

# ARTICLES

## Control, Creators, and Content: The Past, Present, and Future of Diversity in Media Ownership

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INTRODUCTION

Free Press, in its recent initiative, *Media 2070*, asserts that diversity of media ownership must occur in addition to other reparations to address the “anti-black racism [that] has always been part of our media system’s DNA.”<sup>1</sup> Federal Communications Commission (FCC) Chair Jessica Rosenworcel underscored this observation upon the release of the agency’s *Fifth Biennial Ownership Report* in September 2021. She noted:

Today’s report provides data from 2019 that reflect the state of broadcast ownership in the United States. As has been the case for too long, this data makes clear that women and people of color are underrepresented in license ownership. This requires attention because what we see and hear over the public airwaves says so much about who we are as individuals, as communities, and as a Nation.<sup>2</sup>

This paper begins by exploring two court cases, separated by fifty-two years, that both address media ownership and the FCC’s related actions. The first of these cases, the *Office of Communication of the United Church of Christ v. Federal Communications Commission*, remains a landmark precedent, being the first case to allow media consumers to directly participate in FCC proceedings.<sup>3</sup> A group of private citizens challenged, and the appeals court overturned, the FCC’s renewal of a license for a Mississippi television station that broadcasted openly discriminatory programming and coverage during the civil rights movement in a market primarily composed of African Americans.<sup>4</sup> In contrast, in the second case, *FCC v. Prometheus Radio Project*, the United States Supreme Court sided with the FCC and upheld its relaxing of restrictions to the local ownership rules despite its use of imperfect data to determine whether those changes would negatively impact women and minority ownership.<sup>5</sup> The cases illustrate how starkly different the FCC and the courts analyze the nexus between media ownership and their consumers’ exposure to diversity of

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1. JOSEPH TORRES ET AL., FREE PRESS, MEDIA 2070: AN INVITATION TO DREAM UP MEDIA REPARATIONS 9, 50-55, <https://mediareparations.org/wp-content/uploads/2020/10/media-2070.pdf> (last visited Nov. 4, 2022).

2. Press Release, FCC, Statement of Acting Chairwoman Jessica Rosenworcel on Release of the Fifth Biennial Ownership Report (Sep. 3, 2021), <https://www.fcc.gov/document/rosenworcel-release-fifth-biennial-ownership-report>.

3. Off. Comm’n United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Off. Comm’n United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

4. Off. Comm’n United Church of Christ, 359 F.2d at 994; Off. Comm’n United Church of Christ, 425 F.2d at 543.

5. Federal Communications Commission v. Prometheus Radio Project, 141 S.Ct. 1150 (2021). This case will likely have broad implications not only for the media, but also emerging consumer and environmentalist movements.

viewpoints. After discussing the cases and their importance, the authors first turn to the future and explain why having diverse ownership matters, and then conclude by offering suggestions for a path forward in a post-*Prometheus regime* to help ensure minority and female ownership in media.

## I. THE PAST: *OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST V. FEDERAL COMMUNICATIONS COMMISSION*

WLBT, a television station in Jackson, Mississippi became the subject of one of the most important administrative law cases in the twentieth century.<sup>6</sup> The story involves the evolution of an openly racist media outlet to becoming the first television station in the country to hire an African-American general manager.<sup>7</sup> This progression only became possible when private citizens won the right to participate in FCC proceedings.<sup>8</sup> The subsections below explain the landscape that existed in Mississippi before turning to a discussion of the seminal case that forever changed the public's involvement in media ownership. It concludes by examining the idea that a nexus exists between diverse owners, diverse personnel, and diverse viewpoints. This discussion sets the stage for a very recent case that relaxes FCC rules requiring the agency to ascertain how rule changes might negatively impact that nexus.

### A. *WLBT'S Racial Practices*

Originally launched in December of 1953, the owners of WLBT, like many other southern news stations during this time, utilized it as a vehicle for racial intolerance even though it had an African-American audience of over 40%.<sup>9</sup> In spite of the Fairness Doctrine, which required broadcasters to allocate airtime for controversial issues of public interest, including opposing viewpoints, airtime was habitually denied to African Americans.<sup>10</sup> WLBT instead used airtime to promote ideas and

6. *History of WLBT*, WLBT (Jan. 9, 2001), <https://www.wlbt.com/story/212466/history-of-wlbt/>.

7. William Dilday, an African American, served as general manager for twelve years. See Kay Mills, *Changing Channels, Part 2: The Civil Rights Case That Transformed Television*, PROLOGUE MAG. (Fall 2004), <https://www.archives.gov/publications/prologue/2004/fall> [hereinafter *Changing Channels, Part 2*]. During his tenure his reporters won many awards, including the coveted Peabody Award. See *id.* In December 1979, Aaron Henry became the first African-American chairman of WLBT's Board of Directors. See Constance Curry, *Aaron Henry: A Civil Rights Leader of the 20th Century*, MISSISSIPPI HISTORY NOW (Feb. 2011), <https://www.mshistorynow.mdah.ms.gov/issue/aaron-henry-a-civil-rights-leader-of-the-20th-century>. A decade earlier the station had refused to allow him to buy airtime. See *Off. Comm'n United Church of Christ*, 359 F.2d at 994; *Off. Comm'n United Church of Christ*, 425 F.2d at 543. The station remained majority African-American-owned until 2000. See *Changing Channels, Part 2, supra* note 7.

8. KAY MILLS, *CHANGING CHANNELS: THE CIVIL RIGHTS CASE THAT TRANSFORMED TELEVISION* 103 (2004).

9. See Robert Horowitz, *Broadcast Reform Revisited: Reverend Everett C. Parker and the "Standing" Case (Office of Communication of the United Church of Christ v. Federal Communications Commission)*, 2 COMMC'N REV. 311, 321 (1997). Examples of some of the behavior WLBT engaged in included inserting a "Sorry, Cable Trouble" screen when important African-American news aired. Also, during the rare appearances of Black people, the station did not use courtesy titles such as "Mr., Mrs., and Miss." MILLS, *supra* note 8, at 40, 21.

10. For example, American civil rights activist and National Association for the Advancement of Colored People (NAACP) Mississippi Field Secretary Medgar Evers was denied the right to buy airtime. Horowitz,

beliefs of the Citizen's Council, a group dedicated to maintaining segregation.<sup>11</sup>

The FCC received many complaints from Mississippi residents regarding WLBT's lack of coverage of African-American news and its disrespect of African Americans.<sup>12</sup> After the station denied airtime to a group of African American activists to express their viewpoint on the Little Rock Crisis of 1957, Medgar Evers complained to both WLBT and the FCC. The FCC failed to act.<sup>13</sup>

Tensions only got higher in 1962 when the University of Mississippi, under federal court order, admitted its first African-American student, James Meredith.<sup>14</sup> Like many white Mississippians at the time, Fred Beard, WLBT's station manager, strongly opposed desegregation and steadfastly expressed this to the station's audience with statements like: "Mississippi is fortunate in having men at its leadership who have vowed to prevent integration of our schools."<sup>15</sup>

On the day Meredith arrived, riots erupted on campus and in the town of Oxford.<sup>16</sup> Almost immediately, the FCC received complaints that broadcasters from multiple news stations instigated the rioting.<sup>17</sup> The FCC sent investigators to Mississippi, albeit several months later.<sup>18</sup> Following the investigation of WLBT and other news stations, the FCC sent a report to WLBT that raised questions concerning whether the station gave equitable opportunity to groups of opposing viewpoints on topics of racism and integration and questioned whether the station acted in the public interest.<sup>19</sup> WLBT vehemently denied these allegations.<sup>20</sup> Despite conducting this inquiry and identifying real concerns, the FCC failed to take any action against the station.<sup>21</sup>

### B. *The FCC's Pattern of Inaction*

The FCC's inaction conformed to a pattern of hostility towards racial equality in the media.<sup>22</sup> In his excellent article, President Emeritus and Senior Advisor of the Multicultural Media, Telecom and Internet Council (MMTC), David Honig gives the following examples of some of the many ways the FCC failed to protect diversity within the media:

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*supra* note 9, at 323. For further discussion, see Victor Pickard, *The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse*, 12 INT'L J. COMM'C'N 3434 (2018), <https://ijoc.org/index.php/ijoc/article/view/5787>.

11. MILLS, *supra* note 8, at 44.

12. Horowitz, *supra* note 9, at 323; MILLS, *supra* note 8, at 21–23.

13. MILLS, *supra* note 8, at 28.

14. JAMES MEREDITH, *A MISSION FROM GOD: A MEMOIR AND CHALLENGE FOR AMERICA* (2012).

15. MILLS, *supra* note 8, at 40–50.

16. *Id.* at 42.

17. *Id.*

18. *Id.* at 43.

19. *Id.* at 54.

20. *Id.* at 55. The station claimed that they rarely broadcasted any groups that could cause violence or severe dismay unless pressured to do so by FCC or their own lawyers because of the trouble it emanated. To strengthen this claim, their response referred to the vast amount of threatening calls and complaints the station received after speeches from Evers and civil rights activist R.L.T. Smith. *Id.*

21. *Id.* at 56–57.

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

- The FCC and its predecessor, the Federal Radio Commission (FRC), outright refused to grant radio station licenses to African Americans and Jewish Americans because of their race and religion, until World War II;
- The FCC used its licensing power to facilitate the schemes of segregated state university systems to exclude minorities from equal access to broadcast education;
- The FCC licensed and relicensed open segregationists, thereby preventing minorities from gaining a foothold in commercial broadcast employment for generations;
- The FCC used absurdly stringent financial qualifications requirements to keep minorities out of the comparative licensing process; and applied broadcast experience, past broadcast record, and ownership of a daytime-only station as preferential licensing criteria sufficient to overcome minority status as comparative factors;
- The FCC repeatedly ignored a court decision that required it to take minority ownership impact into account when considering technical radio allotment and allocation issues; and
- The FCC adopted a broadcast equal employment opportunity rule, but then failed to this day to meaningfully enforce it or even measure whether it has had any impact.<sup>23</sup>

Troubled by this inaction, Everett C. Parker, the head of the Office of Communications of the United Church of Christ (UCC), wanted to right the injustice against the African-American community occurring in the broadcasting industry, particularly in the South.<sup>24</sup> In an attempt to avoid legal action, Parker contacted the president of the National Association of Broadcasters (NAB). Parker asked the NAB to contact all broadcasting companies to remind them of their responsibility under the Fairness Doctrine to grant African Americans equal time to discuss their viewpoints, integrate any children's programs, and use courtesy titles for all African Americans.<sup>25</sup> The NAB refused to act.<sup>26</sup>

Left with no other choice than to pursue legal action, Parker waited until Mississippi's television licenses came up for renewal in 1964.<sup>27</sup> He planned to obtain a hearing with the FCC gathering evidence from Jackson Mississippi television stations, WLBT and WJTV, that showed their failure to serve the public's interest.<sup>28</sup> However, the FCC at that time did not allow the public to participate in FCC

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23. *Id.* at 47-48.

24. Horowitz, *supra* note 9, at 314.

25. *Id.* at 315.

26. *Id.*

27. *Id.* at 318.

28. Parker contacted Millsaps College professor Gordon Henderson and his wife Mary Ann in hopes of receiving help monitoring the stations. Both agreed to help and recruited other whites to assist in the one-week monitoring and logging of everything that the stations broadcast, from commercials to programs and everything in between. *Id.* at 327-328, Parker also sought the support of Reverend R.L.T Smith, an African-American Mississippian who had previously run for Congress. Smith signed the petition along with Aaron Henry, then Mississippi NAACP President. *Id.* at 320-321.

hearings but only those alleging some direct economic injury or alleging electrical interference.<sup>29</sup>

Despite these obstacles, Parker took his petition to the FCC.<sup>30</sup> The agency did not hold a hearing and swiftly rejected the challenge in a 4-2 vote, claiming the challengers had no standing due to their lack of direct economic interest.<sup>31</sup> The FCC did, however, acknowledge that WLBT had not been properly adhering to the Fairness Doctrine.<sup>32</sup> As a result, the FCC granted WLBT only a one-year license renewal rather than the normal three-year renewal.<sup>33</sup> This probationary license came with strict guidelines for renewal.<sup>34</sup>

### C. *Standing of Private Citizens in FCC Proceedings Challenged*

Following the one-year renewal of WLBT's license, the Office of Communications of the UCC filed an appeal with the D.C. Circuit contesting the FCC's failure to hold a hearing.<sup>35</sup> Referencing the many complaints against WLBT over the years, the court attacked the FCC's decision to not hold a hearing despite the validity of the accusations and its acknowledgement of the transgressions.<sup>36</sup> A significant portion of the court's opinion is devoted to rebutting the FCC's claim that the challengers had no standing, stating that "the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience."<sup>37</sup>

The court held that the public's best interest required broadening the qualifications for standing to include the public at large.<sup>38</sup> It ruled that the FCC erred in failing to hold a hearing in light of the substantial evidence of WLBT's wrongdoings.<sup>39</sup> The court remanded the case for a hearing.<sup>40</sup>

29. Horowitz, *supra* note 9, at 316. *See also* Off. Comm'n United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

30. Horowitz, *supra* note 9, at 319.

31. MILLS, *supra* note 8, at 84.

32. The FCC originally adopted the Fairness Doctrine. *See* FCC, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). Congress eventually passed legislation to codify the doctrine in 1959: "A broadcast licensee shall afford reasonable opportunity for discussion of conflicting views on matters of public importance." 47 U.S.C. § 315(a). Later finding that the doctrine was having the opposite of its intended effect and actually chilling speech, the FCC abolished it. *See In re* Complaint of Syracuse Peach Council v. Television Station WTVH Syracuse, New York, 2 F.C.C.Rcd. 5043 (1987), <https://docs.fcc.gov/public/attachments/FCC-87-266A1.pdf>. For a good history of the doctrine, see *Fairness Doctrine: New Federal Initiatives Project*, FEDERALIST SOCIETY (Apr. 13, 2009), <https://fedsoc.org/commentary/publications/fairness-doctrine>.

33. MILLS, *supra* note 8, at 84-86.

34. Horowitz, *supra* note 9, at 330.

35. *See* Off. Comm'n United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

36. *Id.* at 998-99.

37. *Id.* at 1002.

38. *Id.* at 1009.

39. *Id.*

40. *Id.* *See also* Horowitz, *supra* note 9, at 334.

*D. FCC Holds Hearing Post Remand*

Upon remand, the parties could not settle the dispute and proceeded to a hearing.<sup>41</sup> The FCC assigned the burden of proof to the challengers.<sup>42</sup> The challengers, the United Church of Christ, called witnesses to the stand to recall times that WLBT failed to serve the public interest, whether that be through lack of equal opportunity for all groups, absence of multiple viewpoints, or blatant disrespect.<sup>43</sup> Both African Americans and whites testified.<sup>44</sup> In addition, the challengers produced evidence collected by the volunteer monitors who tracked WLBT programming for a week.<sup>45</sup>

Fred Beard, now-former station manager of WLBT, denied the allegations and asserted that WLBT did make attempts to provide differing viewpoints and fair coverage of both “Negro” and white news.<sup>46</sup> Beard also rationalized discriminatory editorial statements he had made on air.<sup>47</sup>

Unsurprisingly, the hearing examiner ruled in the favor of WLBT and found no significant evidence of transgressions.<sup>48</sup> After the hearing, both sides presented their arguments directly to the FCC.<sup>49</sup> In a 5-2 vote, the FCC voted in favor of the license renewal for WLBT.<sup>50</sup> The FCC justified its decision claiming a lack of evidence and that the monitoring evidence had little value.<sup>51</sup> The FCC also took into consideration that WLBT had hired multiple African Americans and increased African-American participation on the air as well as in its programs following the original probationary license renewal.<sup>52</sup>

The UCC once again appealed the FCC’s decision to the U.S. Court of Appeals.<sup>53</sup> Again ruling against the FCC, the court criticized the reluctance of the FCC to hold the hearing even after being ordered to do so by the court.<sup>54</sup> It also questioned the FCC’s decision to disregard the information collected by the volunteer monitors.<sup>55</sup> Finally, the court did not find that the challengers carried the burden of proof.<sup>56</sup> The

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41. MILLS, *supra* note 8, at 109.

42. *Id.* at 110.

43. *Id.* at 109.

44. *Id.* at 117–123.

45. *Id.* at 120.

46. *Id.* at 126–131.

47. *Id.* at 129, 131. When questioned about his editorial mentioning that “Mississippi is facing the final hour in its official fight to maintain segregation” on James Meredith’s enrollment at the University of Mississippi, Beard claimed that his editorial was not suggesting that the enrollment of Meredith was the concern but rather the Federal Government’s disregard for states’ rights in controlling their public schools. *Id.*

48. *Id.* at 146. Against the wishes of the FCC, the hearing took place in Jackson, MS in May of 1967 with Jay Kyle serving as the examiner. Lawyers opposing WLBT later commented on Kyle’s prejudiced view against them. Lawyers defending WLBT, however, felt that Kyle was fair. *Id.* at 124, 107, 113.

49. *Id.* at 150.

50. *Id.* at 148.

51. *Id.* at 157.

52. *Id.* at 158.

53. *Off. Commc’n United Church of Christ*, 425 F.2d at 551.

54. *Id.* at 550.

55. *Id.* at 548.

56. *Id.*



court overturned the FCC's decision because it was not supported by substantial evidence and vacated WLBT's license.<sup>57</sup>

Communications Improvement Inc. (CCI), would manage WLBT until 1983 while the FCC searched for a permanent licensee.<sup>58</sup> As five companies vied for the new license, CCI, a majority- African-American-owned company, hired more minorities and increased fair coverage of African-American news.<sup>59</sup> In 1972, WLBT hired the country's first African-American general station manager, William Dilday.<sup>60</sup> Fifty percent of WLBT's profits went to Tougaloo College, a historically Black college in Jackson, to help African Americans excel in the journalism industry.<sup>61</sup> WLBT remained majority-African American-owned until 2000.<sup>62</sup>

*E. Nexus Exists Between Diverse Owners, Diverse Personnel, and Diverse Viewpoints*

The increased coverage and diversity of news stories that WLBT produced after hiring more minorities shows that an increase in diversity broadens reporting and heightens fair coverage of all groups. During Dilday's twelve years as station manager, minority employment increased from fifteen to thirty-five percent. Following the increase, significantly more positive African- American news coverage appeared on WLBT.<sup>63</sup>

As the Civil Rights movement continued, the spotlight remained on the media. Riots occurred across America in big cities, mainly in African-American neighborhoods.<sup>64</sup> President Lyndon Johnson tasked the National Advisory Commission on Civil Disorders (otherwise known as the Kerner Commission, named after its chairman, Illinois Governor Arthur Kerner) to look at the root causes for the riots<sup>65</sup> and to specifically examine the media's role.<sup>66</sup> The commission's final report blamed systemic racism for causing the unrest and contained the often quoted statement that "[o]ur nation is moving toward two societies, one African American, one white - separate and unequal."<sup>67</sup>

In its analysis of the media's coverage of the riots, the report gave the media a failing grade.<sup>68</sup> The report criticized journalists for sensationalizing the riots and "fail

57. *Id.* at 547.

58. *Id.*; Horowitz, *supra* note 9, at 343.

59. MILLS, *supra* note 8, at 189-190.

60. Les Brown, *Behind the Scenes at WLBT in Jackson*, N.Y. TIMES (Feb. 24, 1977), <https://www.nytimes.com/1977/02/24/archives/behind-the-scenes-at-wlbt-in-jackson.html>.

61. Bill Kovarik, *TV Windows in a Vast Wasteland*, REVOLUTIONS IN COMMUNICATION: TV, <https://revolutionsincommunication.com/tv/>.

62. *Changing Channels, Part 2*, *supra* note 7.

63. MILLS, *supra* note 8, at 195. Prior to CCI taking over WLBT, very little news about or of importance to the African-American community was reported. When news was reported, it was almost always negative. Following the change in ownership, topics relevant to the minority community were broadcasted. *Id.* at 195-196.

64. U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, INTRODUCTION (1968) [hereinafter *Kerner Comm'n Rep.*].

65. *Id.* at Foreword.

66. *Id.* at 203.

67. *Id.* at 208.

68. *Id.* at 210.



[ing] to adequately report the causes and consequences of civil disorders and the underlying problems with race relations.”<sup>69</sup> The report made a number of recommendations concerning policing and solving poverty and inequity.<sup>70</sup> In addition, it suggested more coverage needed to be devoted to racial issues and that newsrooms needed to become more diverse.<sup>71</sup>

When minorities hold positions in the broadcasting industry, it increases fair coverage and broadens reporting.<sup>72</sup> The National Association of Black Journalists President Dorothy Tucker stated,

But we have to bring our experiences to the story. And that’s what makes us have the advantage in a newsroom. Because we are Black, because we understand what that person in the neighborhood may be going through, because we speak the language, because we share a culture, then, we can bring all of that to the story that, perhaps, someone who is not Black cannot bring.<sup>73</sup>

In addition to bringing a diversity of viewpoint to the story, minorities may also pursue different types of stories than their majority coworkers, broadening the type of news that is covered.

As outlined above, the media and the FCC did not always acknowledge the existence of the nexus between diverse owners, diverse personnel, and diverse viewpoints.<sup>74</sup> But things began to change for the better when the FCC started crafting minority preference policies that promoted minority ownership including racial minority preferences in comparative hearings, racial minority preferences in lottery selections, tax certificate program, and distress sales.<sup>75</sup> The courts routinely upheld challenges to these programs and found the nexus argument persuasive, holding, for example, “that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of black citizenry.”<sup>76</sup> The Supreme Court in finding that the FCC distress sale policy and the consideration of minority ownership in comparative hearings satisfied intermediate scrutiny recognized this nexus stating, “[a] broadcasting industry with representative minority

69. Dam Hee Kim, *Diversity Policies in the Media Marketplace: A Review of Studies of Minority Ownership, Employment, and Content*, 10 INT’L J. COMM’N 2201 (2016).

70. *Kerner Comm’n Rep.*, *supra* note 64, at 212–213.

71. See Michael Bowman, *Repeating History: Has the Media Changed Since the Kerner Commission*, 25 RACE, GENDER & CLASS 17 (2018).

72. Catherine J.K. Sandoval, *Media Diversity Protects Democracy and the Public Interest: Hearing Before H. Subcomm. of Comm’n & Tech. of the H. Energy & Commerce Comm.*, 116th Cong. 1-21 (2020), <https://docs.house.gov/meetings/IF/IF16/20200115/110373/HHRG-116-IF16-Wstate-SandovalC-20200115.pdf> (containing a list of studies that show the nexus between minority ownership and program and format diversity).

73. Katti Gray, *The Racial Divide on News Coverage and Why Representation Matters*, KNIGHT FOUNDATION (Sept. 25, 2020), <https://knightfoundation.org/articles/the-racial-divide-on-news-coverage-and-why-representation-matters>.

74. Kim, *supra* note 69, at 2201. For a good summary of court and FCC actions, see David Honig, *History of FCC Diversity Initiatives*, MULTICULTURAL MEDIA, TELECOM & INTERNET COUNCIL (Feb. 8, 2006), <https://mmtconline.org/lp-pdf/HistoryofDiversity-FCC.pdf>.

75. Kim, *supra* note 69, at 2201. See also Jason Allen, *Disappearing Diversity? FCC Deregulation and the Effect on Minority Station Ownership*, 2 IND. J. L. SOC. EQUAL. 230, 237-239 (2013).

76. *Garrett v. FCC*, 13 F.2d 1056, 1063 (D.C. Cir. 1975).

participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.<sup>77</sup> However, not all the justices accepted that such a nexus existed as evidenced by Justice O'Connor penning her strong objections to the nexus concept in her *Metro Broadcasting* dissent.<sup>78</sup>

Just five years later, Justice O'Connor effectively overturned *Metro Broadcasting* in *Adarand Constructors, Inc. v. Peña* by requiring the use of strict scrutiny, and not intermediate scrutiny, when reviewing racial classifications imposed by the federal government.<sup>79</sup> Today the FCC no longer uses the minority preference or race conscious policies out of concern that they may not be able to defend them under the strict scrutiny standard.<sup>80</sup> In a post-*Adarand* society, the FCC uses race-neutral preference policies that define "eligible entities" in a revenue-based way instead of by race or gender and encourages minority and women-owned businesses that qualify as small businesses to take advantage of these provisions.<sup>81</sup>

Despite the FCC and the courts inconsistently acknowledging this nexus, studies do in fact reveal a nexus between minority and women owners and creators and diverse content.<sup>82</sup> One recent study presented at a Congressional hearing found "empirical evidence of a link between race or ethnicity of broadcast station owners and contribution to diversity of news and public affairs programming across the broadcast spectrum."<sup>83</sup> A current bill seeking to increase minority broadcast station ownership would require the FCC to explore and report back to Congress its findings concerning the nexus of diversity of ownership and diversity of viewpoints.<sup>84</sup>

## II. THE PRESENT: *FCC v. PROMETHEUS RADIO PROJECT*

For the past seventeen years, the FCC and advocacy groups have disagreed on how proposed changes in the media ownership rules would negatively affect minority and

77. *Metro Broadcast. v. FCC*, 497 U.S. 547, 579 (1990).

78. *Id.* at 626 (O'Connor, J. dissenting). "The FCC's policies assume, and rely upon, the existence of a tightly bound "nexus" between the owners' race and the resulting programming. ... For argument's sake, we can grant that the Court's review of congressional hearings and social science studies establishes the existence of some rational nexus. But even assuming that to be true, the Court's discussion does not begin to establish that the programs are directly and substantially related to the interest in diverse programming. That equal protection issue turns on the degree owners' race is related to programming, rather than whether any relation exists." *Id.*

79. *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

80. Allen, *supra* note 75, at 240; *see also* *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.) (denying petition for rehearing); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (denying petition for rehearing en banc); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 494 (D.C. Cir. 1998); *MD/DC/DE Broad. Ass'n v. FCC*, 236 F.3d 13 (denying petition for rehearing and rehearing en banc); *MD/DC/DE Broad. Ass'n v. FCC*, 253 F.3d 732 (D.C. Cir. 2001) (denying cert. sub nom); *Minority Media & Telecomm. Council v. FCC*, 534 U.S. 1113 (2002) (striking on equal protection grounds, two sets of mass media EEO rules).

81. Allen, *supra* note 75, at 241.

82. CHRISTINE BACHEN ET AL, *DIVERSITY OF PROGRAMMING IN THE BROADCAST SPECTRUM: IS THERE A LINK BETWEEN OWNER RACE OR ETHNICITY AND NEWS AND PUBLIC AFFAIRS PROGRAMMING* (Dec. 1999), [https://transition.fcc.gov/opportunity/meb\\_study/content\\_ownership\\_study.pdf](https://transition.fcc.gov/opportunity/meb_study/content_ownership_study.pdf).

83. *Id.* at i (Executive Summary).

84. Expanding Broadcast Ownership Opportunities Act of 2021, H.R. 4871, 117th Cong. (2021).

women media ownership. To understand how the various *Prometheus*' cases originated, an abbreviated history lesson provides context. The Communication Act of 1934 granted the FCC authority to set structural rules to serve the public interest.<sup>85</sup> The Supreme Court upheld strict ownership rules over the decades because they promoted competition, localism, and viewpoint diversity.<sup>86</sup> In the 1970s, the FCC promulgated the cross-media ownership rules at issue in these current cases.<sup>87</sup>

Over the years, the FCC made very minor changes to these ownership rules until the mid-1990s. At that time, the Republicans won back Congress and came to Washington with a conservative legislative agenda including efforts to deregulate industry.<sup>88</sup> As part of this agenda, Congress passed the 1996 Telecommunications Act.<sup>89</sup> The Act contemplated a “pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”<sup>90</sup> Congress made changes to radio ownership rules,<sup>91</sup> but left it to the FCC to revise the television ownership rules.<sup>92</sup> Congress mandated the FCC to perform quadrennial reviews (originally biennial)<sup>93</sup> to “determine whether any of such rules are necessary in the public interest as the result of competition [and to] repeal or modify any regulation it determines to be no longer in the public interest.”<sup>94</sup>

In 2002, the FCC turned its attention to specifically address and broadly change ownership rules, claiming these rules no longer served the public interest.<sup>95</sup> Specifically, the new rules eased restrictions on how many newspapers, TV, and radio stations an entity could own and replaced the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rules.<sup>96</sup> *Prometheus Radio Project* and

85. 47 U.S.C. § 309(a). *See also* §§ 307(a) (Grants), 310(d) (Assignment, Transfer, and Construction), 312 (Administrative Sanctions).

86. *FCC v. Nat'l Citizens Comm. for Broadcast.*, 436 U.S. 775 (1978); *FCC v. Fox TV stations, Inc.*, 556 U.S. 502 (2009).

87. Amend. §§ 73.35, 73.240 and 73.636 of the Comm'n Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970); Amend. §§ 73.34, 73.240 and 73.636 of the Comm'n Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975).

88. *See* REPUBLICAN CONTRACT WITH AMERICA, REPUBLICAN PARTY (1994), <https://web.archive.org/web/19990427174200/http://www.house.gov/house/Contract/CONTRACT.html>.

89. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

90. S. REP. No. 104-230, at 1-2 (1996).

91. Telecommunications Act of 1996 §§ 202(a), 202(c)(1)(B).

92. § 202(h).

93. *Id.*; *see also* Consol. Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

94. Telecommunications Act of 1996 § 202(h).

95. 2002 Biennial Regulatory Review, Notice of Proposed Rulemaking, 17 F.C.C. Rcd. 18503 (24) ¶ 6 (2002), <https://docs.fcc.gov/public/attachments/FCC-02-249A1.pdf>.

96. 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C. Rcd. 13620 (20) (2003), <https://www.fcc.gov/document/2002-biennial-regulatory-review-review-commissions-broadcast-3>.

other activists filed a series of lawsuits over seventeen years (*Prometheus I*,<sup>97</sup> *Prometheus II*,<sup>98</sup> *Prometheus III*,<sup>99</sup> and *Prometheus IV*<sup>100</sup>) contesting these, and other rule changes made in subsequent quadrennial reviews, following remands from the Third Circuit, which lasted for many years. Throughout the proceedings, the Third Circuit, when remanding the cases, consistently directed the FCC to engage in a data-driven analysis, especially on the impact any changes would have on minority and women ownership.<sup>101</sup>

In the first case decided in 2004, *Prometheus I*, the Third Circuit Court of Appeals issued a split decision which stayed the new rules and remanded the case while retaining jurisdiction.<sup>102</sup> After a lengthy standard of review analysis, the court found that the FCC must provide a reasoned analysis when retaining, revoking, or modifying any rule.<sup>103</sup> The court remanded the numerical limits for local television ownership, the local radio ownership rules, and the rule on cross-ownership of media within local markets because they were not supported by the record.<sup>104</sup> Likewise, when analyzing the repealing of the Failed Station Solicitation Rule (the only remaining policy designed to increase minority ownership of television stations), the court scolded the FCC for not conducting a more thorough analysis, noting that “[b]y failing to mention anything about the effect this change would have on potential minority station owners, the Commission has not provided ‘a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’”<sup>105</sup> Remanding this issue for a “more rigorous analysis,” the court further instructed the FCC to also address the Minority Media and Telecommunications Council’s “additional proposals for advancing minority and disadvantaged businesses and for promoting diversity in broadcasting.”<sup>106</sup>

The parties returned to the Third Circuit in *Prometheus II* to contest the FCC’s 2008 Order, resulting from the 2006 Quadrennial Review, and the FCC’s separate

97. See generally *Prometheus Radio Project v. FCC (Prometheus I)*, 373 F.3d 372 (3d Cir. 2004) (subsequent history omitted).

98. See generally *Prometheus Radio Project v. FCC (Prometheus II)*, 652 F.3d 431 (3d Cir. 2011) (subsequent history omitted). The plaintiff, Prometheus Radio Project, is a nonprofit organization that seeks social change by advocating for reform that leads to “more participatory radio for social justice and community expression.” See *About Prometheus Radio Project*, PROMETHEUS RADIO PROJECT, prometheusradio.org (last visited Nov. 2, 2022).

99. See generally *Prometheus Radio Project v. FCC (Prometheus III)*, 824 F.3d 33 (3d Cir. 2016) (subsequent history omitted).

100. See generally *Prometheus Radio Project v. FCC (Prometheus IV)*, 939 F.3d 567, 572 (3d Cir. 2019), *rev’d*, 121 S. Ct. 1150 (2021).

101. *Prometheus I*, 373 F.3d at 421 n.59; *Prometheus II*, 652 F.3d at 471; *Prometheus III*, 824 F.3d at 54 n.13 (quoting 652 F.3d at 471); *Prometheus IV*, 939 F.3d at 572.

102. *Prometheus I*, 373 F.3d at 372.

103. *Id.* at 395.

104. *Id.* at 435.

105. *Id.* at 421 (quoting *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970)). The Failed Station Solicitation Rule required notice of sale to out-of-market buyers of failed or failing stations which were more affordable thus making them appealing to minorities and women who often lack large amounts of capital. *Id.* at 420.

106. *Id.* at 421 n.59.

Diversity Order.<sup>107</sup> By the time the case got to the Third Circuit in 2011, the agency was already engaged in the 2010 Quadrennial Review.<sup>108</sup> The court found that the FCC did not comply with notice and comment rules of the Administrative Procedure Act for the newspaper/broadcast cross-ownership rule and instructed the FCC to remedy this for the ongoing 2010 Quadrennial Review.<sup>109</sup> In addition, it remanded

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 (“SDB”)), so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women.<sup>110</sup>

The court held the definition to be arbitrary and capricious due to the lack of data and explanation the FCC gave for how the “eligible entity” definition would increase minority and women ownership.<sup>111</sup>

The parties returned to the Third Circuit in 2016, asserting that the agency failed to comply with the court’s instructions in the prior two cases and failed to correct the revenue-based “eligible entity” definition in its Diversity Order, which was held to be arbitrary and capricious.<sup>112</sup> Despite the Third Circuit’s instructions, the FCC retained its “eligible entity” definition, allowing preferences to go to small businesses because the definition was race and gender neutral.<sup>113</sup> The challengers again argued that the FCC produced no evidence on how defining “eligible entities” as small businesses actually helped women and minorities.<sup>114</sup> They complained that the FCC failed, as instructed by the court in *Prometheus II*, to carefully consider revising the definition to include “socially and economically disadvantaged businesses.”<sup>115</sup>

The court held the FCC’s twelve-year delay in defining the “eligible entity” term was unreasonable.<sup>116</sup> It remanded the case yet again, giving very specific instructions to the FCC to complete the analysis: “It must make a final determination as to whether to adopt a new definition. If it needs more data to do so, it must get it.”<sup>117</sup>

Likewise, the court remained concerned that the FCC left open the 2010 and the 2014 Quadrennial Reviews, and indicated rules going forward may be vacated if these quadrennial reviews did not conclude by year’s end.<sup>118</sup> In remanding the cases

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107. *Prometheus II*, 652 F.3d at 437.

108. Notice of Inquiry 2010 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, 75 Fed. Reg. 33,227 (June 11, 2010).

109. *Prometheus II*, 652 F.3d at 472.

110. *Id.* at 438.

111. *Id.* at 470.

112. *Prometheus III*, 824 F.3d 33.

113. *Id.* at 41.

114. *Id.*

115. *Id.*

116. *Id.* at 48.

117. *Id.* at 49.

118. *Id.* at 54.

in both *Prometheus II* and *Prometheus III*, the Third Circuit remained consistent in its instructions for the FCC to determine the effect any of the ownership rule changes would have on minority and female ownership.<sup>119</sup>

In 2019, the parties returned to the Third Circuit for the fourth time.<sup>120</sup> During its 2017 Quadrennial Review, the FCC concluded that advanced technology and industry developments resulted in three of its ownership rules no longer serving the public interest.<sup>121</sup> The FCC repealed two of those rules (the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule) and modified the third (the Local Television Ownership Rule).<sup>122</sup>

The FCC examined the impact these changes would have on the agency's goals of promoting competition, localism, and viewpoint diversity, including minority and women ownership.<sup>123</sup> The FCC concluded that there would be no adverse effect on any of those goals.<sup>124</sup> Since the Third Circuit did not stay the changes past the close of notice and comment on the 2018 Incubator Order, the ownership rule changes went into effect and the advocacy groups brought another lawsuit, *Prometheus IV*.<sup>125</sup>

The plaintiffs alleged that the FCC “fail[ed] to compile a record sufficient to consider its impact on ownership diversity and adopt[ed] a definition of ‘eligible entities’ that will not increase ownership diversity—despite the Commission’s stated intention to do so.”<sup>126</sup> The plaintiffs argued that the FCC relied on insufficient and flawed data to the exclusion of studies that showed a negative impact on women and minorities upon consolidation of media entities.<sup>127</sup> A divided Third Circuit agreed.<sup>128</sup>

In ruling against the FCC on the specific issue of the impact on minorities and women, the very same panel that heard *Prometheus I* vacated and remanded the sweeping ownership rule changes because they found the FCC’s analysis to be “woefully simplistic.”<sup>129</sup> The court concluded that the only consideration the FCC had given to the question of how its rules would affect female ownership was the

119. *Prometheus II*, 652 F.3d at 471; *Prometheus III*, 824 F.3d at 54 n. 13 (quoting 652 F.3d at 471).

120. *Prometheus IV*, 939 F.3d at 572.

121. 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 F.C.C. Rcd. 9802 (2017), <https://www.fcc.gov/document/fcc-modernizes-broadcast-ownership-rules-0> (Reconsideration Order); 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, 31 F.C.C. Rcd. 9864 (2016), <https://www.fcc.gov/document/2014-quadrennial-review-commissions-broadcast-ownership-rules> (Second Report and Order).

122. *Prometheus IV*, 939 F.3d at 575.

123. Brief for Respondents at 2-3, *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d. Cir. 2019) (No. 17-1110).

124. *Id.*

125. *Prometheus IV*, 939 F.3d at 576.

126. Bret Baker, *Prometheus: Giving Life to Formal Retrospective Review Through “Thin Rationality Judicial Review*, OHIO STATE L.J. 723, 737 (2020) (quoting Petition for Review at 2, 4, *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3rd Cir. 2019) (No. 18-1092)).

127. Brief for Catherine Sandoval et al., as Amici Curiae Supporting Respondents, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021) (Nos. 19-1231, 19-1241) (outlining the various ways the FCC relies on flawed data for their report).

128. *Prometheus IV*, 939 F.3d at 572.

129. *Id.* at 586.



conclusion that there would be no effect.<sup>130</sup> The court found that the FCC's analysis of the impact on minority ownership was "so insubstantial that it would receive a failing grade in any introductory statistics class."<sup>131</sup> The majority held that the FCC was required to study whether the relaxing of the rules would negatively impact minority and women ownership, including commissioning its own studies if public commenters produced insufficient data.<sup>132</sup>

After the Third Circuit denied the FCC's petition for an en banc review, the United States Supreme Court granted certiorari.<sup>133</sup> Justice Brett Kavanaugh delivered the opinion of a very narrow ruling for the unanimous Court.<sup>134</sup> Justice Clarence Thomas wrote a concurring opinion.<sup>135</sup> The Court reversed the Third Circuit, finding that the FCC did not act arbitrarily and capriciously when it changed the cross-ownership rules.<sup>136</sup> The Court agreed with the agency's conclusion that the rules were no longer necessary to serve the FCC's public-interest goals of promoting competition, localism, and viewpoint diversity.<sup>137</sup>

In addition, the Court accepted the FCC's conclusion that the changes would not negatively impact women and minorities.<sup>138</sup> Disagreeing with the Third Circuit, the Court ruled that agencies have no obligation to conduct independent studies to ascertain the potential impact rule changes have on minority and women ownership.<sup>139</sup> Justice Kavanaugh acknowledged that many times the data available to an agency may not be complete or reliable but that reality does not impose any additional burdens on agencies.<sup>140</sup>

Justice Thomas went one step further than his colleagues and determined the FCC had no duty whatsoever to study the potential impact the rule changes had on minority and women ownership.<sup>141</sup> His interpretation of the law focused on the FCC's obligations to preserve the public interest goals of competition, localism, and viewpoint diversity and nothing more.<sup>142</sup> He did not find persuasive the argument that diversity in ownership is crucial to achieving viewpoint diversity.<sup>143</sup> Instead, he argued that the FCC only sometimes looks to women and minority ownership as a proxy for viewpoint diversity and not as an independent goal.<sup>144</sup>

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130. *Id.*

131. *Id.*

132. *Id.* at 587 ("On remand the Commission must ascertain on record evidence the likely effect of any rule changes it proposes and whatever 'eligible entity' definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis." *Id.*)

133. FCC v. Prometheus Radio Project (*Prometheus V*), 141 S.Ct. 1150 (2021).

134. *Id.* at 1150.

135. *Id.* at 1161.

136. *Id.* at 1160–1161.

137. *Id.*

138. *Id.* at 1160.

139. *Id.* at 1155.

140. *Id.* at 1156.

141. *Id.* at 1160.

142. *Id.* at 1159.

143. *Id.* at 1161.

144. *Id.* at 1162.



### III. THE FUTURE: *SUGGESTIONS FOR A PATH FORWARD*

This section of the article starts with the proposition that all racial groups in the United States understand the need to diversify the media, for various reasons. Unfortunately, these efforts to diversify the media remain unsuccessful. The dismal statistics highlight the problem,<sup>145</sup> but to improve women and minority ownership, advocates need to better understand the barriers women and minorities face, and then develop solutions to eliminate them. The media industry and government play roles in both steps. A current bill pending in Congress would require the FCC to develop solutions, by mandating that the agency make recommendations to Congress at least every two years on how to increase the number of women and minority-owned broadcast stations.<sup>146</sup> The industry must also actively participate in finding solutions, as governmental race-conscious initiatives are unlikely to survive constitutional challenges. Below, the authors suggest a multifaceted governmental and industry approach to help increase the numbers of women and minority owners.

#### *A. Calls to Diversify the Media*

Many consumer groups feel misunderstood because of a lack of diversity and viewpoints in the media industry. According to the Knight Foundation's recent study, this lack of diversity in the media matters to the public.<sup>147</sup> For example, it found "69% of Americans say that reflecting the diversity of the U.S. population is a 'critical' (35%) or 'very important' (34%) role for the media.<sup>148</sup> Black (50%), Hispanic (43%) and Asian people (41%) are more likely than white people (30%) to say the media's role in reflecting diversity is 'critical.'"<sup>149</sup>

Further, a Pew Research Center survey conducted in 2020 illustrates that relatively similar proportions of Americans felt misunderstood by the media.<sup>150</sup> However, the reasoning behind these feelings differs significantly between different races.<sup>151</sup> The majority of African-American respondents said they felt misunderstood due to their personal characteristics, and the majority of Hispanic respondents felt misunderstood based on their perceived difference in personal interests than the news media.<sup>152</sup> On the opposite spectrum, the majority of white respondents believe that their feeling of being misunderstood is based on their differing political ideologies.<sup>153</sup>

145. See *infra* pp. 24-25.

146. Expanding Broadcast Ownership Opportunities Act of 2021, *supra* note 84, at §2.

147. GALLUP/THE KNIGHT FOUNDATION, *Views on the Role of News Media*, AMERICAN VIEWS 2020: TRUST, MEDIA AND DEMOCRACY 35 (Nov. 9, 2020), <https://knightfoundation.org/wp-content/uploads/2020/08/American-Views-2020-Trust-Media-and-Democracy.pdf>.

148. *Id.*

149. *Id.* at 36.

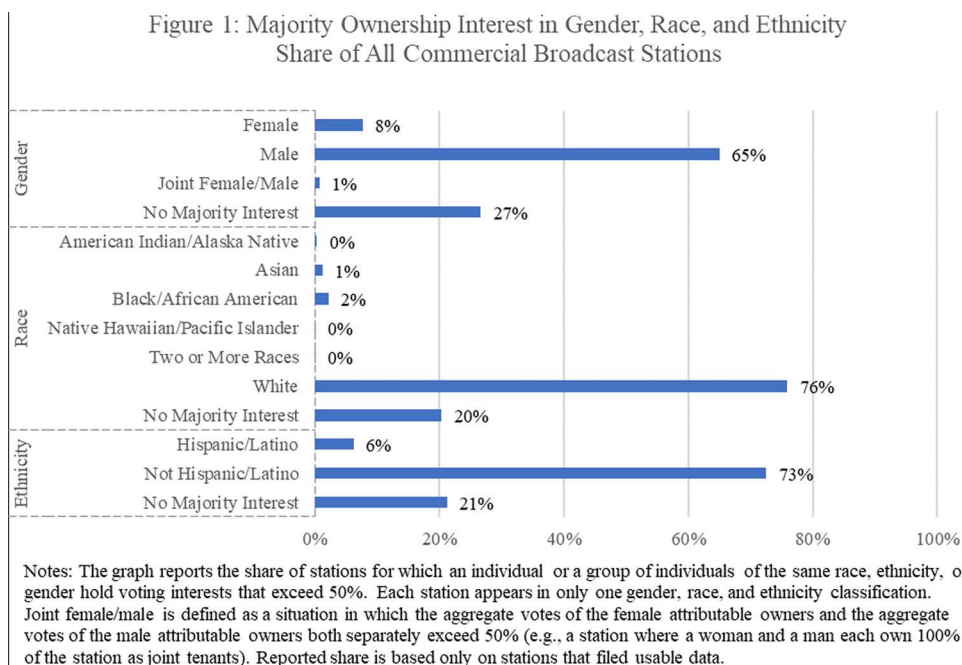
150. Jeffrey Gottfried & Michael Barthel, *Black, Hispanic and white adults feel the news media misunderstand them, but for very different reasons*, PEW RESEARCH CENTER (June 25, 2020), <https://www.pewresearch.org/fact-tank/2020/06/25/black-hispanic-and-white-adults-feel-the-news-media-misunderstand-them-but-for-very-different-reasons>.

151. *Id.*

152. *Id.*

153. *Id.*

The industry still lacks diversity among its owners, despite widespread opinions regarding the importance of having diversity in the media.<sup>154</sup> The FCC's Fifth Report on Broadcast Stations paints a bleak picture on the state of diverse media ownership.<sup>155</sup>



The statistics in the chart above reflect diversity in ownership for 2021. These statistics are disheartening, because they have decreased for women owners in several categories (noncommercial FM radio, noncommercial AM radio, low power non-commercial TV stations, and class A television) as compared to the 2017 data.<sup>156</sup> A very slight increase in women ownership occurred in the categories of full power commercial television (6% from 5%) and low power television (8% from 7%).<sup>157</sup> Women did gain ground as owners of full power Noncommercial Television (20%

154. Although beyond the scope of this article, recent station consolidations and closings have inadvertently created yet another barrier for women and minority ownership. See Mary R. Hornak, *Media Consolidation & Political Polarization: Reviewing the National Television Ownership Rule*, 90 *FORDHAM L. REV.* 909 (2021); S. Derek Turner & Mark Cooper, *Out of the Picture: Minority and Female TV Ownership in the United States: Current Status, Comparative Statistical Analysis & the Effects of FCC Policy and Media Consolidation* (rev. Oct. 2007), <https://www.freepress.net/sites/default/files/legacy-policy/otp2007.pdf>. Cf. Alex Weprin & Georg Szalai, *Local TV Giant Tegna Sold to Private Equity Firms in Megadeal*, *HOLLYWOOD REP.* (Feb. 22, 2022, 4:08 AM), <https://www.hollywoodreporter.com/business/business-news/teгна-sale-private-equity-firms-1235097233/>.

155. FCC, FIFTH REPORT ON OWNERSHIP OF BROADCAST STATIONS, FORM 323 AND FORM 323-E OWNERSHIP DATA AS OF OCTOBER 1, 2019 4 (September 2021).

156. *Id.* at 17, 16, 15, 9.

157. *Id.* at 8, 10.

up from 14%) and Class A Noncommercial Television (from 0% to 14%).<sup>158</sup> Commercial AM radio women ownership remained flat at 9% as did Commercial FM radio at 7%.<sup>159</sup> The statistics for owners who are people of color, especially African-American owners, were even worse with virtually no gains.<sup>160</sup>

The statistics also do not mirror the general population or other industries. For example, in 2019, “the population was almost evenly split between men and women” and “40% of the population belonged to a racial or ethnic minority group,” yet majority ownership numbers remained well below these statistics.<sup>161</sup> Women and minority ownership in other industries is five to ten times higher.<sup>162</sup>

### B. Understanding the Problem

Representative Billy Long from Missouri sponsored the 2021 Media Diversity Act, which passed the House in July 2021.<sup>163</sup> This bill would amend Section 13(d) of the Communications Act of 1934, adding the following:

(4) Considering socially disadvantaged individuals

In assessing the state of competition under subsection (b)(1) and regulatory barriers under subsection (b)(3), the Commission, with the input of the Office of Communications Business Opportunities of the Commission, shall consider market entry barriers for socially disadvantaged individuals in the communications marketplace in accordance with the national policy under section 257(b).

The Senate Committee on Commerce, Science, and Transportation is considering the bill.<sup>164</sup> If passed, this bill would broaden the FCC requirement under Section 257(a), which already requires the FCC to “complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses.”<sup>165</sup> The FCC, however, often produces Section 257 reports late and “with little substance.”<sup>166</sup>

Additionally, twenty-five members of Congress recently called on the FCC to review how its rules and programs have disproportionately impacted African Americans and other minorities.<sup>167</sup> Free Press’s Media 2070 project also launched a petition asking the

158. *Id.* at 13-14.

159. *Id.* at 11-12.

160. *Id.* at 8-17.

161. *Id.*

162. Expanding Broadcast Ownership Opportunities Act of 2021, *supra* note 84, at §2(4).

163. MEDIA Diversity Act of 2021, H.R. 1754, 117th Cong. (2021) (proposing the study of market entry barriers for socially disadvantaged individuals in the communications marketplace in accordance with 47 U.S.C. § 257(b)).

164. *Id.*

165. 47 U.S.C. § 257(a).

166. Honig, *supra* note 22, at 92.

167. Letter from Jamaal Bowman & 24 other Congress Members to FCC Acting Chairwoman Angela Rosenworcel, Free Press: Media 2070 (June 28, 2021), [https://www.freepress.net/sites/default/files/2021-06/congressional\\_letter\\_on\\_fcc\\_racial\\_equity\\_assessment.pdf](https://www.freepress.net/sites/default/files/2021-06/congressional_letter_on_fcc_racial_equity_assessment.pdf).

FCC to explore how its actions have harmed people of color.<sup>168</sup>

Perhaps in response, FCC Chair Rosenworcel re-chartered the Advisory Committee for Diversity and Digital Empowerment, changing its name to the Communications Equity and Diversity Council (CEDC).<sup>169</sup> Three working groups (Innovation and Access, Digital Empowerment, and Inclusion, and Diversity and Equity) include members of the CEDC, additional working group members, and independent subject matter experts.<sup>170</sup> The CEDC will provide suggestions to make sure underserved communities can fully engage with new platforms.<sup>171</sup> Complementing the past work of this group, Rosenworcel acknowledged that

[o]ver the past two years, this committee has benefitted from having some of the most talented civic-minded people in the communications industry, helping to open doors of opportunity that too often have been closed to women and minorities. As we expand the Committee's focus, I am hopeful that we can make meaningful progress on these issues as we look across the broader tech sector.<sup>172</sup>

One suggestion from David Honig, a longtime prominent advocate of diversifying the media, includes convening a summit of all the key players in government and industry to honestly discuss the painful history that contributed to the lack of diversity in media and commit to discussing and implementing initiatives that would repair the harm.<sup>173</sup> Another suggestion would be to involve each state's Advisory Committee to the United States Commission on Civil Rights by submitting a proposal for the state committees to study this issue.<sup>174</sup>

Rather than waiting on the FCC or Congress, the industry is already bringing together experts to explore the issue and possible solutions. For example, the World Economic Forum's newly convened Power of Media Task Force on DE&I will explore issues surrounding diversity of content and representation in the media.<sup>175</sup> The task force originated from a white paper the organization released in September 2021, written by the World Economic Forum in conjunction with Accenture.<sup>176</sup> The paper concluded with a commitment to bring together industry leaders from the

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168. Free Press, *Open Petition to Acting FCC Chairwoman Rosenworcel Tell the FCC to Investigate its Role in Perpetuating Racism in Our Media System*, [https://act.freepress.net/sign/fcc\\_racism\\_in\\_media/](https://act.freepress.net/sign/fcc_racism_in_media/).

169. Public Notice, FCC, FCC Announces Working Group Members of the Communications Equity and Diversity Council (Jan. 13, 2022), <https://docs.fcc.gov/public/attachments/DA-22-41A1.pdf>.

170. *Id.*

171. Press Release, FCC, FCC Acting Chairwoman Announces Expanded Focus of Advisory Committee on Diversity and Digital Empowerment to Take on Broader Tech Sector Issues (June 24, 2021), <https://www.fcc.gov/document/acting-chair-rosenworcel-shares-plan-expand-diversity-advisory-cmte>.

172. *Id.*

173. Honig, *supra* note 22, at 94.

174. The authors submitted a proposal to the MS Advisory Committee to the United States Committee on Civil Rights.

175. WORLD ECON. F., REFLECTING SOCIETY: THE STATE OF DIVERSE REPRESENTATION IN MEDIA AND ENTERTAINMENT (Sept. 2021), [https://www3.weforum.org/docs/WEF\\_The\\_State\\_of\\_Diverse\\_Representation\\_in\\_Media\\_and\\_Entertainment\\_2021.pdf](https://www3.weforum.org/docs/WEF_The_State_of_Diverse_Representation_in_Media_and_Entertainment_2021.pdf).

176. *Id.*

corporate and non-profit worlds to develop best practices and collaborative initiatives focusing on setting measurable goals through community and collaboration.<sup>177</sup>

Other groups are also discussing these issues.<sup>178</sup> An organization called Journal-isms Inc. explores these issues with columns and monthly webinars.<sup>179</sup> Originating as a part of the journal produced by the National Association of Black Journalists (NABJ), this organization's commitment to covering diversity issues began with a focus on African Americans and has since expanded to include all groups, particularly people of color. Journal-isms Inc. has recently partnered with the American University School of Communication (AU SOC) to continue their shared mission of diversity and inclusion in the media and assist in furthering AU SOC's diversification.

Although beyond the scope of this article, understanding the problem will also require us to study what diversity of ownership and content means in the digital world. Technological advances, such as the Internet and streaming platforms, continue to change the media landscape at an astronomical pace.<sup>180</sup> Media will not look the same in fifty years as it does today. Barriers will change with this new way of delivering content. Yet, despite this explosion, the FCC possesses no authority under the law to regulate these platforms, leading to what Commissioner Michael O'Rielly calls "an FCC regulatory free arena."<sup>181</sup> If regulatory frameworks are developed for these digital platforms, there should be significant consideration towards efforts to increase diversity.

### C. Solutions for Removing the Barriers

Identifying each of the barriers to media ownership that minorities and women face is an important first step. These barriers include archaic FCC policies and regulations, knowledge deficits, lack of connections, inadequate resources, and insufficient data. The below suggestions seek to eliminate these known barriers.

#### 1. Remove Regulatory Barriers

Policies that restrict expansion options often adversely impact female station owners and station owners of color. The two most actionable steps the FCC could take are lifting restrictions currently in place on upgrading radio signals and deregulating FM translator program origination.<sup>182</sup>

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177. *Id.*

178. Richard Prince, *Announcing the Formation of Board of Directors and Appointment of Members of the Journal-isms Roundtable*, JOURNAL-ISMS (Oct. 31, 2020), <http://www.journal-isms.com/journal-isms-roundtable/>.

179. *Id.*

180. See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 32 F.C.C. Rcd. 568, 573-574 (2017), <https://docs.fcc.gov/public/attachments/DA-17-71A1.pdf> (18th Annual Video Competition Report) (finding that internet access has changed the needs of video programming since its last report).

181. Michael O'Rielly, *FCC Regulatory Free Arena*, FCC: BLOG (June 1, 2018, 11:15 a.m.), <https://www.fcc.gov/news-events/blog/2018/06/01/fcc-regulatory-free-arena>.

182. Honig, *supra* note 22, at 96.

*a. Restrictions on upgrading inferior signals*

Many female and minority station owners are proprietors of rural stations, smaller stations, or AM and lower-frequency stations.<sup>183</sup> Some restrictions exist that may preclude stations from moving their station closer to more populated areas or from upgrading their tower frequency to reach people farther away.<sup>184</sup> The farther away the tower, the stronger the frequency from the station must be to reach the desired audience. By limiting ability to upgrade signal frequency and eliminating the possibility of moving closer to populous areas, the FCC is leaving rural stations out of the marketplace and silencing their viewpoints. If the FCC eased some of these restrictions, it would open whole new markets for those minority owned rural radio stations to provide more diversity of viewpoint to the citizenry.

*b. Regulation of FM Translator Program Origination*

AM radio stations are disproportionately owned by people of color and women.<sup>185</sup> Recently, the FCC allowed AM radio stations to utilize FM translators to extend their reach beyond where their frequency could normally go.<sup>186</sup> However, these translators are not allowed to originate any original programming, but are required to play whatever broadcast their home station is producing and simply repeat the broadcast over the extended airwaves.<sup>187</sup> If the FCC also deregulated the content they are allowed to produce, minority AM station owners would have new opportunities to produce more diverse content for FM airwaves, including in other languages, allowing them to reach a wider audience and express their diverse viewpoints without having to own an FM station.

## 2. Create Mentoring and Networking Opportunities

A deficit of industry knowledge and lack of connections to business networks remain big barriers for minorities and women.<sup>188</sup> Boot camps can make a big difference in training people to pursue potential opportunities. The National Association for Broadcasters has successfully done this for years through their broadcast leadership training (BLT) academy for those experienced individuals who seek promotions or to own their own station.<sup>189</sup> The ten-month curriculum includes topics on developing a business plan, securing funding, evaluating opportunities, and making the

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183. *Id.* at 97.

184. *Id.*

185. Honig, *supra* note 22, at 97.

186. *What is an FM Translator or FM Booster Station?*, FM TRANSLATORS AND BOOSTERS, <https://www.fcc.gov/media/radio/fm-translators-and-boosters#WHATIS> (last updated June 29, 2021).

187. FCC Revitalization of the AM Radio Services, 82 Fed. Reg. 13,069 (Mar. 9, 2017) (codified at 47 C.F.R. Part 74).

188. Christine Marie Nielson, *Court Ruling Gives Power to Corps, Harms Women, Minority Journalism Entrepreneurs*, GEODIALOG MEDIA REP. (Apr. 8, 2021, 8:33 AM), <https://www.prnewswire.com/news-releases/geodialog-media-court-ruling-gives-power-to-corps-harms-women-minority-journalism-entrepreneurs-301264820.html>.

189. Nat'l Ass'n Broad., BROADCAST LEADERSHIP TRAINING, <https://www.nabfoundation.org/programs/broadcast-leadership/participants.asp> (last visited Nov. 4, 2022).



deal.<sup>190</sup> Participants work through case studies with individuals from different backgrounds and jobs (e.g., pairing a CFO with a content creator) and complete the program by delivering a Shark Tank-style pitch.<sup>191</sup>

When she created the academy twenty-years years ago, Diane Sutter, who owned and operated television stations, hoped it would teach participants “how the game gets played and how to become good at understanding its rules.”<sup>192</sup> The participant cost of the program is \$12,500.<sup>193</sup> The program does not limit who can participate, but does offer scholarships for minorities and women.<sup>194</sup> The current class consists of multiple women and people of color.<sup>195</sup>

The program produces amazing results. Of its 300-plus participants, fifty-seven currently own or have owned a radio or television station,<sup>196</sup> another three became broadcast station group heads, and 65% received promotions, many to the C-suite.<sup>197</sup>

The News Leaders Association (NLA) offers a similar program for emerging leaders.<sup>198</sup> NLA institutes provide free or low-cost leadership training to journalists from traditionally underrepresented groups who would like to pursue managerial and other leadership roles.<sup>199</sup> “ELI’s curriculum includes sessions on leadership skills and values, change management, resource management and budgeting, strategic planning and goal setting, performance management, collaboration and innovation—all through the lens of leading a diverse, successful team.”<sup>200</sup>

Creating more opportunities like these boot camps to reach more people should be a priority. David Honig, President Emeritus and Senior Advisor Multicultural Media, Telecom and Internet Council, offers an even more direct approach to assist entrepreneurs by proposing that a Historically Black College or University (HBCU) can create a type of entrepreneurial-type clinic that could help minorities and women interested in media ownership “develop business plans and strategies, seek financing, and pursue acquisitions.”<sup>201</sup>

In addition, the curriculum of boot camps, or at least portions of it, should not be limited to individuals already in the workforce, but should also provide a journalism curriculum for university and college students. In 2020-2021, colleges and universities

190. *Id.* The program involves 160 hours of teaching by 50 to 60 industry leaders and experts. Telephone Interview with Diane Sutter, President/CEO, Shooting Star Broadcasting (January 28, 2022) [hereinafter Sutter Interview].

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Nat’l Ass’n Broad., *supra* note 189.

196. Sutter Interview, *supra* note 190.

197. *Id.*

198. NLA, *News Leaders Association Announces the 2021 Emerging Leaders Institute for Diversity, Equity and Inclusion Cohort*, NEWS LEADERS ASS’N (Aug. 4, 2021), <https://www.newsleaders.org/nla-updates/news-leaders-association-announces-the-2021-emerging-leaders-institute-for-diversity-equity-and-inclusion-cohort>.

199. *Id.*

200. *Id.*

201. Honig, *supra* note 22, at 97.



awarded 120,571 journalism degrees making journalism the eleventh-most popular major.<sup>202</sup> Students, especially women and people of color, should be introduced to leadership principles and skillsets early in their education so they can appreciate the opportunities that could await them. In addition to leadership classes, schools should also teach all students cross-cultural journalism skills to prepare them to work in a complex, diverse, and changing society while learning how to give voice to diverse narratives.<sup>203</sup> The Association for Education in Journalism and Mass Communication bestowed upon the University of Missouri School of Journalism a national Equity & Diversity Award for its DEI efforts, including a Cross-Cultural journalism course requirement for its journalism students.<sup>204</sup>

In February of 2022, Gray Television, Inc. announced the creation of a media training center through its partnership with WLBT of Jackson, MS, that will target students from HBCUs.<sup>205</sup> With WLBT's history of having its license revoked by the FCC in 1969, its commitment to create the training center serves as an encouraging and exciting development for the future of diversity of viewpoint in the media.<sup>206</sup> The training center will give students the tools they need to excel in both broadcast and digital journalism and will promote diversity, equity, and inclusion in the industry.<sup>207</sup> The program hopes to create more opportunities for Mississippi students in the media industry.<sup>208</sup>

Another avenue to increase networking and mentoring opportunities is to provide targeted training to business students or other individuals interested in the operational side of media. Howard University, in collaboration with the National Association of Broadcasters Education Foundation (NABEF) offers a "Media Sales Institute."<sup>209</sup> NABEF selects twenty-seven graduating Howard seniors to participate in a twelve-day boot camp taught by executives in the field. Participants learn the knowledge and skills needed for a successful career in media sales, and many students receive employment offers upon completion of the program.

202. *2023 Communication & Journalism Degree Guide*, COLLEGE FACTUAL, <https://www.collegefactual.com/majors/communication-journalism-media/> (last visited Nov. 6, 2022).

203. See, e.g., Univ. of Missouri, Missouri Sch. of Journalism, *Course Offerings: Journ2000: Cross-Cultural Journalism*, <http://catalog.missouri.edu/courseofferings/journ/> (last visited Feb. 12, 2022) ("provides journalistic tools for the coverage of diverse ethnic, gender, ability and ideological groups inside and outside the United States. The critical role of diverse voices in a democracy will be discussed").

204. AEJMC, *National Journalism and Communication Association Honors Missouri School of Journalism with Diversity Award*, UNIV. OF MISSOURI, MISSOURI SCH. OF JOURNALISM (July 2, 2021), <https://journalism.missouri.edu/2021/07/national-journalism-and-communication-association-honors-missouri-school-of-journalism-with-diversity-award/>.

205. Jacob Gallant, *Gray launches media training center at WLBT to enhance industry diversity, train next generation of media leaders*, WLBT (Feb. 16, 2022, 9:33 AM), <https://www.wlbt.com/2022/02/16/gray-launches-media-training-center-wlbt-enhance-industry-diversity-train-next-generation-media-leaders/?fbclid=IwAR2GqJTWV1poITPkyTHKfQWgz71-oqMcLKPZwGd5cdBRl1qkarFV-NfAE4>.

206. *Id.*

207. *Id.*

208. *Id.*; See also Associated Press, *Media Training Program Will Focus on HBCU Students*, US NEWS & WORLD REP. (Feb. 19, 2022, 10:21 AM), <https://www.usnews.com/news/best-states/mississippi/articles/2022-02-19/media-training-program-will-focus-on-hbcu-students>.

209. *NABEF Media Sales Institute*, HOWARD UNIV., DEP'T OF MEDIA, JOURNALISM & FILM, <https://communications.howard.edu/index.php/programs/nabef-media-sales-institute/> (last visited Feb. 12, 2022).

Finally, in January 2021, the FCC instituted a promising new program for students and early career staff that offers paid internships at the FCC “to advance equitable opportunities for underrepresented undergraduate, graduate, and law school students.”<sup>210</sup> This program could be a wonderful entry into the communications field for students from underrepresented communities who might not have been able to work unpaid internships. The program also devotes resources to recruitment efforts at HBCUs and other minority-serving institutions, including outreach to diverse affinity groups.<sup>211</sup>

### 3. Provide More Financial Resources

The lack of funding may serve as an even greater barrier for women and minorities than the knowledge deficit. FCC Chair Jessica Rosenworcel acknowledged that “[f]ixing the lack of diversity in media ownership has to include access to resources and capital.”<sup>212</sup> The United States Government Accountability Office has also identified a lack of access to capital as a major barrier to entry for women and minorities.<sup>213</sup> Minorities and women often learn about potential sales well after others and consequently do not have “cash on hand,” which puts them at a disadvantage in buying stations.<sup>214</sup>

The Minority Tax Certificate, a tax-credit program enacted in 1978, attempted to level the playing field by awarding a tax certificate to any station that was sold to a “minority-controlled purchaser,” which would be enjoyed by both parties.<sup>215</sup> The program came as the final point in a policy aimed at increasing media ownership across racial lines.<sup>216</sup> The FCC ran this program from 1978 to 1995, “and [it] increased minority ownership in broadcast stations by more than 550 percent before its repeal.”<sup>217</sup>

The program worked because so much of broadcast ownership depends on access to capital and access to a station to buy. The program gave white owners of broadcast stations a reason to look outside their homogenous board room for talent. This not only provided equity of access to those individuals who qualified, but it fostered and

210. Press Release, FCC, Office of Former Chairman Pai, FCC Announces Intern and Early Career Staff Diversity Initiative (Sept. 10, 2021), <https://www.fcc.gov/document/fcc-announces-intern-and-early-career-staff-diversity-initiative>.

211. *Id.*

212. Press Release, Congressman G.K. Butterfield, *Congressman Butterfield Reintroduces Bill to Increase Minority Broadcast Station Ownership* (Aug 4, 2021), <https://butterfield.house.gov/media-center/press-releases/congressman-butterfield-reintroduces-bill-to-increase-minority-broadcast>.

213. Honig, *supra* note 22, at 97-98.

214. *Id.* at 97.

215. GARY MEYERS ET AL., ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, AND PROBLEMS 1231 (6th ed. 2016).

216. *Id.* at 1231.

217. *House Passes Media Diversity Act*, RADIO INK (July 21, 2021), <https://radioink.com/>. Congress shut the program down for alleged abuses despite widespread bipartisan support for it. *See Four Former FCC Chairs Back Tax Certificate Program to Boost Female, Minority Ownership*, INSIDE RADIO (July 20, 2021), [http://www.insideradio.com/free/four-former-fcc-chairs-back-tax-certificate-program-to-boost-female-minority-ownership/article\\_5e9fe44a-c91f-11eb-87de-8b5c10cda9b8.html](http://www.insideradio.com/free/four-former-fcc-chairs-back-tax-certificate-program-to-boost-female-minority-ownership/article_5e9fe44a-c91f-11eb-87de-8b5c10cda9b8.html).

facilitated relationships across socioeconomic lines.<sup>218</sup> White male executives were incentivized to both seek out men who looked different from them and to build relationships with these persons and their communities at a time when these relationships were nonexistent before.<sup>219</sup> Since its repeal, station owners of color have felt its absence and have been testifying in Congress for its reinstatement.<sup>220</sup>

Without the tax credit, no financial incentive exists to sell to women and minorities.<sup>221</sup> Diane Sutter likens the post-tax credit landscape to a game of monopoly: “Everybody sits at the board and they shuffle their hotels around. You know, I’ll trade you a Boardwalk and a Park Place for St. James Place. . . .”<sup>222</sup> Without these fiscal incentives, not only are station owners of color having their turn skipped, but they are also left out of the Monopoly game altogether. Advocates discuss that the problem is not discrimination against minorities and women per se, it’s discrimination against outsiders as a whole. Sutter cemented this notion when she succinctly stated, “[T]here’s no incentive to sell it to any of us, so why not just keep it in the family?”<sup>223</sup>

In an effort to provide needed resources, Congressman G.K. Butterfield and Congressman Steven Horsford reintroduced their expanding broadcast ownership opportunity legislation in August 2021.<sup>224</sup> The bill seeks to reestablish the Minority Tax Certificate program. In addition, the bill seeks to incentivize sales to minority purchasers and encourage investment in minority owned stations.<sup>225</sup>

In addition to the Minority Tax Certificate, David Honig suggests similar tax credits could be provided to individuals donating a station to a non-profit that trains minorities and women who want to enter the field.<sup>226</sup> This program would replace a tax deduction, which provides little incentive to low income producing stations.<sup>227</sup> His other ideas include getting banks (e.g., a syndicate of minority owned banks) to offer large lines of credit that economically disadvantaged businesses (SDBs) could utilize to buy entities. To help make the investments successful, the SDBs should identify co-investors to mentor the people running the purchased entities<sup>228</sup>

The FCC also established an incubator program for radio stations to match “established broadcasters with the commitment, resources, and experience needed to help a new or small broadcaster purchase and independently operate a radio station

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218. Michael Griffin, *How News Has Changed*, MACALESTER COLL. (Apr. 2017), <https://www.macalester.edu/news/2017/04/how-news-has-changed/>.

219. The tax-credit program only rewarded stations sold to racial minorities, not females. See David Oxenford, *Understanding the Minority Tax Certificate and its Potential for Promoting Diversity in Broadcast Ownership*, BROAD. L. BLOG (June 4, 2020), <https://www.broadcastlawblog.com/2020/06/articles/understanding-the-minority-tax-certificate-and-its-potential-for-promoting-diversity-in-broadcast-ownership>.

220. Sandoval, *supra* note 72, at 1-21.

221. *Id.* at 27.

222. *Id.* at 48.

223. *Id.*

224. See Expanding Broadcast Ownership Opportunities Act of 2021, *supra* note 84.

225. *Id.*

226. Honig, *supra* note 22, at 96

227. *Id.*

228. *Id.* at 98.

that it could not otherwise own or operate.<sup>229</sup> The established broadcasters commit to providing “training, financing, and access to resources” to the small entities and “receive a waiver of the applicable local radio ownership rules” in exchange for their efforts.<sup>230</sup> The FCC hoped the initiative would encourage “the entry of new and diverse voices.”<sup>231</sup> Upon its passing, Chairman Ajit Pai hoped that “it [would] help address the significant barriers, including lack of access to capital, that currently make it hard for many to join the broadcast industry.”<sup>232</sup>

The Third Circuit overturned the FCC’s incubator plan before it could be implemented, because the FCC failed to analyze the program’s impact on women and minority ownership.<sup>233</sup> While awaiting the Supreme Court’s opinion, Representative Greg Walden, Oregon Congressman and former radio station owner, tried to pass legislation in the 116th Congress, but it died without a vote.<sup>234</sup> After the Supreme Court reversed the Third Circuit’s decision, the FCC reinstated the changes adopted in the 2018 Incubator Order.<sup>235</sup>

Interestingly, when the FCC first passed the incubator program, then-Commissioner Roserworcel opposed it: She claimed it would not “make a material difference in the diversity of media ownership. Its scope is too narrow, its consequences too small, and its impact on markets too muddled.”<sup>236</sup> With the Supreme Court upholding the program and now with Rosenworcel as the FCC chair, it is yet to be seen if, when, and how the program will be rolled out.

The financial piece of the puzzle, however, seems larger than just providing resources to minorities and women. The business model for media, especially local media, is broken. Advertisement revenue does not generate enough money to pay the local reporters.<sup>237</sup> Progressive and out of the box thinking needs to occur to fix the model. One suggestion worthy of more study is expanding public media outlets, but this would require an investment by both federal and state governments to underwrite this public good. Such an investment will likely have the collateral effect of

229. PowerPoint Presentation, FCC, Overview of the FCC’s New Incubator Program for Radio Broadcasters (Oct. 30, 2018), [https://transition.fcc.gov/bureaus/mb/docs/iad/10-30-18\\_Incubator\\_Webinar\\_Slides.pdf](https://transition.fcc.gov/bureaus/mb/docs/iad/10-30-18_Incubator_Webinar_Slides.pdf). The MMTC originally proposed the incubator program decades earlier. Adam Jacobson, *MMTC Supports Broadcast Incubator Program Plan*, RADIO+TELEVISION BUS. REP. (Apr. 17, 2017), <https://www.rbr.com/mmhc-supports-broadcast-incubator-program-plan/>.

230. Terry Harper, *FCC Reinstates Media Ownership Rule Changes*, MISSOURI BROADCASTERS ASS’N (June 9, 2021), <https://www.mbaweb.org/2021/06/09/fcc-reinstates-media-ownership-rule-changes/>.

231. Press Release, FCC, Chairman Pai Proposes Broadcaster Incubator Program Requirements (July 11, 2018), <https://www.fcc.gov/document/chairman-pai-proposes-broadcaster-incubator-program-requirements>.

232. *Id.*

233. *Prometheus III*, 939 F.3d 567 (3rd Cir. 2019), *rev’d*, 121 S.Ct. 1150 (2021).

234. Broadcast Diversity in Leadership Act, H.R. 8154, 116th Cong. (2020).

235. Order Reinstating Prior Rule Changes Regarding Media Ownership Consistent with U.S. Supreme Court’s Decision, 36 F.C.C. Rcd. 9354 (2021), <https://www.fcc.gov/document/order-reinstate-prior-rule-changes-regarding-media-ownership>.

236. Statement, Jessica Rosenworcel, FCC Commissioner, Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services (Aug. 3, 2018), <https://www.fcc.gov/document/fcc-establishes-incubator-program-increase-broadcaster-diversity/rosenworcel-statement>.

237. Steven Waldman, *Report for America*, MEDIUM (June 9, 2015), <https://medium.com/@stevenwaldman/report-for-america-bc65a707c395>.

diversifying the owners, creators, and the content.<sup>238</sup> However, estimates exist that the cost to replace lost local media would be between \$265 million to \$1.6 million.<sup>239</sup>

State budgets likely cannot absorb this price tag. Report for America offers another creative approach.<sup>240</sup> Steven Waldman, a former journalist and senior advisor to the FCC chair, advocates for more philanthropic interventions similar to ProPublica, Chalkbeat, and the Marshall Project.<sup>241</sup> But he also recognizes that philanthropic dollars alone cannot help supply the labor lost from consolidations and media outlets shuttering their doors.<sup>242</sup> In addition, he fully acknowledges the complexity of the problem due to the high cost associated with labor-intensive investigative reporting and a business model that centers upon consumer demands, instead of providing “civilly important” content necessary for the health of a democracy.<sup>243</sup>

To address the labor shortage, Waldman proposes a program modeled after successful service corps, such as AmeriCorps.<sup>244</sup> Much like AmeriCorps placements, journalists must compete to earn a place at a host organization.<sup>245</sup> The program would be funded by donors and not the government.<sup>246</sup> As expected, many women and people of color make up the current journalists in the program.<sup>247</sup>

#### 4. Produce More Research and Transparent Reporting

Scholars will continue to debate whether the Supreme Court got *Prometheus* right or wrong regarding whether the agency has a duty to produce data, but everyone can agree that we need more reliable studies that explore the actual impact ownership rule changes have on minority and female ownership. Additional scholarship will require a better collection of data. Currently, FCC statistics only include the media outlets that report data, leading to incomplete and thus inaccurate data.<sup>248</sup>

238. PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? (Univ. of N. Carolina, Hussman Sch. of Journalism & Media 2021), [https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020\\_News\\_Deserts\\_and\\_Ghost\\_Newspapers.pdf](https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf).

239. Steve Waldman, *It's Time to Uproot American Newspapers from Hedge Funds and Replant Them in More Hospitable Ground*, POYNTER. (May 15, 2020), <https://www.poynter.org/business-work/2020/its-time-to-uproot-american-newspapers-from-hedge-funds-and-replant-them-into-more-hospitable-ground>.

240. *Id.*; ABERNATHY, *supra* note 238.

241. Waldman, *supra* note 237.

242. *Id.*

243. As the nation's demographics change, public demand for more diverse viewpoints will be as important as ever.

244. Waldman, *supra* note 237.

245. *Id.*

246. *Id.*

247. *Id.*

248. *The Abysmal State of Media Ownership Diversity in America*, LEADERSHIP CONF. ON CIV. & HUM. RTS.: MEDIA & TECH. RES. (Dec. 12, 2020), <https://civilrights.org/blog/the-abysmal-state-of-media-ownership-diversity-in-america/>. (“Though the most recent full power television data is complete, close to 20 percent of AM and FM stations consistently did not report ownership data from 2009 through 2017, and more than a third of low power TV stations did not provide ownership data during that same time period. This means that in those services, the FCC’s numbers are inaccurate because the commission calculates its percentages based only on the stations reporting, leaving out thousands of stations from the denominator. Thus, most of the FCC’s percentages understate the problem.”). *Id.*

In addition to incomplete data, the FCC fails to effectively manage the valuable data it does collect in an organized, accessible fashion, making it extremely difficult for the public to review the data or conduct studies using the data.<sup>249</sup> The unusable database makes creating beneficial longitudinal studies that explore links between the FCC's ownership rules and policies with minority and female ownership virtually impossible.<sup>250</sup> Although the FCC possesses years of archival data, including an FCC-commissioned Market Entry Barrier Study finding minority owners to be "more likely to tailor their news stories to minority community concerns," it places the burden on third parties to produce studies on female and minority ownership.<sup>251</sup> To make matters worse, when the agency receives insufficient data from the public, the FCC fails to use data already in its possession, violating its obligation under the APA to utilize obtainable data.<sup>252</sup> Moving forward, it is imperative that the FCC collects and organizes its data in a more usable manner. This change will allow them to make more data-driven decisions, effectively allowing for an increasingly transparent relationship with the public. It will also allow the public to utilize the data for valuable research purposes.

Representative Yvette Clark introduced H.R. 5836, the Enhancing DIVERSITY Data Act in November 2021 and it now sits with the House Energy and Commerce Committee.<sup>253</sup> This bill would require the FCC to compile an ownership database available to the public that would include information on:

- (i) Ownership data with respect to any licensee;
- (ii) Ownership interests of any licensee;
- (iii) Industry-wide statistics;
- (iv) Statistics for particular geographic regions; and
- (v) Statistics for particular licensee classifications.<sup>254</sup>

Not only is the data often unavailable and flawed, often it can be incredibly misleading. For example, the FCC has never had a reported case of discrimination in its Equal Employment Opportunity practices since they were enacted in 1969. The FCC concedes that this is akin to evidence that there is an error in the reporting practices.<sup>255</sup>

249. See generally Brief for Catherine Sandoval et al., as Amici Curiae Supporting Respondents, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

250. *Id.*

251. Christine M. Bach et al, *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership*, MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 292 (Philip M. Napoli ed., 2007). See also Ivy Group, LLC, *Whose Spectrum Is It Anyway: Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present Prepared for the Office of the General Counsel*, FEDERAL COMMUNICATIONS COMMISSION (Dec.2000), <https://transition.fcc.gov/opportunity/meb%5Fstudy/historical%5Fstudy.pdf>.

252. Brief for Catherine Sandoval et al., as Amici Curiae Supporting Respondents, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

253. See Enhancing DIVERSITY Data Act, H.R.5836, 117th Cong. (2021).

254. H.R. 5836 § 3(a)(B).

255. Letter from David Honig, President Emeritus and Senior Advisor Multicultural Media, Telecom and Internet Council to Federal Communications Commission Chairman & Commissioners (Dec.11, 2019), <https://docs.house.gov/meetings/IF/IF16/20200115/110373/HHRG-116-IF16-20200115-SD010.pdf>; Letter from Multicultural Media, Telecom and Internet Council to Rosemary Harold, Esq., Chief,



## CONCLUSION

People of color and women continue to make progress in various fields and in the media industry. The lack of progress as broadcast owners remains an outlier and its proliferation unacceptable. According to the United States Census Bureau's annual business survey released in October 2021 (covering 2019 data), 18.7% (1.1 million) businesses were minority-owned and 20.9% (1.2 million) businesses were owned by women.<sup>256</sup> These statistics sharply contrast with the minority and women broadcast ownership percentages.<sup>257</sup>

Although the constitutional restraints on race-conscious measures makes fixing this issue complicated, that cannot be an excuse for inaction by the FCC. As the Third Circuit explained to the FCC, “[s]tating that the task is difficult in light of *Adarand*” does not allow the agency to abandon its efforts to increase minority ownership.<sup>258</sup> It will take both governmental and industry efforts to move the needle forward and no silver bullet exists. However, the initiatives collected and discussed in this article, and others to come from the task forces currently studying the issues, provide a possible path forward. We must stay committed to fixing this problem, because the lack of diversity of media ownership contributes to the lack of diversity in the news which promotes polarization and undermines the pluralistic underpinnings of a truly democratic society. The strength of our democracy will be judged, in part, by allowing exposure to various voices, including ones often who are voiceless and enabling robust dialogues between competing viewpoints.<sup>259</sup>

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Enforcement Bureau, Federal Communications Commission (Sept. 3, 2019), <https://docs.house.gov/meetings/IF/IF16/20200115/110373/HHRG-116-IF16-20200115-SD009.pdf>.

256. Press Release, U. S. Census Bureau, Census Bureau Releases New Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses (Oct. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/characteristics-of-employer-businesses.html>.

257. See FCC, Ownership Reports for Commercial and Noncommercial Broadcast Stations, <https://www.fcc.gov/media/ownership-report-commercial-broadcast-station-form-323>; Fourth Report on Ownership of Broadcast Stations (Feb. 2020), <https://www.fcc.gov/document/media-bureau-releases-fourth-report-ownership-broadcast-stations>; Fifth Report on Ownership of Broadcast Stations (Sept. 2021), <https://www.fcc.gov/document/commission-releases-fifth-report-ownership-broadcast-stations>.

258. *Prometheus II*, 652 F.3d at 471 n.42.

259. See Sandoval, *supra* note 72, at 1-21.