THE FORGOTTEN PUBLIC INTEREST STANDARD

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I. INTRODUCTION

In 2017, Federal Communications Commission (FCC) Chairman Ajit Pai issued an order to revoke the Commission's long-standing rules against media cross-ownership. The move allowed broadcasters to increase the number of television and radio stations they could own. Less than a month later, Sinclair Broadcast Group—the second-largest television station broadcaster in the

DOI: https://doi.org/10.15779/Z38M32NB6N

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United States[1]—took advantage of the FCC's newfound leniency. In a landmark $3.9 billion deal, Sinclair proposed to buy a rival competitor, Tribune Media.[2] Sinclair sought to own or control stations televising to more than 73% of all households with a television set in the United States through the merger.[3] Less than a month after the deal was proposed, Sinclair was accused of forcing dozens of its local news anchors to recite an identical script in newsrooms all across America.[4] The company was not only gaining corporate control of a supermajority of America's television stations, but it was ensuring that American viewers were hearing a uniform message from a singular source. While the merger ultimately failed to materialize due to competition concerns, the potential ramifications would have affected even more foundational aspects of America's democracy.[5] The 2017 rule change and Sinclair's attempt to consolidate the industry was only the latest struggle over the future of media regulation.

Media broadcasting has been governed by the public interest standard for nearly one hundred years. First introduced in the Radio Act of 1927, the public interest standard requires broadcast licensees to operate in the "public interest, convenience and necessity."[6] The policy emerged from a compromise between commercial broadcasters and public interest groups.[7] The federal government established a licensing regime for broadcasters but required them to uphold the public interest. The term was never statutorily defined but it adopted long-held principles reflective of independent media and the freedom of press—namely, diversity, localism, and competition.[8]

1. Neil Macker, *New Coverage of TV Station Owners*, MORNINGSTAR (Jan. 1, 2020), https://www.morningstar.com/articles/961093/new-coverage-of-tv-station-owners.

2. Sydney Ember & Michael J. de la Merced, *Sinclair Unveils Tribune Deal, Raising Worries It Will Be Too Powerful*, N.Y. TIMES (May 8, 2017), https://www.nytimes.com/2017/05/08/business/media/sinclair-tribune-media-sale.html.

3. Klint Finley, *FCC Wants to Ease Rules to Benefit Broadcast Giant Sinclair*, WIRED (Oct. 27, 2017), https://www.wired.com/story/fcc-wants-to-ease-rules-to-benefit-broadcast-giant-sinclair/.

4. Jacey Fortin & Jonah Engel Bromwich, *Sinclair Made Dozens of Local News Anchors Recite the Same Script*, N.Y. TIMES (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html.

5. Reuters, *Tribune Media Sues Sinclair for $1 Billion in Damages After Terminating $3.9 Billion Acquisition Deal*, CNBC (Aug. 9, 2018), https://www.cnbc.com/2018/08/09/tribune-media-terminates-deal-to-be-bought-by-sinclair.html.

6. Radio Act of 1912, ch. 287, § 1, 37 Stat. 302.

7. *See The Public Interest Standard in Television Broadcasting*, BENTON INST. FOR BROADBAND & SOC., https://www.benton.org/initiatives/obligations/charting_the_digital_broadcasting_future/sec2 (last visited Nov. 10, 2023) [hereinafter BENTON INST.].

8. *See infra* Section II.C.

The purpose of this Note is to remember the forgotten public interest standard and reverse course on the last thirty years of harmful deregulation in the broadcasting industry. In Part II, this Note traces the origins of media regulation in the United States and how the public interest standard emerged as an important mechanism for democratic governance. Born out of the fear of oligopolies in media ownership, the public interest standard was designed to protect against a concentrated media environment. After its founding, it was enforced to this end for the next fifty years. The last thirty years have been a departure from the original purpose of the law. In Part III, this Note traces how the public interest standard has been interpreted and enforced by two separate political camps: proponents of the democracy model and proponents of the efficiency model. This Part aligns the purposes of the public interest standard with the democracy model, while describing the efficiency model as an aberration promoted by corporate interests at the expense of a vibrant, diverse, and representative democracy.

The following Parts focus on recent developments and the future of the public interest standard. In Part IV, the article analyzes *FCC v. Prometheus Radio Project*—the most recent Supreme Court case that reviewed the FCC's administrative authority and allowed the Commission to revoke media cross-ownership rules. The Court ignored the normative issues concerning the public interest standard. However, Justice Clarence Thomas wrote a concurring opinion where he objected to the Third Circuit imposing a procedural requirement for the FCC to consider minority and female ownership during their rule review process. Justice Thomas described diversity ownership merely as a proxy for viewpoint diversity, and thus unwarranted. By setting this distinction, Thomas attempted to define the FCC's regulatory target as consumers, rather than producers. However, this distinction is irrelevant. First, the FCC has continuously pursued diversity ownership through rules and regulations over the course of decades. Second, it is unlikely that the FCC could ever achieve viewpoint diversity with respect to minorities and women without promoting diversity ownership.

Finally, Part V charts a path for reversing the current trajectory of media deregulation. The FCC must revitalize enforcement of the public interest standard and interpret it as designed—by prioritizing democratic safeguards ahead of efficiency and economic competition. In practice, this means that the FCC should reinvoke ownership rules to prevent market concentration and only relax them in small- to mid-sized markets where there is substantial evidence of market failure. If a local market cannot sustain competition among multiple broadcasters, then the FCC should allow mergers that will ensure that consumers are receiving quality information. To avoid cyclical rulemaking, Congress should pass a revised Communications Act that provides greater protections to the public interest and takes account of technological changes since 1996.

II. THE ORIGINS OF THE PUBLIC INTEREST STANDARD

A. THE HISTORY OF MEDIA REGULATION IN THE UNITED STATES

The media and its influence on the public have always been vital to American democracy. While the Constitution was written in secrecy, it was reprinted by almost all newspapers and vigorously debated.[9] In 1804, Thomas Jefferson wrote, "Our first object should therefore be, to leave open to him all the avenues to truth. The most effectual hitherto found, is the freedom of the press."[10] Likewise, James Madison opined that, "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or perhaps both."[11] The freedom of the press and access to independent sources were at the root of the Founders' concerns.[12] These principles have driven the purpose of media regulation ever since.

Like the early United States, most democracies viewed concentrated media ownership as a threat to press freedom and democracy.[13] As a result, media diversity became a guiding principle for regulators. At the federal level, since its founding in the 1700s, the Postal Service heavily subsidized postage rates to support a growing newspaper industry.[14] Likewise, state and local governments took legislative action to ensure that their communities did not fall victim to market capture and were serviced by varied interests. In 1821, the New York State constitution required that "every citizen may freely speak,

9. *See* ANTHONY FELLOW, AMERICAN MEDIA HISTORY 12 (2012).

10. Letter from Thomas Jefferson to John Tyler (June 28, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON, at 33 (Albert Ellery Bergh ed., 1907).

11. Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, at 103 (Gaillard Hunt ed., 1910).

12. Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 469–70 (2012).

13. *See* C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 2 (2007).

14. *See* RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE (1995); RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700–1860S (1989); RICHARD D. BROWN, THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA, 1650–1870 (1996); PAUL H. STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS (2004).

write and publish his sentiments on all subjects."[15] Toward the end of the century, New York explicitly sought to promote competition and diversity among the newspaper industry by requiring local governments to advertise in at least two local papers of different parties.[16] Legislators became even more concerned with concentrated ownership as industrialization consolidated the national economy.

Beginning with the American Industrial Revolution, the growth of the media industry rapidly expanded beyond local operations managed under local ownership. The march westward to the Pacific was matched by a rapid modernization in technology and a natural lean toward growth-oriented businesses and economies of scale. New technology—such as the steam-powered "double-press"—had a profound impact on the industry's capabilities, allowing newspapers to increase production tenfold overnight.[17] Later, the introduction of the telegraph and radio outgrew the local business models of newspapers and expanded their reach and content to suit more regional and national audiences. As the communications industry evolved, industry founders adopted the idea of enlightened monopolies characterized by concentrated ownership.[18]

For the first time in history, mere individuals had control over an instantaneous and massive information industry. In 1926, Texas Democrat Representative Luther Alexander Johnson warned that "American thought and American politics will be largely at the mercy of those who operate [broadcast] stations."[19] This sentiment was not only pervasive among political observers worried about democratic decline, but also among cultural critics which recognized the power of media in shaping social patterns. In an essay titled "The Outlook for American Culture," writer Aldous Huxley criticized the media's newfound efficiency: "Mass production is an admirable thing when applied to material objects; but when applied to things of the spirit it is not so

15. Heming Nelson, *A History of Newspaper: Gutenberg's Press Started a Revolution*, WASH. POST (Feb. 11, 1998), https://www.washingtonpost.com/archive/1998/02/11/a-history-of-newspaper-gutenbergs-press-started-a-revolution/2e95875c-313e-4b5c-9807-8bcb031257ad.

16. *See* BAKER, *supra* note 13, at 2.

17. Nelson, *supra* note 15.

18. *See* TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 7–8 (2010).

19. Steve Rendall, *The Fairness Doctrine: How We Lost it and Why We Need It Back*, SISYPHUS (July 2018), https://sisyphuslitmag.org/2018/07/the-fairness-doctrine-how-we-lost-it-and-why-we-need-it-back/.

good."[20] In government and in social circles, the independence and diversity of media was widely considered sanctimonious.

B. THE GREAT COMPROMISE: COMMERCIAL BROADCASTERS AND PUBLIC INTEREST GROUPS

As the national communications industry grew larger and broadcasting technology became sufficiently pervasive, there was a pressing need for federal government oversight. Initially, Congress passed the Radio Act of 1912 and authorized the Department of Commerce to regulate the distribution of radio licenses.[21] It was illegal to transmit on radio without a license;[22] however, due to the broad availability of spectrum frequency, the Commerce Secretary had no authority to deny licenses.[23] By the mid-1920s, this decentralized approach ran into interference issues as there was no mechanism to coordinate frequencies and power levels.[24] Congress sought to prevent market failure and protect the value of wireless services by establishing a system of regulatory control. However, in doing so, Congress needed to balance two separate goals: fostering commercial development of the industry and ensuring that broadcasting served the informational needs of American citizens.[25]

Commercial broadcasters and public interest groups needed to reach a compromise.[26] The commercial broadcasters, represented by the National Association of Broadcasters (NAB), worried that signal interference thwarted the development of broadcasting and preferred a certain level of administrative coordination. At the same time, the industry was adamant about retaining editorial control over programming and the ability to organize individual

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20. Aldous Huxley, *The Outlook for American Culture: Some Reflections in a Machine Age*, HARPER'S MAG. (Aug. 1927), https://harpers.org/archive/1927/08/the-outlook-for-american-culture/.

21. *See* Radio Act of 1912, ch. 287, 37 Stat. 302.

22. *See id.*

23. *See* BENTON INST., *supra* note 7.

24. By 1916, there were approximately 500 radio stations operating in the United States with only 89 available wave-length channels. There were approximately 400 stations applying for broadcasting licenses, yet no more than 331 stations could operate on the spectrum without significant interference. *See* James Patrick Taugher, *The Law of Radio Communication with Particular Reference to a Property Right in a Radio Wave Length*, 12 MARQ. L. REV. 179, 181 (1928); *see also* Jennifer Davis, *Anniversary of the Radio Act of 1927, The Beginning of Broadcast Regulation*, LIBR. CONGRESS BLOG (Feb. 23, 2016), https://blogs.loc.gov/law/2016/02/anniversary-of-the-radio-act-of-1927-the-beginning-of-broadcast-regulation/.

25. *See* BENTON INST., *supra* note 7.

26. *See id.*

broadcasting stations into national networks.[27] Meanwhile, public interest groups feared that a national licensing system would give preference to commercial interests and suppress free speech interests.[28] A number of free speech advocates—including politicians, educators, labor activists, and religious groups—argued for a common carriage regime that would prohibit broadcasters from denying public interest groups access to their channels and allow anyone to buy airtime.[29] By resolving these competing interests, the federal government could encourage innovation in the broadcasting industry while retaining the public benefits of these technologies.

With the passage of the Radio Act of 1927, and later the Communications Act of 1934, Congress resolved the broadcasting dispute. First, Congress banned common carrier regulation and mandated a government-sanctioned licensing regime.[30] The FRC, and later the FCC, was authorized to assign licensees designated channels in the electromagnetic spectrum. Without common carriage, Congress limited free speech rights to broadcasters with a valid license. However, this exclusionary licensing regime was justified when Congress simultaneously introduced a requirement that broadcast licensees must operate in the "public interest, convenience and necessity."[31] Broadcasters were entrusted with spectrum allocation in return for guarantees that they would serve the public interest by adhering to certain factors. The Supreme Court has referred to broadcasters' role as public "fiduciaries" under this arrangement,[32] and the FCC has stated that a "station itself must be operated as if owned by the public . . . as if people of a community should own a station and turn it over to the best man in sight with this injunction: 'Manage this station in our interest . . . .'"[33] The purpose of the public interest was generally resolved, however the standard itself remained relatively vague.

Despite its deep reverence for the media as a democratic governing institution, the FCC never defined the "public interest" after its inception in

27. Stuart N. Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, BROOKINGS INST. (Mar. 23, 2017), https://www.brookings.edu/articles/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation/.

28. *See* BENTON INST., *supra* note 7.

29. *See id.*

30. *See id.*

31. *See id.*

32. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969).

33. John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMM. B. J. 5, 14 (1950) (citing to a 1930 Federal Radio Commission decision).

the Radio Act of 1927.[34] Both the Radio Act and the Communications Act of 1934 refer to the "public interest" in various forms without providing an explicit statutory definition.[35] As such, it has been difficult to institutionalize the public interest standard; its interpretation and enforcement has changed over time to reflect the contemporary doctrinal mainstream or the political leanings of the revolving Executive Branch.[36] Former FCC Commissioner Ervin Duggan once opined that "[s]uccessive regimes at the FCC have oscillated wildly between enthusiasm for the public interest standard and distaste for it."[37] Despite certain administrations showing distaste, both sides have invoked their interpretation of "public interest." The FCC has never done away with the public interest standard—instead, courts and the Commission's leadership have shaped policy through administrative orders and precedent. While the standard applies to all FCC rulemaking, it has been ardently disputed in the context of media ownership.

C. THE PUBLIC INTEREST FACTORS AND CROSS-OWNERSHIP

Since its founding, the FCC has been concerned with ownership concentration and its influence on viewpoint diversity.[38] In 1938, the FCC adopted a presumption against granting radio licenses that would create duopolies—common ownership or control of stations with overlapping signal contours—specifically to uphold the "diversification of service."[39] A few years later, the Commission instated a television duopoly rule which barred a single entity from owning two or more broadcast television stations that "would substantially serve the same area."[40] Both in its approach to radio and

34. Becky Chao, *The Value of the FCC's Public Interest Mandate in Empowering Community Voices*, NEW AM. (Dec. 14, 2017), https://www.newamerica.org/millennials/dm/value-fccs-public-interest-mandate-empowering-community-voices/.

35. *See, e.g.*, 47 U.S.C. §§ 201(b), 215(a), 319(c), 315(a) ("public interest"); §§ 214(a), 214(c) ("public convenience and necessity"); § 214(d) ("interest of public convenience and necessity"); §§ 307(a), 309(a), 319(d) ("public interest, convenience and necessity"); § 307(a) ("public convenience, interest or necessity"); §§ 311(b), 311(c)(3) ("public interest, convenience or necessity").

36. *See* J. Roger Wollenberg, *The FCC as Arbiter of "The Public Interest, Convenience, and Necessity," in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 61, 77–78 (Max Paglin ed., 1989).

37. *Public Interest and Localism: Hearing Before the Comm. on Commerce, Sci., & Transp.*, 108th Cong. 18 (2003) (prepared statement of Robert Corn-Revere, Partner, Davis Wright Tremaine LLP).

38. *See* Christa Corrine McLintock, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 585 (2004).

39. Genesee Radio Corp., 5 F.C.C. 183 (1938).

40. Part 4—Broadcast Services Other Than Standard Broadcast, 6 Fed. Reg. 2282, 2284–85 (May 6, 1941).

television ownership, the FCC favored policies that promoted diverse ownership and preserved viewpoint diversity across media markets.

Beginning in the 1960s, the FCC adopted three ownership rules concerning newspaper, broadcast, radio, and television.[41] In 1964, the agency adopted the Local Television Ownership Rule that restricts the number of local television stations that an entity may own in a single market. The rationale behind the FCC's decision was to have the rule "act indirectly to curb regional concentrations of ownership as well as overlap itself."[42] The Radio/Television Cross-Ownership Rule was implemented in 1970 and limited the number of combined radio stations and television stations that an entity may own in a single market. And finally, in 1975, the FCC adopted the Newspaper/Broadcast Cross-Ownership Rule that prohibits a single entity from owning a radio or television broadcast station and a daily print newspaper in the same media market. At the time, the agency implemented these rules to protect against media concentration.[43]

Under the Communications Act, each ownership rule needed to be justified in serving the public interest. The FCC sought to meet this standard by addressing three public interest factors: diversity, localism, and competition. First, in pursuit of diversity, the FCC targeted a variety of goals including a diversity of viewpoints, programing, and outlets, as well as increased diversity in ownership.[44] Critics have disputed which 'type' of diversity is most impactful to achieve the public interest and which type the FCC is required to consider when rulemaking.[45] Second, by restricting the quantity of media outlets that a company could own or control within a geographic market, the new rules allowed the agency to promote localism.[46] Healthy measures around competition were expected to stimulate localism as broadcasters compete for local viewers. However, critics have pointed to localism as an ill-defined and unjustified principle that limits political debate.[47] Finally, the new ownership

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41. *See* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1155 (2021).

42. Part 73—Radio Broadcast Services, 29 Fed. Reg. 7535, 7537 (June 12, 1964).

43. DOUGLAS GOMERY, THE FCC'S NEWSPAPER-BROADCAST CROSS-OWNERSHIP RULE: AN ANALYSIS 1 (2002).

44. *See* DANA A. SCHERER, CONG. RSCH. SERV., R45338, FEDERAL COMMUNICATIONS COMMISSION (FCC) MEDIA OWNERSHIP RULES 1 (2021), https://crsreports.congress.gov/product/pdf/R/R45338/3.

45. *See Prometheus*, 141 S. Ct. at 1161–62 (Thomas, J., concurring).

46. *See* SCHERER, *supra* note 44, at 26.

47. John Samples, *Broadcast Localism and the Lessons of the Fairness Doctrine*, CATO INST. (May 27, 2009), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa639.pdf.

rules promoted fair competition and aimed to protect against abusive exercises of market power.[48]

However, the relationship between fairness and competition is dynamic and complicated—it involves both normative and procedural challenges for the future of competition law. The following Sections briefly characterize the three public interest factors and explain how the Court and the FCC has interpreted them throughout the last century.

1. *Diversity*

The benefit of diversity to the public interest stems from its benefit to democracy. In a 1919 dissent, Justice Oliver Wendell Holmes wrote that "the ultimate good desired is best reached by free trade in ideas."[49] The free trade of ideas promises unimpeded exchange of information, dissent, accountability, and freedom of expression. These benefits recede when a dearth of diverse voices, sources, or content leads to a limited range of ideas. The FCC pursued this theory by passing the Financial Interest and Syndication ("FinSyn") Rules in 1970.[50] The FinSyn rules intended to "limit network control over television programming and thereby encourage the development of a diversity of programs through diverse and antagonist sources of program services."[51] By the early 1990s, the FinSyn rules were repealed as critics argued that they "undermined the role of independent producers rather than enhanced them" due to the financial barriers of entering and financing national broadcasting networks.[52] Nevertheless, their passage and surrounding debate evidences how diversity has always been a staple value of media regulation and consumption.

However, diversity has been seldom defined for the public interest.[53] In 1999, Duke Professor Phillip Michael Napoli produced a typology including the varieties of diversity.[54] Among the three main groups, Napoli included: source diversity, content diversity, and exposure diversity.[55] Source diversity is intended to produce a diversity of content in theory and provide viewers with

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48. *See id.* at 1.

49. Abrams v. United States, 250 U.S. 616, 630 (1919).

50. Jennifer Gonzalez, *Syndication Regulation and TV's Big Three: Broadcasting Regulations and 1970s Television*, LIBR. CONGRESS BLOG (Jan. 31, 2023), https://blogs.loc.gov/law/2023/01/syndication-regulation-and-tvs-big-three-broadcasting-regulations-and-1970s-television/.

51. *See* Phillip Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM. 7, 10 (1999).

52. Matthew P. McAllister, *Financial Interest and Syndication Rules*, *in* ENCYCLOPEDIA OF TELEVISION 875, 875 (Horace Newcomb ed., 2d ed. 2004).

53. *See supra* Section II.A.

54. *See* Napoli, *supra* note 51, at 1.

55. *See id.* at 10. Source diversity can be broken down into three separate categories according to Napoli: (a) ownership diversity of content or programming; (b) ownership diversity of media outlets; and (c) workforce diversity at media outlets.

options.[56] Content diversity is intended to expose consumers to new types of information that reflects the demographic diversity of the population and, ultimately, the different ideas and viewpoints that they represent. As such, it can be segmented into: (1) program-type format (e.g., comedy, drama, news program); (2) demographic diversity (i.e., portraying racially, ethnically, and gender diverse people in programming); and (3) idea-viewpoint diversity.[57] Finally, exposure diversity refers to the content that consumers ultimately are exposed to and which enables their participation in the marketplace of ideas.[58] The Supreme Court has suggested that regulators' pursuit of policies that encourage exposure to diverse sources and diverse content are in line with free speech principles and promote the public interest.[59] When the FCC has promulgated new regulations or the Court has interpreted the public interest, they have considered one or several of these factors with varying levels of specificity.

For instance, in *FCC v. Prometheus Radio Project*, the issue of minority ownership was a crucial dispute.[60] Industry respondents rejected minority ownership from the FCC's consideration under § 202(h).[61] While minority ownership was not a consideration by the FCC prior to 1973,[62] this changed when the D.C. Circuit Court of Appeals held that race was a "relevant and substantial" factor in the FCC's evaluation of radio license applicants.[63] Shortly thereafter, the FCC extended their diversity ownership consideration to women as well.[64] The D.C. Circuit affirmed the importance of minority

56. Source diversity has been the focus of merger proceedings. However, in 2002 the FCC could not conclude that source diversity should be a policy goal of the agency's broadcast ownership rules. *See* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620, 13633 (2003), https://www.fcc.gov/document/2002-biennial-regulatory-review-review-commissions-broadcast-3 [hereinafter 2002 Review I].

57. *See* Napoli, *supra* note 51, at 11.

58. *See id.* at 24–25.

59. *See* New York Times v. Sullivan, 376 U.S. 254 (1964); Red Lion Broadcasting Co. v. Federal Communications Comm., 395 U.S. 367 (1969).

60. 141 S. Ct. at 1155.

61. *See* Reply Brief for Industry Petitioners at 4, FCC. v. Prometheus Radio Project, 141 S. Ct. 1150 (2021) (Nos. 19-1231 & 19-1241) [hereinafter Reply Brief for Industry Petitioners] (arguing "Section 202(h) does not expressly direct the FCC to consider minority and female ownership, and 'the public interest" cannot be understood as implicitly requiring the Commission to do so.'").

62. Robert B. Horwitz, *On Media Concentration and the Diversity Question*, 21 INFO. SOC'Y 181, 190 (2005).

63. TV 9, Inc. v. FCC, 495 F.2d 929, 942 (1973).

64. Gainesville Media, Inc., 70 F.C.C.2d 143, 149 (Rev. Bd. 1978).

ownership in 1983 because "our society benefits from exposure to a broad diversity of ideas and perspectives."[65]

However, before *Prometheus*, diversity ownership also faced several challenges from a set of Justice Sandra Day O'Connor dissents in the early 1990s.[66] In *Metro Broadcasting*, the majority reasoned that equal employment opportunities would increase minority employment and "contribute significantly toward reducing and ending discrimination in other industries."[67] O'Connor wrote that the FCC's claim "that members of certain races will provide superior programming" should not be legitimized and upheld to a strict scrutiny standard.[68] Similarly in *Turner Broadcasting*, the Court held that cable broadcasters must carry local broadcast signals.[69] Once again, O'Connor stressed the importance of maintaining "constitutional requirements" for any interest in diversity of viewpoint or localism that preferences certain speech and restricts other.[70] In 1995, O'Connor was finally able to write a majority opinion in *Adarand Constructors, Inc. v. Pena* to overrule intermediate scrutiny for race-based ownership regulations.[71] Nevertheless, the Court has never prohibited the use of race-neutral ownership regulation as a means to achieve racial diversity. The lengthy history of the FCC's diversity regulation, and particularly its diversity ownership consideration, underscores its role in promoting the public interest.

2. *Localism*

Localism has been a core mission and policy goal of the FCC.[72] Under Title III of the 1934 Communications Act, broadcasters must serve the public interest and must air programing that is "responsive to the interests and needs of their communities of license."[73] Section 307(b) requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of [radio] service to each of the same."[74] The FCC

65. W. Mich. Broad. Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

66. Metro Broad. v. FCC, 497 U.S. 547 (1990); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

67. *Metro*, 497 U.S. at 555.

68. *Id.* at 620.

69. *Id.* at 637.

70. *Id.* at 680–81, 685.

71. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

72. *See, e.g.*, Deregulation of Radio, 84 F.C.C.2d 968, 994 ¶ 58 (1981) ("The concept of localism was part and parcel of broadcast regulation virtually from its inception.").

73. Broadcast Localism, 19 FCC Rcd. 12425 (2004).

74. 47 U.S.C. § 307(b).

has respected and enforced the concept of localism because "every community of appreciable size has a presumptive need for its own transmission service.."[75] However, there is no specific statutory basis for a localism requirement nor an explicit mandate; the Commission has interpreted the concept of localism as a derivative of Title III's broad authority and a factor within the Communications Act's public interest standard.[76]

The history of localism and § 307(b) explains how an informal principle became a regulatory obligation.[77] Beginning with the Federal Radio Act of 1927 ("1927 Act"), there has been no explicit reference to serve "specific" or "local" communities.[78] The 1927 Act provided that, the FRC, when granting or renewing licenses, must consider "a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient and equitable radio service to each of the same."[79] According to the legislative history, allotment on an equitable basis "among States" was core to the provision.[80] A year later, Congress passed the Davis Amendment to amend § 9 of the 1927 Act to distribute broadcast services among five geographical zones, where licenses where allocated to specific states or zones.[81] When the 1934 Communications Act was passed and the FCC replaced the FRC, § 307(b) was nearly identical to § 9 of the 1927 Act.[82] Further, the Davis Amendment was repealed due to difficulties in administering the zone system.[83]

In the succeeding decades of the FCC's existence, there was no forceful localism obligation, but the Commission referenced the importance of broadcast localism. As part of the *Report on Chain Broadcasting* in 1941, the Commission stated that "[l]ocal program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local

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75. Pac. Broad. of Mo. L.L.C., 18 FCC Rcd. 2291 (2003) (quoting Pub. Serv. Broad. of W. Jordan, Inc., 97 F.C.C.2d 960, 962 (Rev. Bd. 1984)).

76. Harry Cole & Patrick Murck, *The Myth of the Localism Mandate: A Historical Survey of How the FCC's Actions Belie the Existence of a Governmental Obligation to Provide Local Programming*, 15 COMMLAW CONSPECTUS 339, 341–42 (2007).

77. *Id.* at 343–60.

78. *Id.* at 343.

79. Federal Radio Act of 1927, Pub. L. No. 69-632, § 9, 44 Stat. 1162, 1166.

80. 3 F.R.C. Ann. Rep. 1, 82 (1928).

81. *See* Cole & Murck, *supra* note 76, at 344–45.

82. *See id.* at 346.

83. *See* TYLER BERRY, COMMUNICATIONS BY WIRE AND RADIO 134 (1937) (citations omitted); Cole & Murck, *supra* note 76, at 347.

consumer and social interest."[84] Further, the FCC held that "programs of local self-expression" were vital to a broadcaster's "full function."[85] Later in 1955, the Commission's *En Banc Programming Inquiry* focused on network television practices once again reiterated that a "significant element of the public interest is the broadcaster's service to the community."[86] The Inquiry held that "[t]he principal ingredient of such [localism] obligation consists of a diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his service area."[87] Increasingly, the Commission was stressing the importance of broadcast localism but nevertheless remained apprehensive about establishing concrete requirements—either due to its limited authority or due to fears over administration issues.

Beginning in the 1960s, the Commission pursued a regulatory system that incentivized broadcasters to advance localism even without a statutory obligation and without triggering First Amendment programming issues.[88] The FCC established several considerations for broadcasters seeking licenses or renewals, including: (1) maintaining a main studio in the community of license, and originating a majority of its content from that station;[89] (2) maintaining a local public inspection file with information about the station's operations;[90] (3) maintaining detailed logs that describe a station's local programing;[91] (4) establishing lines of communication between community representatives and the station;[92] (5) collecting public comments on a station's renewal application based on their performance to serve the local

84. FED. COMM'CNS COMM., REPORT ON CHAIN BROADCASTING, FCC Order No. 37, Docket No. 5060, at 63, 65 (1941).

85. *Id.* at 4.

86. Report and Statement of Policy Res: Commission En Banc Programming Inquiry, 44 F.C.C. 2303 (1960) [hereinafter En Banc Programming Inquiry].

87. *Id.* at 2312.

88. *See* Cole & Murck, *supra* note 76, at 358.

89. *See, e.g.*, Amendment of Parts 1 and 73 of the Commission's Rules and Regulations Pertaining to the Main Studio Location of FM and Television Broadcast Stations, Report and Order, 27 F.C.C.2d 851 (1971); Reiteration of Policy Regarding Enforcement of Main Studio Rule, 55 Rad. Reg. 2d (P & F) 1178 (1984); Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Stations, Report and Order (Proceeding Terminated), 2 FCC Rcd. 3215, 3216 (1987).

90. *See, e.g.*, 47 C.F.R. § 73.3526 (2006); Office of Commc'n of United Church of Christ v. FCC, 707 F.2d 1413, 1427–28 (D.C. Cir. 1983).

91. *See, e.g.*, Reregulation of Radio and TV Broadcasting, Order, 69 F.C.C.2d 979, 1002–08 (1978); *Office of Commc'n of United Church of Christ*, 707 F.2d at 1422.

92. *See, e.g.*, En Banc Programming Inquiry, *supra* note 86; Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV-A and IV-B of FCC Forms, Report and Order, 27 F.C.C.2d 650 (1971); Ascertainment of Community Problems by Broadcast Applicants, Memorandum Opinion and Order, 61 F.C.C.2d 1 (1976).

community.[93] Despite establishing these regulatory mechanisms, the Commission rarely denied licensing to a broadcaster that failed to adhere to public interest—and specifically, localism—programming.[94] The FCC approved thousands of licenses despite no proven record of broadcast localism and serious concerns about stations' programming performance.[95] By the 1970s, the Commission eliminated requirements to maintain program logging and program reporting.[96]

Broadcast localism, as some critics argue, has become a mere virtue and hardly an obligation. Throughout its history, the Commission has debated whether it should use its licensing renewal process or rely on market forces and programming rules to incentivize broadcasters to further localism.[97] Without proper policies to assess a broadcaster's performance in providing quantity and quality content to a local community, localism has largely been an unenforced factor of the public interest standard.

3. Competition

To evaluate competition, the FCC considers whether stations have adequate incentives to produce diverse news and public interest programming within their communities.[98] However, the history of competition in the United

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93. *See* Amendment of Section 1.580(m)(1)(iii) of the Rules, Governing Text of Licensee Notice to Public of Broadcast Renewal Application Filings, Memorandum Opinion and Order, 36 F.C.C.2d 685, 3 (1972).

94. *See, e.g.*, Applications of Moline Television Corp. (WQAD-TV), Moline, Ill. For Renewal of License of WQAD-TV; Community Telecasting Corp., Moline, 11. For Construction Permit, Decision, 31 F.C.C.2d 289 (1971); Application of National Broadcasting Company, Inc. For Renewal of License of Station WRC-TV, Washington, D.C., Memorandum Opinion and Order, 52 F.C.C.2d 273 (1975); Application of Talton Broadcasting Company For Renewal of License of Station WHBB, Selma, Alabama, Memorandum Opinion and Order, 58 F.C.C.2d 169 (1976); Application of Vogel-Hendrix Corporation For Renewal of License of Station WAMA, Selma, Alabama, Memorandum Opinion and Order, 58 F.C.C.2d 495 (1976); Applications of Leflore Broadcasting Company, Inc. (WSWG-AM) Greenwood, Mississippi Dixie Broadcasting Company, Inc. (WSWG-FM) Greenwood, Mississippi For Renewal of Licenses, Decision, 65 F.C.C.2d 556 (1977).

95. *See* Cole & Murck, *supra* note 76, at 360.

96. *See, e.g.*, Deregulation of Radio, 84 F.C.C.2d 968, 975 (1981); *see also* Deregulation of Radio, Memorandum Opinion and Order, 87 F.C.C.2d 796 (1981); *Office of Commc'n of United Church of Christ*, 707 F.2d at 1413; Deregulation of Radio, Second Report and Order (Proceeding Terminated), 96 F.C.C.2d 930 (1984); Office of Commc'n of the United Church of Christ v. FCC, 779 F.2d 702, 704 (D.C. Cir. 1985); Deregulation of Radio, Memorandum Opinion and Order (Proceeding Terminated), 104 F.C.C.2d 505 (1986).

97. Report on Broadcast Localism and Notice of Proposed Rule Making, 73 Fed. Reg. 8255 (Jan. 24, 2008).

98. 2014 Quadrennial Regulatory Review, 31 FCC Rcd. 9864, 9873 (2016) [hereinafter 2016 Second Report and Order].

States is a complex story characterized by cyclical and abrupt ideological shifts. While there are two agencies responsible for overseeing antitrust enforcement—namely, the Federal Trade Commission (FTC) and the Department of Justice (DOJ)—many other federal agencies regulate competition through their own rules. Over the one-hundred-and-thirty-year history of U.S. antitrust policy, the purpose of competition doctrine has oscillated between preserving democratic and social institutions and efficiently allocating economic resources.[99] It is no surprise that these competing doctrines closely reflect the dichotomy seen in the public interest models.[100]

At the end of the 19th century, Congress passed the first antitrust law in the United States—the Sherman Act of 1890. Born out of popular resentment for concentrated and unfettered monopoly power, the bill passed nearly unanimously in both chambers; only one senator voted against it.[101] The Sherman Act, as noted by the Supreme Court in 1958 and supported by one school of antirust thought, was premised on the idea that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[102] The delicate balancing of the Sherman Act's complementary goals—economic prosperity and democracy—indicates that early competitive regulation intended to quell private concentrations of economic power from having a detrimental impact on political and social institutions.[103] In Justice Louis Brandeis's words, antimonopoly laws intended to prevent "a power in this country of a few men so great as to be supreme over the law."[104]

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99. Sergei Boris Zaslavsky & Melissa H. Maxman, *Too Political or Not Political Enough? A Debate on the Relationship Between Antitrust Enforcement and Democracy*, A.B.A. (May 22, 2023), https://www.americanbar.org/groups/antitrust_law/resources/podcasts/our-curious-amalgam/too-political-or-not-political-enough/; Greg Ip, *Antitrust's New Mission: Preserving Democracy, Not Efficiency*, WALL ST. J. (July 7, 2021), https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424.

100. *See infra* Section III.A.

101. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 222 (1956).

102. N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

103. Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

104. Louis D. Brandeis, Bos. Bar, Address to the Economic Club of New York: The Regulation of Competition Versus the Regulation of Monopoly (Nov. 1, 1912), *in* 3 YEARBOOK OF THE ECONOMIC CLUB OF NEW YORK 7 (1913).

While competition laws went unenforced for decades due to administrative negligence and judicial aversion, competition was largely understood as an issue of political economy until the 1970s. Throughout the mid-20th century, Congress proceeded to pass the Federal Trade Commission Act to ban "unfair methods of competition" and "unfair or deceptive practices."[105] Fairness was prominently a characteristic of competition policy. Congress then passed the Clayton Act to address anticompetitive mergers and interlocking directorates.[106] The pursuit of the *competitive ideal*—an equitable dispersion of economic and political power to promote competition in line with democratic principles, as some scholars have defined it—characterized the "golden era" of competition enforcement.[107]

Beginning in the late 1970s, American competition doctrine experienced a profound change. The Chicago School, advanced by the work of Robert Bork, shifted the traditional understanding of antitrust toward a theory dominated by conservative economics.[108] In 1979, the Supreme Court held that "Congress designed the Sherman Act as a 'consumer welfare prescription'" and the consumer welfare standard became the doctrinal consensus for the next three decades.[109] While scholars have disagreed on aspects of consumer welfare, such as whether the analysis should end at price effects or total welfare, the Chicago School has prioritized efficiency and relied on the market to settle.[110] Critiques have challenged the consumer welfare standard as non-interventionist, and blamed that lax standard for increasing levels of inequality and market concentration.[111]

If the trajectory of competition doctrine sounds familiar, it is because the FCC's media ownership rules have largely followed along in parallel. The FCC

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105. 15 U.S.C. § 41.

106. 15 U.S.C. § 12.

107. Stucke & Ezrachi, *supra* note 103.

108. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice* (Columbia Pub. Law Research Paper No. 14-608, 2018), https://ssrn.com/abstract=3249173.

109. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

110. Daniel A. Crane, *Four Questions for the Neo-Brandeisians*, ANTITRUST CHRONICLE (April 2018), at 1, https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Crane.pdf.

111. *See, e.g.*, *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, BETTER DEAL, http://abetterdeal.democraticleader.gov/wp-content/uploads/2017/10/A-BetterDeal-on-Competition-and-Costs.pdf [https://perma.cc/J8CL-XJQL] (last visited Nov. 11, 2023) ("The extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.").

began with a presumption against concentrated ownership in the 1930s[112] and later instituted more stringent media ownership rules in the 1960s.[113] The rationales behind these rules were underpinned by a stringent commitment to the public interest and the media's role as a sociopolitical institution.[114] While these tradeoffs were not seen as counterintuitive to competition, the emergence of law and economics, as well as the consumer welfare standard, revolutionized competition doctrine. Because fairness was no longer perceived as necessary for markets to function well, any factors that would impede the efficiency model, such as diversity or localism, were considered anti-competitive.

III. THE FIGHT OVER AMERICA'S PUBLIC INTEREST

A. REGULATORY PURPOSE: DEMOCRACY VS. EFFICIENCY

Without an explicit definition, different FCC administrations have enforced the public interest standard to achieve their own political objectives. In his 2006 article "Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?," Georgetown Law Professor Howard Shelanski described two distinct public interest regimes that FCC administrations have pursued: the democracy model and the market-efficiency model.[115]

While each model claims to advance the public interest and prioritize the needs of American citizens, they envision the regulatory purpose of the law differently. The democracy model combines sociopolitical factors that prevent against concentrated ownership and promote local service and community.[116] The efficiency model relies on market mechanisms to produce quality broadcasting which in turn aims to provide viewers with better quality information.[117]

1. *The Democracy Model*

Under the democracy model, media regulation is intended to preserve the ideals of localism, multiple voices, and access.[118] While proponents advance

112. *Genesee*, 5 F.C.C. at 183.

113. *See supra* note 42 and accompanying text.

114. *See* Wu, *supra* note 108, at 11.

115. Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 371 (2006).

116. *Id.* at 384.

117. *Id.* at 383–84.

118. *See* Benjamin M. Compaine & Douglas Gomery, WHO OWNS THE MEDIA? COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 554 (2000).

these ideals for slightly different reasons, they generally seek to promote a well-informed citizenry through the means of independent media. For instance, Yale Professor Robert Post has argued that "democracy requires a public forum in which all policy goals are open for discussion and none . . . is taken as given."[119] Similarly, Edwin Baker makes the point that self-determination is critical to democracy; in order to self-govern, citizens must be able to form public opinion within an egalitarian media structure.[120] Others have argued that the democracy model achieves other benefits such as viewpoint, source, and racial diversity in ownership.[121] As such, proponents argue that diversity is critical among any media regulation objective.[122]

Arguably, the democracy model aligns with how the founders envisioned the development of the free press and how media regulation developed up until recent decades.[123] The FCC, Congress, and courts overwhelmingly aligned with the democracy model for most of the 20th century. In 1931, the Supreme Court first ruled on "public interest" in *KFKB Broadcasting Ass'n v. Federal Radio Commission*. The Court granted the FRC discretion to limit licensing based on the "character and quality of the service rendered."[124] A year later, in *Trinity Methodist Church v. Federal Radio Commission*, the Court allowed the FRC to deny a radio station broadcasting rights because it "obstructed the administration of justice, offended the religious susceptibilities of thousands, inspired political distrust and civic discord . . . and offended youth and innocence by the free use of words suggestive of sexual immortality."[125] In the early days of the public interest standard, the Court ensured that broadcast media was operating with a sense of decency and with civic purpose.

A few years later, Congress adopted the Communications Act of 1934 ("1934 Act"). The "equal-time rule," also known as § 315, required radio and television stations and cable systems to "afford equal opportunities" for

119. *See* Shelanski, *supra* note 115, at 387.

120. *See* BAKER, *supra* note 13, at 6–7.

121. *See* MCGANNON CTR., FORDHAM UNIV., THE CASE AGAINST MEDIA CONSOLIDATION: EVIDENCE ON CONCENTRATION, LOCALISM AND DIVERSITY 77, 201, 331 (Mark N. Cooper ed., 2017).

122. Geoffrey Starks, Commissioner, Fed. Commc'ns Comm'n, Remarks of Commissioner Geoffrey Starks at the FCC Communications Equity and Diversity Council's Media Ownership Diversity Symposium (Feb. 7, 2023), https://docs.fcc.gov/public/attachments/DOC-391014A1.pdf.

123. *Cf.* Shelanski, *supra* note 115, at 387 (noting that in 1940 the Supreme Court limited that mandate, declaring in *FCC v. Sanders Brothers Radio Station* that "the field of broadcasting is one of free competition . . . The Commission is given no supervisory control of the programs, of business management or of policy.")

124. KFKB Broad. Ass'n v. Fed. Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).

125. Trinity Methodist Church, S. v. Fed. Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932).

airtime to all legally qualified candidates for any public office.[126] This provision was explicitly enacted to protect against broadcasters abusing their political power and to ensure an informed public.[127] A decade after Congress passed the 1934 Act, the FCC issued the Public Service Responsibility of Broadcast Licensees, its first major guidelines on broadcast programming.[128] The document identified fourteen major elements of programming necessary to serve the public interest, including:

> (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, (14) entertainment programs.[129]

The great variety was intentionally set to ensure that the public received a diversity of content, otherwise it might not be covered due to market failures.

For instance, the development of local talent or service to minority groups was deemed important to the public even if there was no overwhelming consumer demand.[130] In 1943, the Supreme Court then once again affirmed the FCC's important role in regulating the public interest and upheld their authority to enforce the Chain Broadcasting Regulations.[131] The Court upheld the FCC's exercise of its statutory authority as constitutional because the "public interest" was not a "a mere general reference to public welfare without any standard to guide determinations" and "[t]he purpose of the [1936] Act, the requirements it imposes, and the context of the provision in question show the contrary."[132]

After the Second World War, the Commission on Freedom of the Press (also known as the Hutchins Commission and led by the famed Robert

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126. 47 U.S.C. § 315.

127. Richard G. Singer, *The FCC and Equal Time: Never-Neverland*, 27 MD. L. REV. 221, 236 (1967).

128. STEVEN WALDMAN, FED. COMMC'NS COMM'N, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 281 (2011).

129. *Id.* at 281.

130. *Id.*

131. Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

132. *Id.* at 226 (quoting N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932)); *see* Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 285 (1933); FCC v. Pottsville Broad. Co., 309 U.S. 134, 137–38 (1940). *Compare* Panama Refining Co. v. Ryan, 293 U.S. 388, 428 (1935), *with* Intermountain Rate Cases, 234 U.S. 476, 486–89 (1914), *and* United States v. Lowden, 308 U.S. 225 (1939).

Maynard Hutchins) reaffirmed the media's public interest role.[133] The Hutchins Commission concluded that the press was a "conveyer of information, government watchdog, and educator."[134]

Soon after, the FCC encountered First Amendment challenges to its public interest objectives and the Supreme Court once again upheld its authority. In 1949, the FCC introduced the now-defunct Fairness Doctrine which required broadcasters to present balanced coverage for controversial issues of public importance. The Fairness Doctrine intended to expose viewers to diverse information and prevent broadcasters from monopolizing the airwaves with biased coverage.[135] It wasn't until *Red Lion Broadcasting Co. v. Federal Communications Commission* that the Supreme Court addressed broadcasters' First Amendment rights and upheld the constitutionality of the Fairness Doctrine.[136] Referring to the legislative record for the Radio Act of 1927, the Court pointed to Congressman Byron R. White's reasoning for granting licenses "only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art."[137] The First Amendment challenge, as a matter of the public interest, became a recurring factor where the Court has remained sensitive but largely deferential to administrative authority.[138]

On several occasions, the Supreme Court explicitly recognized the importance of diversity within the public interest mandate in ways that align with the democracy model of media regulation. In 1972, the Court noted in *United States v. Midwest Video Corp.* that "it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'"[139] More recently in *Turner Broadcasting System, Inc. v. FCC*, Justice O'Connor quoted from the Cable Television Consumer Protection and Competition Act of 1992 to emphasize the role of diversity in media regulation: "[t]here is a substantial governmental and First Amendment

133. *See* COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (Robert D. Leigh ed., 1947).

134. *See* Horwitz, *supra* note 62, at 182.

135. KATHLEEN ANN RUANE, CONG. RSCH. SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 10 (2011).

136. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

137. *Id.* at 40.

138. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

139. 406 U.S. 649, 668 n.27 (1972) (plurality opinion).

interest in promoting a diversity of views provided through multiple technology media."[140]

From its emergence in the 1930s and up until the 1980s, the public standard doctrine was interpreted broadly and largely supported the democracy model of mass media regulation. The FCC used regulations, such as the cross-ownership rules, and its licensing authority to promote "localism, diversity of ownership, and diversity of programming."[141]

2. *The Efficiency Model*

Approximately fifty years ago, media regulation advocates softened their adherence to the democracy model and embraced the efficiency-oriented model.[142] The efficiency model seeks to serve consumer demand with greater efficiency by focusing on quality and responsiveness.[143] Free market conditions, proponents argue, can sufficiently supply the public with necessary information to make informed decisions without governmental intervention.[144] Further, efficiency advocates argue that the advent of the internet and the proliferation of other technologies have expanded access to different media sources.[145] Despite the alleged superiority of efficient enterprise and the abundance of outlets to choose from, these arguments did not prevail in media regulation policy until law and economics theories gained broader influence among policy circles.

Between the 1930s and the 1980s, there were only a few instances where the courts or the FCC used efficiency model rationales to support their decision-making.[146] In 1933, the Supreme Court held in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.* that the Commission's requirement to act as "public convenience, interest or necessity requires" did not equate to a "setting up a standard so indefinite as to confer an unlimited power."[147] In particular, the Court explicitly listed the factors which the Commission was required to consider, including: "its context, by the nature of

140. *Turner*, 512 U.S. at 676 (O'Connor, J., concurring in part and dissenting in part) (quoting Pub. L. No. 102-385, § 2(a)(6), 106 Stat. 1460 (1992)).

141. Shelanski, *supra* note 115, at 387.

142. *See id.* at 383.

143. *See id.*

144. Michael O'Rielly, *Defending Capitalism in Communications*, FED. COMM. COMMISSION: FCC BLOG (Feb. 12, 2016), https://www.fcc.gov/news-events/blog/2016/02/12/defending-capitalism-communications.

145. *Prometheus*, 141 S. Ct. at 1155 ("By the 1990s, however, the market for news and entertainment had changed dramatically. Technological advances led to a massive increase in alternative media options, such as cable television and the Internet.").

146. *See* Shelanski, *supra* note 115, at 387.

147. *Nelson Bros.*, 289 U.S. at 285.

radio transmission and reception, by the scope, character and *quality of services*, and, where an equitable adjustment between States is in view, by the *relative advantages in service* which will be enjoyed by the public through the distribution of facilities."[148] A few years later, in *FCC v. Sanders Brothers Radio Station,* the Court more forcefully held that "the field of broadcasting is one of free competition . . . . The Commission is given no supervisory control of programs, of business management or of policy."[149] This departure seemed at odds with other similar cases years prior, such as *Associated Press*, *KFKB*, and *Trinity Methodist Church*, where the Court relied on the agency to secure the public interest with broad discretion and oversight.[150] Despite this aberration, the Supreme Court persistently protected the democratic ideals of localism, diversity, and access throughout the mid-century.

It was only during the 1980s that deregulation and free market solutions came to dominate political thought in government.[151] In 1981, FCC Chairman Charles Ferris led a broadscale repeal of radio regulations because the public interest would be best served by eliminating "unnecessarily burdensome regulations of uniform applicability that fail to take into account local conditions, tastes or desires."[152] The Commission eliminated license-renewal guidelines requiring stations to offer non-entertainment programming, eliminated ascertainment requirements to evaluate community needs, removed restrictions on the number of commercials that could be aired, and abandoned requirements to keep public programming logs.[153] By 1984, President Ronald Reagan appointed FCC Chairman Mark Fowler who essentially transposed each of the radio rules on the television broadcasting stations.[154]

B. ERA OF DEREGULATION

The final blow to FCC's public interest deregulation came with the passage of the Telecommunications Act of 1996. A Republican-controlled Congress passed the law with overwhelming support—414 to 16 in the House and 91 to

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148. *Id.* (emphasis added).

149. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474–75 (1940).

150. Associated Press v. United States, 326 U.S. 1 (1945); *KFKB*, 47 F.2d at 670; *Trinity Methodist*, 62 F.2d at 850.

151. *See, e.g.*, Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 158–59 (2006); Harrison Donnelly, *Broadcasting Deregulation*, *in* EDITORIAL RESEARCH REPORTS 1987, at 629–44 (Hoyt Gimlin ed., 1988); Kevin M. Kruse & Julian Zelizer, *How Policy Decisions Spawned Today's Hyperpolarized Media*, WASH. POST (Jan. 17, 2019), https://www.washingtonpost.com/outlook/2019/01/17/how-policy-decisions-spawned-todays-hyperpolarized-media/.

152. WALDMAN, *supra* note 128, at 283.

153. *See id.* at 283–84.

154. *See id.* at 284.

5 in the Senate—and President Bill Clinton signed it into law.[155] The purpose of the act could be found explicitly in its long title: "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies."[156] With significant pressure from the broadcasting lobby, the 1996 Act dismantled the FCC's authority to regulate the public interest through license renewals.

First, Congress extended each license term from three to eight years for television and radio stations. Given the FCC's weak licensing enforcement, this ensured that broadcasters would maintain licenses for nearly a decade without much scrutiny before renewal. Second, Congress prohibited the FCC from considering competing applications before an incumbent's licenses could be revoked. The resulting outcome would disadvantage new competitors and thus, likely limit historically underrepresented media ownership. Finally, § 202(h) required the Commission to review its media ownership rules every four years.[157] As part of this process, the Commission must review any proposed rule change and, importantly, assess whether it is "necessary in the public interest as the result of competition."[158] Bringing up rules for quadrennial reviews created a more politicized and litigious FCC rulemaking process. Together, these new rules set the stage for abandoning the public interest standard and deregulating media ownership.

Media companies opposed the cross-ownership rules since their inception.[159] However, it was not until the FCC's 2002 Biennial Regulatory Review that the agency began to review and relax its rules governing market concentration and cross-ownership.[160] By June 2003, the Commission adopted a Report and Order which stated that, "neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market (the 'newspaper/broadcast cross-ownership rule') nor a cross-service restriction on common ownership of radio and television outlets in the same market (the 'radio-television cross-ownership rule') [remain] necessary [for] the

155. *Congress Puts Finishing Touches on Major Industry Overhaul*, CONG. Q. ALMANAC (1995), https://library.cqpress.com/cqalmanac/document.php?id=cqal95-1100302.

156. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(b), 110 Stat. 56, 110 (1996).

157. *See id.* at 111–12.

158. *Id.* at 112.

159. GOMERY, *supra* note 43, at 1.

160. *See* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 17 FCC Rcd. 18503 (2002).

public interest."[161] The rule changes allowed the Commission to abandon the enforcement of market concentration to general antitrust laws rather than subject it to its own more stringent regulation.[162]

Following the FCC's move to deregulate the ownership rules, Prometheus Radio Project—a non-profit advocacy group with a mission to resist corporate media consolidation—and other public interest groups embarked on a nearly twenty-year journey to uphold the prior ownership rules.[163] Between 2003 and 2019, the Third Circuit reviewed four separate challenges to the FCC's rule changes.[164] The Commission's general position was that new technologies changed the industry and that the prior rules "inadequately [accounted] for the competitive presence of cable, [ignored] the diversity-enhancing value of the internet, and [lacked] any sound basis for a national audience reach cap."[165] Meanwhile, the Third Circuit consistently held that the Commission failed to provide reasoned analysis for its numerical limits on common ownership, consider the effects of its new rules on minority ownership, or justify market share metrics and assumptions.[166] In each case, the Supreme Court denied certiorari for all relevant appeals.[167] In the most recent successful *Prometheus* challenge in 2016, the Third Circuit concluded that the Commission's rule changes were arbitrary and capricious because they did not adequately assess the deregulatory effect on media ownership diversity—particularly minority and female ownership.[168] Under the Administrative Procedure Act, an agency violates the arbitrary and capricious standard when it "entirely fail[s] to consider an important aspect of the problem."[169]

Simultaneously in 2016, with the *Prometheus* litigation saga ongoing, FCC Chairman Tom Wheeler proposed to retain the original cross-ownership rules with slight modifications.[170] While the core rules remained intact, the FCC

161. 2002 Review I, *supra* note 56, ¶ 2.

162. *See* Shelanski, *supra* note 115, at 375.

163. *See* Prometheus Radio Project v. FCC (*Prometheus IV*), 939 F.3d 567 (3d Cir. 2019); Prometheus Radio Project v. FCC (*Prometheus III*), 824 F.3d 33 (3d Cir. 2016); Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431 (3d Cir. 2011); Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372 (3d Cir. 2004).

164. *See* cases cited *supra* note 163.

165. 2002 Biennial Regulatory Review, *supra* note 56.

166. *See* cases cited *supra* note 163.

167. *See, e.g.*, *Prometheus II*, 652 F.3d at 431 (3d Cir. 2011), *cert. denied*, 567 U.S. 951 (2012); *Prometheus I*, 373 F.3d at 372, *cert. denied*, 545 U.S. 1123 (2005).

168. *Prometheus III*, 824 F.3d at 54 n.13.

169. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

170. 2016 Second Report and Order, *supra* note 98; *see also FCC Chair Proposes Retaining Most U.S. Media Ownership Rules*, REUTERS (June 27, 2016), https://www.reuters.com/article/us-usa-media-rules/fcc-chair-proposes-retaining-most-u-s-media-ownership-rules-idUSKCN0ZD2QC.

created an exception which allowed "failed or failing newspapers" to receive investment from a broadcast television or radio station in the same market.[171] The Newspaper Association of America reacted negatively to Chairman Wheeler's proposal saying it was "stunned that any policymaker in the internet era would propose to keep a 1970s-era law that prevents broadcast stations and newspapers from being owned by the same company."[172] While the Democrat-controlled FCC attempted to preserve the ownership rules and with them, the public interest, the effort was short lived. The rule changes were once again challenged—this time by deregulation advocates and revenue-losing media companies—in the fourth iteration of the *Prometheus* saga.[173]

By the end of 2016, American voters elected Donald Trump as President and subsequently the FCC's political leadership changed with the appointment of Chairman Ajit Pai. The new chairman reinvigorated the campaign to deregulate the FCC ownership rules with significant overhauls in 2017 and 2018. In 2017, the Commission revoked the 2016 rule changes and eliminated the original cross-ownership rules.[174] In 2018, the Commission established an incubator program to promote the entry of new and diverse voices into the broadcast industry.[175] Both orders were challenged and in 2019, the Third Circuit ruled that the FCC had not "adequately considered the effects" of the new rules on "diversity in broadcast media ownership."[176] This time, after seventeen years, the Supreme Court granted certiorari in 2020.[177]

IV. REVIEWING *FCC V. PROMETHEUS RADIO PROJECT*

On April 1, 2021, the Supreme Court unanimously ruled in favor of the FCC's deregulatory change to repeal or modify three media ownership rules—the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television

171. Roger Yu, *FCC Retains Media Cross-Ownership Rules*, USA TODAY (Aug. 11, 2016), https://www.usatoday.com/story/money/2016/08/11/fcc-retains-media-cross-ownership-rules/88584310/.

172. *U.S. FCC Votes to Keep Most Media Ownership Rules*, REUTERS (Aug. 11, 2016), https://www.cnbc.com/2016/08/11/us-fcc-votes-to-keep-most-media-ownership-rules.html.

173. *Prometheus IV*, 939 F.3d at 567.

174. *See* 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802 (2017) [hereinafter 2017 Order].

175. *See* Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, Report and Order, 33 FCC Rcd. 7911 (2018) [hereinafter 2018 Rules and Policies].

176. *Prometheus IV*, 939 F.3d at 584–88.

177. *Prometheus*, 141 S. Ct. at 1157.

Cross-Ownership Rule, and the Local Television Ownership Rule.[178] In arguments, the FCC relied on its conclusion in the 2017 annual review, where the Commission found that the cross-ownership rules were "no longer necessary to serve the agency's public interest goals of competition, localism, and viewpoint diversity."[179] The agency argued that it had the administrative authority to make such rule changes after basing its decision on record evidence, public comments, and with consideration for media industry developments since the 1960s.[180]

The parties sharply disagreed about the weight and scope of each public interest factor.[181] The FCC and industry petitioners argued that § 202(h) authorized them to forego minority ownership analysis because the legislative intent prioritized competition. Industry petitioners claimed that § 202(h) required the FCC only to consider competition, rather than minority and female ownership—and that "the public interest" cannot be understood as implicitly requiring the Commission to [consider diversity ownership].[182] According to them, Congress intended "competition to play a starring role, not second fiddle, in regulatory reform reviews" when drafting the Telecommunications Act of 1996.[183]

Prometheus Radio Project and other media advocacy organizations opposed this characterization. The group argued that the FCC's decision to change the rules was not made in the public interest because it was likely to harm minority and female ownership[184]—factors that both Congress and the Supreme Court have recognized as "essential" to the public interest.[185] To support its factual conclusions, Prometheus relied on several studies conducted by Free Press, a media reform group.[186] The studies showed that past deregulation of ownership rules led to increases in media market

178. *Id.* at 1152–53.

179. *Id.* at 1158.

180. *Id.*; *see, e.g.*, 2016 Second Report and Order, *supra* note 98, at 9803, 9807, 9825, 9834.

181. *See, e.g.*, 2018 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 33 FCC Rcd. 12111, 12116, 12128, 12140, ¶¶ 9, 40, 77 (2018); 2016 Second Report and Order, *supra* note 98, at 9865, ¶ 3.

182. Reply Brief for Industry Petitioners, *supra* note 61, at 25.

183. *Id.* at 4.

184. *Prometheus*, 141 S. Ct. at 1159.

185. Briefs of Members of Congress as *Amici Curiae* in Support of Respondents at 3, FCC. v. Prometheus Radio Project, 141 S. Ct. 1150 (2021) (Nos. 19-1231 & 19-1241) (citing the Cable Television Consumer Protection and Competition Act of 1992; *Turner*, 512 U.S. at 676; and United States v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972), among others).

186. *Prometheus*, 141 S. Ct. at 1159.

concentration and ultimately decreased minority and female ownership levels.[187] According to the media advocacy groups, these negative results were significant because the FCC 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."[188]

Writing for a unanimous court, Justice Brett Kavanaugh shied away from defining or balancing the public interest. The Court ruled that the FCC was "reasonable and reasonably explained for purposes of the APA's deferential arbitrary-and-capricious standard" its interpretation of countervailing evidence.[189] First, upon evaluating the evidence, the FCC concluded that "no record evidence suggesting that past changes to the ownership rules had *caused* minority ownership levels to increase."[190] Second, the FCC explained that the ownership rules no longer fit the reality of today's media industry and that "permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers."[191] Succinctly, the Court held that "[t]he APA requires no more."[192]

After seventeen years, the Court's opinion was relatively short. By skirting around the public interest standard, the Court avoided taking a normative stance on media regulation in America. Instead, the case focused on administrative authority and the burdens of agency rulemaking. If the evidentiary gap indeed favored the FCC's discretion,[193] then it makes sense that none of the judges wrote a dissenting opinion. However, according to the Court, the factual gap mattered only in so much that the FCC gathered public comments and considered them; beyond that, the Commission is wholly justified in its interpretation of countervailing evidence, seemingly with little regard for the merits.[194] The result of this decision will be a wholly politicized agency rule-making process. If the last eighteen years are any example, the Third Circuit might be the public interest's sole line of defense.

In a short concurrence, Justice Clarence Thomas weighed in to criticize the Third Circuit for improperly imposing a procedural requirement on the

187. *Id.*

188. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 780 (1978).

189. *Prometheus*, 141 S. Ct. at 1160.

190. *Id.* at 1159.

191. *Id.* at 1157.

192. *Id.* at 1160.

193. *See id.* The FCC argued that there was a lack of predictive data to show that the rule changes would lead to fewer minority and female owners.

194. *See id.* at 1159–60.

FCC to consider ownership diversity.[195] According to Thomas, the FCC was only required to consider the "public interest as the result of competition" and it had "no obligation to consider minority and female ownership."[196] The concurrence further stated that the FCC's ownership rules were "never designed to foster ownership diversity" and thus, it does not matter that the agency considered it as a factor in its prior policy.[197] However, Thomas conceded that diversity ownership was, in fact, prior policy but only as a proxy for viewpoint diversity.[198] By setting this distinction, Thomas attempted to define the FCC's regulatory target as consumers, rather than producers.[199] Citing the Supreme Court's 1940 decision in *FCC v. Pottsville Broadcasting Co.*, Thomas highlighted that the Commission clarified that "emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster."[200]

This formalist approach ignores the purposes of the public interest standard. To make his arguments, Justice Thomas relied heavily on the public interest standard's disputed history.[201] Since its adoption in the 1930s, the "public interest" has not been defined in any formal statutory manner. Because of this, Thomas insisted that the Third Circuit cannot inject a requirement to consider ownership diversity where one does not exist. According to Thomas, there is no "freestanding goal of promoting ownership diversity" and that promoting minority and female ownership only serves the core goal of maximizing the diversity of viewpoints.[202] Because the ownership rules were "never designed to foster ownership diversity," Thomas argued that the FCC is only required to consider the effects of any rule change on viewpoint diversity.[203]

The purpose of the public interest standard, as evidenced by its origins and longstanding history, was to serve the informational needs of a well-informed citizenry. The FCC has consistently held that this goal should be achieved through a diversity of voices.[204] While there are many ways to achieve a

195. *Id.* at 1160 (Thomas, J., concurring).

196. *Id.* at 1161.

197. *Id.*

198. *Id.* at 1162.

199. *See id.* at 1161 ("From its infancy, the FCC has generally focused on consumers, not producers.").

200. *Pottsville*, 309 U.S. at 138 n.2 (quoting a 1928 agency document).

201. *Prometheus*, 141 S. Ct. at 1161–62 (Thomas, J., concurring).

202. *Id.* at 1162.

203. *Id.* at 1161.

204. *See* 2016 Second Report and Order, *supra* note 98 (stating that the FCC "has a long history of promulgating rules and regulations intended to promote diversity of ownership

diversity of voices, diverse ownership is one obvious and valid approach. The FCC recognized this when it adopted a presumption against media duopolies in 1938[205] and even in 2018, when Commissioner Pai created an incubator program to promote the new and diverse voices entering the broadcast industry.[206] To claim that the FCC has focused on consumers and not producers, as Justice Thomas did, is ahistorical.[207]

One likely reason why minority and female ownership was not formally recognized in neither congressional legislation nor the FCC's rulemaking is because these groups have been historically excluded. In 1971, only 10 of the 7,500 radio stations (0.13%), and none of the 1,000 television stations in the United States, were minority-owned.[208] In 2019, when Black Americans made up roughly 14% of the U.S. population,[209] still only 1.3% of U.S. full-power commercial TV stations were Black-owned.[210] Similarly, only 2% of commercial FM stations were Black-owned. Despite people of color (POC) making up 43% of the U.S. population, only 6% of the nation's full-power TV stations, 7% of commercial FM radio stations, and 13% of commercial AM radio stations were POC-owned.[211] While it is impossible to tell whether the ownership rules were responsible for the modest increase in minority ownership as opposed to other factors, it is clear that deregulation and media consolidation produces the opposite result. According to a study from Free Press, the FCC's era of deregulation in the 1990s led to the loss of over 40% of minority-owned stations by 1998.[212]

among broadcast licensees, and thereby foster a diversity of voices"); *Metro*, 497 U.S. at 566–68 (upholding "minority ownership policies" because they were "substantially related to the achievement of . . . broadcast diversity").

205. Genesee, 5 F.C.C. at 183 (calling for a "diversification of service").

206. *See* 2018 Rules and Policies*, supra* note 175.

207. *See Prometheus*, 141 S. Ct. at 1161 (Thomas, J., concurring).

208. Beth Brodsky & Daniel A. Hanley, *The FCC Seeks to Hinder Female and Minority Broadcast Ownership for Policies Favoring Concentrated Corporate Ownership*, COMMON DREAMS (Jan. 28, 2021), https://www.commondreams.org/views/2021/01/28/fcc-seeks-hinder-female-and-minority-broadcast-ownership-policies-favoring.

209. Christine Tamir, *The Growing Diversity of Black America*, PEW RES. CTR. (Mar. 25, 2021), https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america/.

210. *FCC Media-Ownership Report Underscores the Agency's Historical Exclusion of Black People*, FREE PRESS (Sept. 7, 2021), https://www.freepress.net/news/press-releases/fcc-media-ownership-report-underscores-agencys-historical-exclusion-black.

211. *Id.*

212. Brodsky & Hanley, *supra* note 208.

There is a serious concern that the latest *Prometheus* ruling could lead to a similar outcome in the coming years.[213] While the Court in *Prometheus* acknowledges the FCC's examination of evidence concerning minority ownership, it does not afford the issue proper importance.[214] The strong connection between media diversity and democracy is indispensable and a lack of "empirical or statistical data" is an insufficient reason to forego ownership restrictions given the likelihood of long-term repercussions from a concentrated and homogenous media environment.

The FCC has long understood that diverse ownership has a profound effect on diverse viewpoints. During the Johnson Administration, the Kerner Commission was a group mandated to uncover the causes of civil unrest in 1967 and social conditions which foment riots.[215] The group found that television coverage gave the impression that the riots were confrontations between African Americans and whites, rather than the responses of African Americans to underlying "slum problems."[216] A separate report published in 1977, "Window Dressing on the Set: Women and Minorities in Television," found that "[f]orty percent of the white children attributed their knowledge about how blacks look, talk, and dress to television . . . ."[217] These anecdotes and more underpin the notion that the diversity of broadcasters directly impacts the content that is produced and consumed by viewers. If the FCC directed its public interest regulation solely at consumers, it would be unable to achieve its objectives.

V. REVIVING THE PUBLIC INTEREST STANDARD

When Commissioner Ajit Pai repealed the 1975 Newspaper/Broadcast Cross-Ownership Rule in 2017, he claimed to promote the broadcasting industry's interests. In his order, Pai stated "By ending this entirely arbitrary test, we allow efficient combinations that can help television stations thrive."[218] Similarly, industry petitions in *Prometheus* claimed that Congress intended "competition to play a starring role, not second fiddle, in regulatory reform

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213. *Supreme Court Awards the FCC for Long Neglecting Its Mandate to Promote Media Diversity in the United States*, FREE PRESS (Apr. 1, 2021), https://www.freepress.net/news/press-releases/supreme-court-awards-fcc-long-neglecting-its-mandate-promote-media-diversity.

214. *Prometheus*, 141 S. Ct. at 1160.

215. NAT'L ADVISORY COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1967).

216. *Id.* at 204.

217. U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION 46 (1977).

218. 2017 Order, *supra* note 174.

reviews."[219] However, when the original rules were created, the Commission specifically stated that between its twin goals of viewpoint diversity and economic competition, viewpoint diversity was the "higher" policy.[220] In its creation of the Radio/Television Cross-Ownership Rule in 1970, the Commission likewise said that the "principal purpose" was "promot[ing] diversity of viewpoints" and a secondary purpose is "promot[ing] competition."[221] Today, the media industry and regulators seem to have forgotten the Commission's mandate to serve the public interest.

If an agency is mandated to promote competition in parallel with sociopolitical factors such as diversity and localism, it cannot coherently do so without some acknowledgement of fairness. In the words of Professor Sandra Marco Colino: "It makes little sense to defend a competition policy that develops with its back purposefully turned to the attainment of moral and social justice."[222] Unlike the consumer welfare standard, a competition policy involving fairness goes beyond a competitive playing field that exists only for efficient competitors. For instance, an interpretation that acknowledges fairness—rather than unfettered competition—would appreciate the historic disadvantages faced by minority broadcasters and their value to the public interest.[223]

Today, the biggest proponents of reincorporating fairness into competition policy and putting away the consumer welfare standard are Neo Brandeisians. This group, including members such as National Economic Advisor Tim Wu and FTC Chairwoman Lina Khan, advocates for a return to the "protection of competition" by focusing on structures and processes, rather than outcomes.[224] Unlike the Chicago School, the Neo Brandeisians reject the promise of market forces and advocate for government law and policy to protect markets from being captured by private concentrations of

219. Reply Brief for Industry Petitioners, *supra* note 61, at 4.

220. Amendment of Sections 73.34, 73.249, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046, 1074 (1975).

221. *Id.*; *see also* Multiple Ownership of Standard, FM and TV Broadcast Stations, 22 F.C.C.2d 306, 313, ¶ 25 (1970) (stating that the "principal purpose" of the Radio/Television Cross-Ownership Rule is "promot[ing] diversity of viewpoints" and a secondary purpose is "promot[ing] competition").

222. Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law* 18 (Chinese Univ. of H.K. Faculty of Law Research Paper No. 2018-09, 2019), https://ssrn.com/abstract=3245865.

223. *Id.*

224. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018).

power.[225] As Khan wrote in her seminal *Amazon's Antitrust Paradox* article, "[w]e cannot cognize the potential harms to competition posed . . . if we measure competition primarily through price and output."[226]

By focusing on structure and process, the Neo Brandeisians seek to promote a system that eliminates abuses against competition. The approach follows Justice Brandeis' concern with distinguishing behaviors (a merger or conduct) that promote the process of competition and behaviors that suppress or even destroy competition and encourage concentrated ownership.[227] By maintaining sociopolitical considerations, this approach would protect competition and advance fairness using existing analyses.[228] Some consumer welfare proponents claim that Neo Brandeisian analysis foregoes economics and could potentially overcorrect with "form-based" political interference to maximize democracy.[229] Other critics argue that Neo Brandeisians propose a non-administrable system with no objective principles and many competing interests.[230] For instance, Michigan State Law Professor Adam Candeub has argued that the FCC's regulations have failed because they have applied antitrust law to the "marketplace of ideas."[231] As a result, this system is criticized for "confus[ing] social and economic goals, creating an incoherent regulatory standard ripe for judicial reversal."[232]

If fairness is incorporated into future analysis for competition, the Commission will need to deprioritize efficiency and economic competition. Unlike the DOJ and FTC, which focus on economic competition broadly, the FCC has a narrow, specific mandate to regulate communications. The original ownership rules should be maintained due to both the dearth of new entrants into the broadcasting industry and, particularly, the lack of diverse ownership. However, the ownership rules can be relaxed in small to mid-sized markets where there is substantial evidence of market failure. If a local market lacks the conditions for multiple broadcasters to compete for revenue or viewership, the FCC should ensure that consumers have access to quality information at the expense of diversity ownership. In these situations, diversity ownership is unlikely to be achieved regardless.

225. *Id.*

226. Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016).

227. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

228. *See* Wu, *supra* note 108, at 11.

229. *See* Crane, *supra* note 110, at 4.

230. *See id.* at 3–5.

231. Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547 (2008).

232. *Id.*

Ownership restrictions are only one out of many ways to promote the public interest. While blocking mergers may be the best approach against media concentration, advocacy groups should explore news ways to promote the ideals of diversity, localism, and competition in today's contemporary media environment. The vague public interest standard has devolved beyond its original meaning and intent, and Congress should reconsider the current direction of media regulation. By updating the Communications Act, the legislature can reinvigorate America's commitment to its citizens to provide valuable, civic-minded information. Further, internet platforms have gained outsized influence in the media production industry since the 1990s. Internet companies do not face any of the requirements that broadcasters are beholden to. While the broadcasting industry may view this as a good reason to deregulate all media, media advocacy groups should push for more stringent compliance from internet content providers toward the ends of promoting the public interest.

Finally, the FCC should assuage the fears that proponents of deregulation have raised over the years and investigate them further. For instance, some critics of the public interest standard have argued that despite the FCC's intentions, ownership diversity will have little impact on the public interest because evidence suggests that media content is driven by demand (i.e., consumers) rather than supply (i.e., owners).[233] These findings, however, go against countervailing evidence such as the Kerner Commission report.[234] Others, such as the National Association of Broadcasters (NAB), claim that the FCC fails to account for the fact that broadcasters now compete with giant technology companies for advertising revenue while bearing high capital and operating costs.[235] Outdated rules, the NAB says, "no longer enable broadcasters to viably operate in a competitive market or effectively serve the public interest."[236] The FCC should invest more resources toward surveys that would gather adequate data on how Americans consume their information and what type of information they consume.

233. Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 ECONOMETRICA 35, 38 (2010) (finding "little evidence that the identity of a newspaper's owner affects its slant").

234. *See* NAT'L ADVISORY COMM'N, *supra* note 215.

235. *Media Ownership Rules Are Detrimental to Competition, Loyalism, and Diversity, NAB Says*, NAB (Sept. 3, 2021), https://www.nab.org/documents/newsRoom/pressRelease.asp?id=6190.

236. *Id.*

VI. CONCLUSION

Since this country's founding, the media has been a core institution of an American democracy. Media regulation, accordingly, has been a critical function of democratic governance. Thus, the American experiment has relied on access to an egalitarian media structure where citizens have the ability for self-determination and self-governance. As the media industry became more complex, America's political leaders never abandoned these ideals. The Communications Act of 1933 established the public interest standard to protect against concentrated ownership and promote diversity, localism, and competition. For the last ninety years, the FCC has followed this mandate to balance commercial development and democratic values.

Until the 1980s, the consensus in Washington upheld the public interest as initially intended: the diversity of viewpoints took precedent over economic competition. But as political forces changed and market mechanisms won over, competition rose to the center stage. The new competition doctrine gaining prominence at the time was different from how competition was first envisioned during the turn of the 20th century. Efficiency and econometrics left little room for fairness or sociopolitical factors, such as diversity or localism. Both Democrats and Republicans adopted efficiency policies and worked to deregulate the media industry. The result has led to less protections against corporate concentration, and likely, a less-representative media environment for America's citizenry.

To correct this trend, Congress and the FCC should remember the public interest standard's democratic roots. Technocrats will be disappointed with any policy that seeks to maximize an intangible social value. True, the public interest is an intangible and incalculable social value, amenable to multiple competing, or even conflicting, interpretations. However, in the context of ownership, the media industry should broadly reflect the country. Some changes—such as revitalizing the notion of fairness in competition doctrine—may require insurmountable shifts in legal doctrine. Others, including more abundant and precise data collection on the FCC's part and public interest standards for internet platforms, could catalyze a movement for gradual reform. Regardless of the means, a media industry with diverse owners would mean that the content and direction of broadcasting serves the interests and needs of all Americans, not only those who are profitable and privileged.