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## Overwhelmed by Big Consolidation: Bringing Back Regulation to Increase Diversity in Programming That Serves Minority Audiences

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# Overwhelmed by Big Consolidation: Bringing Back Regulation to Increase Diversity in Programming That Serves Minority Audiences

Caridad Austin\*

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## I. INTRODUCTION

The president of a national organization advocating for more diverse role models in programming once joked, “[T]here actually have been studies showing there are more extraterrestrials on television than Latinos.”<sup>1</sup> Although intended as a humorous representation of the lack of minorities in American media, the statement demonstrates the harsh reality that the media industry often ignores its minority audience. With the deregulation of media in the 1980s, 1990s, and 2000s, the unprecedented consolidation of American media has narrowed the ability of minority and nonminority audiences to obtain diverse programming.<sup>2</sup> While the FCC has tried addressing this problem by promoting its policy of expanding minority ownership of the media,<sup>3</sup> heavy deregulation in the last three decades has resulted in “Big Media” companies consolidating their ownership across media; this consolidation has “threatened [ ] localism, diversity, and competition[.]” and has led to a considerable downsizing of local reporters, editors, and DJs who cater to cities and towns across America.<sup>4</sup>

In an age where the next great technological advancement is just five minutes away, one might think American society has access to a plethora of information to make us a better-informed public with programming that appeals to a variety of individuals within the American public. However, with a few Big Media companies controlling all facets of communication such as radio, television, cable, newspapers, and the Internet, we are reading and seeing recycled stories that cater to a majoritarian audience.<sup>5</sup> In

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1. Gary Dretzka, *Left out of the Picture: Young Women Prod TV Executives to Diversify Programs*, CHI. TRIB., Dec. 4, 1996, at 1.

2. As shall be elaborated on in Part II, universally defining diversity in the media has been a major obstacle of this debate. For this Note, diversity means programming that is inclusive of entertainment and topics of importance to minority audiences.

3. See, e.g., *Metro Brdcast., Inc. v. FCC*, 497 U.S. 547, 556–66 (1990) (noting that the FCC “pledged to consider minority ownership as one factor in comparative proceedings for new licenses[.]” it “outlined a plan to increase minority opportunities to receive reassigned and transferred licenses through the so-called ‘distress sale’ policy[.]” and it “selected the minority ownership policies primarily to promote programming diversity”).

4. See ERIC KLINENBERG, *FIGHTING FOR AIR: THE BATTLE TO CONTROL AMERICA’S MEDIA* 26 (2007). “[J]ust as Starbucks knocked out independent coffee shops and Wal-Mart killed the corner store, media conglomerates have devastated locally produced newspapers, television stations, and radio programs throughout the country.” *Id.* at 14.

5. See Robert B. Horwitz, *On Media Concentration and the Diversity Question*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* 9, 18 (Philip M. Napoli ed., 2007) (stating that “[t]he concentration of media ownership has led to more controlled

order to progress as an inclusive society, we need diverse programming that exposes *all* audiences to different perspectives and not just to that of a nonminority demographic. Although there was hope that deregulating media ownership would result in an open communication marketplace that would optimize the number of viewpoints expressed in the media,<sup>6</sup> market forces by themselves have not been able to achieve this “idealized marketplace of ideas.”<sup>7</sup>

In order to obtain diversity in the media that is more reflective of our diverse population<sup>8</sup> and that does not neglect the minority audience, the FCC needs to bring back regulation rather than allow markets to dictate what best serves the public interest. Although the current policy of the FCC to promote minority ownership of the media as a way to achieve more diverse programming is an important policy, it is a policy that has not been easily achieved and is traditionally criticized for a lack of empirical evidence demonstrating a nexus between minority ownership and diverse programming.<sup>9</sup> The FCC should look beyond its focus on ownership regulation to regulations providing for diversified programming and lowering market control that dictates programming.

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information, fewer and less diverse sources of information, and thus less ‘real’ information despite a purported information overload”).

6. See MARA EINSTEIN, *MEDIA DIVERSITY: ECONOMICS, OWNERSHIP, AND THE FCC* 1 (2004).

7. *Id.* at 2.

8. News Release, U.S. Census Bureau, 2010 Census Shows America’s Diversity (Mar. 24, 2011), [http://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn125.html](http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html) (“Between 2000 and 2010, the Hispanic population grew by 43 percent, rising from 35.3 million in 2000 to 50.5 million in 2010. . . . [and] compris[ing] 16 percent of the total U.S. population[;] . . . [t]he black or African-American population totaled 38.9 million and represented 13 percent of the total population[;] [a]pproximately 14.7 million people (about 5 percent of all respondents) identified their race as Asian alone[;] . . . Native Hawaiian and Other Pacific Islander alone . . . represented 0.2 percent of the total population[;] [t]he remainder of respondents who reported only one race, 19.1 million people (6 percent of all respondents), were classified as ‘some other race’ alone[;] [and] [n]ine million people reported more than one race in the 2010 Census and made up about 3 percent of the total population.”).

9. See, e.g., *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998) (stating that although the Supreme Court in *Metro Brdcast., Inc. v. FCC*, 497 U.S. 547 (1990), found that Congress “produced adequate evidence of a nexus between minority ownership and programming that reflects a minority viewpoint . . . [the Court] never explained why it was in the government’s interest to encourage the notion that minorities have racially based views). The *Lutheran* Court stated, “We do not mean to suggest that race has no correlation with a person’s tastes or opinions. We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them.” *Id.*; see also Laurie Mason, Christine M. Bachen & Stephanie L. Craft, *Support for FCC Minority Ownership Policy: How Broadcast Station Owner Race or Ethnicity Affects News and Public Affairs Programming Diversity*, 6 COMM. L. & POL’Y 37, 44 (noting that “social science research addressing the relationship between ownership and programming is neither voluminous nor consistent”).

This Note considers the current media ownership regulation scheme and provides possible solutions that will enhance programming that serves minority and nonminority audiences alike. Part II describes the historical development of diversity in the media through landmark cases, such as *Metro Broadcasting, Inc. v. Federal Communications Commission*,<sup>10</sup> and the consolidating effects of the Telecommunications Act of 1996<sup>11</sup> and the FCC's 2003 *Report and Order*,<sup>12</sup> which yielded backlash from critics and the courts in *Prometheus Radio Project v. Federal Communications Commission*.<sup>13</sup> Part III analyzes the present discontent with programming that lacks diverse perspectives in the media and the shortage of alternatives despite technological growth. It proposes that bringing back a regulatory approach will increase the availability of diverse programming that is inclusive of minority audiences more so than the current market approach regime we have seen for the past three decades. Part IV concludes that the FCC needs to bring back regulation that continues minority ownership policies and introduces standards that require broadcasters to ascertain the needs of the communities they serve so that advertisers are not the sole dictators of programming.

## II. HISTORY OF DIVERSITY AND CONSOLIDATION IN THE MEDIA

### A. *Early Notions and Development of Diversity*

In the Communications Act of 1934, Congress granted the FCC the authority to grant broadcasting licenses based on “public convenience, interest, or necessity.”<sup>14</sup> Diversity has since been viewed as one of the goals of the FCC as it exercises its authority over regulating media because an essential component of serving the public interest “has meant providing a diversity of viewpoints through the broadcast spectrum.”<sup>15</sup> A major obstacle in the diversity discussion has been the inability of policymakers, scholars, the courts, or content providers to develop a universal definition of diversity due to the fact that regulating content conflicts with the First Amendment.<sup>16</sup> Therefore, policymakers often use “structural diversity, that is diversity of media ownership or diversity of producers,” as a way to

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10. 497 U.S. 547 (1990).

11. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

12. 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, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620 (2003) [hereinafter *2003 Report and Order*].

13. 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2904 (2005).

14. 47 U.S.C. §§ 151, 303 (2006).

15. EINSTEIN, *supra* note 6, at 9.

16. *Id.* at 6.

reach diversity in programming.<sup>17</sup>

Diversity in the media has seen an evolution of different focuses based on the FCC's media policy. Three general concepts of diversity often utilized by the FCC are product diversity (referring to different program types), source diversity (referring to the ownership structure), and viewpoint diversity (referring to different perspectives concerning important issues).<sup>18</sup> Within traditional notions of source and viewpoint diversity, there has often been a concern about imposing the political and economic power of a single media owner onto the beliefs of voters.<sup>19</sup> Regardless of the number of characterizations of diversity, the main goal of diversity in the media is to provide more programming options containing multiple perspectives for all audiences to enjoy.

Notions of diversity can be traced to the idea that communications media is a marketplace of ideas. In order to ensure that the marketplace of ideas flourishes in broadcast media, the government set ownership limits in its licensing process when granting broadcast frequencies to private parties.<sup>20</sup> Early licensing schemes attempted to limit problems, such as the monopolization of local media through common ownership of broadcast and newspapers, in order to allow greater access to viewpoints.<sup>21</sup> These principles were largely derived from the Fairness Doctrine.<sup>22</sup>

The Fairness Doctrine was established in 1949 by the FCC<sup>23</sup> in order to “codify the principle that broadcast media should offer a range of viewpoints to ensure that a scarcity of broadcast licenses would not result in a lack of diversity in the marketplace of ideas.”<sup>24</sup> Two prongs that developed out of the FCC Report that came to be known as the Fairness Doctrine required broadcasters “to devote a significant amount of time to coverage of issues of public importance, and . . . to provide reasonably comparable exposure to significant contrasting viewpoints.”<sup>25</sup> Although the

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17. *Id.*

18. Peter J. Alexander & Brendan M. Cunningham, *Public and Private Decision Making: The Value of Diversity in News*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS*, *supra* note 5, at 79, 81.

19. *See id.*

20. Horwitz, *supra* note 5, at 26.

21. *Id.*

22. *See* David L. Bazelon, *The First Amendment and the “New Media”—New Directions in Regulating Telecommunications*, 31 *FED. COMM. L.J.* 201, 205 (1979) (“The most notorious vehicle for promoting diversity has been the fairness doctrine. The rationale behind the fairness doctrine was to limit the ability of a broadcaster to use his quasi-monopoly position to promote only a single side of an important public issue.”).

23. Editorializing by Broadcast Licensees, *Report*, 13 *F.C.C.* 1246 (1949).

24. JOSH SILVER & MARVIN AMMORI, *THE FAIRNESS DOCTRINE DISTRACTION* 3, <http://www.freepress.net/files/fp-FairnessDoctrine.pdf>.

25. *Id.*

Supreme Court upheld the Fairness Doctrine in *Red Lion Broadcasting Co. v. Federal Communications Commission*,<sup>26</sup> the Fairness Doctrine was criticized because of concerns that it led to censorship.<sup>27</sup>

In the early 1980s, the FCC, spearheaded by President Reagan's appointee, Chairman Mark Fowler, reconsidered its position towards the Fairness Doctrine and it "urged Congress to repeal the Commission's statutory authority to impose fairness obligations and equal time duties upon federal licensees."<sup>28</sup> Since Congress did not respond to the proposal, the FCC "initiated a comprehensive review of the Fairness Doctrine[.]" and by 1985 it released a report that questioned the necessity of the Fairness Doctrine, which signaled the FCC's shift from a regulatory approach to a deregulatory market approach.<sup>29</sup>

[W]e conclude that the fairness doctrine is no longer a necessary or appropriate means by which to effectuate [the public] interest. We believe that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today and that the intrusion by government into the content of programming occasioned by the enforcement of the doctrine unnecessarily restricts the journalistic freedom of broadcasters. Furthermore, we find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogative of broadcast journalists.<sup>30</sup>

Eventually in 1987, the Fairness Doctrine was repealed "after the U.S. Court of Appeals for the D.C. Circuit remanded a Fairness Doctrine case to the [FCC.]"<sup>31</sup> Although Congress attempted to reinstate the Fairness Doctrine, President Ronald Reagan vetoed the attempt, and the Fairness Doctrine has remained dead law.<sup>32</sup>

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26. 395 U.S. 367 (1969).

27. See SILVER & AMMORI, *supra* note 24, at 5; see, e.g., Bazelon, *supra* note 22, at 205–06 (discussing how the Fairness Doctrine has not promoted diversity and has essentially "plac[ed] a government editor in the programmer's booth"); Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, *Report*, 102 F.C.C.2d 145, para. 1 (1985) (calling into question the Fairness Doctrine as having "an impermissible chilling effect on the free expression of ideas") (internal quotation omitted) [hereinafter *1985 Fairness Report*].

28. R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 293–94 (1993).

29. *Id.* at 294–95.

30. *1985 Fairness Report*, *supra* note 27, at para. 5; see also EINSTEIN, *supra* note 6, at 23–24 (citing Enver Masud, *Broadcasting Fairness Doctrine Promised Balanced Coverage*, WISDOM FUND (July 25, 1997), <http://www.twf.org/News/Y1997/Fairness.html>).

31. See SILVER & AMMORI, *supra* note 24, at 3; *Telecomm. Research & Action Ctr v. FCC*, 801 F.2d 501, 502–03 (D.C. Cir. 1986).

32. SILVER & AMMORI, *supra* note 24, at 3.

Despite the rise and fall of the Fairness Doctrine, concerns for diversity in the media remained prominent and found growth in the 1960s during the civil rights era. A reform movement developed in the 1960s pushing the FCC to be more in tune with the public interest standard of the Communications Act of 1934 by encouraging broadcasters to air content that was important to minority audiences and to hire minorities to work at broadcast stations.<sup>33</sup> The lack of minorities in ownership, programming, and broadcast employment was a catalyst for FCC regulations addressing diversity, such as ascertainment requirements that required “licensees to ‘ascertain’ the communities to which they broadcast and to air programming relevant to these ascertained local community concerns.”<sup>34</sup> In 1960, the FCC adopted the *Report and Statement of Policy Res: Commission en banc Programming Inquiry*,<sup>35</sup> which set fourteen criteria for broadcasters to use to determine the needs of the communities they served and how to develop programming that served those needs.<sup>36</sup> These ascertainment requirements gave broadcasters a standard to follow to ensure they were serving the public interest.

In 1973, the FCC began considering minority ownership as a factor in comparative hearings for broadcast license applications as a way to introduce more diversity into the media.<sup>37</sup> Previously, the FCC considered race only if the licensing applicant could prove that his or her race would enhance diversity in programming.<sup>38</sup> However, minority ownership was virtually nonexistent by 1971, with only ten out of approximately 7,500 radio stations being minority-owned and none of the 1,000 television stations owned by minorities.<sup>39</sup> Questions of minority ownership reached the courts in *TV 9, Inc. v. Federal Communications Commission*,<sup>40</sup> in which the D.C. Circuit Court of Appeals ruled that the racial identity of an applicant for a radio license was relevant when choosing between

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33. Horwitz, *supra* note 5, at 27.

34. *Id.*

35. *Public Notice*, 44 F.C.C. 2303 (1960).

36. The fourteen criteria listed in the 1960 Programming Policy Statement were the following: “(1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs[,] (11) weather and market reports, (12) sports programs, (13) service to minority groups, [and] (14) entertainment programs.” *Id.* at 2314; *see also* Carolyn M. Byerly, Professor, Dep’t of Journalism, JHJ Sch. of Comm., Howard Univ., Statement to Participants and Audience at Media Ownership Workshop on Diversity Issues: Gender-and-Race-Conscious Research Toward Egalitarian Broadcast Ownership Regulation 2 (Jan. 27, 2010), <http://www.fcc.gov/ownership/workshop-012710/byerly.pdf>.

37. *See* Horwitz, *supra* note 5, at 28.

38. *Id.*

39. *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 n.28 (D.C. Cir. 1973).

40. *Id.*



applicants.<sup>41</sup> With the court finding that minority ownership could result in more diverse programming, the FCC began giving “evaluation enhancement[s] in comparative hearings to minority ownership and participation in station management by members of minority groups.”<sup>42</sup>

In 1978, the FCC further addressed diversity concerns through its *Statement of Policy on Minority Ownership of Broadcasting Facilities*,<sup>43</sup> which provided for a minority tax certificate program<sup>44</sup> and a distress sale program<sup>45</sup> to encourage existing broadcast property to be sold to minorities. Despite more race-neutral measures to increase the opportunities of minorities in the equal employment context and with its community ascertainment requirements, the FCC felt that the views of minorities<sup>46</sup> were not adequately represented in broadcast media, which was a disservice to the interest of the minority audience and to that of the general public.<sup>47</sup>

The FCC noted that having diversified programming was a key objective of the Communications Act of 1934 and of the First Amendment, and aside from serving the minority audience such programming “also enriches and educates the non-minority audience.”<sup>48</sup> To assist in the diversification of the media, the FCC believed that minority ownership was the key to including minority viewpoints in programming.<sup>49</sup> The FCC further noted that just because an applicant proposes to present the views of minority groups in their programming, it “does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the

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41. *Id.* at 937; *see also* Horwitz, *supra* note 5, at 28.

42. Horwitz, *supra* note 5, at 28.

43. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, *Public Notice*, 68 F.C.C.2d 979 (1978) [hereinafter 1978 *Statement of Policy*].

44. *Id.* at 983; *see also* Christine M. Bachen et al., *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS*, *supra* note 5, at 269, 285 (“[T]he FCC awarded a certificate allowing capital gains taxes to be deferred when a broadcast or cable system owner elected to sell their license to minority owned or controlled entities or entrepreneurs.”).

45. 1978 *Statement of Policy*, *supra* note 43, at 983; *see also* Bachen et al., *supra* note 44, at 284–85 (“[T]he FCC allowed a broadcast licensee that had been designated for hearing because of an issue that disqualified it from controlling a license, to sell its license to a minority owned firm to avoid the loss of value of the license.”).

46. The FCC defined minorities to include “those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.” 1978 *Statement of Policy*, *supra* note 43, at 980 n.8.

47. *Id.* at 980–81.

48. *Id.* at 981.

49. *Id.*

presentation of news.”<sup>50</sup>

While remaining cautious of not overstepping censorship of broadcast speech and the editorial function of a broadcast license, the FCC developed minority ownership policies in order to expand broadcast diversity.<sup>51</sup> Essentially, the FCC would give a “plus” to applicants that were at least in part minority owned or managed when awarding initial broadcast licenses.<sup>52</sup> Ultimately, these FCC policies were legitimated based on the presumption that there was a “connection between ownership diversity and . . . program and viewpoint diversity.”<sup>53</sup> As a result of FCC minority ownership policies, there was an increase of minority ownership in the approximately 12,000 radio and 1,200 television stations from around 1 % to 3.5 % in the years between 1978 to 1990.<sup>54</sup> In addition, during this time the diversity rationale for increasing minority ownership received both judicial and congressional approval.<sup>55</sup>

*B. Metro Broadcasting, Inc. v. Federal Communications Commission and the Following Stagnation of Minority Ownership*

Although there are different types of diversity, viewpoint diversity in programming seemed to be the aim of the ownership policies of the 1970s.<sup>56</sup> Since direct regulation of viewpoint diversity conflicts with anticensorship principles of the First Amendment and the Communications Act of the 1934, the FCC regulated ownership diversity as a way to indirectly regulate viewpoint diversity.<sup>57</sup> However, questions about the indirect use of ownership diversity to reach viewpoint diversity surfaced in the courts and changed the direction of minority ownership policies.

In 1990, the Supreme Court in *Metro Broadcasting, Inc. v. Federal Communications Commission*<sup>58</sup> addressed challenges of FCC policies regarding awarding enhancement for minority ownership in comparative

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50. *Id.* at 982 (quoting *TV 9, Inc. v. FCC*, 495 F.2d 929, 937–38 (D.C. Cir. 1973)).

51. See *Bachen et al.*, *supra* note 44, at 284–85.

52. *Id.* at 284. The FCC would consider six factors when comparing mutually exclusive new broadcast license applications: diversification of control of mass media communications, full-time participation in station operation by owners, proposed program service, past broadcast record, efficient use of the frequency, and the character of the applicants. See Policy Statement on Comparative Broadcast Hearings, *Public Notice*, 1 F.C.C.2d 393, 394–99 (1965); *W. Mich. Brdcast. Co. v. FCC*, 735 F.2d 601, 604–05, 615 (D.C. Cir. 1984) (arguing that minority ownership and participation is a “plus” factor to be considered with all other factors).

53. Horwitz, *supra* note 5, at 29.

54. *Bachen et al.*, *supra* note 44, at 285.

55. Horwitz, *supra* note 5, at 30.

56. *Id.* at 29.

57. *Id.* at 30.

58. 497 U.S. 547 (1990).

hearings for new licenses and the minority distress sale program.<sup>59</sup> Noting that the FCC's minority ownership programs had been specifically approved and mandated by Congress<sup>60</sup> and that an integral part of the FCC's mission is to safeguard the public's right to receive diverse views and information,<sup>61</sup> the Court held:

benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.<sup>62</sup>

Under this intermediate scrutiny standard, the Court found that the minority ownership policies served an “important governmental objective of broadcast diversity” and that they were “substantially related to the achievement of that objective.”<sup>63</sup>

The Court ultimately ruled that “[t]he FCC’s conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference.”<sup>64</sup> Addressing the argument that the assumption that minority ownership will produce diverse viewpoints and programming was a stereotype, the Court noted:

Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.<sup>65</sup>

The Court drew the following analogy between affirmative action jurisprudence and the diversification of media:

Just as a “diverse student body” contributing to a “robust exchange of ideas” is a “constitutionally permissible goal” on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values.<sup>66</sup>

Furthermore, the Court noted that empirical evidence demonstrated that minority ownership influenced the selection of topics for news coverage and editorial views, especially when it came to matters of concern for

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59. *Id.* at 547.

60. *Id.* at 563.

61. *Id.* at 567.

62. *Id.* at 564–65 (internal citations omitted).

63. *Id.* at 566.

64. *Id.* at 570.

65. *Id.* at 579.

66. *Id.* at 568 (internal citations omitted).

minorities.<sup>67</sup>

Although the majority decision in *Metro Broadcasting* upheld the FCC minority ownership policies, it was Justice O'Connor's dissent that provided the framework for later cases reversing minority preferences and criticized the logic of the diversity rationale in broadcasting.<sup>68</sup> Justice O'Connor believed the majority was departing from equal protection jurisprudence because any racial classification, regardless of whether it was deemed as benign, should be reviewed under strict scrutiny.<sup>69</sup> She also disagreed with the majority's assumption that individuals think a certain way because of their race.<sup>70</sup> Justice O'Connor felt that the minority ownership programs provided benefits to some members of society while denying other members the same benefits based on the individual's race or ethnicity, and that this process would lead to stigmatization of these groups because individuals would not be rewarded based on individual merit.<sup>71</sup> Furthermore, she noted that the FCC had not implemented these procedures as remedial measures for past discrimination and that they were not narrowly tailored to remedy identified discrimination.<sup>72</sup> Ultimately, Justice O'Connor cast doubt on the assumption that diverse ownership would produce diverse viewpoints, therefore rejecting the nexus argument between an owner's race and diverse programming.<sup>73</sup>

Justice O'Connor's dissent in *Metro Broadcasting* effectively changed future analysis of minority preference programs. Her analysis provided the framework for the majority opinion in *Adarand Constructors, Inc. v. Peña*,<sup>74</sup> which held that all racial classifications, even benign ones imposed by government action, would trigger strict scrutiny.<sup>75</sup> Although *Adarand* overruled the intermediate scrutiny standard of *Metro Broadcasting*, the permissibility of the diversity rationale of *Metro Broadcasting* was not addressed.<sup>76</sup> However, later cases continued to cut

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67. *Id.* at 580–81.

68. Horwitz, *supra* note 5, at 32.

69. *Metro Broadcasting*, 497 U.S. at 602–03, 609–10 (O'Connor, J., dissenting) (“‘Strict scrutiny’ requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest.”).

70. *Id.* at 602–03.

71. *Id.* at 604.

72. *Id.* at 611–12 (“Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest.”).

73. *Id.* at 626–27.

74. 515 U.S. 200 (1995).

75. *Id.* at 201–02.

76. *See Adarand*, 515 U.S. 200; *see also* Horwitz, *supra* note 5, at 35.

down the diversity rationale,<sup>77</sup> and due to the lack of empirical evidence concerning the nexus between diverse ownership and diverse programming, minority ownership policies were seen “as violat[ing] [ ] the speech rights of corporations.”<sup>78</sup>

C. *Furthering Consolidation: The Telecommunications Act of 1996 and the FCC 2003 Report and Order*

Ownership limits have been used by the FCC to control media consolidation since the FCC’s inception; however, the last three decades have seen a relaxation of these ownership limits. A reason for this deregulation stemmed from the tremendous growth of media outlets in the 1980s and 1990s due to technological changes, such as the advancement of cable television and direct broadcast satellite, which put economic stress on more traditional media like radio and broadcast television since they were competing for the same audience and advertisers.<sup>79</sup> Because alternatives to more traditional media like broadcast television and radio were causing advertising dollars to shift to cable as cable is more efficient at providing advertisers with a more concentrated audience of a particular demographic,<sup>80</sup> the FCC stepped in to ensure the viability of more traditional media by allowing multiple station ownership in order to produce “economies of scale that significantly reduce overhead.”<sup>81</sup>

Between the 1950s and the enactment of the Telecommunications Act of 1996 (1996 Act), the landscape of ownership limits transformed tremendously:

From 1954 to 1984, the FCC limited national ownership to seven stations, where each station was in a separate geographic market. In 1984, the FCC expanded ownership limits to 12 stations, provided that the total number of stations owned did not reach over 25% of the national market. The 1996 Telecommunications Act raised the broadcast television ownership limit to 35% of the national market and

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77. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (1998) (noting that even if the Court in *Metro Broadcasting* held that “the diversity interest was ‘important[,]’” the *Lutheran* Court did “not think diversity can be elevated to the ‘compelling’ level [required by the *Adarand* decision], particularly when the Court has given every indication of wanting to cut back *Metro Broadcasting*”); *Fox Television Stations v. FCC*, 280 F.3d 1027, 1052 (2002) (concluding that the FCC’s “diversity rationale for retaining the [Cable/Broadcast Cross-Ownership] Rule is woefully inadequate”).

78. Horwitz, *supra* note 5, at 38.

79. EINSTEIN, *supra* note 6, at 17, 112. Also in the 1980s, television saw the addition of the first new network in fifty years with the Fox broadcast network. The addition of Fox and the growth of cable brought considerable competition for ABC, CBS, and NBC with strong competition not only from the growth of cable, but also from the formidable competitor Fox. *Id.* at 112.

80. *Id.* at 122.

81. *Id.* at 18.

eliminated the station ownership limit.<sup>82</sup>

As a result of the relaxation in ownership limits, traditional broadcast networks began to buy and create cable networks in a horizontal integration strategy<sup>83</sup> that resulted in massive consolidation of traditional and new technology in the media industry. This led companies like AOL/Time Warner Inc., The Walt Disney Company, and Viacom to become multinational media conglomerates that had their hand not only in broadcast and cable television, but also in the Internet, magazine, music, and retail industries.<sup>84</sup>

The 1996 Act amended the Communications Act of 1934. With the passage of the 1996 Act, section 202(h) required that the FCC “review its media ownership rules biennially ‘to determine whether any of such rules are necessary in the public interest as the result of competition.’”<sup>85</sup> In 2004, Congress amended the biennial review requirement in the 1996 Act so that reviews occur quadrennially and that the review does not include the national television multiple ownership review.<sup>86</sup> The 1996 Act further provided that, in designing competitive bidding systems, the FCC would consider public interest objectives such as:

promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.<sup>87</sup>

Although the language in the 1996 Act made it seem as if it were a proponent of minority ownership, the massive media consolidation resulting from the 1996 Act completely diminished whatever momentum previous minority ownership policies had established.

The 1996 Act, coupled with the fact that the FCC abandoned policies such as the fourteen criteria ascertainment requirements and requirements for stations to keep program logs to determine whether community problems and issues were getting program coverage, resulted in lax

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82. Alexander & Cunningham, *supra* note 18, at 79. “Subsequently, the FCC’s decision in 2000 to retain a national broadcast television ownership limit was challenged by Fox Television Stations in the U.S. Court of Appeals, D.C. Circuit, and the Court reversed the FCC’s decision, sending the rule back to the FCC for further consideration.” *Id.* at 79–80.

83. EINSTEIN, *supra* note 6, at 128.

84. *Id.* at 138.

85. MARK LLOYD & PHIL NAPOLI, LOCAL MEDIA DIVERSITY MATTERS: MEASURE MEDIA DIVERSITY ACCORDING TO DEMOCRATIC VALUES, NOT MARKET VALUES 7 (2007), [http://www.americanprogress.org/issues/2007/01/pdf/media\\_diversity.pdf](http://www.americanprogress.org/issues/2007/01/pdf/media_diversity.pdf) (citing 2003 Report and Order, *supra* note 12, at para. 56).

86. Consolidated Appropriations Act of 2004, Pub. L. No. 108–199, § 629, 118 Stat. 3, 97–98 (amending section 202(h) of the Telecommunications Act of 1996).

87. 47 U.S.C. § 309(j)(3)(B) (2006).

standards that allowed major corporations to run amok.<sup>88</sup> After the 1996 Act was passed, the media industry saw dramatic consolidation with numerous mergers, acquisitions, and new partnerships resulting from relaxed ownership limits.<sup>89</sup> Big Media companies like Clear Channel, Viacom, and Disney overtook small broadcasters and minority-owned stations.<sup>90</sup> For those small broadcasters and minority-owned stations that already had licenses, the 1996 Act allowed “big companies [competing for the license[s]] [to drag] out the process to weed out the small players.”<sup>91</sup> In addition, the consolidation began eliminating many workers in the communications industry.<sup>92</sup>

All mediums in the industry saw their fair share of change. Perhaps one of the most notable examples of consolidation was in the radio industry with the rise of nationally syndicated conservative talk radio. Subsequent to the mergers resulting from a relaxation in ownership caps, nationally syndicated programming captivated the market, and conservative radio was one of the first genres to jump on the wagon.<sup>93</sup> Since the 1996 Act eliminated national station ownership limits and raised local radio station ownership limits from four to eight, Big Media companies such as Cumulus Media, Viacom/Infinity, and Citadel Broadcasting Corporation joined Clear Channel in dominating the market.<sup>94</sup> Within approximately two years after ownership limits were relaxed, Big Media companies bought and sold 4,400 stations out of the 10,400 commercial radio stations that existed at the time of the Act, which resulted in 700 radio owners losing their stations—a forty percent reduction in the number of radio owners.<sup>95</sup> Television and cable also followed the radio model in consolidating the market and reducing the number of small and local broadcasters.<sup>96</sup>

However, the story of ownership limits did not end with the 1996 Act. The FCC’s *2003 Report and Order* further relaxed media ownership regulations.<sup>97</sup> Included in the *2003 Report and Order* were revisions to the newspaper/broadcast cross-ownership rule, the radio-television cross-

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88. See Byerly, *supra* note 36, at 2.

89. KLINENBERG, *supra* note 4, at 224.

90. *Id.*

91. *Id.* at 58.

92. *Id.* at 65. For instance, the union AFTRA, a “national labor union representing journalists, broadcasters, and artists, estimated that [Clear Channel] eliminated between 1,500 and 4,500 positions between 2000 and 2004.” *Id.*

93. SILVER & AMMORI, *supra* note 24, at 4.

94. KLINENBERG, *supra* note 4, at 27.

95. *Id.*

96. *Id.* at 93, 209–10.

97. *2003 Report and Order*, *supra* note 12.

ownership rule, the local television multiple ownership rule, the national television ownership cap, and the dual network rule.<sup>98</sup> In effect, “the FCC increased the ownership limit to [forty-five percent] of the national market.”<sup>99</sup> However, the controversy surrounding the relaxed ownership limits led Congress, in 2004, to step in and set a statutory limit on the national television ownership rules at thirty-nine percent.<sup>100</sup>

Although the *2003 Report and Order* served a blow to minority ownership with its relaxation of ownership regulation, the question of diversity was still on the table. The *2003 Report and Order* noted that “[a] diverse and robust marketplace of ideas is the foundation of our democracy.”<sup>101</sup> In analyzing diversity, the FCC noted five types of diversity: “viewpoint, outlet, program, source, and minority and female ownership diversity.”<sup>102</sup> These types of diversity are part of media policy goals that try to achieve fundamental policy goals such as “a more effective and representative democratic process, economic efficiency, and greater participation of women and ethnic minorities in economic and political affairs.”<sup>103</sup> The *2003 Report and Order* stated, “[e]ncouraging minority and female ownership historically has been an important Commission objective, and we reaffirm that goal here.”<sup>104</sup> Similar to the ownership policies of the 1970s, such as the 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities,<sup>105</sup> viewpoint diversity continued to be a concern as it would contribute to a better-informed citizenry—a “fundamental policy goal” of the FCC.<sup>106</sup>

The FCC’s answer to the question of diversity was the development of the Diversity Index (DI).<sup>107</sup> The DI was based on the Herfindahl-Hirshman Index (HHI) used in antitrust enforcement to measure a firm’s market concentration for a specific good or service.<sup>108</sup> Market

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98. *Id.* at para. 2

99. Alexander & Cunningham, *supra* note 18, at 80.

100. *See id.*; *see also* Consolidated Appropriations Act of 2004, Pub. L. No. 108–199, § 629, 118 Stat. 3, 97 (amending section 202 (c)(1)(B) of the Telecommunications Act of 1996).

101. *2003 Report and Order*, *supra* note 12, at para. 19.

102. *Id.* at para. 18.

103. Steven S. Wildman, *Indexing Diversity, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS*, *supra* note 5, at 151, 158.

104. *2003 Report and Order*, *supra* note 12, at para. 46 (internal citations omitted).

105. 1978 Statement of Policy, *supra* note 43.

106. Wildman, *supra* note 103, at 159.

107. *2003 Report and Order*, *supra* note 12, at para. 391. Measuring diversity, although a very important part of the “diversity in media” discussion, is beyond the scope of this Note.

108. LLOYD & NAPOLI, *supra* note 85, at 8; *see also* Wildman, *supra* note 103, at 152. For an explanation of HHI mechanics, *see* Wildman, *supra* note 103, at 152–54.



concentration in the HHI is calculated by “taking the market share of each firm, squaring it, and then summing the result for all firms.”<sup>109</sup> The DI was “to play a role in assessments of the effect of ownership structure on the performance of local media markets with respect to certain noneconomic policy goals analogous to that played by the HHI in antitrust enforcement.”<sup>110</sup>

Similar to the HHI, the DI “is a measure of structure rather than a direct measure of performance with respect to a policy goal,” which demonstrates the “belief that ownership structure influences performance.”<sup>111</sup> The FCC hoped that the DI would serve as an internal guide to assess viewpoint diversity while evaluating the status of local media markets and whether there should be further ownership consolidation of these markets.<sup>112</sup> In using the DI, the FCC “define[s] a market, measure[s] concentration,” and defines reasons for “rejecting or accepting mergers.”<sup>113</sup> In defining markets, the FCC “had to decide which media to include and how much weight they should be given.”<sup>114</sup>

#### D. *Backlash to FCC Actions: Prometheus Radio Project v. Federal Communications Commission*

The *2003 Report and Order* faced much criticism despite efforts to install the DI. What resulted was denouncement across the political spectrum, limitations enacted by Congress, and eventually the *2003 Report and Order* was remanded for consideration by the U.S. Court of Appeals for the Third Circuit<sup>115</sup> in *Prometheus Radio Project v. Federal Communications Commission*.<sup>116</sup> The court noted that the FCC’s objective in setting licensing policies 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.”<sup>117</sup> However, the court found that the FCC had not “sufficiently justified its particular chosen numerical limits for local television ownership, local radio ownership, and

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109. Mark Cooper, *When Law and Social Science Go Hand in Glove: Usage and Importance of Local and National News Sources—Critical Questions and Answers for Media Market Analysis*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS, *supra* note 5, at 193, 200.

110. Wildman, *supra* note 103, at 151.

111. *Id.* at 153.

112. LLOYD & NAPOLI, *supra* note 85, at 7–8.

113. Cooper, *supra* note 109, at 202.

114. *Id.*

115. LLOYD & NAPOLI, *supra* note 85, at 7.

116. 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

117. *Prometheus Radio Project*, 373 F.3d at 383 (citing *FCC v. Nat’l Citizens Comm. for Brdcast.*, 436 U.S. 775, 780 (1978)).

cross-ownership of media within local markets.”<sup>118</sup>

The court remanded the *2003 Report and Order* to the FCC because the FCC “gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results.”<sup>119</sup> The court noted that diversity comes from independent news sources and that it was inconsistent for the FCC to include the Internet in its DI but leave out cable television because most websites would not be considered independent news sources for local news any more than local news “retransmitted broadcast stations could be counted as cable-provided news.”<sup>120</sup> In addition, the court found the assumption of equal market shares among all outlets within the same media type to be inconsistent with the FCC’s “overall approach to its Diversity Index and also makes unrealistic assumptions about media outlets’ relative contributions to viewpoint diversity in local markets.”<sup>121</sup> The court pushed for the FCC to “measure media audiences, assess media usage, and apply a rigorous understanding of the function of media in democracy.”<sup>122</sup>

In response to the backlash received with regard to its diversity efforts, the FCC engaged in numerous studies to analyze issues relating to market entry barriers that affect minority media owners, such as: licensing, programming, advertising, and access to capital.<sup>123</sup> After various rounds of seeking comment, the FCC adopted the *2008 Broadcast Diversity Order*.<sup>124</sup> The *2008 Broadcast Diversity Order* adopted thirteen proposals to improve diversity efforts, such as the advertising nondiscrimination rule<sup>125</sup> (also known as the ban on “no urban/no Spanish” dictates)<sup>126</sup> and establishing policies that encourage growth of “eligible entities” that were to benefit

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118. *Id.* at 382.

119. *Id.* at 403.

120. Wildman, *supra* note 103, at 156; *see also Prometheus Radio Project*, 373 F.3d at 405–07.

121. *Prometheus Radio Project*, 373 F.3d at 408.

122. Cooper, *supra* note 109, at 194.

123. Memorandum from the Minority Media and Telecomm. Council on the FCC’s Ability to Rely Upon Previous *Adarand* Studies to Henry M. Rivera, Chair, FCC Advisory Comm. on Diversity for Commun. in the Digital Age (May 5, 2009), <http://www.fcc.gov/DiversityFAC/050709/adarand-status-050509.pdf> (citation omitted). Examples of such studies may be found at *Policy Forum on Market Entry Barriers*, FCC CREATING OPPORTUNITIES (Dec. 12, 2000), [http://www.fcc.gov/opportunity/meb\\_study/](http://www.fcc.gov/opportunity/meb_study/), and *FCC Presented with Advertising Study Which Reveals a Tale of Two Systems*, FCC, [http://www.fcc.gov/Bureaus/Mass\\_Media/Informal/ad-study/](http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/) (last visited Apr. 14, 2011).

124. Promoting Diversification of Ownership in the Broadcast Services, *Report and Order and Third Further Notice of Proposed Rule Making*, 23 F.C.C.R. 5922 (2008) [hereinafter *2008 Broadcast Diversity Order*].

125. *Id.* at paras. 49–50.

126. *Id.*

under the *Order* (including reviving a distress sale policy and making rules encouraging investment in “eligible entities”).<sup>127</sup> However, the FCC is still working on and seeking comment on new regulations that will help with implementing these proposals.<sup>128</sup>

The consolidation of the media industry resulting from the 1996 Act and the FCC’s *2003 Report and Order* changed the landscape for diversity in the media. Although the FCC has addressed the issue of diversity by establishing policies that promote minority ownership, minority owners have not been able to compete in this consolidated market. Regardless of whether one believes this has contributed to the lack of diverse programming serving minority audiences, this history shapes the diversity debate and the future of diversifying the media.

### III. THE FUTURE OF DIVERSITY IN THE MEDIA

#### A. *Should We Have Diversity in Ownership of the Media?*

The current status of media was illustrated by Josh Silver, executive director of *Free Press*:

We now have a political system run by big money and a media controlled by big corporations that are happy to keep Americans uninformed about the bread-and-butter issues that affect us most. You can’t have democracy without an educated public, and you can’t have an educated public with the media ownership structure we have today.<sup>129</sup>

As the 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities noted, minority ownership is important because it helps to “serve[] not only the needs and interests of the minority community but also enriches and educates the non-minority audience.”<sup>130</sup> As Mr. Silver’s comment demonstrates, today’s broadcast media fall short of providing adequate programming to fulfill such an objective.

For example, in the instance of broadcast and cable television, both are silent on issues regarding minority concerns and often engage in stereotypes of minorities in their program portrayals.<sup>131</sup> Typically, news coverage concerning minorities is limited to certain activities or concerns,

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127. *See id.* at paras. 35–39. “Eligible entities” are defined as “any entity that would qualify as a small business consistent with Small Business Administration (“SBA”) standards for its industry grouping, based on revenue.” *Id.* at para 6.

128. *See infra* part III.A.

129. KLINENBERG, *supra* note 4, at 221.

130. 1978 Statement of Policy, *supra* note 43, at 981.

131. *See* Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS*, *supra* note 5, at 227, 248 [hereinafter *White Out*]; *see also* Bachen et al., *supra* note 44, at 274.

and it often portrays minorities as “a threat or social burden” to society.<sup>132</sup> Studies demonstrate that “television news constrains White viewers’ perceptions and attitudes of minorities, and, more broadly, the policies and programs they are likely to support.”<sup>133</sup>

In addition, programming geared toward a minority audience has traditionally been very limited in broadcast and cable television. In broadcast television, the major networks have often shied away from more minority or urban programming.<sup>134</sup> One potential reason for this is that networks traditionally want to produce less expensive programming that they can more likely syndicate.<sup>135</sup> Although cable may be deemed to provide more options for all viewers, these options are considerably limited in number for minority viewers compared to the options of nonminority audiences, even on regular broadcast television.<sup>136</sup> For example, “Black Entertainment Television (BET), which used to be a black-owned company,<sup>137</sup> has primarily black-oriented programming, and has been criticized for mostly playing music videos . . . and recycled sitcoms.”<sup>138</sup> In addition, although Latinos are deemed to have more viewing options (like Univision and Telemundo) than African Americans, Latino viewing options are “often broadcast only in Spanish” (therefore excluding North American Latinos who do not speak Spanish) and that mergers in the industry have left “fewer Latino voices . . . on the air.”<sup>139</sup>

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132. Bachen et al., *supra* note 44, at 282.

133. *Id.* at 280 (relying on a study by Franklin D. Gilliam & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000), which found that local television news broadcasts depicting African Americans committing crimes create bias among White viewers).

134. See, e.g., Leonard M. Baynes, *Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color*, 39 U. MICH. J.L. REFORM 199, 207–08 (2006) (noting that the “majority-owned television networks [ABC, CBS, FOX, and NBC] fail to provide sufficient diversity,” and that despite their attempts in the early 2000s at diversifying programming, “[m]ost of the ‘gains’ in diversity resulted from an increase in non-recurring and secondary roles, not in starring roles”). Despite some progress in the early 2000s, there were “fewer scripted all-African American or all-Latino/a shows . . . broadcast in the 2004–2005 season than in the previous season . . . [and the] percentage of Asian/Pacific Island characters on primetime television remained small and unchanged . . . [with] Arab American, Asian Indian, Pakistani, and American Indian characters [being] virtually nonexistent.” *Id.* at 208–09. Although smaller networks in the 1990s, such as UPN and the WB, started out targeting more urban audiences that included more minorities, these networks shifted programming with “the WB programs . . . targeted more towards young, White audiences, and the UPN Black-oriented shows were segregated to Monday nights.” *White Out*, *supra* note 131, at 228.

135. See generally EINHORN, *supra* note 6, at 166.

136. See *White Out*, *supra* note 131, at 248.

137. *Id.* BET’s founder Robert Johnson sold BET to Viacom for \$2 billion. *Id.*

138. *Id.*

139. *Id.* at 249 (“In 2003, the FCC approved a merger between Univision and Hispanic Broadcasting. The deal created a Hispanic media conglomerate, which controls 63 of 65

Considering the current lack of minority programming, how can minority ownership ensure that programming formats provide viewpoint diversity to both minority and nonminority audiences? Although there is not a lot of empirical evidence concerning the nexus between minority ownership and broadcast diversity, some studies do indicate an increase in broadcast diversity when there is minority ownership of media in communities with larger minority populations.<sup>140</sup> Studies demonstrate that minority ownership, especially in radio stations, differs in programming and in news focus from majority-owned stations.<sup>141</sup> For instance, minority-owned radio stations are more likely to choose program formats that provide news and public affairs programming that are of importance and concern to minority communities.<sup>142</sup> For example, Black radio stations have been historically known to play an active role in community affairs and serve to unify African American audiences, especially in promoting political activism in the community and acting as a forum in critical social eras.<sup>143</sup> Yet, studies also show that “the targeting of local programming to minority viewers is much greater in markets with larger minority populations.”<sup>144</sup>

However, given Justice O’Connor’s dissent in *Metro Broadcasting* and her concern that we may be violating the Equal Protection Clause by making racial distinctions in regards to minority ownership policies, should we assume that just because one is a minority owner then he or she will broadcast information promoting diverse viewpoints? Although minority ownership does not guarantee diverse viewpoints, studies demonstrate that minority ownership rather “assure[s] the existence of a particular race-based viewpoint on the part of the station owner, [and] what is in fact realized is a sensitivity to and appreciation for minority or ethnic preferences and viewpoints that allows for their articulation as part of the marketplace of ideas.”<sup>145</sup> Although minority ownership does not guarantee diverse programming and sharing of diverse viewpoints, it does raise the likelihood of minority audiences being served.

Even if the FCC were able to provide for more minority ownership in broadcast, would its regulations pass under the strict scrutiny standard for racial classifications advanced in *Adarand*? Legal logic from the affirmative action realm may be able to provide some guidance for this

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radio stations owned by Hispanic Broadcasting, two broadcast television networks, one cable network, one record label, and 53 television stations.”).

140. See *Bachen et al.*, *supra* note 44, at 291–92.

141. *Id.* at 292.

142. *Id.*

143. *Id.* at 279.

144. *Id.* at 294.

145. *Id.* at 296.

problem. In *Grutter v. Bollinger*,<sup>146</sup> the Supreme Court found that diversity is a compelling state interest when looking at “race-based governmental action in the context of equal protection jurisprudence.”<sup>147</sup> *Grutter*, which involved higher education, held that “race may be a factor in admitting law students to promote diversity in the educational setting and better prepare students for the workforce . . . .”<sup>148</sup>

Even though *Grutter* dealt with a state action, the diversity rationale of the Court has application to broadcast. Like promoting the diversity dialogue in schools, the diversity dialogue can be important to broadcast and in the marketplace of ideas.<sup>149</sup> The diversity dialogue in higher education allows students to learn different viewpoints from one another. Likewise, increasing minority ownership also increases the pool of viewpoints in broadcast and allows for more ideas to be experienced by minority and nonminority audiences. The relationship between educational goals and broadcasting roles should be realized because “[b]roadcasting shapes cross-racial and ethnic understanding and may expose the American public to the existence of an increasingly diverse society and world.”<sup>150</sup> Therefore, this diversity logic from the affirmative action context should be utilized by the FCC in formulating minority ownership policies.

Although minority ownership policies should not remain the sole focus of the FCC as a way to achieve more diverse programming, it is still an important policy that is currently being pursued by the FCC. The FCC’s Advisory Committee on Diversity for Communications in the Digital Age (Advisory Committee) formally recommended on October 14, 2010, that the FCC undergo a Notice of Proposed Rulemaking to consider how to adopt a new preference program for its competitive bidding process in spectrum auctions.<sup>151</sup> On December 2, 2010, Chairman Julius Genachowski released a Public Notice requesting comment based on the Advisory Committee’s recommendations.<sup>152</sup> According to the Public Notice:

Under the proposed preference, persons or entities who have overcome substantial disadvantage would be eligible for a bidding credit. The Advisory Committee explains that the new preference “would expand

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146. 539 U.S. 306 (2003).

147. Bachen et al., *supra* note 44, at 288; *Grutter*, 539 U.S. at 327.

148. *Grutter*, 539 U.S. at 345; *see* Bachen et al., *supra* note 44, at 288.

149. *See* Bachen et al., *supra* note 44, at 288.

150. *Id.* at 291.

151. Transcript of Diversity Federal Advisory Committee Meeting (Oct. 14, 2010), available at <http://www.fcc.gov/DiversityFAC/meeting101410.html> (click on “Word” or “Acrobat” hyperlink).

152. Public Notice, Media and Wireless Telecommunications Bureaus Seek Comment on Recommendation of the Advisory Committee on Diversity for Communications in the Digital Age for a New Auction Preference for Overcoming Disadvantage, FCC GN Docket No. 10-244 (rel. Dec. 2, 2010).

the pool of designated entities to include those qualified applicants who have overcome substantial disadvantage,” noting that the proposed program is analogous in some respects to programs used by educational institutions in their admissions processes.<sup>153</sup>

These designated entity rules from the proposals would benefit auction bidders who have “overcome a disadvantage, such as a disability or a minority or low-income background,” and “would thereby help to level the playing field.”<sup>154</sup> In addition, as recognized by Commissioner Robert McDowell, the FCC is currently considering possibly replacing the “eligible entities” definition used in the *2008 Broadcast Diversity Order* “with a new concept that more directly addresses race and gender classifications”; however, doing so “must satisfy the rigorous demands of the Equal Protection Clause, as interpreted under the Supreme Court’s *Adarand* line of cases.”<sup>155</sup>

Although there is not strong empirical evidence that there is a direct link between minority ownership and diverse programming, minority ownership is believed to improve the likelihood of diverse programming in the aggregate. As the Court in *Metro Broadcasting* emphasized, we should defer to the FCC’s expertise on this matter and its historical belief that diverse media ownership does allow more ideas to be introduced into the marketplace of ideas. Diversified programming has traditionally been viewed by the FCC as a key objective of the Communications Act of 1934 and the First Amendment, and we should defer to the FCC’s goals to enhance diversified programming through its minority ownership policies because of this tradition and historical belief. However, at the same time the FCC needs to expand its focus and introduce regulations that further improve the achievement of diverse programming.

#### B. *Could the Internet Serve As a Substitute for Diverse Programming?*

Although there are arguments that because of the Internet we have access to many diverse viewpoints at any given moment, the Internet can hardly serve as a substitute for diverse programming that will serve minority audiences. While diverse viewpoints may be more easily expressed through the Internet because of fewer barriers from pressures of

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153. *Id.* at 1.

154. Press Release, Media Access Project, MAP Congratulates FCC for Helping to Enhance Diversity in Telecommunications and Media (Dec. 2, 2010), <http://www.mediaaccess.org/2010/12/map-congratulates-fcc-for-helping-to-enhance-diversity-in-telecommunications-and-media/> (last visited Apr. 14, 2011).

155. Commissioner Robert M. McDowell, Remarks to the Advisory Committee on Diversity in Communications for the Digital Age 2 (Dec. 2, 2010), [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1202/DOC-303198A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1202/DOC-303198A1.pdf).

economic markets and Big Media companies, there are still barriers for minority audiences and for acquiring information of interest. Although broadband connection to the Internet in the home has increased from ten percent in 2000 to over eighty percent in 2009, web users' confidence in the reliability of the Internet has declined from fifty-five percent in 2000 to thirty-nine percent in 2009.<sup>156</sup> In addition, there are still problems of computer literacy, which lead to "exacerbate[ing] inequalities among American communities."<sup>157</sup> Therefore, until problems of reliability and computer literacy are remedied, diverse viewpoints will have a difficult time reaching minority and nonminority audiences who may not have computer literacy or Internet access.

In addition, the Internet, although an expansive source, can be described as the "antiloocal medium" because it connects us to places far away.<sup>158</sup> The Internet is largely dominated by Big Media that recycles its broadcast and news sources on their websites, which are relied upon by other websites for information:<sup>159</sup>

The majority of online news content consists of repackaged wire service articles and syndicated newspaper stories, and most daily newspapers use the Web primarily to republish print articles rather than offering interactive or multimedia products. New media giants such as Yahoo, AOL, and IBS rely almost entirely on news supplied by other organizations, while bland, brief stories from wire services such as the Associated Press and Reuters constitute about three-fourths of the content at ABC.com and three-fifths of the content at both Fox.com and MSNBC.com.<sup>160</sup>

Although there is greater information available at our fingertips on the Internet, "[o]nline diversity is astonishingly shallow."<sup>161</sup> Because of the problem of reliability on the Internet, people typically prefer news companies that have proven themselves, which usually means "old media" news companies.<sup>162</sup> Since web users often use just a few successful sites, this makes it more difficult for diverse viewpoints to be explored.<sup>163</sup>

While technology could potentially better serve minority audiences,

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156. Press Release, USC Annenberg Sch. for Comm. & Journalism, 2010 USC Annenberg Digital Future Study Finds Strong Negative Reaction to Paying for Online Services (July 23, 2010), [http://www.digitalcenter.org/pdf/2010\\_digital\\_future\\_final\\_release.pdf](http://www.digitalcenter.org/pdf/2010_digital_future_final_release.pdf).

157. KLINENBERG, *supra* note 4, at 193.

158. *Id.* at 177.

159. *See id.*

160. *Id.* at 178.

161. Matthew Hindman, *A Mile Wide and an Inch Deep: Measuring Media Diversity Online and Offline*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS*, *supra* note 5, at 327, 329.

162. *See* KLINENBERG, *supra* note 4, at 179.

163. Hindman, *supra* note 161, at 329.



it has yet to prove itself. Computer literacy and Internet access remain barriers for minority audiences, and the Internet remains limited in providing various reliable sources. Even though we as a society should promote education in all communities to learn how to use new technologies as they become available, we should not wait on a future technology to be our saving grace. Technology should not be used to deflect the insufficiency of other media to serve minority audiences and to produce diverse programming.

*C. Bringing Back Regulation and Implications of the Fairness Doctrine*

Traditionally, there have been two main approaches to achieving diversity in the media: an open market approach and a regulatory approach.<sup>164</sup> However, the consolidation of the media industry in the last three decades demonstrates that the market approach has not served minority audiences and the ability to create more diverse programming. Therefore, the FCC needs to bring back a regulatory approach that focuses not only on ownership but also on the standards of programming and how that programming is brought to fruition by means other than strictly advertising.

The market approach, which is the approach the FCC has adopted primarily in the last three decades, stands for the efficient use of market forces to create diverse voices in media and society by allowing media companies to compete and determine the amount of programming desired by the market.<sup>165</sup> Efficiency in the market results by allowing media companies to be free from government regulation so that they may create diverse choices as the market demands it.<sup>166</sup> In order to obtain efficiency, media companies have structured themselves into vertically integrated organizations, which allow them to achieve scale economies because “costs can be amortized over many products rather than a single product.”<sup>167</sup> In addition, “economies of scope<sup>168</sup> are achieved when a company produces multiple products that are in some way compatible,” such as selling DVDs and books that complement television shows produced by a media company.<sup>169</sup> Achieving economies of scope allows Big Media companies to

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164. EINSTEIN, *supra* note 6, at 2.

165. *Id.*

166. *Id.*

167. *Id.* A vertically integrated organization is an “organization that integrates processes from production through distribution.” *Id.*

168. John C. Panzar & Robert D. Willig, *Economies of Scope*, 71 AM. ECON. REV. 268, 268 (1981) (“There are economies of scope where it is less costly to combine two or more product lines in one firm than to produce them separately.”).

169. EINSTEIN, *supra* note 6, at 2.

“produc[e] similar content over many forms[,]” which allows them to “more efficiently produce a profit.”<sup>170</sup>

Opponents of a strict market approach argue that by media companies organizing in vertically integrated structures, it makes it more difficult for new media competitors to enter the competitive market because “[m]ultiple stage entry is always more costly, difficult, and risky than single stage entry.”<sup>171</sup> Therefore, the vertical integration structure leads to a few corporations, or “media monopolies,” dominating the marketplace and “restricting marketplace diversity” by denying access to different viewpoints.<sup>172</sup>

The regulatory approach proposes that government regulation is the only way to promote social needs such as creating diversity.<sup>173</sup> If left strictly to the market, “pro-social programming” would not be created because private companies would not want to risk their ability to make a profit over working toward the public interest.<sup>174</sup> Since the broadcast system is based on advertising, which is determined by the size of the audience, producers create programs that will appeal to a majority audience.<sup>175</sup> As a result, in order to achieve the largest possible audience, programming will not account for “minority tastes.”<sup>176</sup> The reason this is a problem for achieving diversity in media is because multinational corporations that depend on other multinational corporations (advertisers) for profits are the ones that decide what will be communicated to audiences.<sup>177</sup>

The FCC has used ownership regulation as a way to regulate content. However, with the deregulation of media, ownership caps have expanded

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170. *Id.*

171. *Id.* at 3 (quotation omitted); see also Kurt A. Wimmer, *The Future of Minority Advocacy Before the FCC: Using Marketplace Rhetoric to Urge Policy Change*, 41 FED. COMM. L.J. 133, 137, 142–43 (1989) (noting that “[u]nder the theory of marketplace regulation, the FCC has a self-imposed responsibility to intervene in markets that have failed” and that the “market has failed minority audiences . . . because the advertisers that subsidize television programming perceive minorities as a less desirable audience[,]” which therefore requires “[a] properly configured system of regulation [that] would empower the viewer and might remedy a market failure by encouraging broadcasters to serve their minority audiences more effectively”); William A. Wines & Terence J. Lau, *Can You Hear Me Now?—Corporate Censorship and Its Troubling Implications for the First Amendment*, 55 DEPAUL L. REV. 119, 167 (2005) (“A recognition that the market approach to allocating a media spectrum has failed and a return to antitrust enforcement of media consolidation might also be fruitful.”).

172. EINSTEIN, *supra* note 6, at 3.

173. *Id.* at 2.

174. *Id.*

175. *Id.* at 3.

176. *Id.*

177. *Id.* at 5.

and have essentially barred the ability of smaller program producers to enter media. Even if minority owners were able to break through the barrier of vertically integrated companies, they would still face barriers produced by advertisers because advertisers place limits on the type of programming to be produced.<sup>178</sup> Perhaps the solution is in reaching programming. Although regulating programming runs the risk of violating the First Amendment, examples from other countries demonstrate that democracies have been able to require certain percentages of programming instead of requiring specific content. For instance, Western European countries have regulated the percentage of cultural, educational, and entertainment programming.<sup>179</sup> “In the Netherlands, 25% of programming is dedicated to culture, 25% to information, 25% to entertainment, and 5% to education.”<sup>180</sup> Likewise, Ireland requires radio stations to have news and current affairs comprise 20% of their programming.<sup>181</sup> The only example in the United States where content has been mandated is in the Children’s Television Act, which enabled the FCC to require that three hours of children’s programming be made available on the public airwaves.<sup>182</sup>

Broadcasters are viewed as public trustees because they impact public airwaves with their broadcast license.<sup>183</sup> Since broadcasters are required to serve the public interest, we may view programming obligations as part of public rights.<sup>184</sup> Many view pro-society programming as the type of programming that is often on public television, such as “children’s programming, public affairs programming, arts programming, documentaries, [and] nature programming.”<sup>185</sup> Although public television does provide more pro-society programming compared to broadcast

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178. *Id.* at 212.

179. *Id.* at 211.

180. *Id.* (citation omitted).

181. *Id.* at 212 (citation omitted).

182. Children’s Television Act of 1990, Pub. L. No. 101-437, §§ 101–03, 104 Stat. 996 (codified at 47 U.S.C. §§ 303(a)–(b) (2006)). § 303(b)(a) states that the FCC “shall, in its review of any application for renewal of a commercial or noncommercial television broadcast license, consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.” *See also* Policies and Rules Concerning Children’s Television Programming, Revision of Programming Policies for Television Broadcast Stations, *Report and Order*, 11 F.C.C.R. 10660, para. 120 (1996) (stating that “the Mass Media Bureau will be authorized to approve the Children’s Television Act portions of a broadcaster’s renewal application where the broadcaster has aired three hours per week . . . of educational and informational programming that has as a significant purpose serving the educational and informational needs of children ages 16 and under”).

183. EINSTEIN, *supra* note 6, at 212.

184. *See id.*

185. *Id.* at 219.

network and cable networks, public television faces “increasing costs, increasing competition from cable networks and decreasing public spending.”<sup>186</sup> Therefore, public television has come to rely on advertisers in the same way as for-profit broadcasters in order to supplement public funds it receives and funds from individual subscribers.<sup>187</sup> Because all media producers rely on this method of financing its programs, the FCC should reinstate its ascertainment requirements. By laying out specific standards for programming, such as the FCC did previously with the fourteen criteria ascertainment requirements in the 1960s, broadcasters will be required to serve communities’ needs and include the interests of minority audiences in their programming decisions while lessening the pressures of advertisers to dictate the content of programming.

If the FCC were to proceed with regulations promoting more diverse programming to serve minority audiences, such as ascertainment requirements, then concerns might arise that the FCC would be doing so in order to push certain viewpoints in broadcasting. Such regulations may bring about concerns about a resurgence of the Fairness Doctrine. Despite assertions by President Obama and FCC Commissioner Michael Copps that they do not support reinstating the Fairness Doctrine,<sup>188</sup> conservative politicians and critics—fearing that the Obama Administration and Congress would reinstate the Fairness Doctrine in order to contain conservative talk radio—introduced bills in both houses to keep the Fairness Doctrine from reemerging.<sup>189</sup> On February 26, 2009, the Senate voted to ban the reinstatement of the Fairness Doctrine by adding a rider—“S.Amdt. 573: To prevent the Federal Communications Commission from repromulgating the fairness doctrine”—to the D.C. Voting Rights Bill: Broadcaster Freedom Act.<sup>190</sup> These efforts demonstrate that the Fairness Doctrine is not likely to return.

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186. *Id.*

187. *Id.*

188. SILVER & AMMORI, *supra* note 24, at 3–4; see *White House: Obama Opposes ‘Fairness Doctrine’ Revival*, FOXNEWS.COM (Feb. 18, 2009), <http://www.foxnews.com/politics/first100days/2009/02/18/white-house-opposes-fairness-doctrine/> (noting that White House spokesman Ben LaBolt told FoxNews.com, “As the president stated during the campaign, he does not believe the Fairness Doctrine should be reinstated”); Matt Cover, *Acting FCC Chair Sees Government Role in Pushing ‘Media Diversity’*, CNSNEWS.COM (Feb. 11, 2009), <http://www.cnsnews.com/news/article/43414> (stating that Copps believed the Fairness Doctrine “didn’t need to be rehashed”).

189. SILVER & AMMORI, *supra* note 24, at 3; see, e.g., Broadcaster Freedom Act of 2009, S. 34, 111th Cong. (2009); Broadcaster Freedom Act of 2009, S. 62, 111th Cong. (2009); Broadcaster Freedom Act of 2009, H.R. 226, 111th Cong. (2009).

190. *S. 160: District of Columbia House Voting Rights Act of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s111-160&tab=amendments> (last visited Apr. 14, 2011).

Although President Obama and Commissioner Copps stated they opposed the Fairness Doctrine, both have made statements regarding the need for media diversity. For instance, President Obama, as a then-acting Senator, wrote a joint article with Senator John Kerry that stated, “As we look toward the future, we must ensure that all voices in our diverse nation have the opportunity to be heard. One important way to do this is to expand the ownership stake of women-owned, minority-owned and small businesses in our media outlets. . . . The FCC has an obligation to promote the public interest, including diversity in media ownership.”<sup>191</sup> Commissioner Copps, formerly acting as Chairman, stated that he believed the government has a role in enforcing media diversity.<sup>192</sup> In a speech to the Future of Music Coalition, Commissioner Copps stated that in order “to ensure that the public airwaves truly deliver the kind of news and information that we need to sustain our democratic dialogue and to reflect the great diversity of our country [we need] to make sure that these goals . . . remain at the center [of] the national agenda.”<sup>193</sup> In response to the “excessive” media consolidation, Commissioner Copps noted a more regulatory approach may be needed:

Sometimes . . . markets create problems, and boy have they created some whoppers this time . . . . Sometimes we need the government to step in and provide some oversight and some public accountability and if we learn one lesson from our present national crisis, that ought to be it.<sup>194</sup>

Commissioner Copps further stated, “[i]f markets cannot produce what society really cares about, like a media that reflects the true diversity and spirit of our country, then government has a legitimate role to play.”<sup>195</sup>

In response to the role that government must play in expanding media diversity, the Senate adopted the Durbin Amendment.<sup>196</sup> Proposed by Senator Durbin, it was adopted by Senate Amendment 591 to the D.C. House Voting Rights Act (S.160).<sup>197</sup> The amendment states that the FCC “shall take action to encourage and promote diversity in communication media ownership.”<sup>198</sup>

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191. Barack Obama & John F. Kerry, *Media Consolidation Silences Diverse Voices*, POLITICO (Nov. 7, 2007), <http://www.politico.com/news/stories/1107/6758.html>.

192. Cover, *supra* note 188.

193. *Id.* (quotation omitted).

194. *Id.* (quotation omitted).

195. *Id.* (quotation omitted).

196. *Senate Adopts Durbin FCC Diversity Amendment to D.C. Voting Rights Bill*, SENATUS (Feb. 26, 2009, 1:29 PM) <http://senatus.wordpress.com/2009/02/26/senate-adopts-durbin-fcc-diversity-amendment-to-dc-voting-rights-bill/> [hereinafter SENATUS].

197. *Bill Summary & Status: 111th Congress (2009–2010) S.AMDT.591*, LIBR. CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SP591> (last visited Apr. 14, 2011).

198. SENATUS, *supra* note 196.

Critics claim this is promoting a new Fairness Doctrine.<sup>199</sup> Republicans worry that the broad language of the amendment will lead to the implementation of the Fairness Doctrine later in time.<sup>200</sup> On the other hand, Democrats counter that the amendment does not mention the Fairness Doctrine, and it would work to ensure that those with a broadcast license work to promote the public interest.<sup>201</sup>

It seems very unlikely that the Fairness Doctrine will make a return; however, this does not mean that the promotion of diversity in the communications industry should be completely abandoned. In addition, changing media ownership rules to reflect more diversity does not constitute censorship.

Since the very beginning of broadcast regulation, the FCC has maintained limits on the number of stations one company may own in a local community and the number they may own nationally, to ensure diversity. While media companies would prefer to get larger, there is no plausible argument that ownership limits censor content.<sup>202</sup>

The onslaught of media deregulation and court rulings has led to a media industry dominated by big business and the survival of the fittest (or those with the deepest pockets) in an economic market. So what chance does diverse programming have in this grim reality? In order to ensure the role of diversity in the communications industry, the government must take a stronger role in its promotion. Policies advancing minority ownership should continue to be promoted. In addition, since diverse programming has difficulty thriving because it must compete in economically demanding markets in which advertisers and Big Media rule the roost, regulation should focus on changing the means of financing ownership. The broadcast industry's reliance "on advertising for its financial support" (especially that

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199. Matt Cover, *Durbin: 'Right-Wing' Radio Hosts Wave 'Bloody Shirt' over Broadcast Censorship*, CNSNEWS.COM (Mar. 11, 2009), <http://www.cnsnews.com/news/article/44895>; see also, e.g., Seton Motley, *Essay: The Durbin Amendment—The New 'Fairness' Doctrine with a Kicker*, NEWSBUSTERS.ORG (Feb. 27, 2009), <http://newsbusters.org/blogs/seton-motley/2009/02/27/essay-durbin-amendment-new-fairness-doctrine-kicker>; Jim DeMint, TWITTER (Feb. 26, 2009, 11:43 AM), <http://twitter.com/JimDeMint/status/1254977388> (quoting a tweet by Republican Senator Jim DeMint of South Carolina, who proposed a counter amendment to the Durbin Amendment, "We have closed the front door on Fairness Doctrine, but Durbin amend opens back door to censorship. The fight goes on"); Conn Carroll, *Morning Bell: The Durbin Doctrine's Assault on Free Speech*, FOUNDRY: CONSERVATIVE POL'Y NEWS BLOG (Mar. 16, 2009, 8:07 AM), <http://blog.heritage.org/2009/03/16/morning-bell-the-durbin-doctrine-assault-on-free-speech/> (stating that Senator Durbin "knows that reinstating the old Fairness Doctrine is a non-starter so he has come up with a new but equally pernicious law that will accomplish the exact same thing").

200. SENATUS, *supra* note 196.

201. *Id.*

202. SILVER & AMMORI, *supra* note 24, at 6.

of television) has been argued to “lead[] to limited diversity.”<sup>203</sup> In order to expand minority ownership and diversity, “we need a more mixed system of mass media with different mandates and different modes of financing.”<sup>204</sup> Finally, rather than allow advertisers to dictate content, the FCC needs to bring back regulation that promotes diverse programming, such as ascertainment requirements, so that broadcasters have standards for serving minority audiences like they serve their nonminority audiences.

#### IV. CONCLUSION

A high-ranking studio executive once noted, “It’s an awfully white world on television.”<sup>205</sup> This “awfully white world” aptly describes the landscape of today’s American media. The current state of American media reflects the interests of Big Media corporations who rule the audience’s intake of information. Despite the fallacy that we have more information in a constantly developing technological age, much of the information we acquire consists of condensed and recycled stories. In a democracy that relies on having an informed public, how can we truly feel informed when we have to rely on a handful of major media companies to send the information to us in as many mediums as they can reach us? By bringing back regulation, the FCC can ensure the public interest is served and that minority audiences are not continuously neglected.

The evolution of diversity in media has seen many highs and many lows, but at the moment it seems stagnant. With the FCC’s 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities, we saw the potential for the advancement of minority ownership in broadcast as a way of promoting diversity in the marketplace of ideas. However, after Supreme Court decisions in *Metro Broadcasting* and *Adarand*, we saw the Court limiting government action that would be deemed to be providing benefits due to racial classifications. Furthermore, the opportunity for minority ownership seemed to be further slashed by the unprecedented media consolidation that resulted from relaxed ownership regulations by the Telecommunications Act of 1996 and the FCC’s *2003 Report and Order*. Although the FCC attempted to provide a Diversity Index that would assist in measuring local markets and their ability to put out diverse viewpoints, the Diversity Index has been deemed an insufficient remedy in the wake of *Prometheus Radio Project*. In response, the FCC adopted the *2008 Broadcast Diversity Order*, but we have yet to see full implementation of the proposals adopted to assist minority media owners.

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203. See EINHORN, *supra* note 6, at 4.

204. Horwitz, *supra* note 5, at 41.

205. Greg Braxton, *A White, White World on TV’s Fall Schedule*, L.A. TIMES (May 28, 1999), available at <http://articles.latimes.com/1999/may/28/news/mn-41995>.

The FCC needs to bring back regulation. Rather than allow a handful of major companies to dominate the content received by our local audiences, the FCC should continue to focus on minority media ownership. As of 2005, “only 3.6 percent of all broadcast radio and television stations were minority-owned, while a mere 3.4 percent were owned by women.”<sup>206</sup> Although it is not guaranteed that minority ownership will always result in diverse programming, we should defer to the FCC’s long standing history in believing it will improve the likelihood of diverse programming in the aggregate.

Media policies promoting minority ownership should continue, but they should not be the only way to achieve diverse programming. Rather, the FCC should also consider regulations that focus on programming itself, such as bringing back ascertainment requirements, as a way to control how programming is determined. Although developing technologies, such as the Internet, could serve minority audiences, many barriers still exist that keep this technology from being used to its full potential. In order to ensure that the needs of all audiences are served, the FCC needs to lay out standards for broadcasters so that they meet the needs of their communities. Only by looking to the communities broadcasters serve can programming become diversified and reflect interests that are inclusive of minority audiences as well as nonminority audiences.

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206. KLINENBERG, *supra* note 4, at 28.



