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Regulatory Paralysis: The Answer to the Unanswerable Question of FCC Minority Ownership Policy

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REGULATORY PARALYSIS: THE ANSWER TO THE UNANSWERABLE QUESTION OF FCC MINORITY OWNERSHIP POLICY

Christopher Terry*

ABSTRACT

For five decades, the Federal Communications Commission (FCC) has struggled to implement policies that promote minority ownership of broadcast stations. Four “Prometheus” decisions from the Third Circuit span a seventeen-year legal impasse that highlighted the agency’s shortcomings on effective minority ownership policies. Now, after the Supreme Court’s 2021 decision in FCC v. Prometheus Radio Project, the FCC is required to relaunch its media ownership policy in 2022. This paper explores how the FCC has interpreted diversity in media ownership policymaking by examining a range of diversity policies and assessment methodologies particularly regarding minority ownership. The paper then presents data from a thirty-year period to demonstrate that the impasse of the Prometheus cases corresponded with significant growth in minority station ownership. Results of a series of independent empirical tests examining the connection between ownership and diversity, and assessing the diversity of content production in broadcast radio by company size and ownership by race and ethnicity, are discussed in the context of the legal rulings.

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I. INTRODUCTION

Media ownership policy was paralyzed by Federal Communications Commission (FCC) rulemaking failures for nearly two decades. In April 2021, the Supreme Court broke a seventeen-year deadlock over the FCC's regulation of media ownership caused by four decisions in the Third Circuit Court of Appeals.¹ Now, following a unanimous, but narrowly focused Supreme Court decision,² the FCC has moved ahead in finishing an uncompleted Quadrennial Review Process.³ First launched in 2018 but left open

1. See generally Christopher Terry, Stephen Schmitz & Eliezer (Lee) Joseph Silberberg, *The Score is 4-0: FCC Media Ownership Policy, Prometheus Radio Project, and Judicial Review*, 73 FED. COMM'NS L.J. 99 (2020) [hereinafter *Prometheus 4-0*] (discussing a detailed history tracking media ownership from the implementation of the 1996 Telecommunications Act through the Third Circuit's final *Prometheus Radio Project v. FCC* decision in 2019); See generally Christopher Terry, Eliezer Joseph Silberberg & Stephen Schmitz, *We Didn't Stop the Fire: Media Ownership Policy After FCC v. Prometheus Radio Project*, 44 HASTINGS COMM'NS & ENT. L.J. 93 (2021) [hereinafter *Prometheus Fire*] (discussing the Supreme Court's decision in *FCC v. Prometheus Radio Project* in detail).

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

3. The FCC launched the 2018 Quadrennial Review in December of 2018 while the review in *Prometheus IV* was pending in the Third Circuit, functionally taking no action until after the Supreme Court decision in April of 2021. See 2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 33 FCC Rcd. 12111 (2018). In June of 2021, the agency implemented the rules from its November 2017 decision as well as the 2018 Incubator proposal. See Media Bureau Reinstates Comm'n's Prior Rule Changes Regarding Media Ownership Consistent with the U.S. Supreme Court's Decision, 36 FCC Rcd. 9354 (2021) (Order); Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, 33 FCC Rcd. 7911 (2018) (Report and Order); 2014 Quadrennial Regulatory Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 32 FCC Rcd. 9802 (2017) (Order on Reconsideration and Notice of Proposed Rulemaking); 2014 Quadrennial Regulator-

following the outcome of the Supreme Court decision, the statutory mandate of the 1996 Telecommunications Act also requires the FCC to undertake another Review Process during 2022.⁴

Within the larger policy structure of media ownership is the issue of station ownership by minorities and women.⁵ Over the past five decades, the FCC has adopted a variety of policies designed to increase the number of minority-owned radio and television stations.⁶ During oral arguments in January of 2020, Justice Breyer asked Ruthanne Deutsch, the representative of the Citizen Petitioners, “Now why in heaven’s name did you not, or groups that support you, given the tremendous number of people who I’m happy are interested in this—why aren’t there some studies or something? There are 10,000 law professors and economics professors who look for studies to do.”⁷

The question is legitimate. The FCC has failed to support its minority ownership initiatives with data, an action that was remanded by the Third

ry Rev. – Rev. of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 31 FCC Rcd. 9864, 9960-10008, paras. 234-336 (2016) (Second Report and Order).

The agency reopened the 2018 Quadrennial Review Docket for additional comments. *See* Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Rev., 86 Fed. Reg. 35089 (Jul. 1, 2021).

The agency did not formally conclude the 2018 review before the end of 2021 and has a mandate to launch a new Quadrennial process during 2022. *See Prometheus Fire, supra* note 1, at 116.

4. *Prometheus Fire, supra* note 1, at 116.

5. Minority ownership policy covers media ownership by racial and ethnic minorities, but also women. The FCC’s broadcast ownership reporting forms are designed to obtain detailed ownership information from the broadcast industry. There are two gender classifications (male and female), six racial classifications (American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, Two or more races, and White), and two ethnic classifications (Hispanic/Latino and not Hispanic/Latino). The gender, race, and ethnicity categories identified in Forms 323 and 323-E follow the guidance provided by the Office of Management and Budget. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, Notice of Decision, 62 Fed. Reg. 58782, 58789 (Oct. 30, 1997).

6. In this Article I use the word “minority” because it is the word the FCC has used in its various policies designed to increase station ownership by people of color. However, “minority” has a pejorative connotation that has led many organizations to stop using it. *See, e.g.,* Hugo Balta, *I Am Not A Minority: Why News Media Must Stop Using Inaccurate, Prejudiced Term*, CONNECTICUT BY THE NUMBERS (Aug. 9, 2020), <https://ctbythenumbers.news/ctnews/i-am-not-a-minority-why-news-media-must-stop-using-inaccurate-prejudiced-term>; Danique Dolly, *A Major Request: Please Stop Calling Us Minorities*, EDUCATION REIMAGINED (June 10, 2020), <https://education-reimagined.org/a-major-request-please-stop-calling-us-minorities>; Rashaad Lambert, *There Is Nothing Minor About Us’: Why Forbes Won’t Use The Term Minority To Classify Black And Brown People*, FORBES (Oct. 8, 2020), <https://www.forbes.com/sites/rashaadlambert/2020/10/08/there-is-nothing-minor-about-us-why-forbes-wont-use-the-term-minority-to-classify-black-and-brown-people/?sh=5dd8de797e21>.

7. Oral Argument at 53:43, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021) (No. 19-1231), <https://www.oyez.org/cases/2020/19-1231>.

Circuit in 2004, 2011, 2016 and 2019.⁸ The FCC's data on minority ownership has been collected inconsistently and criticized for its quality.⁹ While seeking a policy solution to this longstanding issue, the FCC has found itself trying to navigate between a longstanding goal to foster content diversity, a regulatory approach focused on station ownership, and the Supreme Court's restrictions on how the agency could favor various parties in comparative licensing cases.¹⁰ The FCC's first direct minority ownership initiatives had been slowly expanding minority ownership levels¹¹ and were upheld on review in *Metro Broadcasting*.¹² But those policies were then overturned in a non-broadcast case *Adarand* in 1995.¹³

As the FCC prepares to restart media ownership policy, this article corrects the longstanding gaps in knowledge about minority ownership of broadcast stations. Part II explores how the FCC has interpreted the concept of diversity in media ownership policymaking, exploring a range of diversity policies, assessment methodologies, and court decisions. Part III discusses the implementation of the 1996 Telecommunications Act, the changes to the traditional rulemaking processes imposed upon the agency through Section 202(h), and the role that minority ownership played in the four *Prometheus Radio Project* decisions in the Third Circuit as well as the Supreme Court's review. Part III presents data from a thirty-year period to demonstrate that the impasse of the *Prometheus* cases corresponded with growth in minority ownership. Part IV reports the results of a series of independent empirical tests examining the ownership and diversity nexus. This section assesses the diversity of content production in radio by company size, and ownership by race and ethnicity. Part V provides policy recommendations as the FCC prepares to restart media ownership policy reviews.

8. The lack of empirical support for the FCC's decision making was a consistent theme in all four decisions in the Third Circuit. *See, e.g., Prometheus Radio Project v. FCC*, 939 F.3d 567, 589 (3d Cir. 2019) ("We do conclude . . . that the [FCC] has not shown yet that it adequately considered the effect its actions since *Prometheus III* will have on diversity in broadcast media ownership."); *See Prometheus 4-0, supra* note 1, at 110–22.

9. Philip M. Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM'C'N 7, 15–16, 18–19 (1999).

10. *See, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547, 563–64 (1990).

11. *See* Caridad Austin, *Overwhelmed by Big Consolidation: Bringing Back Regulation to Increase Diversity in Programming That Serves Minority Audiences*, 63 FED. COMM'C'N L.J. 733, 741 (2011) (showing Minority ownership tripled between 1978 and 1990).

12. *Id.* at 741–42.

13. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

II. DIVERSITY AND THE FEDERAL COMMUNICATIONS COMMISSION

A. *Defining Diversity*

The “public interest” that the Communications Act mandates as a guide for broadcast regulation is such a vague concept that the FCC uses “three pillars” of competition, localism, and diversity, to direct regulatory decisions.¹⁴ In August 2016, the FCC stated: “We continue to find that the longstanding policy goals of competition, localism, and diversity represent the appropriate framework within which to evaluate our media ownership rules.”¹⁵

The “three pillars” framework has created a conceptual quagmire. The FCC’s frequent invocation of its three policy goals obscures the fact that the agency places undue emphasis on competition at the expense of localism and diversity.¹⁶ Indeed, the FCC asserts that economic competition serves as a valid proxy for both localism and diversity, although there is limited empirical basis for the assertion.¹⁷ Having policy goals implies criteria for evaluating the performance of broadcasters and broadcasting markets. But evaluation is impossible if the policy goals do not have clear definitions. A 2001 review, asserted that “the central guiding principles (of communications policymaking) have suffered from years of ambiguity, inconsistency, and manipulation. . . . (P)olicymakers have failed to infuse these concepts with the specific and concrete meaning necessary for these terms to become meaningful and effective tools for both the design and analysis of policies.”¹⁸

In 2002, the FCC proposed four proxies for assessing diversity: Viewpoint Diversity, Source Diversity, Program Diversity, and Outlet Diversity.¹⁹ Viewpoint diversity is a content-based measurement.²⁰ While both

14. Michael J. Copps, F.C.C. Comm’r, Remarks to the Alliance for Community Media and the New America Foundation, at 4, (October 11, 2011). (*Author Note*: Localism is a regulatory objective where each station treats the significant needs and issues of the community that it is licensed to serve with the programming that it offers. Since 1934, the FCC has promoted a system of local stations to allow stations to respond to the unique concerns and interests of the audiences within the stations’ respective service areas.)

15. See 2014 Quadrennial Regulatory Rev. – Rev. of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *supra* note 3.

16. Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM’N L.J. 327, 337 (2019).

17. *Prometheus 4-0*, *supra* note 1, at 101–03, 111–12, 121.

18. Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL’Y STUD. J. 372, 372 (2001).

19. 2002 Biennial Regulatory Rev. – Rev. of the Comm’n’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620, paras. 35–41 (2002) (Report and Order and Notice of Proposed Rulemaking).

Source Diversity and Program Diversity examine content indirectly, Viewpoint Diversity requires a direct analysis of the content itself.²¹ More importantly, Viewpoint Diversity as an approach “has been the touchstone of the [FCC]’s ownership rules and policies.”²² The FCC is committed to “preserving citizens’ access to a diversity of viewpoints through the media.”²³ Yet, when dealing with Viewpoint Diversity, the FCC expressed concerns that regulations involving measurements of content would be problematic under the First Amendment.²⁴ The FCC admitted that it questioned whether Viewpoint Diversity, a longstanding policy objective, should retain the central, “touchstone” position in policy implementation for media ownership rules. The FCC sought comment on whether Viewpoint Diversity should be a primary goal, and whether Source Diversity or Program Diversity, as simple counting methodologies, could be used as proxies for Viewpoint Diversity.²⁵

As I will discuss in depth in the following paragraphs, the FCC argues that diversity and localism are directly related to the agency’s use of limits on the number of broadcast and other media properties a single company may own.²⁶ The logic of the FCC’s Outlet Diversity policy is straightforward. Within individual broadcast markets, station A competes for audience share with other stations – including stations that are owned by the owner of station A. The FCC assumes that the greater the level of competition, the greater the level of content diversity in a market.²⁷

Concerns over minority access to information were originally a programming rather than ownership issue. In the agency’s 1953 multiple ownership rules,²⁸ the assessment of minority programming was a concern over

20. *See id.* para. 35.

21. *See id.* paras. 35, 37–38.

22. *Id.* para. 35.

23. *Id.*

24. *Id.* para. 20–21.

25. “Viewpoint diversity has been a central policy objective of the [FCC]’s ownership rules. We seek comment on whether viewpoint diversity should continue to be a primary goal of the [FCC]’s decision-making. The [FCC] has not viewed source and outlet diversity as policy goals in and of themselves, but as proxies for viewpoint diversity. Should the [FCC] continue to use source and outlet diversity as proxies to protect and advance viewpoint diversity?” *Id.* para. 41.

26. *Id.* paras. 37–40.

27. “The principal means by which the Commission has fostered diversity of viewpoints is through the imposition of ownership restrictions... [D]iversity of ownership as a means to achieving viewpoint diversity has been found to serve a legitimate government interest, and has, in the past, been upheld under rational-basis review.” *Id.*

28. The 1953 multiple ownership rules permitted a single owner to operate 5 television, 7 AM and 7 FM radio stations. Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 291 (1953) (Report and Order). *See also* Herbert H. Howard, *A Critique of the Fowler FCC’s 1984-85 Multiple Ownership Rule*, 10 HASTINGS COMM’N & ENT. L.J. 555, 555 (1987).

the desire for alternative programming options, rather than diversity of race, gender or ethnicity.²⁹ Programs expressing minority perspectives were defined exclusively in majority terms as programming that enlightened white audiences about civic duties rather than programming targeted at racial or ethnic minorities.³⁰ Since the late 1970's, the FCC's media ownership policies use the term minority ownership to refer to broadcast station ownership by racial and ethnic minorities, as well as women.³¹ By making ownership the key assessment of diversity, race or minority status became a way for the FCC to categorize and organize people into quantifiable groups. But minority groups are not monolithic, and to assume so undermines the value of the viewpoints and cultural diversity these groups contribute to the public sphere.³²

Throughout broadcasting history in the United States, minorities have been dramatically underrepresented in media ownership.³³ But because the FCC has been unable to resolve the underrepresentation, the shortcoming continues, leaving all citizens underserved.³⁴ Yet, whatever metric is applied, the underlying policy problem is using ownership as a proxy for Viewpoint Diversity.³⁵ The conflict over media ownership policy, like the policy itself, is really a proxy debate about what content is being produced and how the audience is being served with programming that caters to their tastes while providing them access to diverse information.³⁶ In other words, FCC media ownership policy is functionally an effort to foster diverse content production, without having to directly account for viewpoint diversity.

At the foundational level, one may ask the question; does media ownership affect media content and, if so, in what ways? A consistent answer to

29. Wendy M. Rogovin, *The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard*, 42 CATH. U. L. REV. 51, 53 (1992).

30. *Id.* at 83.

31. Although the FCC had treated the ownership racial and ethnic minorities separately from gender, after *Prometheus I*, the agency incorporated racial, ethnic and gender into one area under the minority ownership label. See generally Caitlin R. Carlson, *Half the Spectrum: A Title IX Approach to Broadcast Ownership Regulation*, 23 COMM'N L. & POL'Y 221 (2018); Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM'N L. & POL'Y 403, 407 (2019).

32. Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of Diversity*, 1993 WIS. L. REV. 105, 140 (1993).

33. See generally Howard Kleiman, *Content Diversity and the FCC's Minority and Gender Licensing Policies*, 35 J. BROAD. & ELEC. MEDIA 411 (1991).

34. See generally ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (2015 ed. 1999).

35. Terry, *supra* note 16, at 334. See generally Napoli, *supra* note 9; Benjamin W. Cramer, *Unasked Questions and Unquestioned Answers: The Perils of Assuming Diversity in Modern Telecommunications Policy*, 17 COMM'N L. & POL'Y 265 (2012).

36. Terry & Carlson, *supra* note 31, at 416. See generally *Prometheus 4-0*, *supra* note 1; *Prometheus Fire*, *supra* note 1 (discussing *FCC v. Prometheus Radio Project* in detail).

this straightforward question has long eluded the FCC.³⁷ Researchers attempting to establish or refute a direct relationship between media ownership and viewpoint diversities face methodological difficulties.³⁸ Any assessment of diversity faces a range of competing legal, economic, political and social issues, each of which can complicate research design and execution.³⁹

A widely cited article identified eight different definitions of diversity used interchangeably by media policymakers.⁴⁰ One scholar labeled this “the fetishization of diversity as a policy principle.”⁴¹ Another noted that the agency has “usually soft-pedaled the conceptual difficulties associated with diversity, sticking to generic praise of the policy.”⁴² Mara Einstein concluded that “no one has been able to develop a working definition of diversity—not the content providers, not the policymakers, not the scholars, and not the courts.”⁴³ Even the D.C. Court of Appeals observed that “[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured.”⁴⁴

Interested parties in the minority ownership debate have approached the issue by trying to establish causation between media ownership policies and content diversity.⁴⁵ Does ownership affect content? Certainly, but the effects are not consistent. Patterns, and causation, are hard to establish when the relationship between a media owner and the content that owner’s stations produce varies by each owner. However, the FCC relies on the assumption that different content owners provide content unique to their respective groups – and in this way, the agency uses regulation of ownership to achieve content diversity goals.

There is logically a cause-and-effect relationship between ownership and content production, but the relationship is not one that can be easily quantified for analysis or policymaking.⁴⁶ In framing the debate in terms of the relationship between ownership and viewpoint diversity, the FCC has fostered economics of media ownership which have created obstacles to mi-

37. The FCC’s lack of empirical evidence was an important factor in the long running dispute between the agency, the Citizen Petitioners led by the Prometheus Radio Project, and the industry petitioner coalition in the Third Circuit Court of Appeals. *See generally Prometheus 4-0*, *supra* note 1.).

38. Napoli, *supra* note 9, at 24.

39. *Id.*

40. *Id.* *See also* Cramer, *supra* note 35.

41. Sandra Braman, *The Limits of Diversity*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* 139, 139 (Philip M. Napoli ed., 2007).

42. Robert B. Horowitz, *On Media Concentration and the Diversity Question*, 21 *THE INFO. SOC’Y* 181, 183 (2005).

43. MARA EINSTEIN, *MEDIA DIVERSITY: ECON., OWNERSHIP AND THE FCC* 6 (2004).

44. *Nat’l Citizens Comm. for Broad. v. FCC*, 555 F.2d 938, 961 (D.C. Cir. 1977).

45. Kleiman, *supra* note 33, at 412.

46. *See* Cramer, *supra* note 35, at 281.

minority ownership that endanger access to speech from the periphery of public debate.⁴⁷

Assessments conducted since the 1980s suggest that minority-orientated programming is under-produced,⁴⁸ and that the shortage of minority-responsive broadcast programming represents a market failure.⁴⁹ In terms of competition and localism, the vast majority of minority-owned broadcast stations are single-station operators, operating locally.⁵⁰ In terms of diversity, the Congressional Research Service determined that minority broadcasters target their own representation groups far more frequently than non-minority owners do.⁵¹ Local station ownership by a minority group increased the availability of other minority programming.⁵² Minority owned stations also carried a higher percentage of public affairs programming, covering more topics presumed to be of interest to ethnic or racial minority audiences than White owned stations.⁵³ A 2009 study demonstrated that 73% of minority owned stations served the local minority community by broadcasting minority orientated programming.⁵⁴ Beyond racial, gender or ethnic contributions to the marketplace of ideas, minority programming often also includes an understanding of social and economic class issues missing from media with mass-targeted appeal.⁵⁵

Access to minority content also has been correlated with political maximization.⁵⁶ Black radio stations play 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 areas.⁵⁷ The same is true for LatinX and Hispanic groups. A 2006 study of televised Spanish-language programming was correlated with an increase of 5-10% in

47. Sean Michael McGuire, *Media Influence and the Modern American Democracy: Why the First Amendment Compels Regulation of Media Ownership*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 705 (2006).

48. Kurt A. Wimmer, *Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 HASTINGS COMM. & ENT. L.J. 329, 339-41, 347-48 (1985).

49. *Id.* at 353.

50. McGuire, *supra* note 47, at 706.

51. Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 339 (1991).

52. Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841, 855 (1995).

53. 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, 37 (2001).

54. David Honig, *How the FCC Suppressed Minority Broadcast Ownership and How the FCC Can Undo the Damage It Caused*, 12 S. REGION BLACK STUDENTS ASS'N L.J. 44, 54 (2018).

55. *See* Spitzer, *supra* note 51, at 329-31.

56. *See id.*, at 316-17.

57. Austin, *supra* note 11, at 752.

overall Hispanic voter turnout.⁵⁸ A 2011 FCC study concluded that minority-owned stations tended to broadcast minority programming, and although the majority of minority-formatted stations were not minority-owned, the presence of minority-owned stations increased the amount of minority-targeted content in a market.⁵⁹ Radio speaks directly to niche audiences about political information. In one example, a study of political issue advertising on Spanish language radio stations during the 2018 election indicated that Hispanic audiences were being targeted with traditional bread and butter issues like employment and education to motivate and mobilize LatinX voters.⁶⁰

B. FCC Diversity Policy Before the Telecommunications Act of 1996

1. The Nexus of Media Ownership Policy

The relationship between ownership and diversity has been historically called the nexus of media ownership policy.⁶¹ Expanding the reach of minorities in the media has two related objectives: representational and political.⁶² Representational objectives include expanding viewpoint diversity, but also offer a tool to combat negative stereotypes.⁶³ Minority ownership is positively associated with increased minority hiring, management and employment,⁶⁴ each of which has secondary benefits in terms of avoiding racial and ethnic stereotypes,⁶⁵ while combatting the problem of the underrepresentation of minority viewpoints in media.⁶⁶

Prior to adopting the nexus policies, the FCC used a mixed approach to expanding access to minority content. Avoiding compelled content regulation, the FCC never took action to ensure that minority-orientated programming appeared in peak or near peak hours.⁶⁷ Community ascertain-

58. Honig, *supra* note 54, at 54.

59. *Id.*

60. Christopher Terry & Fernando Severino, *Spanish-Language Radio and Issue Advertising: Targeting Latinos During the 2018 Elections*, J. RADIO & AUDIO MEDIA, at 12 (2020).

61. See, e.g., Allen S. IV Hammond, *Measuring the Nexus: The Relationship Between Minority Ownership and Broadcast Diversity After Metro Broadcasting*, 51 FED. COMM'N. L.J. 627 (1999); see also Honig, *supra* note 54, at 54 (stating that numerous studies show the nexus between media ownership and diversity).

62. Steven Weissman, *The FCC and Minorities: An Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs*, 16 COLUM. J.L. & SOC. PROBS. 561, 563–64 (1981).

63. See *id.* at 564–65, 574.

64. Foster, *supra* note 32, 141–42.

65. *Id.*

66. See *id.* at 142.

67. Weissman, *supra* note 62, at 569.

ment⁶⁸ adopted in 1971 began requiring radio and television stations to engage in regular assessment of the “problems, needs, and interests” of the communities they were licensed to serve.⁶⁹ The policy was implemented, in part, as a race-neutral solution to connect local audiences to stations including local minority populations.⁷⁰ The FCC’s approach to policing licensees problematically meant that station discretion on the ascertainment of local minority issues was often unresponsive to local needs,⁷¹ especially among minority communities.⁷² The requirement was dropped in the 1980s as part of larger program of deregulation.⁷³ Likewise, on the whole, minorities were also unsuccessful in using the Fairness Doctrine to enhance coverage of minority issues.⁷⁴

The FCC recognized that the lack of broadcasting experience can adversely affect a minority applicant’s ability to obtain financing for station acquisitions because lenders prefer experienced broadcasters.⁷⁵ So, the FCC also adopted an Equal Employment Opportunity (EEO) policy to resolve some of the tension over representational issues.⁷⁶ After D.C. Circuit Court of Appeals decision in *Lutheran Church-Missouri Synod* limited the federal government’s authority to establish any race-based programs aimed at increasing minority employment,⁷⁷ the FCC adopted a less stringent EEO rule

68. See generally Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971) (providing guidance and clarification for the Commission’s ascertainment policies for broadcast applicants).

69. *Id.* at 682–83.

70. Akosua Barthwell Evans, *Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry*, 8 YALE L. & POL’Y REV. 380, 381 (1990).

71. The focus of ascertainment efforts continued to be focused on majority concerns. See Wimmer, *supra* note 48, at 355–61. For further discussion, including advocacy to return to community ascertainment mechanisms, see Austin, *supra* note 11, at 756–62.

72. Weissman, *supra* note 62, at 586.

73. Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1097–101 (1984).

74. One of the most misunderstood laws in media history, the “Fairness Doctrine,” required licensed stations to do two things: 1) provide coverage of issues of local concern and 2) when those issues were controversial, provide opportunities for multiple viewpoints on those issues. See generally Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) (clarifying the Commissioner’s position on the obligations of broadcast licensees).

75. Honig, *supra* note 54, at 97.

76. Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 15 FCC Rcd. 2329, para. 21, at 2336 (2000) (“Equal employment of minorities and women furthers the public interest goal of diversity of programming, both directly and by enhancing the prospects for minority and female ownership.”); see also *id.* at 62.

77. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *reh’g denied*, 154 F.3d 487 (D.C. Cir. 1998).

which require station owners to implement recruitment programs that would reach the entire community.⁷⁸

Although the EEO Policy was functionally a proxy policy for resolving the underrepresentation of ownership, the policy had some success in expanding the diversity of the employees in media organizations.⁷⁹ The FCC's EEO policy relied on self-reporting by media organizations. The greatest changes in minority representation among media employees occurred during the first decade after stations began filing employment reports.⁸⁰ Despite the overall growth, African American-owned stations still provided largest single opportunity for minority employment.⁸¹ In April 1998, the D.C. Circuit struck down the Commission's equal employment opportunity (EEO) guidelines.⁸² The suspension of reporting requirement correlated with dropping levels of employment diversity.⁸³

The FCC began to consider minority ownership initiatives directly after the decision in *TV9*.⁸⁴ In *TV9*, the FCC had chosen not to award a minority candidate a merit credit during a comparative hearing for a station license.⁸⁵ The D.C. Circuit Court of Appeals conceptualized a nexus that existed between minority ownership and an increase in the availability of viewpoint diversity.⁸⁶ The D.C. Circuit Court overturned the agency, arguing "[m]inority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded."⁸⁷ The nexus between minority ownership and content production quickly became the conceptual basis for minority ownership policy, expanding on the ownership-diversity relationship which was adopted by the agency as part of the 1975 Newspaper Broadcast-Cross Ownership proceeding.⁸⁸

The FCC's explicit justification for the cross-ownership rule, however, was not to increase economic competition, but rather to foster viewpoint di-

78. In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, *supra* note 76, paras. 66, 78.

79. C. Ann Hollifield & Clay W. Kimbro, *Understanding Media Diversity: Structural and Organizational Factors Influencing Minority Employment in Local Commercial Television*, 54 J. BROAD. & ELEC. MEDIA 228, 231 (2010).

80. *Id.* at 238.

81. *Id.* at 243.

82. See Lutheran Church-Missouri Synod, *supra* note 11.

83. Hollifield & Kimbro, *supra* note 79, at 244.

84. *TV 9, Inc. v. FCC*, 495 F.2d 929 (1973).

85. *Id.*

86. *Id.*

87. *Id.*

88. Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, 1085 (1975). See also David Pritchard, Christopher Terry & Paul R. Brewer, *One Owner, One Voice: Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy*, 13 COMM'N L. & POL'Y 1 (2008) (discussing history of the FCC's policy initiatives with regards to newspaper-broadcast cross-ownership) and Terry, *supra* note 16 (discussing the FCC's pursuit of ownership-diversity in media outlets).

iversity in communities or – as the agency was increasingly calling them – markets. Media companies mounted a legal challenge to the newspaper/broadcast cross-ownership rule, pointing out that many studies showed considerable diversity of viewpoints within the content of commonly owned newspapers and broadcasting stations, but once again the Supreme Court upheld the FCC’s rationale.⁸⁹ The Court said, “Notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints.”⁹⁰

The Supreme Court’s validation of the FCC’s use of diversity of ownership – in other words, economic competition – as a proxy for assessing viewpoint diversity came at the beginning of an unprecedented era of deregulation.⁹¹ After formally adopting this relationship as the basis for media policy, the FCC would ease many of its content regulations in the belief that ownership regulations encouraging greater economic competition would lead to content that better served the public interest in terms of a broader diversity of viewpoints.⁹²

Empirical research that has explored the relationship between content and ownership is, in general, inconclusive.⁹³ There is however empirical evidence to support the widely accepted belief that minority ownership and viewpoint diversity are related.⁹⁴ Empirical support for the conceptual relationship at the heart of the nexus between minority ownership and minority targeted content has existed since shortly after the concept was first proposed in *TV9*.⁹⁵

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

90. *Id.* at 796.

91. *See, e.g.*, Sam Peltzman, *The Economic Theory of Regulation after a Decade of Deregulation*, BROOKINGS PAPERS: MICROECONOMICS 1989 (1989), <https://www.brookings.edu/bpea-articles/the-economic-theory-of-regulation-after-a-decade-of-deregulation>.

92. Adam Candeub, *The First Amendment and Measuring Media Diversity: Constitutional Principles and Regulatory Challenges*, 33 N. KY. L. REV. 373 (2006).

93. *See* Rob Frieden, *Academic Research and its Limited Impact on Telecommunications Policy*, 2 INT’L J. COMM. 421 (2008); Benjamin M Compaine, *The Impact of Ownership on Content: Does it Matter?*, 13 CARDOZO ARTS & ENT. L.J. 755 (1995).

94. Lili Levi, *Reflections on the FCC’s Recent Approach to Structural Regulation of the Electric Mass Media*, 52 FED. COM. L.J. 581, 601 (2000).

95. *See* Mike Meeske, *Minority Ownership of Broadcast Stations: The Diversification Policy*, 16 FREE SPEECH Y.B. 81 (1977); Lawrence Soley & George Hough II., *Black Ownership of Commercial Radio Stations: An Economic Evaluation*, 22 J. BROAD. 455 (1978); Bari S. Robinson, *Achieving Diversity in Media Ownership: Bakke and the FCC*, 67 CAL. L. REV. 231 (1979); Bruce R. Wilde, *FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Reexamination of Policy*, 138 U. PA. L. REV. 979 (1990); Alan G. Stavitsky, *The Rise and Fall of the Distress Sale*, 36 J. BROAD. & ELEC. MEDIA 249 (1992); Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violations of Equal Protection*, 5 COMMLAW CONSPICUOUS 269 (1997); Erwin G. Krasnow & Lisa M. Fowlkes, *The FCC’s Minority Tax Certificate Program: A Proposal for Life after Death*, 51 FED. COM. L.J. 665 (1999); LaVon-

There are few universal truths in the relationship between media ownership and content production. Examinations have shown that group-owned stations are programmed differently than independently owned stations.⁹⁶ The belief that minority owned stations are always different from majority owned stations is not universal, but because of industry professional standards and practices, programming has historically fallen into a narrow range of mass audience attracting options.⁹⁷ Black formatted stations had White owners even before Jesse Blayton, the first Black station owner, was issued the license for WERD-Atlanta in 1949.⁹⁸ Black audiences were pursued by White owners in areas where the audience size was significant or the programming held appeal across racial categories.⁹⁹ In one example, the rapid success of WDIA-Memphis when it went on 1947 led to 108 Black formatted stations by 1977, only a fraction of which were owned by minorities.¹⁰⁰

Current FCC policy has been routinely criticized for empirical evidence that contradicts the theoretical nexus between minority ownership and diverse programming.¹⁰¹ Arguing that the evidence of a relationship between ownership and content diversity is inconclusive has even led to comments such as these: “[t]here is no evidence that such variables have any significant impact on beliefs of minority or female licensees as manifested in their station’s programming,”¹⁰² and “[t]he rationale that minority ownership of broadcast stations will result in a greater diversity of programming has not been supported convincingly by the data.”¹⁰³ In one example, a Black owner who had used tax certificates to purchase 28 stations over twenty months, denied providing a “Black” viewpoint on his stations.¹⁰⁴

Some economic theory suggests there are conceptual reasons to doubt the nexus, because concentration actually may increase an owner’s incentive to diversify.¹⁰⁵ A key conceptual foundations of contemporary media ownership policy is the continuing, but largely untested, belief in “internal competition’s” creation of an economic incentive for consolidated media firms to

da N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 97 (2006); Austin, *supra* note 11.

96. See generally David Waterman, *A New Look at Media Chains and Groups: 1977-1983*, 35 J. Broad and Elec. Media 167 (1991); see also Compaine, *supra* note 93.

97. See Compaine, *supra* note 93.

98. Antoinette Cook Bush & Marc S. Martin, *The FCC’s Minority Ownership Policies from Broadcasting to PCS*, 48 FED. COM. L.J. 423 (1996).

99. Evans, *supra* note 70, at 405.

100. *Id.* at 406.

101. Austin, *supra* note 11, at 735.

102. Kleiman, *supra* note 33, at 423.

103. Stavitsky, *supra* note 95, at 260.

104. Constance Ledoux Book, *New Precedent Set with Program Diversity Ruling in Metro Broadcasting, Inc. v. FCC*, 14 COMM. & L. 3, 21 (1992).

105. Ryan H. Weinstein, Note, *The Diversity Paradox: Media Ownership Regulation and Program Variety*, 10 STAN. J.L. BUS. & FIN. 150, 161 (2004).

diversify their programming options.¹⁰⁶ This conceptual relationship between internal competition and diversity relies on Peter Steiner's 1952 proposition that a monopoly firm in media could provide more diversity than competing firms,¹⁰⁷ and has been a major component of FCC arguments in favor of increasing the limits on media ownership since the beginning of deregulation in the late 1970s.¹⁰⁸

Competition for audience then, according to the FCC, creates content diversity through economic incentive, because desirable programming content will be produced by competitors seeking to generate audience share. Audience members make choices, and by keeping deregulatory marketplace mechanisms in place, you provide the ability for these consumers to "shop" for the media content they want.¹⁰⁹ This conceptual belief is prominent among deregulatory proponents who have argued that concentration actually may increase owner incentive to diversify.¹¹⁰ Ownership limits may lead to more diversity because competition leads competitors to chase the same pie and internal competition will "theoretically" maximize audience by carrying multiple formats.¹¹¹

2. Tax Certificate Program

In 1976, following *TV9*, minorities held licenses to three TV stations and fifty-three radio stations,¹¹² but an assessment in 1977 suggested only one of the 8,196 TV licensed stations was owned by Black owner.¹¹³ Native Americans historically have been one of the least-recognized minority groups in terms of media ownership.¹¹⁴ In 1976 minorities held 22 of 7,107 station licenses (0.3 %),¹¹⁵ but at the time just four carried Native American programming.¹¹⁶

106. The premise of the theory of internal competition is that as more media outlets are consolidated into common ownership, an economic incentive is created for a media organization to provide a more diverse set of programming, rather than to provide multiple programming formats that compete for audience with other commonly owned stations. See Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 206 (1952).

107. *Id.* at 206-07.

108. Weinstein, *supra* note 105, at 152, 157.

109. Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009 (1996).

110. Weinstein, *supra* note 105, at 161.

111. Brenner, *supra* note 109, at 1017.

112. Meeske, *supra* note 95, at 16.

113. Robinson, *supra* note 81, at 232.

114. Bonnie Schomp, *Current Progress of Native American Broadcasting—Status of Indian Ownership*, 4 AM. INDIAN L. REV. 91, 91 (1976).

115. *Id.*

116. They are KYUK in Bethel, Alaska; KEYA-FM in Belcourt, N.D.; KIPC in Albuquerque, N.M.; and KTDB in Ramah, N.M. The FCC claimed there were two additional sta-

Expanding minority ownership was considered as part of package of larger solutions designed to improve service. In 1978, the FCC, under Charles Ferris, proposed restructuring AM allotments, expanding the table of allotments for FM stations.¹¹⁷ These new stations would have provided new opportunities for minority broadcasters, but were opposed by the media industry over concerns about interference if more stations were added at the market level.¹¹⁸

The FCC responded to advocacy by minority groups. With the support of Ferris, the agency established a Minority Ownership Task Force (MOTF).¹¹⁹ The MOTF was tasked with researching options to increase not only minority ownership, but also minority employment in the broadcasting industry, arguing that, “[r]epresentation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience.”¹²⁰ In 1978, the MOTF released a report that concluded the best option to increase minority-targeted programming was to increase the number of minority owners, arguing that minority populations as well as the general public was being deprived access of the views of minorities.¹²¹

Following *TV 9*, the MOTF report and the agency’s formal adoption of the nexus concept, the FCC adopted two new policies designed to expand minority representation on the airwaves.¹²² At the time, the 1978 Broadcast Policy Statement proposed comparative hearing preferences favoring minority applicants, the distress sale policy and tax certificates, minorities owned .5% (40 of approximately 8500) broadcast stations.¹²³

tions targeting Native Americans with programming: KHAC in Window Rock, Ariz. and KNCC-FM in Tsalie, Ariz. *Id.*

117. Reed W. Smith, *Charles Ferris: Jimmy Carter’s FCC Innovator*, 21 J. OF RADIO & AUDIO MEDIA 149, 155 (2014).

118. *Id.*

119. *Id.*; see also Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990).

120. Devins, *supra* note 119 at 144 n.132 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 556.).

121. The FCC’s approach to minority issues has long let non-minority owners “off the hook” as the burden of fighting societal racism was rested primary on the shoulders of minority owners. “Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities.” FEDERAL COMMUNICATIONS COMMISSION, MINORITY OWNERSHIP IN BROADCASTING 1 (1978).

122. W. LaNelle Owens, *Inequities on the Air: The FCC Media Ownership Rules - Encouraging Economic Efficiency and Disregarding the Needs of Minorities*, 47 HOW. L.J. 1037, 1045 (2004).

123. Bush & Martin, *supra* note 98, at 424.

The first was a tax certificate program to help new entrants.¹²⁴ Under the tax certificate plan, the FCC would issue tax credits to broadcasters selling their stations to parties “where minority ownership is in excess of 50 percent or controlling.”¹²⁵ A proposed transaction was also required to demonstrate a “substantial likelihood that diversity of programming will be increased.”¹²⁶

Likewise, the second policy, a distressed station sale program, was adopted to help direct station licenses towards minority applicants.¹²⁷ The FCC’s distress sale policy gave licensees the opportunity to avoid costly, time-consuming revocation or renewal hearings by selling stations to minorities at below market prices before any hearing commenced.¹²⁸ The FCC offered an expeditious review of applications for tax certificates and distress sales, providing an incentive to transfer stations using these policies.¹²⁹

3. Pre-*Prometheus* Back and Forth at SCOTUS: *Metro* and *Adarand*

Among the supporters of the nexus principle was a majority of the Supreme Court in *Metro Broadcasting*.¹³⁰ In the opinion, the majority said there was evidence of the nexus, which in turn, allowed the FCC to adopt minority preference policies.¹³¹ Metro Broadcasting had been involved in a comparative bidding proceeding for the rights to construct and operate a new UHF television station in Orlando, Florida.¹³² In the case, the FCC awarded the license and construction permit to Rainbow Broadcasting, after giving a substantial enhancement to Rainbow’s application because its ownership was 90% Hispanic, while Metro had only one minority partner.¹³³ The agency ruled that the minority enhancement awarded to Rainbow outweighed the local residence and civic participation advantage that Metro had demonstrated in the proceeding.¹³⁴

In *Metro*, the Supreme Court examined empirical studies that supported the conceptual nexus between minority ownership and viewpoint diversi-

124. Owens, *supra* note 122, at 1045.

125. Wilde, *supra* note 95, at 988.

126. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978).

127. Philip H. Lebowitz, *FCC Minority Distress Sale Policy: Public Interest v. the Public’s Interest*, 1981 WIS. L. REV. 365, 366 (1981).

128. Owens, *supra* note 122, at 1045.

129. Stavitsky, *supra* note 95, at 251.

130. Metro Broad., Inc., *supra* note 10, at 549.

131. “The minority ownership policies are substantially related to the achievement of the Government’s interest in broadcast diversity. First, the FCC’s conclusion that there is an empirical nexus between minority ownership and greater diversity, which is consistent with its longstanding view that ownership is a prime determinant of the range of programming available, is a product of its expertise and is entitled to deference.” *Id.* at 549.

132. *Id.* at 558.

133. *Id.* at 559.

134. *Id.*

ty.¹³⁵ Empirically, there was evidence supporting the nexus principle which the majority Supreme Court relied on when crafting the opinion.¹³⁶ This included findings that minority owned stations devoted more time to racial issues, presented more minority newsmakers and provided increased viewpoint diversity.¹³⁷ Among this data, the conclusions of a Congressional Research Service study, “Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?” provided important context to the value of minority owned broadcast stations.¹³⁸ The CRS had concluded, based on FCC survey data, that increasing minority ownership in a market had led to an increase in diversity of the available programming content.¹³⁹

In the decision, a 5-4 majority held that both of the FCC’s minority enhancement policies could withstand “intermediate” scrutiny under the Fifth Amendment’s Equal Protection clause.¹⁴⁰ The decision proposed five significant reasons for reducing the level of protection from strict to intermediate scrutiny of the Equal Protection claims.¹⁴¹ First, the minority ownership policies at issue in *Metro* served an important government objective, as all audiences, not just those made up of minorities are served by an increase in the diversity of viewpoints minority owners were likely to provide.¹⁴² The Court added that the policies were directly related to achieving the long standing goal of content diversity.¹⁴³ Justice Brennan argued that the robust exchange of ideas that minorities were able to engage in as a result of the minority enhancement policies resulted in positive influence for news production and had been successful in expanding diversity of existing media outlets.¹⁴⁴ Justice Brennan also noted that the FCC’s previous policies to promote minority access, including community ascertainment, had failed to provide adequate minority content to listeners.¹⁴⁵ Therefore, the policies under review in *Metro* served an important governmental objective, and were substantially related to the government’s interest. The opinion also noted the “overriding significance” of the fact that the FCC’s enhancement and distress sale policies had been specifically mandated and approved by Congress.¹⁴⁶ Lastly, the Court ruled that the substantial government interest in promoting diversity outweighed any Equal Protection violations, adding that

135. *Id.*

136. Seung Kwan Ryu, *Justifying the FCC’s Minority Preference Policies*, 23 COMM. & L. 61, 64 (2001).

137. *Id.*

138. Hammond, *supra* note 61.

139. *Id.*

140. *Metro Broad. Inc.*, *supra* note 10, at 566.

141. *Id.*

142. *Id.* at 567.

143. *Id.* at 567-68.

144. *Id.* at 569-70.

145. *Id.* at 586-87.

146. *Id.* at 563.

the petitioners were free to bid on any other stations that became available.¹⁴⁷

After being upheld in *Metro*, the tax incentive policy was an effective tool for expanding minority ownership of broadcast stations.¹⁴⁸ Preliminary assessments of the tax certificate proposed that by providing mechanism minorities to obtain capital necessary to purchase stations that were for sale (in limited numbers), but access to the subsidy resulted in a successful program of expanding minority ownership.¹⁴⁹

A survey of twenty African American station owners in 1978 (roughly one-third of all African Americans who owned stations at that time) showed strong support for the FCC's minority ownership policies.¹⁵⁰ All twenty owners in the survey felt the 1978 policies had encouraged minority ownership.¹⁵¹ Eleven of the owners had benefited directly from those initiatives, including eight who had used tax certificates to acquire one or more stations and five who had acquired at least one station through distress sales.¹⁵² The owners in the survey indicated that the minority preference policies had made minority buyers more attractive to non-minority station sellers, and in the process, had opened new opportunities for ownership.¹⁵³

When the nexus initiatives were in place between 1978 and 1990, minority ownership tripled overall,¹⁵⁴ raising minority ownership from less than 1% in 1978 to roughly 3% of broadcast stations.¹⁵⁵ In 1986, the NAB released data stating that 2.1% of broadcast stations were minority owned, including thirty-eight TV and 209 radio stations.¹⁵⁶ In 1993, 313 of 11,334 radio stations were owned by minorities, 181 of which were owned by African Americans.¹⁵⁷ Despite the growth, an assessment conducted by the FCC as of June 1994 indicated that members of racial and ethnic groups represented 23% of general U.S. population, but collectively owned just 2.9% of stations.¹⁵⁸ Proponents of the program argued that the minority tax certificate was an effective and non-intrusive tool.¹⁵⁹ By October 1988, 166 minority tax certificates had been issued. During the period between 1978 and

147. *Id.* at 596-97.

148. Krasnow & Fowlkes, *supra* note 95, at 669-71.

149. Book, *supra* note 104, at 8.

150. See Evans, *supra* note 70, at 390, 408-09.

151. *Id.* at 408.

152. *Id.* at 408-09.

153. *Id.* at 408.

154. Austin, *supra* note 11, at 741.

155. Ryu, *supra* note 136, at 64 (discussing minority ownership of broadcast stations).

156. Wilde, *supra* note 95, at 981 (discussing minority ownership of broadcast stations).

157. LaVonda N. Reed-Huff, *supra* note 95, at 111 (discussing minority ownership of broadcast stations).

158. Michael E. Lewyn, *The Case for Color-Blind Distress Sales*, 19 HASTINGS COMM'NS & ENT. L.J. 31, 35 (1996) (discussing minority ownership of broadcast stations).

159. Krasnow & Fowlkes, *supra* note 95, at 670 (discussing proponents' view of the minority tax certificate).

March 1995, the Commission issued 359 tax certificates to promote minority ownership in broadcasting.¹⁶⁰

Despite the success of the nexus policies, the protections for the FCC's licensing enhancement and distress sale programs were overturned in 1995 as the result of the Supreme Court's decision in a non-broadcast case, *Adarand Constructors Inc. v. Pena*.¹⁶¹ In *Adarand*, the four dissenters in *Metro* joined with the recently promoted Justice Clarence Thomas, who had ruled against a gender based enhancement in *Lamprecht v. FCC* while he was still on the D.C. Circuit,¹⁶² striking down a federal program granting preferences to minorities who were bidding on public works projects.¹⁶³ The majority in *Adarand* argued that policies upheld under intermediate scrutiny in *Metro* should have required a strict scrutiny test by the Court. As part of this newer, more tailored approach to judicial review of government preference programs, the majority decision proposed that strict scrutiny was not "...strict in theory and fatal in fact,"¹⁶⁴ applying three key principles to the review. First, race-based criterion should always be treated with skepticism.¹⁶⁵ Second, Equal Protection should be consistently applied and not depend on race for the group benefitting or burdened by the program.¹⁶⁶ Finally, an analysis of Equal Protection demanded "congruence" under both the Fifth and Fourteenth Amendments.¹⁶⁷

After *Adarand*, minority preferences, including programs designed to correct "benign discrimination," were required narrow tailoring to meet a compelling governmental interest.¹⁶⁸ The decision explicitly overturned the holding in *Metro* that the FCC's "benign" minority ownership policies needed to only pass an intermediate scrutiny review.¹⁶⁹ Arguably, the Court's majority no longer supported diversity as sufficient to justify race-based classifications in public contracting.¹⁷⁰ Functionally, after *Adarand*, a preferential government program requires empirical statistical evidence to 1.) demonstrate previous discrimination and 2.) that the program under review meets a narrow tailoring test to assess if the new policy will correct the previous discrimination.¹⁷¹

160. Of these, 285 certificates involved radio station sales, 43 involved television deals, and 31 involved cable television transactions. *FCC's Tax Certificate Program: Hearings Before the Senate Committee on Finance*, 104th Cong. 9 (1995) (statement of William Kennard, General Counsel, FCC).

161. *Adarand Constructors, Inc.*, *supra* note 13, at 227.

162. *Lamprecht v. FCC*, 958 F.2d 382, 398 (D.C. Cir. 1992).

163. *Id.*

164. *Adarand Constructors, Inc.*, *supra* note 13, at 237.

165. *Id.* at 223.

166. *Id.* at 224.

167. *Id.*

168. *Id.* at 258.

169. *Id.*

170. *Id.* at 226.

171. *Id.* at 235.

After *Adarand*, the mandate imposing stringent justifications for preferential programs led the FCC to discontinue the distress sale policy, by refusing to extend the policy to women and then by refusing to extend a preferential policy during auctions for licensed allotments of electromagnetic spectrum.¹⁷² But *Adarand* would bring even more complications to the FCC's policymaking process and regulatory objectives following the passage of the 1996 Telecommunications Act.¹⁷³ By imposing obstacles to developing new minority ownership policies, lingering in the background until the Third Circuit Court of Appeals decision in *Prometheus Radio Project v. FCC (I)* in 2004.¹⁷⁴

The repeal of the tax certificate and distress sale policies after the *Adarand* decision substantially curtailed the Commission's ability to directly increase the variety of opinions and perspectives available to the public through mass media ownership by minorities. These developments prompted the Commission to reexamine its telecommunications ownership programs for minorities to determine whether it could empirically support a compelling state interest under *Adarand's* strict scrutiny standard.¹⁷⁵

172. While awaiting a decision from the Supreme Court in the *Metro* cases, the FCC shut down a rulemaking proceeding that could have expanded the Distress Sale policy to new categories of participants, including women. See *Distress Sale Policy of Broad. Licensees*, 5 FCC Rcd. 397 (1990).

173. Christopher Terry & Caitlin Ring Carlson, *Rethinking Adarand After Prometheus: A Rational (Basis) Solution to FCC Minority Ownership Policy*, 74 FED. COMM'NS L. J. 137, 147 (2022) (conversation on policymaking complications).

174. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004).

175. Following the *Adarand* decision, the FCC contracted for six studies to assess the sufficiency of viewpoint diversity and government remediation of past discrimination in an effort designed to see if a race or gender based policy could be implemented and defended as a compelling government interest in to resolve the impasse between the *Adarand* decision and the agency's obligations to advance ownership opportunities by women and minorities under 47 U.S.C. § 257 (1996) and 47 U.S.C. § 309(j) (1994). These studies included: KPMG LLP Economic Consulting Services, *Study of the Broadcast Licensing Process*, consisting of three parts: KPMG LLP, *HISTORY OF THE BROADCAST LICENSE APPLICATION PROCESS 3* (2000); KPMG LLP, *UTILIZATION RATES, WIN RATES, AND DISPARITY RATIOS FOR BROADCAST LICENSES AWARDED BY THE FCC 3* (2000); KPMG LLP, *LOGISTIC REGRESSION MODELS OF THE BROADCAST LICENSE AWARD PROCESS FOR LICENSES AWARDED BY THE FCC 3* (2000); ERNST & YOUNG, LLP, *FCC ECONOMETRIC ANALYSIS OF POTENTIAL DISCRIMINATION UTILIZATION RATIOS FOR MINORITY AND WOMEN-OWNED COMPANIES IN FCC WIRELESS SPECTRUM AUCTIONS 2* (2000); WILLIAM D. BRADFORD, *DISCRIMINATION IN CAPITAL MARKETS, BROADCAST/WIRELESS SPECTRUM SERVICE PROVIDERS AND AUCTION OUTCOMES IV* (2000); IVY PLANNING GROUP LLC, *WHOSE SPECTRUM IS IT ANYWAY?: HISTORICAL STUDY OF MARKET ENTRY BARRIERS, DISCRIMINATION AND CHANGES IN BROADCAST AND WIRELESS LICENSING 1950 TO PRESENT 1* (2000); KOFI OFORI, *CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY WHEN BEING NO. 1 IS NOT ENOUGH: THE IMPACT OF ADVERTISING PRACTICES ON MINORITY-OWNED AND MINORITY-FORMATTED BROADCAST STATIONS 1* (1999).

III. EFFECTS OF THE TELECOMMUNICATIONS ACT OF 1996

A. Consolidation

The FCC's ownership rules prior to 1996 were designed to promote public interest through localism.¹⁷⁶ The Telecommunications Act implemented specific limits on media ownership,¹⁷⁷ mandated by Congress, rather than limits created through rulemaking processes undertaken by the FCC. This change was significant. Prior to 1996, the FCC had determined the limits on media ownership and made decisions on media cross ownership prohibitions through developed rulemaking proceedings.¹⁷⁸ These legal changes also resulted in a significant change in the implementation of media ownership policy by the FCC.¹⁷⁹ The scale of the changes to the top-end limits on media ownership, included the move to allow the creation of large numbers of commonly owned and operated radio stations at the market level.¹⁸⁰ This resulted in significant changes as the radio industry began to transition from stations focused on local operation to ownership groups that were programming stations using a regional or national approach.¹⁸¹

When implementing the ownership limits beginning in 1996, the FCC solicited no comments on the rule changes, and the agency did not assess the state of the media before the changes took effect.¹⁸² In place of a traditional rulemaking process to interpret the delegation, the FCC implemented the numerical limits specified by the statutory mandate.¹⁸³ Freed from the longstanding restrictions on joint-ownership of broadcast stations, station transfers and ownership consolidation quickly followed.¹⁸⁴ Starting in 1996, the FCC justified station mergers and ownership consolidation using the

176. Michael Otner, *Serving a Different Master – The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 *HAMLIN J. PUB. L. & POL'Y* 139, 152 (2000).

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

178. *Prometheus 4-0*, *supra* note 1.

179. *Id.*

180. Howard, *supra* note 95.

181. Specifically, the Local Radio Ownership Rule permits the following: An entity may own (1) up to eight commercial radio stations in radio markets with 45 or more radio stations, no more than five of which can be in the same service (AM or FM); (2) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which can be in the same service (AM or FM); (3) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which can be in the same service (AM or FM); and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which can be in the same service (AM or FM), provided that an entity may not own more than 50 percent of the stations in such a market, except that an entity may always own a single AM and single FM station combination. 47 CFR § 73.3555(a) (1996).

182. In the matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCCR 12638, 12371 (1996).

183. *Id.*

184. *Prometheus 4-0*, *supra* note 1.

theoretical benefits of economies of scale,¹⁸⁵ rather than relying on a public trustee model, and did so without any consideration for how such economies would actually be created in practice.¹⁸⁶ During the first month of 1996 Telecommunication's Act's adoption by the FCC, \$2 billion worth of radio station transfers occurred.¹⁸⁷ In the first nine months, 1,175 stations were traded.¹⁸⁸ By the end of 1997, there were already measurable decreases in competition, in addition to substantial decreases in localism and diversity.¹⁸⁹

Reducing local airstaff and station-specific news operations were among the first items eliminated where consolidated radio operations sought price saving efficiencies.¹⁹⁰ As a result of this cost-saving potential, media companies, especially in radio, began to merge at rapid pace.¹⁹¹ The new ownership groups often reduced local programming staff while implementing a range of content sharing practices to reduce production costs, resulting in a reduction of the diversity in media as content production was standardized across markets.¹⁹² Assessments indicated that by 2000, the Telecommunications Act homogenized programming options and decreased ownership diversity by more than twenty percent.¹⁹³ As media companies continued to expand their ownership, they also increasingly used their expanded market power to push competitors out of local advertising markets.¹⁹⁴ Along with a substantial reduction in the number and diversity of owners, the decrease in competition lead to corresponding decreases in localism and diversity.¹⁹⁵

The change in ownership structure also exacerbated the existing problems for minorities attempting to acquire stations.¹⁹⁶ Coupled with the loss of the nexus initiatives, the new ownership limits mandated by the Telecommunications Act and the FCC's rapid approval of mergers created a sellers-market for stations. In 1990, the average station selling price was eight times a station's cash flow, but by 1998, the average price had ex-

185. Traditionally the concept of economy of scale relates to "the saving in cost of production that is due to mass production." *Economy of Scale*, AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011). In terms of media ownership, economy of scale allows for the reduction of the cost of production through the sharing of facilities, staff and even content.

186. *Prometheus 4-0*, *supra* note 1.

187. Howard, *supra* note 95, at 278.

188. *Id.* at 279.

189. *Id.*

190. *Id.* at 280.

191. *Id.* at 279-80.

192. *Prometheus 4-0*, *supra* note 1, at 126.

193. Ortner, *supra* note 176, at 172.

194. *Id.* at 154.

195. Howard, *supra* note 95, at 279.

196. 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, Fall 2004, at 282.

panded to thirteen times the flow.¹⁹⁷ Minority owners lost 27 stations within a year of Telecom Act.¹⁹⁸ Already struggling to obtain necessary capital, minorities were often unable to match the rapid increase in pricing for stations.¹⁹⁹ Overall, minority ownership of broadcast stations dropped fourteen percent between the implementation of the Telecommunications Act and the decision in *Prometheus I*.²⁰⁰

B. *The Poison Pill: Section 202(h) and Rulemaking*

For most of the 20th Century, courts gave considerable deference to the decisions of the FCC in matters of broadcast regulation. The Supreme Court led the way, regularly upholding the Commission's decisions about broadcasting in the face of numerous challenges. To cite just a few examples from the past fifty years, the Court upheld the constitutionality of the FCC's Fairness Doctrine,²⁰¹ the Commission's ruling that broadcasters were not required to accept editorial advertisements,²⁰² the Commission's ban on local cross-ownerships involving daily newspapers and broadcast stations,²⁰³ the Commission's decision not to consider proposed changes in entertainment programming when it considered whether to renew a station's license,²⁰⁴ the Commission's interpretation of Section 312 (a) (7) of the Communications Act,²⁰⁵ and the Commission's policies that gave preference to owners from racial and ethnic minority groups.²⁰⁶

For the Supreme Court during this era, siding with the FCC was something of a no-brainer. As it explained in 1981: "[t]he Federal Communications Commission is the experienced administrative agency long entrusted by Congress with the regulation of broadcasting" and thus its construction of the Communications Act is "entitled to judicial deference" unless there are compelling reasons to believe that a Commission decision was arbitrary and capricious or at odds with the language and/or the purpose of the statute.²⁰⁷

But then the Telecommunications Act of 1996 was enacted.²⁰⁸ The statute ended the era of judicial deference to the FCC by shifting the burden of

197. Ortner, *supra* note 176, at 162.

198. David S. Miller, *Limits on Media Ownership: Should the FCC Curb Its Reliance on Deregulation*, 2004 U. ILL. J.L. TECH. & POL'Y 345, Fall 2004, at 352.

199. Baynes, *supra* note 196, at 238.

200. *Id.* at 239.

201. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).

202. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 138-39 (1973).

203. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978).

204. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981).

205. *CBS v. FCC*, 453 U.S. 367, 386 (1981).

206. *Metro Broad. Inc.*, *supra* note 10, at 566.

207. *CBS v. FCC*, *supra* note 205, at 390.

208. Telecommunications Act of 1996, *supra* note 177 (codified as amended in scattered sections of 47 U.S.C.).

proof with respect to media ownership rules. Before 1996, FCC action on ownership rules could be overturned only if a challenger could show that a decision of the Commission had been “arbitrary and capricious.”²⁰⁹

When the new ownership limits were delegated to the FCC, traditional rulemaking and adjudication processes for media ownership were also altered.²¹⁰ Included in Section 202(h) of the Telecommunications Act was a provision that altered the traditional rulemaking process for the agency, requiring the FCC to affirmatively demonstrate that the rule was necessary for the public interest.²¹¹ In other words, parties challenging FCC actions with respect to media ownership no longer had to show that a rule was arbitrary or capricious. Instead, the Commission was required to defend existing rules as if those regulations were new rules on a periodic basis.²¹² Section 202(h) of the Telecommunications Act specifies that:

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and 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.²¹³

The continuing requirement for frequent reviews of ownership rules placed the FCC in a difficult position. On the one hand, the Communication Act of 1934 required the FCC to ensure that stations served the public interest and numerous court decisions had upheld its authority to take bold measures, including requiring stations to air a variety of viewpoints and placing limits on media ownership. On the other hand, the Telecommunication Act of 1996 seemed to equate the public interest with minimal limits on media ownership and the text of Section 202(h) imposes few constraints on the FCC’s ability to determine what regulations to repeal or modify. In fact, while the plain text of the provision indicates that the FCC must review its ownership rules and make determinations biennially, the FCC appears to be left free to decide whether to modify or repeal a rule.²¹⁴ While the provision does indicate that the FCC must determine whether the rules “are necessary in the public interest as the result of competition,” the terms “public inter-

209. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1047 (D.C. Cir. 2002).

210. *Prometheus 4-0*, supra note 1, at 3.

211. *See id.* at 104-05.

212. Consolidated Appropriations Act, Pub. L. No. 108-199, § 629(3), 118 STAT. 101 (2004).

213. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 STAT. 111, 112.

214. *Prometheus 4-0*, supra note 1, at 3.

est” and “competition” are not defined in the particular provision, leaving the agency to determine their meaning.²¹⁵

The new standard made a huge difference, even before the *Prometheus* decisions. In 2001 and 2002, the Court of Appeals for the D.C. Circuit not only overturned a cable-broadcasting cross-ownership rule,²¹⁶ but also sent three other rules (the national cable limits,²¹⁷ the national television ownership caps,²¹⁸ and the local television ownership rule²¹⁹) back to the FCC for justification in light of the standards set forth in the Telecommunications Act.

C. Minority Ownership Policies in the Post-Telecommunications Act Environment

1. The Challenge of Empirical Data

Since the agency’s implementation of the newspaper-broadcast cross ownership ban in 1975,²²⁰ the FCC has relied on a regulatory premise that conceptually ties the ownership of stations to the level of content diversity available to citizens at the market level.²²¹ While the conceptual premise that ownership and content are directly related has become the “touchstone premise” of FCC regulation of broadcaster ownership for five decades,²²² the body of empirical evidence supporting this regulatory premise has been inconsistent at best.²²³

At least part of the FCC’s struggle to resolve minority ownership policy can be explained simply: quality empirical evidence to support a minority ownership policy has been in short supply.²²⁴ Researchers using the FCC’s ownership data have suggested that the FCC’s data on minority ownership “is extremely crude and subject to a large enough degree of measurement

215. *Id.* at 105.

216. *Fox Television Stations v. FCC*, 280 F.3d 1027, 1049-53 (D.C. Cir. 2002).

217. *Time Warner Ent., Co. v. FCC*, 240 F.3d 1126, 1144 (D.C. Cir. 2001).

218. *Fox Television Stations*, 280 F.3d at 1040-44.

219. *Sinclair Broad. Grp. v. FCC*, 284 F.3d 148, 169 (D.C. Cir. 2002).

220. *In re Amend. of Sections 73.34, 73.240, & 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, Fm, & Television Broad. Stations*, 50 F.C.C.2d 1046, 1089-90. (1975).

221. The FCC has employed a range of methodologies ranging from voice counts to Congressional mandated ownership limits but defends the use of quantitative limits as a proxy protection for diversity. *See Sinclair Broadcast Grp. v. F.C.C.*, 284 F.3d 148, 169 (D.C. Cir. 2002).

222. 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*, in 18 FCC RCD. 13620, 13623 (2003).

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

224. *Id.*

error to render it essentially useless for any serious analysis.”²²⁵ Calling the data problematic and cumbersome, one researcher argued, “[t]he FCC datasets create barriers to analysis, particularly for longitudinal studies or efforts to analyze trends within or between larger groups of broadcasters.”²²⁶

Since the Telecommunications Act was implemented, the FCC’s review processes have been plagued by a range of procedural issues and a lack of empirical evidence. Those problems became important issues in the four *Prometheus* decisions before the Third Circuit Court of Appeals which remanded media ownership decisions to the FCC.²²⁷ In *Prometheus II*, the FCC was accused of “in large part punting” on the effort to obtain data and develop a workable minority ownership policy.²²⁸ The court ordered the FCC to resolve the issue over the lack of empirical data, “Stating that the task is difficult in light of *Adarand* does not constitute considering proposals.... The FCC’s own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the [FCC] requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor.”²²⁹

2. Trying Again: The Eligible Entity Designation and the Incubator Program

In response to the remand in *Prometheus I*, in 2007 the FCC released a new minority ownership policy.²³⁰ Adopting a standard from the Small Business Administration (SBA), the proposal created a class of license ap-

225. ARIE BERESTEANU & PAUL B. ELICKSON, *MINORITY AND FEMALE OWNERSHIP IN MEDIA ENTERPRISES 2-3* (2007), <https://docs.fcc.gov/public/attachments/DA-07-3470A8.pdf>.

226. Catherine J.K. Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Window, and the Nexus Between Ownership, Diversity and Service in the Public Interest*, in *COMMUNICATIONS RESEARCH IN ACTION: SCHOLAR-ACTIVIST COLLABORATIONS FOR A DEMOCRATIC PUBLIC SPHERE*, at 4 (Minna Aslama & Philip M. Napoli, eds., 2010), <https://ssrn.com/abstract=1516820>.

227. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 478 (3d Cir. 2004); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 461 (3d Cir. 2011); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 46 (3d Cir. 2016).

228. “Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the [FCC] has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the [FCC] has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the [FCC] relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order.” *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471-72.

229. *Id.* at 471, n. 42.

230. *In re Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd. 5922, 5924-25 (2008).

plicants called “Eligible Entities.”²³¹ The Eligible Entity policy represented a significant change from previous FCC minority ownership initiatives that had provided direct enhancements and incentives to minorities.²³² In fact, the Eligible Entity proposal was not a direct minority ownership policy, but a broader and more comprehensive policy for diversity, which the agency proposed might include opportunities for women and minorities alike.²³³

In developing the Eligible Entity designation, the FCC argued the type of minority enhancements once upheld in *Metro* would be subjected to strict scrutiny after *Adarand*.²³⁴ Therefore, for a new minority ownership policy to bypass any constitutional barriers, the policy must be implemented as “race neutral.”²³⁵ Rather than providing ownership enhancements to minorities directly, the FCC argued that the policy could (eventually) include women and minorities as Eligible Entities.²³⁶ In crafting the new policy, the FCC relied on the empirically unsupported contention at the cornerstone of media ownership theory, that internal and external competition between stations will increase content diversity.²³⁷ The FCC argued that the Eligible Entity designation could increase the number of independently owned media outlets, that independently owned outlets are more likely to have ties to a local community and are better positioned to serve the needs of a local audience.²³⁸

An applicant had to meet SBA standards as defined by total annual sales of an organization or its parent company to qualify as an “eligible entity.”²³⁹ For radio, the qualifying limit was \$6.5 million and for television it

231. *Id.* at paras. 6–7.

232. *See id.*

233. *See id.* at para. 4.

234. *Id.* at ¶¶ 5–6.

235. The FCC believed that by implementing the new policy on a race-neutral basis, and avoiding constitutional scrutiny on equal protection grounds, the policy can be implemented, and have demonstrable results much quicker. *Id.* at ¶ 9.

236. The Commission was seeking comment on whether a special category of “eligible entity” should be created to assist minorities and women with the acquisition of media outlets, but for now the diversity policy will remain race and gender neutral. *Id.* at ¶ 39.

237. The FCC believes that competition that creates diversity does not always come from external competitors. As more local stations are commonly owned, there is also an incentive for diverse programming to reduce “internal competition.” This premise does not account for an economic reality that media companies will target the most valuable audience demographics even if forced to compete for that audience, a process known as rivalrous imitation. *Id.* ¶ 17. *See also* John Dimmick & Daniel G. McDonald, *Network Radio Oligopoly 1926–1956: Rivalrous Imitation and Program Diversity*, 14 J. MEDIA ECON. 197, 201 (2001).

238. *See* 2008 Minority Ownership Order, *supra* note 230 at 41–42.

239. In addition to financial status requirements, to become an eligible entity an applicant had to hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership inter-

was \$13 Million.²⁴⁰ The Eligible Entity designation was also adapted from a previous definition of minority ownership of a broadcast outlet, where the ownership reports identify one or more minorities which, in aggregate, have a greater than 50% voting interest in the broadcast licensee entity.²⁴¹

Between the decisions in *Prometheus III* and *Prometheus IV*, in November of 2017, the FCC released its initial proposal for a new minority ownership policy, called the “Incubator”²⁴² as part of a directed effort to break the legal impasse over media ownership policy.²⁴³ The Incubator proposal paved avenues for additional ownership consolidation, including the opportunity to exceed the local limits set by Congress in the Telecommunications Act for companies that would be willing to provide assistance and foster new broadcasters.²⁴⁴ Under the Incubator program, existing operators provide financial, operational, and technical guidance to smaller entities,²⁴⁵ and the Incubator program focused on developing new ownership entities in broadcast radio.²⁴⁶ The FCC argued that radio required fewer staff, less technical experience, and a far smaller financial commitment than broadcast television.²⁴⁷

To be eligible for the Incubator program, a startup entity must meet two criteria. The first prong of eligibility ties to an update of the FCC’s entrant bidding credit standard.²⁴⁸ To meet this new standard, an applicant must not have owned or have an attributable interest in more than three full-service AM or FM radio stations and may not have any attributable interest in any broadcast television stations. The second requirement for the new initiative

ests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company. *Id.* ¶ 6.

240. *See id.*

241. *Id.*

242. Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, *Report and Order*, 33 FCC Rcd. 7911, ¶ 126 (2018) [hereinafter *2018 Incubator Policy*] (in which the FCC describes the Incubator Program as method to foster new and diverse voices into the broadcast industry).

243. *Id.* ¶ 127; *see also In re Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, 33 FCC Rcd. 7911, ¶ 1 (2018) [hereinafter *2018 Incubator Policy*] (describing the FCC Incubator Program as method to foster new and diverse voices into the broadcast industry).

244. *2014 Quadrennial Review*, *supra* note 212, ¶ 127.

245. *See id.*

246. “*2018 Incubator Policy*, *supra* note 243, ¶ 6-7 (“The program we implement today will apply in the radio market, as radio has traditionally been the more accessible entry point for new entrants and small businesses seeking to enter the broadcasting industry, and a waiver of the local radio rules provides an appropriate reward for incubation. Owning and operating a radio station requires a lower capital investment and less technical expertise than owning and operating a television station, and it also requires less overhead to operate. In addition, we believe that the [FCC]’s existing ownership limitations on local radio markets provide a sufficient incentive for incumbent broadcasters to participate in an incubator program with the promise of obtaining a waiver to acquire an additional station in a market.”).

247. *Id.* ¶ 7.

248. *Id.* ¶ 19; *2008 Order*, *supra* note 230, at 5925.

was that an incubated entity must meet the criteria established for the Eligible Entity designation proposed by the FCC in 2007,²⁴⁹ the designation of which had been remanded in both *Prometheus II* and *Prometheus III*.²⁵⁰ Despite promoting the Incubator as a minority ownership policy, like the Eligible Entity before it, the proposal contained no direct mechanisms for expanding ownership by women or minority groups.²⁵¹

3. Minority Ownership and *Prometheus I-IV*

The FCC launched the first of the mandated biennial reviews for media ownership rules under Section 202(h) on March 12, 1998.²⁵² The 17-month review examined seven ownership policies using the guidelines set by Section 202(h).²⁵³ During review of its media ownership rules, but before approving changes to those rules, the FCC granted a series of conditional waivers to various owners, anticipating future review changes.²⁵⁴ By continuing to grant waivers, even conditionally, the FCC was encouraging further ownership consolidation, before the agency could empirically assess the results of its freshly approved mergers.²⁵⁵ Indeed, when the 1998 Biennial Review concluded, the FCC admitted that it could not meaningfully assess the outcomes of industry consolidation since 1996.²⁵⁶

Shortly after concluding the 1998 Biennial Review, the FCC proposed using the 2000 Biennial Review to build a framework to “form the basis for

249. 2008 Order, *supra* note 230, at 5925.

250. 2018 Incubator Policy, *supra* note 243, ¶ 19.

251. See Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC’s Incubator Program*, 24 COMM’N. L. & POL’Y. 403, 416 (2019).

252. *In re* 1998 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, 13 FCC Rcd. 11276, 11276, 11279–11280 (1998).

253. See *id.* at 11279–92 (discussing the seven policies for 202(h) review).

254. For example, QueenB’s request for waiver: “Because the present case also proposes a commonly owned television station, we must next determine whether to waive our one-to-a-market rule. In considering the current request for a permanent waiver we will follow the policy established in recent one-to-a-market waiver cases where the radio component to a proposed combination exceeds those permitted prior to the adoption of the Telecommunications Act of 1996. . . . In such cases, the [FCC] declined to grant permanent waivers of the one-to-a-market rule, and instead granted temporary waivers conditioned on the outcome of related issues raised in the television ownership rulemaking proceeding. . . . Similarly, we conclude that a permanent, unconditional waiver would not be appropriate here. QueenB has, however, demonstrated sufficient grounds for us to grant a temporary waiver conditioned on the outcome of the rulemaking proceeding.” Concrete River Associates, L.P., 12 FCC Rcd. 6614, 6618 (1997) (assigning a license to QueenB Radio and establishing that QueenB was granted temporary waiver).

255. See *In re* 1998 Biennial Regulatory Review – Review of the Commission Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 FCC Rcd. 11058, 11061 (2000).

256. See *id.* ¶ 4 (“It is currently too soon to tell what effect this will have consolidation, competition, and diversity.”).

further action.”²⁵⁷ The FCC couched the proposal as an opportunity to build a working framework for future reviews under Section 202(h), ahead of the biennial review process scheduled to begin in 2002. The FCC had two objectives that dominated the early phase of the 2002 Biennial Review proceeding. First was the Section 202(h) mandate to engage in the review, part of which incorporated the ongoing rulemaking proceedings launched after the 2000 Biennial Review.²⁵⁸ A second mandate involved responding to a remand issued by the D.C. Circuit Court of Appeals in *Fox Television*²⁵⁹ and *Sinclair*.²⁶⁰

In *Sinclair*, the D.C. Circuit noted that ownership limits encourage diversity in the ownership of broadcast stations, which can in turn promote a diversity of viewpoints available in broadcast media.²⁶¹ The court added that promoting ownership diversity as a means to achieving viewpoint diversity serves a legitimate government interest, and has, in the past, survived a rational basis review.²⁶² In a section of the 2002 Biennial Review NPRM, the FCC twisted the finding in *Sinclair* by stating, “[t]he interests that government may promote through content neutral rules also include competition – both the promotion of competition and the prevention of anti-competitive practices and results.”²⁶³ In doing so, the FCC attempted to shift media ownership policy away from the traditional Viewpoint Diversity objective, instead creating an ownership-focused environment that would “advance diversity without regulatory requirements.”²⁶⁴

On July 2, 2003, the FCC released an Order in the 2002 Biennial Review proceeding.²⁶⁵ The FCC’s 2002 Biennial Review Order retained the existing limits on local radio ownership as defined by the Telecommunications Act, with two significant changes: it adopted the radio market defini-

257. *In re* 2000 Biennial Regulatory Review, 16 FCC Rcd. 1207, 1210 (2001).

258. *Id.* ¶ 3.

259. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002), *modified on reh’g*, 293 F.3d 537 (D.C. Cir. 2002).

260. *See Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002); *In re* 2002 Biennial Regulatory Review – Review of Commission’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of Telecommunications Act of 1966, 17 FCC Rcd. 18503, 18510–11 (2002).

261. The *Sinclair* court elaborates on American courts’ general presumption against judicial review of FCC regulatory line-drawing. That court applied this presumption to the “voice-count test” that the FCC proposed to promote diversity. *Sinclair*, 284 F.3d at 148.

262. *In re* 2002 Biennial Regulatory Review, *supra* note 260, ¶ 30; *see Sinclair*, 284 F.3d at 159-60 (“The [FCC] had acted rationally, despite the inconclusiveness of the rulemaking period, in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoint.”) (quoting *Metro*, 497 U.S. at 570).

263. *In re* 2002 Biennial Regulatory Review, *supra* note 260, ¶ 30.

264. *Id.* ¶ 42.

265. *In re* 2002 Biennial Regulatory Review – Review of the Commission’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620 (2003).

tions as defined by *Arbitron*,²⁶⁶ and included the non-commercial stations in a count of the total number of stations in each market.²⁶⁷

Groups of both “citizen petitioners”²⁶⁸ and “deregulatory petitioners”²⁶⁹ challenged the FCC’s 2003 Order on media ownership in multiple federal circuit courts, and the Judicial Panel on Multidistrict Litigation consolidated the petitions.²⁷⁰ Unlike the *Sinclair* and *Fox* cases which were heard by the D.C. Circuit Court of Appeals, the traditional venue for administrative agencies, the panel sent the case to the Third Circuit Court of Appeals. The multiple challenges were consolidated under the lead “Citizen Petitioner” Plaintiff, Prometheus Radio Project.²⁷¹ In 2004, in a 2-1 decision written by Judge Thomas L. Ambro, the court stayed and remanded most of the FCC’s 2003 Order.²⁷² Among the primary reasons for remand was the FCC’s arbitrary and capricious decision-making process and the lack of supporting evidence for its decisions in the record.²⁷³

In 2011, both the decision in the 2006 Quadrennial Review and the eligible entity program were reviewed under the existing remand from *Prome-*

266. *Id.* at 13725. *See id.* at 13725–28 (providing a deeper explanation of how the FCC came to their decision).

267. *In re* 2002 Biennial Regulatory Review, *supra* note 265, at 13727. The 2003 Order also revised the national television ownership rule to permit a single party to own television stations reaching 45% (rather than 35%) of the national audience. *Id.* at 13919 (describing national television ownership rule).

268. In the *Prometheus* ruling, the court assigned the various petitioners to two groups. The first was referred to as the “Citizen Petitioners.” *Prometheus I*, 373 F.3d at 381 (“including Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ (‘UCC’) (intervenor). The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised anti-deregulatory challenges to the national television ownership rule”).

269. *See id.* at 382 n.2 (stating that the “Deregulatory Petitioners” included: “Clear Channel Communications, Inc.; Emmis Communications Corporation; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom Inc.; Belo Corporation (intervenor); Gannett Corporation (intervenor); Morris Communications Company (intervenor); Millcreek Broadcasting LLC (intervenor); Nassau Broadcasting Holdings (intervenor); Nassau Broadcasting II, LLC (intervenor); Newspaper Association of America (intervenor); and Univision Communications, Inc. (intervenor)”).

270. *Id.* at 382.

271. *Id.* at 389.

272. *Id.* at 435 *supra* note 265, ¶ 327 (describing the cross-ownership rulemaking by the FCC — with foregoing explanation — with which the Third Circuit found fault.).

273. *Prometheus I*, 373 F.3d at 411.

theus I.²⁷⁴ This brought the parties back before the Third Circuit—and the *Prometheus II* decision came out along the same 2-1 panel split.²⁷⁵ The Third Circuit concluded that the FCC’s rationale, policy decision, and lack of evidence to support its decisions collectively demonstrated that the FCC had again failed to develop an adequate method of addressing diversity of ownership.²⁷⁶ The Third Circuit issued another remand, this time of the FCC’s 2007 decisions on media ownership, citing the agency’s continuing series of procedural and evidentiary problems.²⁷⁷ Holding for a second time that the FCC’s continuing failure to develop a policy plan to increase ownership of stations by women and minorities had undermined the agency’s decision making.²⁷⁸ Judge Ambro suggested that the agency had “in large part punted” on the issue of minority ownership.²⁷⁹ The opinion also rebuked the agency for complaining about the decision in *Adarand*,²⁸⁰ and included a mandate to develop a new minority ownership policy before the agency concluded its open 2010 Quadrennial Review of its media ownership rules.

After the remand in *Prometheus II*, the FCC’s actions on media ownership generally, and minority ownership specifically, were little more than avoidance, with the agency functionally doing nothing to advance policy or

274. *Prometheus II*, 652 F.3d at 438, 440.

275. *Id.* at 472 (vacating and remanding the NBCO rule but leaving intact the other rules from the FCC’s 2008 Order).

276. *Id.* at 469 (citing Commissioner Copps’ part concurrence, part dissent, commenting that, “[w]e should have started by getting an accurate count of minority and female ownership—the one that the Congressional Research Service and the Government Accountability Office both just found that we didn’t have. . . . [W]e don’t even know how many minority and female owners there are. . . .”) (citing *In re Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd. 5922, 5983 (2008)).

277. *Id.* at 438 (“We also remand those provisions of the Diversity Order that rely on the revenue-based ‘eligible entity’ definition, and the FCC’s decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business, so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women.”).

278. *Id.* at 471.

279. *Id.* at 471–72 (“Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the [FCC] has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the [FCC] has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the [FCC] relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order.”).

280. *Id.* at 471 n.42 (“Stating that the task is difficult in light of *Adarand* does not constitute ‘considering’ proposals using an SDB definition. The FCC’s own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor.”).

respond to the Third Circuit's remands. The FCC extended the 2010 Quadrennial Review into the statutorily mandated Quadrennial Review in 2014, not just stalling for time, but failing to act until ordered to do so by the Third Circuit in the *Prometheus III* decision in April of 2016.²⁸¹

During a hostile oral argument in *Prometheus III*, the judges on the panel pressed the FCC for a straight answer as to when the agency would conclude the unfinished proceedings and take some type of formal action.²⁸² The FCC was reluctant to commit to a timeline for final agency action, but stated that a draft of a decision on ownership rules would be circulated among the FCC commissioners before the end of June 2016.²⁸³

The Third Circuit panel in *Prometheus III* mandated agency action to conclude the open 2010 and 2014 proceedings and deliver a new proposal for a functional minority ownership policy before the end of 2016.²⁸⁴ In response to this mandate, in August 2016, the FCC released an Order that concluded the open 2010 and 2014 Quadrennial Reviews while serving as the agency's response to both the *Prometheus I* and *Prometheus II* remands.²⁸⁵ After six years of agency inaction, the FCC decided to maintain the existing media ownership rules "with some minor modifications."²⁸⁶ The FCC responded to the Third Circuit's third mandate on minority ownership by releasing a recycled version of its 2007 "Eligible Entity" policy that the Third Circuit had already deemed unworkable.²⁸⁷

Before the Third Circuit could review the agency's action, but after the composition of the FCC shifted after the election of Donald Trump, the FCC issued an Order on Reconsideration in November of 2017. The Order on Reconsideration notably did not include a revision to the local radio ownership rule nor did it address the Third Circuit's mandate to develop a viable minority ownership policy.²⁸⁸ While consolidated cases challenging

281. After close to six years of FCC inaction on media ownership, the deregulatory petitioners, citizen petitioners, and FCC returned to the Third Circuit. See *Prometheus 4-0*, *supra* note 1, at 128–30.

282. *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 824 F.3d 33, 51 (3d Cir. 2016).

283. See *id.* at 53–54.

284. See *id.*

285. 2014 Quadrennial Regul. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 31 FCC Rcd. 9864 (2016).

286. *Id.* ¶ 3.

287. See *id.* ¶ 313 (“[W]e disagree with arguments that the *Prometheus II* decision requires that we adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that we continue this proceeding until the [FCC] has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law.”); see also *Prometheus 4-0*, *supra* 1, at 131 (describing how *Prometheus III* recycled *Prometheus II*).

288. See 2014 Quadrennial Regul. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm.s Act of 1996, 31

the original 2016 Order and 2017 Order on Reconsideration were pending in *Prometheus IV*, the Order implementing the new Incubator program released in August 2018 just ahead of the Third Circuit’s order to respond to the challenges to the 2016 and 2017 decisions.²⁸⁹

A consolidated challenge to the 2016 and 2017 orders on media ownership as well as the 2018 Incubator returned to the Third Circuit for oral arguments in June of 2019. On September 23, 2019, in another 2-1 opinion written by Judge Ambro, the Third Circuit handed down a decision which, in practical terms, undermined the entirety of the FCC’s decision making on media ownership between 2011 to 2019.²⁹⁰ In *Prometheus IV*, the panel ruled again that the FCC had failed to resolve the two core issues it botched in the prior cases: providing empirical evidence to support a rational policy decision and proposing a policy that would increase ownership by women and minorities.²⁹¹ Predicting this would not be a final review of FCC media ownership policy.²⁹² Judge Ambro stated that in future reviews the FCC would have to show its work and then determine whether other choices or approaches might be better.²⁹³

On November 29, 2019, the panel issued a mandate formally implementing the remand.²⁹⁴ On December 20, 2019, the FCC’s Media Bureau responded to the mandate with an Order which concluded the 2014 Quad-

FCC Rcd. 9864, ¶¶ 319–21 (2016). *See generally Prometheus 4-0, supra* note 1, at 133–34 (further explaining the history of the Order on Reconstruction).

289. *See Prometheus IV*, 939 F.3d 567 (3d Cir. 2019).

290. *See id.* at 589 (“We do conclude... that the [FCC] has not shown yet that it adequately considered the effect its actions since *Prometheus III* will have on diversity in broadcast media ownership. We therefore vacate and remand the Reconsideration and Incubator Orders in their entirety, as well as the “eligible entity” definition from the 2016 Report & Order”). *See generally Prometheus 4-0, supra* note 1, at 135–36 (further explaining the scope of the panel’s review).

291. *See Prometheus Radio Project*, 939 F.3d at 573 (“We do . . . agree with the last group of petitioners, who argue that the [FCC] did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities. Although it did ostensibly comply with our prior requirement to consider this issue on remand, its analysis is so insubstantial that we cannot say it provides a reliable foundation for the [FCC’s] conclusions. Accordingly, we vacate and remand the bulk of its actions in this area over the last three years.”).

292. *Id.* at 586 (“And even if we only look at the total number of minority-owned stations, the FCC did not actually make any estimate of the effect of deregulation in the 1990s. Instead it noted only that, whatever this effect was, deregulation was not enough to prevent an overall increase during the following decade. The [FCC] made no attempt to assess the counterfactual scenario: how many minority-owned stations there would have been in 2009 had there been no deregulation.”).

293. *See id.* at 587–88.

294. Letter from Patricia S. Dodszuweit, Clerk, *Prometheus Radio Project v. FCC*, Nos. 17-1107 et al. (3d Cir. Nov. 29, 2019).

rennial Review, the 2010 Quadrennial Review, and the incubator program.²⁹⁵ *Prometheus IV* left the FCC's media ownership rules in the same state of paralysis those rules had been in since the decision in *Prometheus I* in 2004, with only minor changes to the ownership limits that were included in the Telecommunications Act.²⁹⁶

After a request for an en banc review was denied, the FCC and the National Association of Broadcasters appealed the decision to the Supreme Court.²⁹⁷ Certiorari was granted, and oral arguments occurred on January 19th, 2021, one day before the end of the Trump administration and during the last day of Ajit Pai's term as Chairman.²⁹⁸

In the unanimous opinion, Justice Kavanaugh argued that the FCC had broad authority to regulate in the public interest, and acknowledged that the FCC has affirmatively sought to promote competition, localism, and viewpoint diversity by "ensuring that a small number of entities do not dominate a particular media market."²⁹⁹ The Third Circuit had held that "the record did not support the FCC's conclusion that the rule changes would 'have minimal effect' on minority and female ownership."³⁰⁰ But the Court ruled that the FCC had acted rationally in 2017, by explaining its findings and having sought public comment on the impact the rule changes would have on minority and female ownership.³⁰¹

295. 2014 Quadrennial Regul. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 34 FCC Rcd. 12360 (2019).

296. See *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 939 F.3d 567, 588–89 (3d Cir. 2019).

297. It is significant that the case was heard on the last day of Ajit Pai's tenure as FCC Chair. He, along with the other two GOP members of the Commission have been strong supporters of expanding media ownership limits. Had the case been heard after this date, the agency, now under Democratic Leadership could have dropped its challenge ahead of oral arguments, choosing instead to complete the 2018 Quadrennial Review.

298. See *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S.Ct. 1150 (2021). It is significant that this case was heard on the last day of Ajit Pai's tenure as FCC Chair. He, along with the other two GOP members of the Commission had been strong supporters of expanding media ownership limits. Had the case been heard after this date, the agency, subsequently under Democratic leadership, could have dropped its challenge ahead of oral arguments, choosing instead to complete the 2018 Quadrennial Review.

299. *Id.* at 1155 (citing 2002 Biennial Regul. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 17 FCC Rcd. 18503, 18515–27 (2002)).

300. *Id.* at 1157 (quoting *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 939 F.3d 567, 584 (3d Cir. 2019)).

301. See *id.* at 1160 ("In short, the FCC's analysis was reasonable and reasonably explained for purposes of the APA's deferential arbitrary-and-capricious standard. The FCC considered the record evidence on competition, localism, viewpoint diversity, and minority and female ownership, and reasonably concluded that the three ownership rules no longer serve the public interest . . . The Commission further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue here was not likely to harm minority and female ownership.").

In reversing the decision in *Prometheus IV*, the Court's opinion focused on three points: (1) the deferential nature of *State Farm* review; (2) the FCC's acknowledgment of its lack of data; and (3) the inability of courts to impose burdens that are not statutorily imposed by the Administrative Procedure Act (APA).³⁰²

In a concurring opinion, Justice Thomas sought to convey his belief that the FCC had no obligation to consider minority or female ownership in future reviews, conflating several ideas in the process.³⁰³ Notably, Thomas inaccurately proposed that "the FCC's ownership rules unlike some of its non-ownership rules were never designed to foster ownership diversity."³⁰⁴ Taken as a whole, the decision in *FCC v. Prometheus Radio Project* does not address or resolve the minority ownership issue that was a significant element of the four decisions by the Third Circuit. Instead, Justice Kavanaugh argued that the FCC's 2017 decision was not arbitrary or capricious, and moving forward, the agency could employ its own judgment in future reviews mandated by Section 202(h).³⁰⁵

IV. EMPIRICALLY DOCUMENTING THE EFFECTS OF MINORITY OWNERSHIP POLICY

A. *National Telecommunications and Information Administration 1990-1999*

Assessing the issue of minority ownership using existing data is complicated by longstanding concerns over data quality.³⁰⁶ In 1990, the National Telecommunications and Information Administration (NTIA)³⁰⁷ began gathering data on commercial broadcast station ownership by racial and ethnic minorities, including African Americans, Hispanic Americans, Asian Americans, and Native Americans.³⁰⁸ The NTIA issued reports on commercial broadcast station ownership by minorities in the United States annually

302. See *id.* at 1158 ("Judicial review under [hard look review] is deferential, and a court may not substitute its own policy judgment for that of the agency.").

303. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1161-63 (2021) (Thomas, J., concurring).

304. *Id.* at 1161.

305. *Id.* at 1159.

306. See Philip M. Napoli & Joe Karaganis, *Toward a Federal Data Agenda for Communications Policymaking*, 16 COMMLAW CONSPECTUS 53, 54 (2007).

307. See *About NTIA*, NTIA, <https://www.ntia.doc.gov/about> (last visited Oct. 17, 2022) ("The National Telecommunications and Information Administration (NTIA), located within the Department of Commerce, is the Executive Branch agency that is principally responsible by law for advising the President on telecommunications and information policy issues.").

308. U.S. DEP'T OF COM., NAT'L TELECOMM. AND INFO. ADMIN., *CHANGES, CHALLENGES, AND CHARTING NEW COURSES: MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES* (2000), <https://www.ntia.doc.gov/report/2001/changes-challenges-and-charting-new-courses-minority-commercial-broadcast-ownership-unit>.

from 1990 through 1994 and from 1996 through 1998 before publishing a comprehensive report in 2000.³⁰⁹

Both the NTIA and FCC adopted a standard of greater than 50% voting threshold among shareholder when assessing minority ownership.³¹⁰ Combining the NTIA data with the biennial data collected by the FCC between 2004 and 2019 allows for an evaluation of the trends in overall commercial station ownership by minorities from 1990 through 2019. In terms of the history of media ownership policy, this thirty-year period represents two key windows: first, the time just prior to and just after the passage of the 1996 Telecommunications Act, and second, during the period of policy hiatus beginning in 2004 that followed the remands from the Third Circuit as a result of the *Prometheus Radio Project* decisions.

As Table 1 shows, only about 3% of commercial radio stations were owned by minorities in the years immediately preceding the passage of the Telecommunications Act. When the dust settled after implementation of the Act, about 4% of commercial radio stations were owned by minorities. The growth from 3% to 4% minority ownership, an increase that occurred between 1998-1999, may seem small at first glance, but represented an increase of nearly 40% in the number of minority-owned stations. The increase in the number of stations owned by African Americans grew 26% from 1998 to 1999, while the increase for Hispanic ownership was even higher – roughly 44%. Because the number of stations owned by Asian Americans and Native Americans was so small in 1998, minute increases equated to large percentage increases (360% for stations owned by Asian Americans, 150% for stations owned by Native Americans).

309. “A Statistical Analysis of Minority-Owned Commercial Broadcast Stations Licensed in the United States in 1991, MTDP, NTIA (Oct. 1991) [1991 MTDP Report]; Compilation by State of Minority-Owned Commercial Broadcast Stations, MTDP, NTIA (Nov. 1992) [1992 MTDP Report]; Analysis and Compilation by State of Minority-Owned Commercial Broadcast Stations, MTDP, NTIA (Oct. 1993) [1993 MTDP Report]; Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States, MTDP, NTIA (Sept. 1994) [1994 MTDP Report]; Minority Commercial Broadcast Ownership in the United States, MTDP, NTIA (April 1996) [1996 MTDP Report]; Minority Commercial Broadcast Ownership in the United States, MTDP, NTIA (Aug. 1998) [1998 MTDP Report] at Appendix A of 1998 MTDP Report. The 1997 report titled *Minority Commercial Broadcast Ownership in the United States: A Report of the Minority Telecommunications Development Program.*” *Id.* at 8 n.20.

310. “Historically, NTIA’s minority ownership reports have defined minority ownership with a focus on equity ownership to the exclusion of controlling interests of voting stock (or voting interests in a partnership) greater than 50 percent.” *Id.* at 5.

TABLE 1: NTIA DATA: COMMERCIAL RADIO STATION OWNERSHIP 1990-1999

Year	African American	Asian American	Hispanic	Native American	Other	Total Stations
1990	175 (1.8%)	5 (.05%)	88 (.9%)	4 (.04%)	9116 (97%)	9,388
1991	181 (1.9%)	5 (.05%)	84 (.8%)	4 (.04%)	9231 (97%)	9,505
1992	179 (1.9%)	5 (.05%)	88 (.9%)	5 (.05%)	9295 (97%)	9,572
1993	200 (2.1%)	2 (.02%)	86 (.9%)	5 (.05%)	9463 (97%)	9,756
1994	191 (1.9%)	4 (.04%)	111 (1.1%)	5 (.05%)	9623 (97%)	9,934
1995	195 (1.9%)	5 (.04%)	106 (1%)	6 (.06%)	9749 (97%)	10,061
1996	165 (1.6%)	3 (.03%)	111 (1.1%)	5 (.05%)	9951 (97%)	10,235
1998	168 (1.6%)	5 (.05%)	130 (1.3%)	2 (.02%)	10002 (97%)	10,307
1999	211 (2%)	23 (.22%)	187 (1.8%)	5 (.05%)	10056 (96%)	10,482

Meanwhile, Table 2 shows that minority ownership of commercial television stations declined in the 1990's. The decline was especially notable in the wake of the implementation of the Telecommunications Act. From 1998 to 1999, the number of minority-owned stations dropped from 32 to 23, about 28%.

TABLE 2: NTIA: COMMERCIAL TELEVISION STATION OWNERSHIP 1990-1999

Year	African American	Asian American	Hispanic	Native American	Other	Total Stations
1990	17 (1.5%)	7 (.63%)	4 (.36%)	1 (.09%)	1088 (97%)	1,117
1991	17 (1.5%)	7 (.62%)	5 (.44%)	1 (.09%)	1098 (97%)	1,128
1992	19 (1.7%)	7 (.62%)	4 (.35%)	0 (0%)	1106 (97%)	1,136
1993	20 (1.7%)	1 (.09%)	8 (.7%)	0 (0%)	1117 (97%)	1,146
1994	22 (1.9%)	1 (.09%)	9 (.8%)	0 (0%)	1121 (97%)	1,153
1995	28 (2.4%)	1 (.09%)	9 (.77%)	0 (0%)	1127 (97%)	1,165
1996	28 (2.3%)	1 (.08%)	9 (.76%)	0 (0%)	1148 (97%)	1,186
1998	26 (2.2%)	0 (0%)	6 (.05%)	0 (0%)	1170 (97%)	1,202
1999	20 (1.6%)	2 (.16%)	1 (.08%)	0 (0%)	1196 (98%)	1,219

The data demonstrate the validity of the concerns about minority ownership the NTIA was voicing prior to, during and immediately following the

implementation of the 1996 Telecommunications Act.³¹¹ Even though there were fluctuations in the number of stations owned by minorities in the 1990's, the numbers document dramatic underrepresentation of minorities in owning commercial broadcast stations compared to the proportion of minorities in the general U.S. population. The data also reflect the large number of minority-owned radio stations, especially those owned by African-Americans, which were sold immediately prior to and shortly after the Telecommunications Act. The low levels of ownership by Asian Americans and Native Americans for both television and radio are evident. Hispanic ownership in radio was expanding, a process that according to FCC data, had stalled out between 1999 and 2004.

B. Federal Communications Commission 2004-2019

An assessment of the status of minority ownership beginning in 2004 demonstrated that in the time-period following the decision in *Prometheus I*, expansions begin to occur. Additional expansions followed the FCC's period of limited action during the 2006 Quadrennial Proceeding as well as the long period of inaction during the 2010 and 2014 Quadrennial Reviews. During the roughly three-year time period that included the FCC's decision not to alter media ownership rules in August of 2016,³¹² through the FCC's action in November of 2017 to reverse course,³¹³ as well as before launching the 2018 Quadrennial Review on the last possible day,³¹⁴ and including the time where rule changes were suspended while *Prometheus IV* was being litigated in the Third Circuit,³¹⁵ the expansion in overall minority ownership continued.

311. "With the passage of the Telecommunications Act of 1996 ("1996 Act"), further deregulation in commercial broadcasting increased competition and drove station prices to their highest levels. (13) Under the provisions of the 1996 Act, a single company can have radio holdings in a market that are substantial enough to result in its control of up to 40 percent of the advertising revenue in that market. Our data show that minority owners will face increasing difficulty in generating revenues that are sufficient to maintain viable businesses in markets where one company exercises this kind of control." NAT'L. TELECOMM. INFO. ADMIN., MINORITY COMMERCIAL BROADCAST OWNERSHIP OVERVIEW (1997). <https://www.ntia.doc.gov/legacy/reports/97minority/overview.htm>

312. 2014 Quadrennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 31 FCC Rcd. 9864 (Aug. 25, 2016).

313. 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., 32 FCC Rcd. 9802 (Nov. 20, 2017).

314. The FCC launched the 2018 Quadrennial Review proceeding at the last Commission meeting of the year, issuing the NPRM on December 13, 2018. 2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 33 FCC Rcd. 12111 (Dec. 13, 2018).

315. *Prometheus IV* was decided in October of 2019.

With respect to commercial radio, the number of stations with African American ownership increased by 66% from 2004 to 2019, while in the same period Asian American ownership increased by 350%, Hispanic ownership by 162%, and Native American ownership by 4%, as Table 3 shows.

TABLE 3: FCC DATA: COMMERCIAL RADIO STATION OWNERSHIP 2004-2019

Year	African American	Asian American	Hispanic	Native American	Other	Total Stations
2004	140 (1.3%)	26 (.2%)	197 (1.8%)	25 (.2%)	10,617 (96%)	11,005
2006	172 (1.6%)	59 (.5%)	201 (1.8%)	16 (.1%)	10,554 (96%)	11,002
2009	152 (1.4%)	107 (1%)	315 (2.8%)	23 (.2%)	10,652 (95%)	11,249
2011	199 (1.8%)	145 (1.3%)	323 (2.9%)	48 (.4%)	10,596 (94%)	11,311
2013	160 (1.4%)	145 (1.3%)	356 (3.1%)	35 (.3%)	10,643 (94%)	11,339
2015	159 (1.4%)	125 (1.1%)	394 (3.5%)	27 (.2%)	10,656 (94%)	11,361
2017	217 (1.9%)	112 (1%)	418 (3.7%)	24 (.2%)	10,649 (93%)	11,420
2019	232 (2%)	117 (1%)	516 (4.5%)	26 (.2%)	10,484 (92%)	11,375

Television station ownership by minorities also expanded during the *Prometheus* window. Although Asian Americans lost half of their television stations, and Native Americans first gained and then returned to their starting points, African Americans expanded their ownership by 550%. Hispanic ownership of television stations grew 400% between 2004-2019. While these increases were notable, minority groups are still drastically underrepresented in terms of ownership percentage to population, collectively owning around 6% of broadcast television outlets in 2019.

TABLE 4: FCC DATA: COMMERCIAL TELEVISION STATION OWNERSHIP 2004-2019

Year	African American	Asian American	Hispanic	Native American	Other	Total Stations
2004	3 (.2%)	8 (.6%)	13 (1%)	4 (.3%)	1334 (98%)	1362
2006	5 (.4%)	5 (.4%)	11 (.8%)	4 (.3%)	1353 (98%)	1378
2009	12 (.8%)	9 (.6%)	30 (2.1%)	8 (.6%)	1336 (96%)	1395
2011	11 (.8%)	6 (.4%)	39 (2.8%)	12 (.8%)	1314 (95%)	1382
2013	9 (.6%)	19 (1.4%)	42 (3%)	11 (.8%)	1304 (94%)	1385
2015	12 (.9%)	10 (.7%)	62 (4.5%)	12 (.9%)	1294 (93%)	1390

2017	12 (.9%)	9 (.7%)	58 (4.2%)	4 (.3%)	1300 (94%)	1383
2019	18 (1.3%)	4 (.3%)	55 (4%)	4 (.3%)	1302 (94%)	1383

Notably, substantial increases in minority ownership came at a time when the FCC's minority preference policies were in limbo because of *Prometheus* remands and the minority preference policy obstacles of the *Adarand* decision. During the fifteen-year window where the FCC could not alter media ownership rules, African American ownership of radio stations increased by nearly 65%, with a corresponding six-fold increase in television station ownership. Asian Americans expanded radio ownership by 161% controlling four times as many stations in 2019 compared to 2004, despite losing half of the television stations they owned at the time of the decision in *Prometheus I*. Hispanics expanded their ownership of two and half times (161%) as many radio stations between 2004 and 2019, while expanding the ownership of television stations from 13 to 55, an increase of 323%. While Native American ownership of media outlets fluctuated during this time frame, the ownership of both television and radio stations by Native Americans was slightly larger in 2019 than 2004.

In 2019, White, non-Hispanic persons held a majority ownership interest in 76% of commercial broadcast stations reporting data and 95% of all stations, while persons belonging to racial minority groups held a majority ownership interest in 4% of commercial broadcast stations that reported data, and 5% of all stations. Finally, Hispanic/LatinX persons held a majority ownership interest in 6% of commercial broadcast stations reporting majority ownership and 7.5% of all stations while non-Hispanic/LatinX persons held a majority ownership interest in 73% of commercial broadcast stations reporting majority ownership and 92% of all commercial stations.³¹⁶

Minority ownership expanded during the seventeen years the agency failed to address the minority ownership issue contained in the remands from the Third Circuit. This is an important finding because station ownership by minorities appears to have increased without any help from policies of racial preference by the FCC. Put another way, policies designed to increase minority ownership during the 1990's failed to do so, while regulatory paralysis beginning in 2004 did not prevent positive outcomes for minority ownership. Nonetheless, the proportion of stations owned by minorities falls far short of the proportion of minorities in the general American population. This suggests that the Supreme Court's decision freeing the FCC from the longstanding regulatory impasse is potentially problematic because

316. Percentages do not add up to 100% because of stations that report "no majority interest." MEDIA BUREAU AND OFFICE OF ECONOMICS AND ANALYTICS, FCC, FIFTH REPORT ON OWNERSHIP OF BROADCAST STATIONS (2021), <https://docs.fcc.gov/public/attachments/DA-21-1101A1.docx>.

the decision permits the agency to restart the process of changing ownership rules.³¹⁷

C. *Original Empirical Tests*

Previous scholarship has suggested that smaller, locally operated stations owned by underrepresented groups are most likely to produce minority targeted content.³¹⁸ A focus on smaller ownership structures served as a proxy for a race or gender-based classification in the FCC's eligible entity program in both 2007 and 2016. It also provided the underlying conceptual ideas in the Incubator Proposal. Using the available FCC ownership data from 2004 and 2019, an examination of minority ownership by structure was conducted.³¹⁹ Consistent with the findings of previous research, the analysis demonstrated that in both 2004 and 2019 minority owners were more likely to operate small locally operated media structures.

In 2004, 14 of 18 self-identified minority owners (78%) owned only a single broadcast television station.³²⁰ For radio in 2004, the analysis demonstrated a similar result. Eight years after the implementation of the Telecommunications Act, 203 of 264 (77%) the self-identified minority owners operated a single station, a number that expands to 92% of owners when the analysis is expanded to include owners who have a second station. The

317. In the wake of the Supreme Court's decision, in June of 2021, the FCC adopted the rule changes it proposed in the November 2017 Order on Reconsideration. *See* Order to Reinstate 2016 Quadrennial Media Ownership Rules, 34 FCC Rcd. 12360 (Dec. 20, 2019).

318. *See generally* Todd Chambers, *Losing Owners: Deregulation and Small Radio Markets*, 8 J. RADIO STUD. 292 (2001); 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 (2001); Todd Chambers, *The State of Spanish-Language Radio*, 13 J. RADIO STUD. 34 (2006); Todd Chambers, *Local Ownership and Radio Market Structure*, 18 J. RADIO & AUDIO MEDIA 263 (2011); Christopher Terry, *Minority Ownership: An Undeniable Failure of FCC Media Ownership Policy*, 5 WIDENER J.L. ECON & RACE 18 (2013).

319. The gender, race, and ethnicity categories used by the FCC follow the guidance provided by the Office of Management and Budget. Ethnicity Definition *Hispanic or Latino*: A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish Culture or origin, regardless of race. Race Definitions include *American Indian or Alaska Native*: A person having origins in any of the original peoples of North America and South America including Central America, and who maintains tribal affiliation or community attachment; *Asian*: A person having origins in any of the original peoples of the Far East, Southeast Asia, or Indian Subcontinent including Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam; *Black or African American*: A person having origins in any of the black racial groups of Africa; *White*: A person having origins in any of the original peoples of Europe, the Middle East, or North Africa. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

320. Data on single station ownership by White owners was not available as part of the FCC's 2004 dataset.

analysis also demonstrated that 75% of all minority owned radio stations in 2004 were operated by owners of two or fewer stations.

Fifteen years later, in 2019, the pattern of minority ownership along racial categories remained consistent. Single-station ownership by racial minorities represented twelve of the twenty (60%) of the self-identified minority owners of television stations. Eleven of seventeen (65%) station owners who self-identified as minorities operated a single television station.

In terms of radio, 68% of self-identified racial minority owners operated a single station, and 86% operated no more than two. Overall, 45% of minority-owned stations in 2019 were operated as single-station operations, with the other 65% accounted for by only two owners who operated sixty-six stations.

In terms of a breakdown along ethnic rather than racial lines, 35% of all Hispanic AM stations were operated by a single-station owner in 2019. Eighty-eight of the 140 (63%) self-identified Hispanic station owners operated a single station, with 83% owning no more than two stations. On the FM dial, 80% of Hispanic owners are single-station operations, representing 33% of the stations in the sample. When the analysis is expanded to single or dual station operations, 98 of the 112 (88%) self-identified Hispanic owners are included in the result.

Collectively this data tells a clear story. Minority operations trend smaller than white ownership groups. This pattern has been consistent during the entire *Prometheus* window and was the dominant minority ownership structure prior to the sample period. If the FCC wants to increase diversity, then a minority station owner, locally operating a single or dual station group appears to provide a consistent structural model to follow.

D. Content Production by Minority Ownership in Radio

Raw ownership numbers alone do not speak to the availability of diverse content, which is the objective of FCC media and minority ownership policies. Examining targeted specialty content production quantitatively, while a useful assessment of the availability of diverse programming content, has an underlying weakness for evaluation of the overall availability of viewpoint diversity, especially in the context of the theorized ownership-diversity nexus. The FCC retains a belief that each individual owner in a media market will provide one viewpoint, and that competition, both internal (from commonly owned stations) and external (from competitors) will result in an increase in content diversity which meets the stated policy goal of a diversity of viewpoints. To explore content diversity by ownership structure, a simple count of minority owners does not suffice. The assessment requires an analysis of the content of media, something the FCC has steadfastly refused to do as part of mandated reviews of media ownership for over 25 years.

Although media format, or radio programming content, (e.g., Top 40, Sports, News Talk) might be considered a crude measure of a station's actual content, the FCC has funded external research using format-counting methodology. Using a radio station's "format" as an assessment mechanism is a practical solution to two related and substantial research obstacles.³²¹ First, almost all radio stations identify themselves with a primary programming format, providing an opportunity for quantitative assessments of content diversity in terms that the radio industry understands. Second, by allowing the radio station's self-identification with a format as a proxy for actual content analysis, it removes the agency or its supported researchers from accusation of making subjective judgments about content.

The raw data provided by the FCC's 2019 biennial ownership reports provided the starting point for this analysis.³²² Combining the FCC's data on station owners with media industry data about formats provides an opportunity to conduct a contemporary test of the ownership nexus concept.

In terms of owners that self-identified as minorities in their 2019 filing, data was collected on the owners and their stations. This data was then used to collect information, independent of the FCC's data, on the station's owner and the programming formats of the stations that owner operates.³²³ Industry data from Katz Media was available on 135 of the 182 (74%) of the self-identified minority radio station owners, ranging in size from single station operations to an owner with sixty stations, representing a total of 369 stations. Data were collected on the formats each owner operated, identifying stations that carried one of the seventeen defined minority formats used in previous research.³²⁴

321. See Terry, *supra* note 317, at 30.

322. See also Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM L. & POL'Y 403, 422 (2019).

323. The industry database is produced and maintained by Katz Media, "the number-one national sales representation firm in the radio industry, working with more than 2200 radio stations in over 300 markets across the U.S. Agencies, advertisers and our represented stations rely on us for a suite of research reports, tools and services to plan, buy and sell radio. We created the Radio Resource Center to provide immediate access to information, which we update in real time each day." The database was used in both the Terry, 2014 and Terry and Carlson, 2019 studies. *KRGSPEC – Katz Radio Group*, www.KRGSPEC.com (last visited Oct. 16, 2022).

324. Seventeen of fifty-four radio format types that primarily target minority groups. These include: **Black**: "Recurrent based format concentrating on Motown and R&B. Many stations often intersperse Gospel or regional music. Most Black stations are found on the AM dial." **Ethnic-Other**: "Foreign-language broadcasts, often programmed for different languages in different time periods." **Gospel**: "Originating from African American spirituals as a symbol of salvation, bonding and unity, the Gospel format includes a combination of Jazz, R&B, and Rock & Roll. The Gospel format creates a mood; it is spiritual, emotional, inspirational and motivational. Audience composition skews similar to AM Black stations." **Hawaiian**: "Ethnic Hawaiian music and talk." **Hispanic**: "The Hispanic format includes a wide variety of different music types: Ranchera, Nortena, Contemporary Hits, Banda, Tropical and Tejano.

A total of 314 of the 369 (85%) of radio stations in the sample were carried a format targeting minority groups, representing 127 of the 135 (94%) of the owners. Of the self-identified minority owners carrying minority formatted programming, 113 of 129 (86%) carried only minority formatted programming on the stations they owned. Only four of the eighty-six (5%) single-station operations did not carry minority-formatted programming, and just two owners with dual station operations carried no minority-formatted programming. The analysis demonstrated that 92% of self-identified minority owners who operate three or more stations carried minority-formatted programming on at least one of their stations. Of the 238 stations operated by the twenty six minority owners with three or more stations in the sample, minority-formatted content is carried on 200 (84%) stations. Fourteen (54%) minority owners with three or more stations operate only minority formatted stations, including owners that own eleven to fifteen station groups.

V. DISCUSSION

At its foundation, the debate over media ownership has become a policy conflict between mechanisms to increase the economic efficiency of media companies versus citizen access to information. While competition can be assessed through a variety of economic methodologies, including measurements of concentration, diversity – especially Viewpoint Diversity – is an abstract and difficult to quantify policy goal. The FCC has complicated the implementation of media ownership policy by using ownership (the policy

There are also Spanish language News/Talk, Sports and All News formats. . . As the number of Spanish-language stations has increased and their programming has become more targeted, we have been able to add specific format definitions under the Hispanic umbrella. **Latino Urban:** “Includes Latino Urban, Hip Hop, Bachata, Pop Rock that targets Spanish speaking Hispanics, but is also English friendly.” **Mexican Regional:** “Spanish-language stations include Norteno, Grupero, Banda, Randhero, Corridos and Mariachi styles of music.” **Romantica:** “Includes mostly ballads and slow to medium tempo of songs sung in Spanish.” **Rock en Espanol:** “Includes Rock’n Roll bands of Latino origin that perform in Spanish.” **Spanish Adult Hits:** “Includes all-time favorite Spanish hits from the 70s, 80s and 90s.” **Spanish Contemporary:** “Includes Spanish AC and International Pop Hits.” **Spanish News-Talk-Sports:** “Includes Talk, News and Sports in Spanish.” **Tejano:** “Includes Latino music that has roots in Texas and the American Southwest.” **Tropical:** “Includes Salsa, Merengue, Cumbia and some Reggaeton styles of music.” **Urban Adult Contemporary:** “Urban Adult Contemporary plays hit Black music from a variety of decades depending on market conditions. Current songs included in the mix are typically smooth and relaxing without Rap or Dance.” **Urban Talk:** “Urban Talk is a traditional All Talk format that focuses on topics, issues and news relevant to the African American community found primarily on the AM band.” **Urban Inspirational:** “Primarily found on the FM dial, Urban Inspirational plays music with an emphasis on positive, family themes. Songs are typically uplifting. No Rap or religious sermons are heard during the week. The audience skew is similar to that of an Urban Adult Contemporary.” Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC’s Incubator Program*. 24 COMM. L. & POL’Y 403 (2019).

implementation) as a proxy for measuring the diversity of media content (the policy goal).

The dispute over minority ownership remains a debate framed around the number or percentage of stations women or minorities control when the substantive issue is that content that should be available at the market level is not being produced in sufficient quantity.³²⁵ Like the ownership rules themselves, a national approach to evaluating minority ownership by percentage is an assessment without meaning. When targeted informational content with viewpoints and coverage of local issues is not accessible through the media outlets that minorities in a community are the most likely to use, it is not only the minorities that are harmed. Collectively, Americans are all affected when the political participation of underrepresented groups is not maximized.

Beyond the theoretical harms, the practical failures are also problematic. In a regulatory environment that favors competition over other concerns, entire audience demographics remain underserved because of a perception that those demographics are less desirable, and that dividing up the more valuable ones rather than diverse programming options is the best strategy to maximize profits, the results of focusing media policy on the potential economic benefits to media owners at the expense of the public who consumes media.

Assessing the nexus between minority ownership and minority content production demonstrates the weakness in using ownership as a proxy for content production. Reliance on regulatory mechanisms, like ownership limits, when minorities are so drastically unrepresented as station owners translates simple counting issues into a regulatory failure. The continued reliance on economic theory, like Steiner's model of internal competition, is a symptom of a larger conceptual failure, and in the case of media ownership, one that has undermined the entire policy implementation in an area that has direct consequences for democratic participation.

Before, during and after the changes brought about by the 1996 Telecommunications Act, minority station owners have trended toward smaller entities, operating locally, who are overwhelmingly providing content to audiences at the market level that larger owners are not producing despite internal and external competitive pressures to do so. This finding, that minority content is largely being produced by minorities, is consistent even in media markets with large minority populations.

This study confirms the previous empirical support for the structural mechanism that is most likely to make minority content available: a small

325. "The vital social, political and cultural functions of the media ultimately flow from their content, not from their ownership structure." David Pritchard, Christopher Terry & Paul R. Brewer, *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy*, 13 COMM. L. & POL'Y 1, 26 (2008).

scale, local owner, based and operating in a market with a minority population. While it is not a perfect correlation, it is far more likely to produce the content missing from the marketplace, both of ideas and economics, than any other arrangement the agency has attempted. Importantly, this has been a reality since the nexus concept was first adopted by the FCC after the decision in *TV9*.

The agency's continuing reliance on a conceptual relationship between ownership and diversity is not misguided. Rather, it has been misapplied. While inconsistent and largely unsupportable when applied to larger media organizations,³²⁶ as this study demonstrates, there is a strong correlation between ownership and content diversity for stations operated by minorities. If the FCC remains committed to the stated objectives of media ownership policy, competition, localism, and diversity, it will likely need to find ways to promote minority ownership where the owners will operate their stations locally.

In the future, the FCC should consider changes in media ownership, such as license transfers, through individual adjudications that consider the public interest benefits that a merger will generate in the local media market and then following up post-merger to verify that stations kept their commitments to diversity and the programming of locally produced content.

The FCC has accepted the concept of the nexus relationship since the late 1970s, but the agency has been inconsistent in its application to regulation implementation. There's little to contradict that the FCC's tax incentive and distressed sale programs were improving minority ownership before these initiatives were derailed by the *Adarand* decision. The FCC's longstanding fear of the precedent set by the decision in *Adarand* contributed to at least seventeen years of inaction on minority ownership.

There was another by-product of the FCC's regulatory paralysis. The lengthy legal impasse correlated with a notable overall expansion in the number of minority owners. There was growth of the number of minority-owned stations and the regulatory stoppage which followed the decision in *Prometheus I* during the time the FCC was unable to undertake rule changes or expand ownership limits further.³²⁷ Limiting the ability of the FCC to implement mechanisms for further ownership consolidation appears to have been the most effective minority ownership policy since the tax incentive policy.

So, in the end, the agency's unanswerable question of minority ownership policy does have an answer. The FCC's most successful policy outcome in terms of minority ownership policy was the regulatory paralysis the

326. See Compaine, *supra* note 92, at 756.

327. S. Derek Turner & Mark Cooper, *Out of the Picture: Minority & Female TV Station Ownership in the United States*, FREE PRESS (Sept. 2006), https://mediajustice.org/wp-content/uploads/2014/04/out_of_the_picture-1.pdf.

agency found itself in as a result of the four *Prometheus* decisions. Unfortunately, doing nothing did not provide a complete solution to the minority ownership policy dilemma. Concern over fostering diversity is not just rhetoric,³²⁸ and policies that seek to advance the marketplace of ideas represent a compelling government interest.³²⁹ The reality that viable minority audience demographics often exist in larger media markets where stations are more expensive means that financing for new owners will remain an obstacle. However, with proposals for new tax incentive policies,³³⁰ these hurdles can be lowered if station licenses become available.

Importantly, this study also suggests that localism is the policy objective the FCC failed to achieve in the implementation of media ownership policy.³³¹ Broadcasting was intended to be an inherently local medium.³³² Targeted local content provides an opportunity for traditional media to compete for audience in the age of the internet where so much content is produced for mass consumption at the national level. The FCC's initiatives to allow stations to consolidate ownership were a questionable approach to a policy regime intended to protect diversity and localism, but the decision to allow the owners to remove the local presence of those stations magnified the policy shortcoming exponentially.

Since the 1980's era of rapid deregulation, the FCC has undermined many of the licensee's obligations to the local community they are licensed to serve. The Fairness Doctrine and Community Ascertainment, were both removed from a station's local community obligations.³³³ In more recent times, the growth of Joint Service Agreements and the repeal of the Main Studio Rule have further reduced the production of content at the local level.³³⁴ The FCC's refusal to recognize these realities is somewhat puzzling given that the benefits of economies of scale were used as the primary justification in hundreds of ownership merger cases between 1996 and 2010.³³⁵

Refocusing the regulatory scheme of media ownership around localism would provide a mechanism to rectify many of the issues surrounding the debate over media and minority ownership policy. Ownership would be an

328. See Ortner, *supra* note 176, at 148.

329. See Terry, *supra* note 31, at 412.

330. See Expanding Broadcast Ownership Opportunities Act of 2019, H.R. 3957, 116th Cong. § 4 (2019).

331. See Terry, *supra* note 16, at 352.

332. See Glenn T. Hubbard, *Putting Radio Localism to the Test: An Experimental Study of Listener Responses to Locality or Origination and Ownership*, 54 J. BROAD. & ELEC. MEDIA 407, 407 (2010).

333. Steven Weissman, *The FCC and Minorities: An Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs*, 16 COLUM. J.L. & Soc. PROBS. 561 (1981).

334. See Elimination of Main Studio Rule, 32 FCC Rcd. 8158 (Oct. 24, 2017).

335. See Christopher Terry, *The Use of Social Science Evidence by the Federal Communications Commission in the Construction and Enforcement of Media Ownership Policy* (2012) (Ph.D. dissertation, University of Wisconsin-Madison) (ProQuest).

irrelevant factor if broadcasters were focused on the audience they are licensed to serve instead of mass producing content and repurposing it for use across multiple media markets. Broadcasting is inherently a local medium that is inexpensive and easy for citizens to access, and radio is the one form of media which consistently demonstrates the ability to be profitable using niche programming formats. As the FCC itself has observed, radio has a central role to play in meeting the policy objectives of the FCC, especially as the agency reexamines media ownership policy after the Supreme Court's decision.

Hyperlocal radio operations have been successful even in the era of consolidation.³³⁶ If the FCC needs to find a race neutral approach to enhancement in licensing proceedings, the issue is not just a matter of race or ethnicity, but also of organizational size. The FCC's Incubator program, while a step in the right direction with a focus on smaller entities, has so far been a half measure. At the end of 2021, more than three years after it was proposed, and six months after it was formally adopted, there still was not an applicant to use the program.³³⁷

The failure of the FCC to resolve these conceptual failures has hurt both citizens and the media industry. By continuing to rely on a flawed economic theory to justify rule changes in the face of evidence that suggested everything the FCC was doing was counterproductive, the agency ended up in court for the better part of two decades. Now, even after the Supreme Court's decision, the FCC must complete a pair of Quadrennial Review Processes in a relatively short amount of time. Given the requirements of Section 202(h), this task is no small order, and with a regulated industry and citizen petitioner groups each ready to pounce on the agency's next decision, the pressure to develop a viable administrative record is quite high.

From multiple perspectives, minority ownership levels need to be improved. Non-minorities are not providing the content diversity that was anticipated by the widespread, but largely untested, belief in the incentives created by internal competition. This represents a market failure that has limited the marketplace of ideas and affects everyone, regardless of gender or majority and minority identification. While the FCC is historically reluctant to admit it made a mistake,³³⁸ the opportunity for the agency to reset its

336. See, e.g. James Walsh, *Low-power St. Paul Radio Station Tunes into the Heart of Frogtown*, STAR TRIBUNE (Dec. 20, 2021, 10:49 PM), <https://www.startribune.com/behind-the-scenes-at-st-paul-wfnu-frogtown-community-radio/600129057>.

337. The Multicultural Media, Telecom and Internet Council, *Further Comments in the 2018 Quadrennial*, FCC (Aug. 31, 2021), <https://www.fcc.gov/ecfs/document/10831207011452/1> [<https://www.fcc.gov/ecfs/search/search-filings>].

338. Rob Frieden, *Case Studies in Abandoned Empiricism and the Lack of Peer Review at the Federal Communications Commission*, 8 J. ON TELECOMM. & HIGH TECH. L. 277, 9–11 (2010).

media ownership policy, including initiatives to improve minority ownership, in the wake of the Supreme Court's decision should not be squandered.

