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## Introduction

On March 5, 2012, the Leadership Conference on Civil and Human Rights sent a letter to Federal Communications Commission (FCC) Chairman Julius Genachowski regarding diversity in media ownership.[1] It was signed by representatives of several prominent human rights organizations, including the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP).[2] This letter explained that "[t]he civil rights community has long regarded the expansion of minority and female ownership in media as an important goal because of the powerful role the media plays in the democratic process, as well as in shaping perceptions about who we are as individuals and as a nation."[3]

In short, the Leadership Conference on Civil and Human Rights was expressing its concern over worrisome statistics that indicate a fundamental inequity in the distribution of mainstream media's power dynamics. The letter claimed that despite the fact that Latinos, African Americans, Asian Americans, and Native Americans combine to constitute a full third of the American population, these minority groups only represent 4.6% of the ownership of all television stations[4] and 7.24%

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1. ACLU, Ctr. For Cmty. Change, Common Cause, Cmmc'n Workers of Am., Leadership Conference on Civil & Human Rights, BNAACP, Nat'l Orgs. for Women Found, United Church of Christ & Office of Commc'n, Inc., to Julius Genachowski, Chairman, Robert McDowell, Comm'r & Mignon Clyburn, Comm'r, Fed. Commc'ns Comm'n (Mar. 5, 2012), *available at* http://www.civilrightsdocs.info/pdf/mediatel/fcc-final-signatories-3-5-12.pdf.
2. *Id.*
3. *Id.* at 1.
4. *Id.* at 3 (citing S. Derek Turner, Free Press, Off the Dial: Female and Minority Radio Station Ownership in the United States 4 (2007), http://www.freepress.net/files/off_

of the ownership of all radio stations.[5] In a similar vein, women comprise approximately 51% of the country's population; nevertheless, females own just 5.87% of commercial television stations[6] and 6% of commercial broadcast radio stations in the United States.[7]

These statistics led many, from human rights watchdogs to media policymakers, to note with some dismay the modest efforts made by the FCC to encourage meaningful change in this arena.[8] While the FCC once boasted a relatively robust slate of incentives and systematic advantages for minority and single-station owners, these policies and programs are now largely defunct.[9] Combined with ongoing reduction in the limitations upon station ownership and the corresponding rise in media consolidation, many onlookers believe that there is an inevitable trend toward the demise of viewpoint diversity.[10] To illustrate the prevalence of media consolidation into the hands of fewer, larger companies, consider that from 1984 to 2004, the overall number of radio station owners has fallen over 34%.[11] The clear trend is that a few large ownership groups are acquiring more and more media properties.

Part I of this Note will focus on the history of deregulation in the United States and the apparent effects of past reductions in efforts to increase ownership diversity. This Part will examine the general loosening of the legal limitations upon the concentration of media among individual owners. Part II will focus on the rise and fall of the FCC's affirmative action programs that specifically sought to increase the market share enjoyed by both minorities and females. Part III will consider empirical data that demonstrates the inequity of the current ownership landscape. Finally, this Note will seek to demonstrate the need for the reestablishment of

the_dial.pdf).

5. *Id.* (citing Catherine J. K. Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest* 5 (2009), http://centerformediajustice.org/wp-content/files/Minority_Commercial_Radio_Broadcasters_Sandoval_MMTC_2009_final_.pdf).

6. *Id.* at 2 (citing S. Derek Turner & Mark Cooper, Free Press, Out of the Picture 2007: Minority & Female TV Station Ownership in the United States: Current Status, Comparative Statistical Analysis & the Effects of FCC Policy and Media Consolidation 2 (2007), http://www.freepress.net/sites/default/files/fp-legacy/otp2007.pdf).

7. *Id.* (citing Turner, *supra* note 4, at 4).

8. *See, e.g.*, Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities*, *in* 10 Advances in Applied Microeconomics 73 (Michael R. Baye & Jon P. Nelson eds., 2001), *available at* http://transition.fcc.gov/ownership/roundtable_docs/waldfogel-c.pdf; Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 Rutgers L. Rev. 235, 237 (2004).

9. *See* Baynes, *supra* note 8.

10. *See* Siegelman & Waldfogel, *supra* note 8.

11. Baynes, *supra* note 8, at 239.

affirmative action programs and the viability of such programs under the strict scrutiny standard.

## I. The History of Deregulation

No legislative act has done more to shape the current environment in broadcasting than the 1996 Telecommunications Act. Prior to 1996, the FCC closely regulated national consolidation of media properties.[12] In other words, strict limits precluded monolithic corporations from accumulating the concentration of ownership required to substantially affect viewpoint diversity. The rationale for these restrictions was relatively straightforward: for broadcasting to serve the public interest, it was important to preserve the ability for many speakers to shape the content available to the public.[13] Diverse programming would create fuel for discourse and reduce the chance of any entity exerting undue influence upon the national consciousness.[14]

The 1996 Telecommunications Act slackened this restriction significantly. In addition to raising a previously existing restriction on the percentage of the national audience that a single television property owner could potentially reach,[15] the Act also wholly abolished the restriction on the total number of television stations or radio stations one entity could own.[16] This set off a feeding frenzy as powerful multiple-property owners snapped up smaller properties in an attempt to solidify their power bases. As an example of just how pronounced this effect was, Clear Channel Communications amassed ownership of over 1,200 radio stations between the passing of the Act in 1996 and 2003.[17]

In many ways, the 1996 Telecommunications Act was a logical outgrowth of previous deregulatory acts. For instance, during the early days of the FCC, the ownership cap for television stations for a single owner was three stations nationwide.[18] In 1944, this cap was lifted to five stations.[19] By 1985, the cap had

12. *See Telecommunications Act of 1996*, FCC, http://transition.fcc.gov/telecom.html (Dec. 13, 2013).

13. *See, e.g.*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 780 (1978) ("The Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.").

14. *Id.*

15. The cap on the total percentage of the potential national audience a single television owner could reach was raised from 25% to 35%. Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 202(a), 202(c)(1)(B), 110 Stat. 56.

16. *Id.* at § 202(a), 202(c)(1)(A).

17. Eric Klinenberg, Fighting For Air: The Battle to Control America's Media 62 (2007).

18. Jonathan W. Emord, *First Amendment Invalidity of FCC Ownership*, 38 Cath U. L. Rev. 401, 413 (1989).

19. *Id.*

been further raised to twelve.[20] Clearly, the move toward a deregulated climate of media ownership has been a gradual progression.

Radio station ownership rules were relaxed even further, as national reach limits were not introduced for radio. Instead, the only remaining restriction on the ownership of radio properties is the local consolidation rule, which creates a sliding scale for the ownership of commercial radio stations based on the size of the media market.[21] For instance, while a single media property owner can own up to eight combined commercial and non-commercial radio stations in a city with forty-five or more stations, a single owner can own no more than six stations in a market with only fifteen to twenty-nine stations.[22]

An additional requirement of the 1996 Telecommunications Act has also had a far-reaching impact: the imposition of a mandate upon the FCC to conduct a biennial review (later modified by Congress to a quadrennial review) of its policies.[23] Congress required that the FCC "shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."[24] In essence, this section imposes an ongoing requirement upon the FCC to remove non-essential regulations, which seems likely to drive future deregulatory efforts. This effect is obvious in *Fox Television v. FCC*, a 2002 case in which the D.C. Circuit Court rejected the FCC's attempts to justify the National Television Station Ownership Rule because the FCC needed to observe the effects of the newly raised national ownership cap before taking further action.[25] The court found that "[t]he Commission's wait-and-see approach cannot be squared with its statutory mandate . . . to 'repeal or modify' any rule that is not 'necessary in the public interest.'"[26] Thus, the rule has been read to require action as soon as the regulation appears to have outlasted its usefulness.

The first indication of the significance of the biennial review requirement came following the 2002 review. The FCC reviewed the entirety of its broadcast ownership policies and ultimately issued the 2003 Media Ownership Order.[27] This order, which examined restrictions on everything from national television ownership to local radio ownership to the cross-ownership rules that precluded one entity

20. Roger L. Sadler, Electronic Media Law 105 (2005)

21. *Review of the Broadcast Ownership Rules*, FCC, http://www.fcc.gov/guides/review-broadcast-ownership-rules (Dec. 13, 2013).

22. *Id.*

23. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112, *amended by* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629(3), 118 Stat. 100.

24. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112.

25. Fox Television Stations, Inc. v. FCC (*Fox I*), 280 F.3d 1027, 1041−42 (D.C. Cir.), *modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002).

26. *Id.* at 1042.

27. *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd. 13620 (2003).

from operating multiple types of media outlets within a single local market,[28] has become the focal point of an ongoing judicial battle. After the Third Circuit Court of Appeals struck down many of the 2003 order's provisions in the *Prometheus I* case,[29] the FCC issued its 2008 Remand Order.[30] While the 2008 Order reset most policies to their pre-2003 levels, the case again returned to the Third Circuit in *Prometheus II* in 2011.[31] While *Prometheus II* focused on the cross-ownership rules for newspapers and broadcast stations and is beyond the scope of this Note's focus, the ongoing judicial dialogue is illustrative of the continuing controversy surrounding these issues.

The 2003 Media Ownership Order also once again raised the national television ownership rule limit on the portion of the potential market that an individual media property owner could reach from 35% to 45%.[32] In so doing, the FCC concluded that the national television cap was not necessary to promote viewpoint diversity, but instead served the primary function of preserving localism in programming.[33] In 2004, Congress imposed a statutory cap of 39%, which superseded the FCC's proposed 45%.[34]

This section of the Ownership Order also went to great lengths to demonstrate that the priorities of a local station are more closely aligned with the needs and tastes of an individual community and thus are better able to serve the public interest of a local market. This outcome was driven in part by the finding that independently owned stations were more likely than network owned stations to resist programming initiatives by networks. The FCC found that by protesting or preempting certain programming decisions that affiliates did not feel would serve its community's public interest (and thus the affiliates' own economic interest) network programming was better tailored to fit local needs.

A final contribution of the 2003 Media Ownership Order is the diversity index.[35] This controversial tool, designed to replace traditional cross-ownership limitations, attempts to assign numerical values to signify the concentration of a given media market. The equation factors in the number of media outlets (defined as

28. *Id.* at 13623.
29. Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372 (3d Cir. 2004).
30. Review of the Commission's Broadcast Ownership Rules, 23 FCC Rcd. 2010 (2007), *aff'd in part, vacated in part sub nom.* Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 472 (3d Cir. 2011).
31. *Prometheus II*, 652 F.3d 431.
32. 2003 Media Ownership Order, 18 FCC Rcd. at 13814–15.
33. *Id.* at 13815.
34. Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. Cal. L. Rev. 669, 705 (2005). According to Yoo, setting the national television ownership cap at 39% allowed Congress to avoid a showdown with Fox and Viacom, who had exceeded the previous 35% cap using temporary waivers granted by the FCC. *Id.* at 705 n.171. Setting the cap at 39% allowed Congress to defuse political momentum in favor of further liberalization. *Id.*
35. 2003 Media Ownership Order, 18 FCC Rcd. at 13814−15.

television stations, radio stations, newspapers, and internet service providers) and the number of discrete property owners operating within the market.[36] The relative impact of each of these types of media is scaled using intermedia weightings to adjust for the perceived importance of diversity within that medium; for instance, the intermedia weighting for television is 33.8%, while the weighting for the internet is a mere 12.5%.[37] Thus, a concentration of power with one owner is viewed as more problematic for television than a similar amount of concentration for an internet service provider. This index would provide a rule of thumb for calculating the likely impact of proposed mergers on the diversity of a given market.

The diversity index was considered in *Prometheus I*.[38] While the Third Circuit Court of Appeals found that the implementation of the diversity index was not constitutionally untenable, it found that the FCC had failed to properly support its analysis.[39] The decision focused on the lack of reasoned analysis regarding the choice and weight of the media outlets incorporated into the index.[40] The decision went on to say that even if the diversity index was considered to be an accurate portrayal of media concentration, the proposed merger rules based upon the index were inconsistent and were not "rationally derive[d] . . . from the Diversity Index results."[41] For these reasons, the diversity index was struck down.[42]

## II. The Rise and Fall of the FCC's Affirmative Action Policies

The FCC is not, and has never been, blind to the impact of minority and female ownership on the end product received by consumers.[43] In 1998, the FCC adopted the following position regarding the impact of minority and female station ownership:

> We do not assume that minority and female employment will always result in minority and female-oriented programming. Nor do we believe that all minorities or all women share the same viewpoints. Nonetheless, we believe that, as more minorities and women are employed in the broadcast industry, it is more likely that varying perspectives will be aired and that programming will be oriented to

36. *Id.* at 13783.
37. *Id.*
38. *Prometheus I*, 373 F.3d 372 (3d Cir. 2004).
39. *Id.* at 404–06.
40. *Id.* at 406−09.
41. *Id.* at 409.
42. *Id.* at 411.
43. *See, e.g.*, 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, 39 (2001).

serve more diverse interests and needs.[44]

While this stance expressly stops short of acknowledging an inherent link between station ownership and content production, it was the FCC's open admission that there is, at minimum, an imperfect correlation between the two.[45] Additionally, a 2001 study by Siegelman and Waldfogel, which was adopted by the FCC, lent support to the hypothesis that policies promoting minority and female ownership will in fact result in an increase in the amount of content produced that is targeted for consumption within those demographics.[46]

Despite early reluctance to expressly consider race and ethnicity in the adjudication of license applications due to the lack of an empirically proven nexus between station ownership and content, the FCC was prodded into action by a 1973 decision of the D.C. Court of Appeals in the *TV 9* case, which found that "minority ownership is likely to increase diversity of content" and that programs providing an advantage to racial and ethnic minorities were integral to the FCC's responsibility to promote the public interest.[47]

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44. Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 65 Fed. Reg. 11315 (Jan. 20, 2000), *available at* http://transition.fcc.gov/Bureaus/Mass_Media/Notices/1998/fcc98305.txt..

45. *See, id.*

46. *See* Siegelman & Waldfogel, *supra* note 8. The study's abstract provides as follows:

> Market provision of radio programming is beset by possible inefficient underprovision of formats appealing to small audiences whose social benefit of programming—but not advertising revenue—exceeds their costs. Larger markets have more programming, so that listeners derive benefits from being in the same market as others with similar preferences, a mechanism we term "preference externalities." Yet, because white and minority content preferences are substantially different, preferences externalities are positive only within group. We expect problems of inefficient underprovision to be more likely for small minority populations. We find evidence that policies promoting minority ownership increase the amount of minority-targeted programming.

*Id.* at abstract.

47. TV 9, Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973). The court further elaborated:

> To say that the Communications Act, like the Constitution, is color blind, does not fully describe the breadth of the public interest criterion embodied in the Act. Color blindness in the protection of the rights of individuals under the laws does not foreclose consideration of stock ownership by members of a Black minority where the Commission is comparing the qualifications of applicants for broadcasting rights in the Orlando community. The thrust of the public interest opens to the Commission a wise discretion to consider factors which do not find expression in constitutional law.

*Id.* at 936. As justification for this stance, the court quoted its earlier decision from *Citizens*

In response, the FCC adopted a number of affirmative action programs for the purpose of promoting minority ownership and active management.[48] The following four programs were adopted for this purpose, though each has subsequently fallen out of favor or been explicitly repealed.

*A. Racial Minority Preferences in Comparative Hearings*

During the days when it was common practice for the FCC to resolve multiple claims to a particular station via comparative hearings, the FCC frequently used both race and gender as factors in assessing the relative merits of the candidates.[49] In fact, the FCC had an express list of criteria that it considered in deciding between multiple claimants to a particular broadcast property.[50]

First, the commission considered "two primary objectives,"[51] including which station could offer the "best practicable service to the public, and . . . a maximum diffusion of control of the media of mass communications."[52] Then, the panel would review secondary factors including diversification of control of the media, whether the station owner participated full time in the station's function, the proposed programming or content of the station, past broadcast record, efficient spectrum use, and the "character" of each applicant.[53]

The FCC adopted the 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities, which created a preference for minority ownership.[54] However, the D.C. Circuit Court found in *Bechtel v. FCC* that the underlying definition used for the comparative criterion of "integration of ownership and

*Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971), which read in part, "As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." *TV 9, Inc.*, 495 F.2d at 937.

48. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 588 (1990) ("The FCC noted that '[w]hile the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media.'" (citation omitted)).

49. *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 979–80 (1978).

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

51. *Id.* at 394.

52. *Id.*

53. *Id.* at 399.

54. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 981–83 (justifying the reinforcement of this preference by saying, "[h]ence, the present lack of minority representation in the ownership of broadcast properties is a concern to us. We believe that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties.").

management" was arbitrary and capricious.[55] Thereafter, the FCC stopped implementing the enhancement as a criterion for comparative hearings.

It is unlikely that this program will ever be resurrected. In 1997, Congress ordered that the FCC conduct its selection of license holders in competitive markets based on an auction method.[56] This measure means that the comparative hearings in which race and gender could have been used as a factor in assessing applicants' merit are no longer a valid process that the FCC can choose to employ.

*B. Racial Minority Preferences in Lottery Selections*

In a similar vein, the FCC used to weight the odds in lottery selections for station allocation to grant a more favorable chance of winning to minority owners.[57] This program was primarily used when awarding licenses for low-power television stations. However, once Congress mandated that station allocation be controlled by an auction system, this initiative became obsolete.

*C. Tax Certificate Program*

Another program designed to foster minority media ownership was the tax certificate policy. The FCC adopted this program in 1978 as part of greater efforts to meet its obligation to ensure diversity in media ownership. This policy allowed media property owners to sell off media properties to qualifying minority buyers while either deferring or altogether avoiding the subsequent capital gains tax on the transactions.[58] This made such sales very attractive and effectively subsidized minority media owners with benefits unavailable to larger conglomerates.

The policy was in effect until 1995 when Congress repealed it. The program was repealed due to concerns that it was being abused by deals either structured so that the sale was to a "minority owner" who was not actively involved in the management of the station or by using a minority as a middle man to ensure a tax break for the seller; sales executed under either of these conditions obviously failed to accomplish the program's underlying objective of placing minority owners in positions to influence content.[59] Because Congress repealed this measure, the FCC does not possess the authority to reinstate this program without congressional assistance.

55. 10 F.3d 875, 877 (D.C. Cir. 1993).

56. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 388 (1993).

57. *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 984 n.22.

58. *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 982–83.

59. See generally Bruce R. Wilde, Note, *FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Re-Examination of Policy*, 138 U. Pa. L. Rev. 979 (1990), for a fairly comprehensive outline of the types of abuse with which Congress was concerned.

*D. Distress Sales*

Minorities also received preference in distress sales, which occurred when a station either lost its accreditations or went bankrupt.[60] Under this program, minority station owners were often able to obtain ownership of a struggling station's license for no more than 75% of the station's actual fair market value.[61] This created considerable incentive for minorities to take on more media ownership responsibilities, while having a sizable portion of the required capital outlay essentially subsidized by the FCC. Unfortunately, the FCC last attempted to implement this policy in 1995 due to concerns about whether the program would survive heightened constitutional scrutiny.[62]

*E. Constitutional Disposition*

The rise and fall of the FCC's affirmative action programs was shaped in part by the changing national discourse on race-related programs as a whole. As described above, the FCC received a mandate from the D.C. Court of Appeals requiring the creation of programs for the benefit of minority broadcast owners.[63] The propriety of these programs was upheld in the 1990 Supreme Court case of *Metro Broadcasting, Inc. v. FCC*.[64] The Supreme Court determined that the racial diversity in broadcasting promoted by the FCC's programs promoted the type of "important" government interest that could survive intermediate scrutiny, the then-existing standard for affirmative action programs.[65]

However, *Metro Broadcasting* was reversed just five years later by *Adarand Constructors, Inc. v. Pena*.[66] This case raised the constitutional bar to one of strict scrutiny, which requires a compelling government interest and a program narrowly tailored to promote that interest.[67] The FCC harbored serious concerns as

60. *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 982–83.

61. Alan G. Stavitsky, *The Rise and Fall of the Distress Sale*, 36 J. Broadcasting & Electronic Media 249, 249 (1992).

62. *See id.* at 255–56.

63. TV 9, Inc. v. FCC, 495 F.2d 929, 936 (D.C. Cir. 1973).

64. 497 U.S. 547 (1990).

65. *See id.* at 548. As the Court described:

> 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 the achievement of those objectives.

*Id.*

66. 515 U.S. 200 (1995).

67. *See, e.g.*, *id.* at 202.

to whether its programs could surmount either of these hurdles. First, despite the affirmation under *Metro Broadcasting* that broadcasting diversity was an "important" government interest, it was unclear whether courts would find that the type of diversity these programs sought to promote constitutes a compelling interest.

The second, possibly more daunting hurdle, was whether race-based affirmative action was narrowly tailored to address the issue of diversity in media content. While *Metro Broadcasting* expressly accepted the FCC's contention of the existence of a nexus between minority ownership and program diversity,[68] it was unclear whether courts would continue to uphold this rationale under the more demanding strict scrutiny test. While further empirical studies have demonstrated that there is a correlation between program diversity and minority ownership,[69] the concept of being "narrowly tailored" leaves enough to judicial discretion that it is difficult to say whether courts would uphold such programs if they were proffered for examination.

### *F. Currently Existing Programs*

Currently, the FCC has no formal affirmative action programs designed for the explicit benefit of minority station owners. Instead, the FCC has implemented only a very limited range of policies designed to benefit small businesses or businesses owning few or no other media properties.

The current state of the FCC's policies on race and ethnicity is encapsulated in the Diversity Order,[70] which was released alongside the 2008 Order issued in the aftermath of *Prometheus I*.[71] The first prong of the Diversity Order formally adopted

68. The court declined to challenge the FCC's determination in this matter, stating that "[t]he FCC's conclusion that there is an empirical nexus between minority ownership and broadcast diversity is a product of its expertise, and we accord its judgment deference." *Metro Broad. Inc.*, 497 U.S. at 570.

69. Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841, 869 (1995), which states that:

> [W]e have seen that minority ownership has a distinct and significant impact on minority programming, even after we control for the composition of minorities in the marketplace. . . . The magnitude of the coefficients for black ownership on black programming and Hispanic ownership on Spanish programming are significantly larger than the coefficient for female ownership on female programming. We also see, however, that a greater degree of female ownership leads to increases in programming targeted to several other minority groups. Stations with female ownership are more likely to program primarily for females, but are also more likely to increase programming for blacks, Hispanics, Asians, and American Indians.

70. Promoting Diversification of Ownership in the Broadcasting Services, 23 FCC Rcd. 5922 (2007).

71. Review of the Commission's Broadcast Ownership Rules, 23 FCC Rcd. 2010 (2007), *aff'd in part, vacated in part sub nom.* Prometheus Radio Project v. FCC (*Prometheus II*), 652

antidiscrimination rules banning such practices as discriminating on the basis of race or gender, both in station sale and in advertising contracts.[72] The second prong pledged to undertake more comprehensive studies on the demographics of its owners as part of the biennial Form 323 ownership report.[73]

The third prong of the Diversity Order expanded opportunities for "eligible entities" under existing FCC rules. This included a reaffirmation of the distress sale policy described above (with the change of eligibility from "minority controlled entities" to "eligible entities"), as well as extended construction windows, priorities in forming duopolies within a local market, and other advantages.[74] Perhaps most significantly, eligible entities receive bidding credits in the auction system used to assign disputed licenses, giving these entities a distinct advantage over conglomerates controlling a far larger number of properties.[75]

The problem with this seemingly promising development lies in the definition of "eligible entity." Instead of basing eligibility on owner race, gender, or some other character strongly associated with diversity, the term is instead defined strictly as a function of the economic size of the entity.[76] This definition, while helpful for sidestepping the need to survive review under strict scrutiny, has caused former FCC Commissioner Jonathan Adelstein to remark that "[t]he definition of the entities eligible is so broad . . . that minority- and women-owned businesses are likely to be incidental beneficiaries at best."[77] Efforts to review this policy are underway and will be described in more detail below.

In addition to concerns about the efficacy of defining "eligible entities" in strictly economic terms, the Third Circuit Court of Appeals decision in *Prometheus II* expressly held that the definition provided by the Diversity Order was arbitrary and capricious on three grounds.[78] First, the Diversity Order did not explain how adopting its definition of "eligible entity" would further the goal of increasing broadcast ownership by minorities or women.[79] Second, the court pointed out that the actual impact of the program, even if fully realized, would have a negligible impact at best because the percentage of minority media owners for small businesses and for the industry as a whole are within one percentage point of one

F.3d 431, 472 (3d Cir. 2011).

72. Promoting Diversification of Ownership in the Broadcasting Services, 23 FCC Rcd. at 5941.

73. *Id.* at 5942, 5945–55.

74. *Id.* at 5937–39.

75. *Id*. at 5936, 5963.

76. To be an "eligible entity" a business must be eligible for the "small business" designation under the Small Business Administration's standards. *Id.* at 5925. The current annual revenue standards for television broadcasting stations cannot exceed $13 million and radio broadcasting stations cannot exceed $6.5 million. *Id.* at 5926.

77. *Id.* at 5987.

78. *Prometheus II*, 652 F.3d 431, 469–71 (3d Cir. 2011).

79. *Id.* at 470.

another.[80] Finally, the court noted that the analytical process through which the FCC derived its new policies was not based on hard data, because the FCC had collected no reliable data revealing ownership by minorities or women in either television or commercial radio.[81] Without statistical backing, and without a well-developed rationale as to how or why this definition of eligible entities would be beneficial to minorities, the court found that the FCC's policy was not rationally derived to serve the public good.[82]

## III. Empirical Research on Minority Market Share

Having established the correlation between station ownership and viewpoint diversity, the next analytical step is to determine whether deregulatory steps taken by the FCC and Congress have in fact led to a reduction in minority ownership. In particular, this Note is interested in the impact specifically on Hispanic station owners as something of a proof of concept. If a minority group whose presence as a proportion of the overall population has risen so dramatically in recent years is still struggling to establish sufficient ownership share, then it paints a dire picture for other minority groups whose populations are more static.

On November 14, 2012, the FCC released its Report on Ownership of Commercial Broadcast Stations containing detailed data on gender, race, and ethnicities of station owners.[83] This is the first such report issued by the FCC since the revised Form 323; the FCC had long not required this information on its biennial Form 323 ownership report.[84] The requirement to more reliably report this data went into effect in 2009; thus, the newly issued report illustrates changes between the 2009 and 2011 annual reports.[85] While this two-year period is insufficient for demonstrating long-term trends in the data, and does little to illuminate the degree of control that may have been accrued by minorities during the peak of the FCC's affirmative action efforts, it nonetheless provides an interesting snapshot of the current state of minority media ownership.

The raw ownership figures for 2011 illustrate the staggering degree to which the industry lacks minority representation. Hispanic owners accounted for only 2.9% of all full-power commercial television stations, 4.5% of all commercial AM radio stations, and 2.7% of all commercial FM radio stations.[86] Only about a quarter (26.5%) of full-power commercial television stations boasted even a single

80. *Id.*
81. *Id.* at 470–71.
82. *Id.*
83. 2012 Report on Ownership of Commercial Broadcast Stations, 27 FCC Rcd. 13814 (2012).
84. *Id.* at 13815.
85. *Id.*
86. *Id.* at 13816–17.

Hispanic stockholder controlling at least 5% of the station's ownership rights.[87]

As stated in the introduction to this Note, minorities[88] comprise a full third of the American population. However, the 2012 Report on Ownership released by the FCC reveals that these minorities combine to control just 5.1% of all full-power commercial television stations, 10.7% of all commercial AM radio stations, and 6.2% of all commercial FM radio stations.[89] The numbers are slightly more promising if low-power television stations are considered, but the figure for that type of station remains at just 15.2%, still well below the level at which these minorities are found in the general population.[90] Under the premise that ownership serves as a reasonable proxy for the ability to influence programming decisions, these figures throw concerns about minority underrepresentation, and thus, a lack of viewpoint diversity, into sharp relief.

The nonpartisan research group Free Press released a report titled *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States*.[91] While this piece is older than the FCC report, and limits its scope to television ownership instead of also considering radio, its findings paint an equally bleak picture. According to Free Press, Latinos comprised 15% of the United States population in 2007; however, they controlled only seventeen full-power commercial television stations, which amounted to a mere 1.25% of the more than one thousand full-power stations nationwide.[92]

The Free Press also reported that there has been a significant drop in ownership levels for minorities since the 1996 Telecommunications Act went into effect, claiming that 40% of minority controlled stations were converted to either white or corporate control between 1998 and 2007.[93] The Free Press laid the continuing bleakness of this situation squarely at the feet of the deregulatory changes made as part of the 1996 Telecommunications Act, claiming that the majority of sales of minority-owned stations would not have been permitted under the national ownership cap or other bars to media consolidation before the Act removed these controls.[94]

Clearly, this data does not provide an irrefutable causal link between deregulatory efforts and this decline in minority station ownership. However, the picture painted by this massive shortfall is too clear to ignore. Ideally, one would wish to see a proportional share of station ownership enjoyed by Latinos; the shortfall

87. *Id.* at 13818–19.

88. The FCC's 2012 Report on Ownership of Commercial Broadcast Stations incorporates statistics about both Latinos, who are considered an ethnic minority, as well as racial minorities, a category that includes American Indians, Asians, African Americans, Native Hawaiians, Pacific Islanders, and biracial individuals. *See id.* at 13814.

89. *See id.* at 13816–17.

90. *See id.* at 13822.

91. Turner & Cooper, *supra* note 6.

92. *Id.* at 2.

93. *Id.* at 3–4.

94. *Id.* at 3.

observed instead is a cause for concern not only in its own right, but also as an indicator of the impact other minority groups may be enduring. As a larger data set becomes available when future Form 323 ownership reports are filed, it will bear watching what trends continue to develop.

## IV. Arguing for the Return of Affirmative Action

At this point, the FCC still appears to be clinging gamely to the belief that the broadcasting arena can police itself in accordance with the will of the free market.[95] In other words, the FCC has chosen to let consumer demand for diverse programming serve as the incentive for stations to produce such programming. However, this begs the fundamental question of whether the public's tastes truly serve as a perfect substitute for the FCC's requirement of serving the "public good."

One explanation for the FCC's reluctance to impose industry regulation centered around advancing minority ownership, particularly on racial or ethnic grounds, is the necessity that any such regulation pass muster under constitutional strict scrutiny.[96] While the FCC has never had one of its affirmative action programs challenged under the strict scrutiny standard, due predominantly to the fact that any such programs which could have been challenged under that standard were dismantled before strict scrutiny's full rise to prominence, there does appear to be hope that at least some programs the FCC could implement would survive the requirement of a compelling government interest. In both *Gratz v. Bollinger*[97]

95. As examined by Adam Marcus in his note, *Media Diversity And Substitutability: Problems with the FCC's Diversity Index*, 3 I/S: J. L. & Pol'y 83 (2007):

> FCC regulations can be classified into one of three models: scarcity, trusteeship, and market forces. Current media ownership regulations are based primarily on the market forces model. There are no regulatory or statutory requirements to air news or public affairs programming; previously it was believed that stations would continue to provide this type of programming in response to market forces.
>
> The market forces approach to broadcast regulation has resulted in a decrease in the number of minutes of news programming per hour, stations have cut their news staffs or eliminated them entirely, and news has been outsourced to wire services. News that is aired has shifted from serious investigations and series to entertainment, sports, and consumer-related items. "On local TV news, fewer and fewer stories feature correspondents, and the range of topics that get full treatment is narrowing even more to crime and accidents, weather, traffic and sports." . . . The FCC's proposed rules will increase consolidation in the broadcasting markets without fixing these systemic problems.

*Id.* at 88 (citation omitted).

96. *See* Baynes, *supra* note 8, at 237, 249–52.

97. 539 U.S. 244 (2003).

and *Grutter v. Bollinger*,[98] the Supreme Court indicated that the merits of diversity in education, business, politics, and the military might be so valuable as to rise to the compelling interest level.[99] If the program could be implemented so as to be narrowly tailored to further these interests, it appears to be entirely feasible that the FCC could reinstate at least some race-based preferential practices.[100]

Perhaps most encouragingly, there are signs that the FCC's commissioners are tired of the inertia that has limited progress on this front. As part of the 2008 Diversity Order, then-Commissioner Michael Copps expressed his dissatisfaction with the ongoing failures of the FCC's diversity initiatives saying, "Racial and ethnic minorities make up 33 percent of our population. They own a scant 3 percent of all full-power commercial TV stations. And that number is plummeting. . . . It is almost inconceivable that this shameful state of affairs could be getting worse; yet here we are."[101] Hopefully, the discontent with the status quo, combined with the judicial mandate for better standards imposed in the *Prometheus II* decision, manifests itself as a move toward meaningful reform in the near future.

One avenue for reform that is already being explored is the possibility of reconfiguring the "eligible entities" definition for the current system of bidding credits. In December 2010, FCC Chairman Julius Genachowski released a public notice soliciting comment on redefining the "eligible entities" eligible for bidding credits and other systemic advantages.[102] Specifically, Commissioner Robert McDowell has said that the FCC is considering a new set of criteria that would focus on gender and race, although he acknowledges the importance of ensuring that such a program would not run afoul of equal protection concerns.[103]

Ultimately, there appears to be ample evidence that the FCC's current marketplace ideology has proven to be largely ineffective in fostering the appropriate or desirable level of programming made both for and by minorities and females.

98. 539 U.S. 306 (2003).

99. *See Gratz*, 539 U.S. at 268; *Grutter*, 539 U.S. at 330–31.

100. *See Grutter*, 539 U.S. at 341.

101. Michael Copps, *Transcript: Prepared Statement – FCC Meeting*, PBS (Dec. 18, 2007), http://www.pbs.org/moyers/journal/12212007/transcript3_fcc.html.

102. Public Notice, 75 Fed. Reg. 81274 (Dec. 27, 2010), which reads in part:

> 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 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.

*Id.* at 81274–75.

103. Caridad Austin, Note, *Overwhelmed by Big Consolidation: Bringing Back Regulation to Increase Diversity in Programming that Serves Minority Audiences*, 63 Fed. Comm. L.J. 733, 754 (2011).

If this trend is allowed to continue, there appears to be a real danger that the percentage of stations owned by minorities may continue to decline.

While academics have been careful to note that there is a difference between programming that serves the interests of minorities and programming created by minority-owned stations, the FCC and much of academia have acknowledged that there is at least an imperfect correlation between the two. The FCC must consider whether a marketplace model that has led to a demonstrable drop in the ownership percentages of minorities truly serves the public interest.

Encouragingly, however, the commissioners of the FCC asked Congress in July of 2012 to reconsider implementing the tax certificate problem. One commissioner, Jessica Rosenworcel, told the House Communications and Technology Subcommittee that the tax certificate program was "one of the most effective ways of promoting diversity of ownership."[104] Another commissioner, Robert McDowell, acknowledged that the program in its original form was imperfect, but suggested to the subcommittee that it could be tweaked to reduce inefficiency and the chance for abuse.[105] The reinstatement of a program with a positive track record could lay the groundwork for either the reinstatement of other programs that have fallen out of favor with the FCC or even new initiatives. However, Congressional endorsement would not be enough, as the hurdle of passing judicial muster under the strict scrutiny standard would still have to be cleared. The decisions in *Gratz* and *Grutter*, coupled with research showing a clear link between station ownership by minorities and programming targeted to those minorities, provide hope that the program may survive even under that rigorous standard.

While this one program is unlikely to singlehandedly reverse the trend toward media consolidation, it is heartening to see that the FCC is still exploring options to ensure the ongoing survival of minority viewpoints. Combined with the existing programs that provide systemic advantages to small businesses, it is possible that the foundation has been laid for a resurgence of affirmative action programs in the broadcasting arena.[106]

Another possibility is the imposition of private regulation within the industry. Cognizant of the pushback by a vocal subgroup of consumers, large media property owners may voluntarily seek to vary their programming or place more minorities in a position to control stations' content. This sort of private self-regulation is consistent with the FCC's market forces philosophy and would create renewed hope in the viability of an industry that could legitimately function under reduced federal regulation. Such self-regulation may also dampen many of the doubts expressed about the demise of the single-station owner. However, such measures may

104. Doug Halonen, *FCC Commissioners to Congress: Restore Financial Benefits for Sales to Minorities*, Wrap (July 10, 2012, 3:51 PM), http://www.thewrap.com/media/column-post/fcc-commissioners-congress-restore-financial-benefits-sales-minorities-47176.

105. *Id.*

106. *See generally* Baynes, *supra* note 8, at 248–91.

be insufficient to diffuse the fear that even with apparently diverse programming, media ownership groups may use their extensive reach to manipulate the fashion in which the public perceives their various properties.

In the short to intermediate term, the trend appears to be toward a continuing reliance on the market forces model. However, the sustainability of this tactic appears to be doubtful if the FCC intends to meet its obligation to ensure that diverse viewpoints are available as an essential part of the public good.

## Conclusion

There can be little doubt that the deregulation of the broadcast industry has reduced the viewpoint diversity conveyed to viewers and listeners. While an imperfect indicator of this trend, the demise of the minority station owner shows just how far this issue has progressed. The dearth of official FCC data makes it difficult to make compelling empirical conclusions as to long-term changes in station ownership trends, but it is indisputable that minorities control a far lower proportion of media properties than their proportional size of the overall population would suggest. Additionally, third-party research demonstrates the reduction in minority ownership that has transpired since the 1980s.[107]

The FCC and Congress have been complicit in this reduction, which has been exacerbated by both the removal of property ownership regulations and the dismantling of programs that affirmatively sought to battle this issue. In order to combat this problem, the FCC must accept that its market forces philosophy has proven inadequate for the job of protecting the public interest. Carefully constructed affirmative action programs may allow the FCC to pursue diversity in broadcast station ownership, as the Supreme Court has acknowledged that the desire for such diversity may create a compelling government interest. While the attempt to allow consumer behavior to compel the creation of diverse programming was and is a commendable goal, the evidence suggesting its failure is simply too formidable to continue without substantial modification.

107. *See* Turner & Cooper, *supra* note 6, at 3.