Third parties, including scholars, cannot alone solve the FCC's poor record-keeping and data analysis.

The FCC's attempts from 2001 to 2009 to collect data on the race or ethnicity of broadcast licensees through FCC Form 323 yielded incomplete and unreliable data.³⁴⁵ The FCC's poor data gathering frustrated attempts of researchers the FCC hired and funded to analyze questions relevant to the FCC's media ownership reviews.³⁴⁶ Respondents merits brief for *Prometheus* observed that the "Commission had itself in 2009 recognized major flaws in data drawn from Form 323, the agency's mandatory licensee reporting form."³⁴⁷

The FCC's poor data practices persist despite more than two decades of scholarly, public interest organization, and Congressional calls for the FCC to improve its record-keeping to enable analysis and serve the public interest.³⁴⁸

345. Philip M. Napoli & Joe Karaganis, *Toward A Federal Data Agenda For Communications Policymaking*, 16 COMMLAW CONSPECTUS 53, 86 (2007) (citing C. Anthony Bush, *Minority and Women Broadcast Ownership Data*, in OWNERSHIP STRUCTURE AND ROBUSTNESS OF MEDIA: FCC MEDIA OWNERSHIP STUDY #2 13 (2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 44 (3d Cir. 2016) (*Prometheus III*) ("Prior to 2009, full-power commercial AM, FM, and television broadcast stations typically had to file Form 323 biennially, but many other types of entities were exempt. The 2009 initiative ended the exemption for sole proprietorships, partnerships comprised of natural persons, and low-power television stations . . . The FCC also directed that the format for filing Form 323 be changed so that a database could be created.") (internal citations omitted).

346. Arie Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises* 2–3 (June 2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A8.pdf ("[D]ata 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.").

347. *Respondents Brief*, *supra* note 101, at 86 (citing *Promoting Diversification of Ownership in the Broadcasting Services*, 24 FCC Rcd. 5896, 5897–98 (2009)).

348. See, e.g., Rob Frieden, *Case Studies in Abandoned Empiricism and The Lack of Peer Review at The Federal Communications Commission*, 8 J. TELECOMM. & HIGH TECH. L. 277, 286 (2010) ("The FCC must engage in transparent and fair-minded data collection, because many of the issues the Commission addresses have a quantitative component that can provide evidence supporting compliance with legislative mandates."); Sandoval, *Minority Commercial Radio Ownership in 2009*, *supra* note 288 ("The FCC's highly inefficient, incomplete and burdensome system frustrates analysis and monitoring of important trends. Critical issues such as the link between licensing and consolidation policies and minority broadcast entry, as well as the fate of small and minority broadcasters during the recession, are hidden in the FCC's labyrinthine databases."); Napoli & Karaganis, *supra* note 348, at 86 ("[M]any of the basic questions that policymakers, courts, and stakeholders pose regarding communications policy cannot be answered due to the poor quality, scope, and accessibility of policy-relevant data. The result is the frustrating scenario in which the studies that are conducted are subjected to withering methodological critiques—and thus frequently discredited—while little effort is made either to produce better data or to ensure easier access to existing datasets. This situation undermines the extent to which research can effectively inform public policymaking.").

Gaps in FCC data about minority and female license ownership and the effect of FCC consolidation and program rules on access, entry, expansion and service have grown in the twenty-five years since the '96 Act. Those data gaps will continue to expand until the FCC invests in data gathering, digitization, database creation and publication.

Excavating the FCC's motives behind its failure to prioritize the funding and completion of research on minority and female licensing is beyond this Article's scope. That topic may be better left to memoirs of FCC Chairmen who followed FCC Chairman Hundt and Chairman Kennard and their fellow Commissioners who authorized FCC staff to initiate archival research, as well as quantitative and qualitative studies, for the FCC's Section 257 market entry barrier analysis.

Whatever the FCC's motives for leaving its archival data largely untouched for decades, the result has been decision-making stagnation about a policy priority the FCC has touted for more than forty years. The FCC's systematic failure to keep, organize, or analyze its data brings into relief the link between poor data jurisprudence and policy failure.

This Article seeks to transform long ignored FCC data into machine-readable digital data. This Article recommends Congress adopt legislation requiring the FCC to digitize and publish its data including its twentieth century analog licensing, regulatory, and programmatic records. While such legislation is pending, the Administration should also adopt an Executive Order directing NTIA to develop methodologies to analyze FCC licensing and programmatic data.

B. DATA DEMOCRACY: INTO THE LIGHT

“Open data can be a powerful force for public accountability—it can make existing information easier to analyze, process, and combine than ever before, allowing a new level of public scrutiny.”³⁴⁹ Digital democracy promotes democratic engagement and government accountability. Tiago Peixoto argues “[i]t is the combination of (publicized) transparency and institutions that promote governmental responsiveness and empower citizens to partake in public decision-making that leads to substantive accountability.”³⁵⁰

The FCC recognizes the importance of sound, open, and transparent data to its rulemakings. “Data underpins every activity at the Federal Communications Commission. By better involving data in open and

349. Yu & Robinson, *supra* note 25, at 182.

350. Peixoto, *supra* note 25, at 207.

transparent rulemaking, the FCC can better serve the public while enabling public innovation,” the FCC’s Data page proclaims.³⁵¹

The FCC’s data jurisprudence must adapt to twenty-first century needs and technology. Digitizing FCC archival data and making FCC public data publicly accessible will foster data democracy, analytical integrity, and accountability. Doing so will inform FCC media ownership reviews and other rulemakings and licensing decisions.

Prometheus did not create a legal impediment to FCC data gathering, research, and analysis. Instead, it left it to the FCC’s discretion to develop a record to support its quadrennial regulatory review of media ownership rules, absent Congressional direction to do otherwise.

FCC proceedings do not need to remain in data darkness or dimness. We have the tools to fill this gap and need the will and commitment to do so. “This data is obtainable. It is available to the FCC. The FCC has opted not to make it effectively to the public or even to its own staff.”³⁵² “Just as Dorothy had the power to go home all along, the FCC had the power during its twenty-two years of media ownership reviews to draw data from its archives to establish the baseline of minority and female license ownership reflected in its programs records that took those factors into account.”³⁵³ It is long past time for the FCC to bring light to data darkness.

Scanning, digitizing, and making documents available on a database at the FCC’s scale is feasible with modern technology. More than sixteen years ago, Google’s “Library Project” (which was initiated in 2004) scanned, digitized, and made available on the internet “books in the collections of the New York Public Library, the Library of Congress, and a number of university libraries.”³⁵⁴ The FCC could arrange a contract for reputable and knowledgeable entities to support its employees in this project. The FCC should create a free, public-facing, machine-readable database that facilitates longitudinal analysis, qualitative, and quantitative research.

Data in FCC archives is static. The challenge is that there are decades of data kept in paper, largely in boxes, and there’s a lot of it. This is not, however “big data,” which refers to “large amounts of different types of data produced

351. *Data*, FCC, <https://www.fcc.gov/reports-research/data> (last visited April 30, 2021).

352. *Amicus Brief, Professors of Communications Law*, *supra* note 129, at 15 (citing *Fox Television*, 556 U.S. at 519) (“It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained...It is something else to insist upon obtaining the unobtainable.”).

353. *Id.*

354. *Authors Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282, 285 (S.D.N.Y. 2013), *aff’d sub nom.* *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

at high speed from multiple sources, whose handling and analysis require new and more powerful processors and algorithms.”³⁵⁵ Technology is readily available for a large-scale static data scan. Building a database will require substantial work, but static data does not update in the way big data proliferates. We have the technology, talent, and models to complete this work within eighteen months to two years of its initiation. Only the will to begin and complete this project is required.

Creating a free, public-facing digital FCC database should reverse the FCC’s practice of relying “heavily on the datasets developed by commercial data providers for their clients and the investment community,” while “neglect[ing] their own substantial data collection capabilities and responsibilities.”³⁵⁶ Philip Napoli and Joe Karaganis argue the FCC’s reliance on third-party, commercial databases “has created problems in both the scope and quality of policy inputs—scope insofar as commercially collected data are expensive to access and are not always structured in ways that illuminate public policy concerns.”³⁵⁷

Relying on individual researchers to examine analog data introduces methodology and variability issues. Shifting to individuals or non-governmental organizations the initiative to scan and digitize such data would perpetuate data privatization. Privatization of public data undermines transparency, administrative decision-making, and the public interest.

Citizen data gathering or a mass “scanathon” at the National Archives is not the solution to the FCC’s data problem. Digitizing the FCC’s data and publishing it on free and accessible databases should be the FCC’s responsibility, consistent with the Communications Act and the principles of the Foundations for Evidence-Based Policymaking Act (“Evidence Act”).

The Evidence Act, enacted on January 14, 2019, applies to executive departments and certain named agencies, but does not apply to the FCC.³⁵⁸ The Evidence Act requires data from designated agencies to be accessible, and mandates planning to develop statistical evidence to support policymaking.³⁵⁹

355. Alex Ingrams, *Public Values in the Age of Big Data: A Public Information Perspective*, 11 POLICY & INTERNET 128, 129 (June 2019) (citing B. van der Sloot & S. van Schendel, *Ten Questions for Future Regulation of Big Data: A Comparative and Empirical Legal Study*, 7 J. INTELL. PROP., INFO. TECH. & E-COMMERCE L. 110, 113 (2016)).

356. Napoli & Karaganis, *supra* note 348, at 86.

357. *Id.*

358. Foundations for Evidence-Based Policymaking Act, Pub. L. No. 115–435, 132 Stat. 5530; *see also* Federal Data Strategy, *Data Governance Playbook* n.1 (July 2020), [fds-data-governance-playbook.pdf](#).

359. 5 U.S.C. § 101, Pub. L. No. 111–435 (2019).

The FCC chartered a Data Governance Council in 2020 to guide its data management consistent with the Evidence Act and the Federal Data Strategy.³⁶⁰ FCC media ownership reviews have yet to address the Evidence Act or Federal Data Strategy.

The Open, Public, Electronic, and Necessary (OPEN) Government Data Act, Title II of the Evidence Act, requires independent agencies such as the FCC and executive branch agencies to publish public government data assets as machine-readable data.³⁶¹ OPEN requires agency heads to conduct information resource management activities to promote productivity, efficiency, and effectiveness per 44 U.S.C. § 3506.³⁶²

The FCC IT Strategic Plan FY 2021–2023 published on January 6, 2021, lists a goal of informing FCC rulemakings consistent with the OPEN Act.³⁶³ That IT Strategic Plan did not include any initiatives to digitize and publish FCC analog media ownership and licensing information. The “Open Government at the FCC” webpage heralds the Commission’s broadband mapping work as its flagship data initiative.³⁶⁴ Mapping broadband access is critical, but it does not substitute for media ownership data publication.

The OPEN Act mandates that government data should be open by default and mandates open format data publication for data collected after the Act’s effective date.³⁶⁵ That Act requires agencies to develop a data inventory that accounts for any “data asset created, collected, under the control or direction of, or maintained by the agency.”³⁶⁶ Older government agency data kept in analog format should be included in the data inventory, although the Act does not appear to require an open format for data collected in the past.

Commissioner Stark emphasized that FCC data practices must comply with the OPEN Act. His dissent in the 2019 FCC inquiry into broadband and advanced telecommunications capability argued the “FCC should also ensure that its Form 477 data set [reporting on broadband internet access] complies

360. FCC, *Enterprise Data Management Council, Governance* (Jan. 2020), <https://www.fcc.gov/sites/default/files/fcc-data-governance-council-charter-january-2020.pdf>.

361. OPEN Act, Pub. L. No. 115–435, *enacting* 44 U.S.C.A. § 3520A (amending 44 U.S.C.A. §§ 3502, 3504, 3506, 3511, 3520, and enacting provisions set out as notes under 44 U.S.C.A. §§ 101, 3506, 5 U.S.C.A. § 306 (West 2022)).

362. OPEN Act, *supra* note 361, at 3561(a) referencing 44 U.S.C. § 3502.

363. *See* FCC, *FCC IT Strategic Plan FY2021–2023* (Jan. 6, 2021), <https://www.fcc.gov/sites/default/files/fcc-it-strategic-plan-fy2021-2023.pdf> (listing as a strategic goal: “Provide information about the status of matters pending before the FCC by developing and posting information online and communicating with stakeholders.”).

364. FCC, *Open Government at the FCC*, <https://www.fcc.gov/managing-director/privacy-transparency/open-government-fcc> (last visited Jan. 31, 2022).

365. 44 U.S.C. § 202 (C)(2)(b)(i)(I) (2018).

366. 44 U.S.C. § 3511(a)(1) (2018).

with the Open Government Data Act which requires it to publish much of its non-confidential data in machine-readable format.³⁶⁷ Commissioner Stark's rationale applies with equal force to the FCC's broadcast licensing data.

The FCC's data strategy should support sound longitudinal analysis. The Commission's previous attempt to compare FCC Form 323 data and NTIA data gathered before 2000 created an apples-to oranges-mismatch. The Supreme Court's *Prometheus* decision allowed the FCC to insert predictive analysis into that data gap. Consistent with the principles of the Open Data Act adopted after the FCC's 2016–2018 media ownership reviews analyzed in *Prometheus*, the FCC should do more than tolerate information gaps created by the FCC's faulty data jurisprudence.

This Article does not advocate replicating a “before-after comparison” of pre- and post-2009 data. A “before-after comparison” assumes that the data from before a point in time are comparable to the data that would have been collected after that point—but for the occurrence of a specific change.”³⁶⁸ The American Statistical society criticized in its *Prometheus* Amicus brief in support of respondents the FCC's attempt to construct incompatible before and after datasets comparing FCC and NTIA data using different methodologies.³⁶⁹ The FCC and NTIA research suggested herein should do more than report minority ownership data before the '96 Act, and female ownership data as it became available, and compare it to the twenty-five years following the '96 Act.

NTIA and FCC analysis should examine market entry data including FCC and congressional programs and policies which facilitated the *first* FCC license acquisition by a diverse broadcaster. 53% of minority radio licensees in 2009 obtained their first FCC licenses prior to the '96 Act.³⁷⁰ This entry point is significant as the '96 Act “ended the restrictions on the number of stations a corporation could control nationally and dramatically raised the number of stations that could be under common control in a local market.”³⁷¹

This Article renews the author's call for the FCC and NTIA to study opportunities for first FCC license acquisition in the context of FCC rules, and their consequences for market entry and expansion opportunities. The author's study of minority commercial radio licensees in 2009 found that most

367. *In re Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion*, 34 FCC Rcd. 3857 (2019) (Commr. Starks, dissenting).

368. *Id.* at 4–5.

369. Brief for the American Statistical Society as Amicus Curiae Supporting Respondents at 2, 4–5, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

370. *Sandoval, Minority Commercial Radio Ownership in 2009*, *supra* note 288, at 19–20.

371. *Id.*

minority licensees then existing acquired their first FCC license prior to 1996 when the market was less consolidated and FCC policy promoted minority license acquisition under an intermediate scrutiny standard.³⁷² Research on this topic has gone unexamined by the FCC, NTIA, and other scholars. Access to FCC archival data is necessary to analyze this issue. Understanding more about minority entry through the Tax Certificate program, for example, would inform Congressional consideration of the reauthorization of the Tax Certificate and FCC media ownership rule reviews.³⁷³

IX. RECOMMENDATIONS AND CONCLUSION: CONGRESSIONAL LEGISLATION TO REQUIRE NTIA AND THE FCC TO STUDY OF MINORITY AND FEMALE LICENSE OWNERSHIP

Prometheus, we have heard thy call.

Aeschylus, *Prometheus Bound*, 430 BCE³⁷⁴

Broadcast media forms a critical infrastructure service vital to America's economy, safety, and deliberative democracy. The public interest counsels declining the *Prometheus* decision's invitation to remain in data darkness. Unless we do so, the Promethean cycle of underinformed decision-making based on acknowledged FCC data gaps will continue. Those gaps perpetuate low levels of minority and female access to FCC licenses rooted in FCC data and licensing jurisprudence. We should not have to lament the continued consequences of poor FCC data jurisprudence when commemorating the centennial of the Communications Act of 1934.

To end the Promethean cycle of FCC analytical failure that diserves both community information needs and the overall public interest, this Article urges Congress to order the FCC to digitize its archival data and create a free, public-facing, machine-readable database that supports longitudinal analysis. Applying modern data management methods to FCC data will build government and public analytical capacity, empower democracy, and foster government accountability. The FCC's database development should also improve the transparency and consistency of its Form 323 reporting. These digitization and data openness initiatives also fulfill OPEN Act requirements

372. *Id.* at 297.

373. *Sandonal Congressional Testimony*, *supra* note 184 (urging support for Congressional passage of bills to reauthorize the FCC tax certificate program); *See* Expanding Broadcast Ownership Opportunities Act of 2021, H.R. 4871, 117th Cong. (2021) (introduced by Congressman Butterfield and proposing to reauthorize the FCC Tax Certificate program).

374. AESCHYLUS, *supra* note 1.

to enhance public access to government data and improve accountable public decision-making.

Digitizing and publishing in a machine-readable database FCC broadcast records from its inception through the present will create a foundation to examine proposals to promote minority and female licensing opportunities under the strict and intermediate scrutiny standard, respectively. This data would inform an *Adarand* study and examination of the nexus of FCC policy and license entry windows for minorities, women, and small businesses. It would inform FCC media ownership rules under § 202(h) and other FCC dockets. Digital publication of FCC records will also reveal whether there is a basis for remedial action to address the FCC's licensing and data jurisprudence that created and perpetuated the paucity of broadcast licenses held by minorities and women.

The FCC should be ordered to report to Congress on the data transparency and analytical initiatives recommended herein (with opportunities for public comment). NTIA should also develop a methodology to document minority and female FCC license control prior and subsequent to the '96 Act.

FCC data analysis is a foundational requirement for consideration of initiatives to promote access to licenses for a diverse range of Americans including minorities and women. Congressional and Executive mandates for FCC and NTIA data and research initiatives recommended herein must be accompanied by sufficient funding to support this investment in decision-making integrity, government accountability, and participatory democracy.

Investing in FCC data access will empower citizens, academics, government agencies, businesses, public interest organizations, and others to engage in analysis that informs communications policy and first amendment values. Addressing and solving this data gap invests in democratic capacity and the future.

The FCC's data gaps are not a technology problem. Technology is readily available to scan and digitize FCC data and create public-facing, machine readable databases within two years or less. The FCC has the legal authority under the Communications Act's public interest, public safety, and media ownership diversity requirements to order the digitization and publication of its record. Doing so would be consistent with the OPEN Act's default to open and digitally available data. The decision to shift from data darkness to data democracy is the missing predicate to solving this problem.

Mark Lloyd and Lewis Friedland argue that there "is a communications crisis in America" not caused by lack of technology or opportunities to harness

profit in the market, but due to poor public policy.³⁷⁵ “Our communication ecology is not meeting the critical information needs of the public because our public policies are badly made and misinformed.”³⁷⁶ Ensuring FCC regulatory policy serves the needs of the diverse American public is vital to our safety, equity, and future.

Lewis Friedland emphasized “Americans need information to govern themselves, to participate effectively in society, and to be safe.”³⁷⁷ America’s democracy, economy, and safety depend on a vibrant, diverse, and inclusive media ecosystem, and public policy that achieves those aims. Ending the FCC’s tolerance of data darkness will inform public policy, enable service to all Americans, foster opportunity, and spur equity in the public interest.

375. Mark Lloyd & Lewis A. Friedland, *Solving America’s Communications Crisis*, in *THE COMMUNICATION CRISIS IN AMERICA, AND HOW TO FIX IT*, xxix (Mark Lloyd and Lewis A. Friedland, eds., Palgrave Macmillan, 2016).

376. *Id.*

377. Lewis A. Friedland, *America’s Critical Community Information Needs*, in *THE COMMUNICATION CRISIS IN AMERICA, AND HOW TO FIX IT* 3 (Mark Lloyd & Lewis A. Friedland, eds., Palgrave Macmillan 2016).

