

Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act

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I. INTRODUCTION

In 2016 the U.S. Court of Appeals for the Third Circuit, in a decision that has come to be known as *Prometheus III*,¹ expressed frustration with the FCC's failure to comply with the terms of two previous remands from the same court in cases known as *Prometheus I*² and *Prometheus II*.³ After cataloguing what it saw as the shortcomings in the FCC's most recent actions, the court appeared resigned to still more litigation over the FCC's broadcast ownership rules. The last paragraph of the opinion of the court noted:

This is our third go-round with the [FCC]'s broadcast ownership rules and diversity initiatives. Rarely does a trilogy benefit from a sequel. To that end, we are hopeful that our decision here brings this saga to its conclusion. However, we are also mindful of the likelihood of further litigation.⁴

The court's prediction was correct; its decision did not bring the long litigation saga to a conclusion. In November 2017 the FCC, with a new Republican majority in the wake of the election of Donald J. Trump as president, abolished several rules limiting ownership of radio and television stations, while relaxing other restrictions on ownership.⁵ In early 2018, *Prometheus Radio Project* returned to the Third Circuit with yet another challenge.⁶ The journey to a decision that will no doubt be known as *Prometheus IV* began.

To borrow a phrase from baseball immortal Yogi Berra, it was déjà vu all over again.⁷

The inconclusive nature of the litigation means that fundamental issues underlying media ownership policy remain unsettled. What is the relationship between economic competition and diversity of broadcast content? Does greater competition among station owners lead to greater diversity of news and entertainment content, or not? As local ownership of radio and television stations becomes increasingly rare, what is the relationship between economic competition and locally-produced content? Since the enactment of the Telecommunications Act of 1996,⁸ and especially since *Prometheus Radio Project* filed its initial challenge to relaxed restrictions on broadcast

1. *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*).

2. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (*Prometheus I*).

3. *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*).

4. *Prometheus III*, 824 F.3d at 60.

5. See generally, FCC Modernizes Broadcast Ownership Rules, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd 9802 (11) (2017) [hereinafter *MBOR Order*].

6. Petition for Review of an Order of the FCC, FCC No. 17-156, 32 F.C.C.R. 9802 (2017). *Prometheus Radio Project v. FCC*, No. 18-1092 (3d Cir. Jan. 16, 2018).

7. ALLEN BARRA, *YOGI BERRA: ETERNAL YANKEE* xxxiv (2009).

8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

ownership in 2003,⁹ questions about competition and its relationship to the concepts of diversity and localism have been at the heart of discussion and debate over broadcast ownership policy in the United States. Meanwhile, as policymakers, interest groups, and judges wrestle with these questions, the economic and technological environment for American broadcasting is in a state of constant change.

The result of all of this uncertainty is that Prometheus, the FCC, and the U.S. Court of Appeals for the Third Circuit have been trapped in a maze of seemingly endless litigation since 2003. They are like the characters in Jean Paul Sartre's famous play *No Exit*, condemned to be with each other for all eternity in a locked room.¹⁰ The repetitive pattern of the cases—rule changes from the FCC followed by challenges to the changes from Prometheus followed by a remand back to the FCC from the Third Circuit (rinse and repeat)—evokes not only the well-known American movie *Groundhog Day*¹¹ but also popular culture's pithy definition of insanity: Doing the same thing over and over, but expecting a different result.¹²

There has to be a better way. And, as this Article shows, there is a better way.

American law does not look kindly upon mazes of endless litigation.¹³ This Article proposes a way for the FCC to escape the legal labyrinth without sacrificing its long-standing policy goals of competition, localism, and diversity.¹⁴ The FCC should shift its regulatory focus from issues of media ownership to issues of media production—specifically, to local media production. Such a shift would acknowledge the reality that the modern media environment by itself, with no need for intervention by the FCC, provides a

9. Petition for Review, *Prometheus Radio Project v. FCC*, 2003 WL 22340470 (2003).

10. JEAN-PAUL SARTRE, *NO EXIT* (Paul Bowles trans., Samuel French, Inc., 1958) (1945).

11. *GROUNDHOG DAY* (Columbia Pictures 1993) features a TV weatherman who is doomed to endlessly relive Groundhog Day (Feb. 2nd), a minor holiday that he finds pointless and aggravating, until he reevaluates his life priorities. After the release of the film, the phrase “groundhog day” became common in American vernacular. It refers to a situation in which events are, or appear to be, continually repeated. See OXFORD LIVING DICTIONARY (2018), https://en.oxforddictionaries.com/definition/groundhog_day [https://perma.cc/7ZP5-PHJA] (last visited July 21, 2018).

12. Although the quote is often attributed to Albert Einstein, its true source is unknown. ALBERT EINSTEIN, *THE ULTIMATE QUOTABLE EINSTEIN* 474 (ALICE CALAPRICE ED., 2010).

13. Concerns about “mazes of endless litigation” have a long history in American law. See, e.g., *Fitler v. Fossard*, 7 Pa. 540, 542 (1848); ELWOOD MEAD, *REPORT OF IRRIGATION INVESTIGATIONS IN CALIFORNIA* 182 (1901); Chris Hamby, *Coal Industry's Go-To Law Firm Withheld Evidence of Black Lung, at Expense of Sick Miners*, THE CTR. FOR PUB. INTEGRITY (Oct. 29, 2013), <https://www.publicintegrity.org/2013/10/29/13585/coal-industrys-go-law-firm-withheld-evidence-black-lung-expense-sick-miners> [https://perma.cc/BD6K-EQLU] (last updated Aug. 6, 2014, 5:53 PM).

14. In *NBC v. United States*, 319 U.S. 190 (1943), the Court accepted the FCC's determination that the principles of competition and localism fall within the scope of the public interest. In *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978), the Court held that the public interest standard included the goal of the “widest possible dissemination of information from diverse and antagonistic sources” (quoting *AP v. United States*, 326 U.S. 1, 20 (1945)).

high level of economic competition among owners of broadcast stations across the United States, as well as a vast diversity of viewpoints about national and international issues. The unregulated marketplace falls short, however, in providing local content to citizens of many American communities.¹⁵ The proposal this Article presents accepts the economic and technological environment within which radio and television stations exist, while being readily adaptable to future changes in that environment.¹⁶ The proposal would apply only in situations when market forces have failed to supply adequate competition, diversity, and localism.

Over the past several decades, the FCC has come to rely on theories that assume that economic competition among media outlets is a meaningful proxy for diversity of content and localism. Research has failed to validate such theories, not only leaving many of the FCC's media ownership decisions resting on an empirically unstable foundation that fails to satisfy the judges of the Third Circuit, but also ignoring the fact that the aspect of the media most important to citizens and to democracy is the content, not the ownership.¹⁷

15. STEVEN WALDMAN, *THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 5* (2011), https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf [<https://perma.cc/EWU6-4E27>].

16. As of the end of July 2018, uncertainty reigned in a number of areas relating to economic competition in American broadcasting. A challenge to the FCC's decision to reinstate the UHF "discount" that allows companies which operate UHF television stations to count only half of the households in the stations' coverage areas for purposes of calculating the proportion of American homes reached by a company's stations was under consideration by the Court of Appeals for the D.C. Circuit. *See* *Free Press v. FCC*, No. 17-1129 (D.C. Cir. 2017). The UHF discount was central to Sinclair Broadcast Group's proposed \$3.9 billion purchase of Tribune Media Co.'s forty-two television stations in thirty-three markets. *See* Sinclair & Tribune, MB Docket 17-179, <https://www.fcc.gov/transaction/sinclair-tribune> [<https://perma.cc/3WG8-73C3>] (last visited July 21, 2018). Without the UHF discount, Sinclair's purchase of Tribune's stations would enable Sinclair to reach 72% of American households, far exceeding the 39% ownership cap set by Congress. *See* David Vance, *Common Cause Joins Public Knowledge in Requesting FCC Delay Review of Sinclair-Tribune Merger Pending D.C. Circuit Case*, COMMON CAUSE (June 28, 2018), <https://www.commoncause.org/media/common-cause-joins-public-knowledge-in-requesting-fcc-delay-review-of-sinclair-tribune-merger-pending-d-c-circuit-case/> [<https://perma.cc/YKJ5-797X>]. As of late July 2018, the fate of the Sinclair-Tribune deal was uncertain. *See* John D. McKinnon et al., *FCC Moves to Prevent Sinclair-Tribune Deal*, WALL ST. J. (July 17, 2018) at B1, <https://www.wsj.com/articles/fcc-chairman-has-serious-concerns-with-sinclair-tribune-deal-1531755740> [<https://perma.cc/29R5-TQFD>]; Edmund Lee, *Sinclair Deal Is in Doubt as Tribune Reconsiders*, N.Y. TIMES (July 20, 2018) at B6, <https://www.nytimes.com/2018/07/19/business/media/sinclair-tribune-fcc.html> [<https://perma.cc/2K33-PLSC>]. Meanwhile, the National Association of Broadcasters asked the FCC to relax rules about the number of radio station one company could own in a local market. *See* David Oxenford, *NAB Asks for Changes in FCC Local Radio Ownership Rules – What's Next?*, BROAD. L. BLOG (June 18, 2018), <https://www.broadcastlawblog.com/2018/06/articles/nab-asks-for-changes-in-fcc-local-radio-ownership-rules-whats-next/> [<https://perma.cc/6D7U-XY7R>].

17. *See* David Pritchard et al., *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy*, 13 COMM. L. & POL'Y 1, 27 (2008) ("It is important to remember that the vital social, political[,] and cultural functions of the media ultimately flow from their content, not from their ownership structure.").

Section II of this Article documents the strong emphasis on locally-produced media content during the first several decades of broadcast regulation in the United States. Section III outlines how a regulatory concern about the structure of media ownership, in individual communities as well as nationally, supplanted the previous focus on content. Section IV examines the relationship between patterns of media ownership and the FCC's principal content goal, diversity. Section V provides detail about the litigation over media ownership rules brought about by the enactment of the Telecommunications Act of 1996. Section VI presents a proposal for a new rule that will survive legal challenge and put an end to the FCC's long-running litigation with Prometheus.

II. THE INITIAL REGULATORY FOCUS ON LOCAL CONTENT

At the time of the passage of the Radio Act of 1927¹⁸ and for several decades thereafter, American broadcasting's regulators not only granted licenses and allocated frequencies but offered broadcasters frequent guidance on the kind of content that would serve the public interest.¹⁹ Cities were thought of as communities rather than media markets. Individuals were conceptualized as citizens in a democracy rather than as consumers in a free-market economy. Broadcasters were expected to use the limited space on public airwaves not in their own private interest, but rather as trustees with licenses to serve the public interest, as a 1929 decision by the Federal Radio Commission (the forerunner of the FCC) demonstrated.

The case, *Great Lakes Broadcasting Co. v. FRC*,²⁰ involved three radio stations in the Chicago area that were in conflict over frequencies and hours of operation assigned by the FRC. To evaluate their claims and any similar claims that other license holders might make in the future, the FCC developed a set of criteria to guide stations in meeting their public interest obligations.²¹ The criteria encouraged stations to use local talent for locally-produced original programming, and to air informational programming such as news, weather, and religious programs, among other things.²² Despite these guidelines, which stressed serving local communities with locally originated

18. Radio Act of 1927, 47 U.S.C. § 81 (2012).

19. JAMES BAUGHMAN, *TELEVISION'S GUARDIANS: THE FCC AND THE POLITICS OF PROGRAMMING 1958-1967* (1985). See also NEWTON N. MINOW, *EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* (1964); Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Thomas W. Hazlett & David W. Sosa, *Chilling the Internet: Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV. 35 (1997).

20. *Great Lakes Broad. Co. v. Fed. Radio Comm'n*, 3 F.R.C. ANN. REP. 32 (1929), *aff'd in part and rev'd in part*, 37 F.2d 993 (D.C. Cir. 1930), *cert. denied*, 281 U.S. 706 (1930).

21. Public Service Responsibility of Broadcast Licensees, *Report*, FCC 95462 FCC (1946).

22. *Id.*; see also Victor Pickard, *The Battle Over the FCC Blue Book: Determining the Role of Broadcast Media in a Democratic Society, 1945-8*, 33 MEDIA, CULTURE & SOC'Y 2 (2011).

programming, in the 1930s many stations turned away from a local approach and became increasingly dependent on national radio networks for programming.²³ The increase in network control was coupled with an agreement among the major radio networks and newspapers to limit the production of radio news, further reducing local content.²⁴ What little local news and public affairs content radio stations did air often took the form of one-sided commentary that reflected only the opinions and interests of the station owners.²⁵ Because the FCC deemed such content not to serve the public interest, in 1940 it essentially prohibited editorializing by radio stations.²⁶ The FCC's decision stated, "Truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably."²⁷

In 1941, the FCC issued its *Report on Chain Broadcasting*, adopting a set of regulations that limited networks' control over stations with which they had contracts.²⁸ One of the practices prohibited by the regulations was unlimited "network option time," which enabled networks to require stations to air network programming up to 24 hours a day.²⁹ The FCC sharply criticized the practice because it reduced the amount of local content stations produced:

A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.³⁰

The FCC determined that unlimited network control over local station affiliates contravened the public interest.³¹ The NBC network challenged the regulations, arguing that the FCC was authorized only to consider technical matters such as frequency allocation and hours of operation.³² The Supreme Court upheld the FCC's position, saying that the congressional delegation of authority to the FCC required the agency not only to keep the pathways of

23. BRUCE LENTHALL, *RADIO'S AMERICA: THE GREAT DEPRESSION AND THE RISE OF MODERN MASS CULTURE* 12 (2007).

24. See George E. Lott, Jr., *The Press-Radio War of the 1930s*, 14 J. BROAD. 275, 281 (1970).

25. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941).

26. *Id.*

27. *Id.*

28. *Chain Broadcasting, Report*, FCC 37-5060 (1941).

29. *Id.*

30. *Id.* at para. 63.

31. *Id.* at para. 30-45.

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

communication open, but also placed a burden upon the FCC to consider the content of what was broadcast.³³

The Supreme Court's decision strengthened the FCC's confidence in its authority to regulate broadcast content. In response to requests from broadcasters for clarity on how to apply the public interest standard, in 1946 the FCC released the "Blue Book," a set of guidelines for stations to follow to meet their public interest obligations.³⁴ The Blue Book favored the production of live local programs and programs devoted to the discussion of local public issues.³⁵ The guidelines also emphasized the desirability of airing unsponsored programs and avoiding excessive advertising.³⁶ Broadcasters were opposed to several of the provisions in the Blue Book, especially its limitations on advertising and editorializing.³⁷

The FCC responded to the broadcasters in 1949, declaring that "one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day."³⁸ The FCC stated that stations should "devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station."³⁹ In addition, the FCC adopted what it called the Fairness Doctrine, which allowed editorializing by broadcasters.⁴⁰ The Fairness Doctrine consisted of two obligations. The first was that a broadcast licensee had a duty to cover issues of public importance, including "important controversial issues of interest in the community served by the licensees."⁴¹ The second required that a licensee who presented one side of a controversial issue of public importance also had to present contrasting views.⁴² The FCC expanded the doctrine in 1967 by adding rules requiring radio and television stations to offer free air time to people who wished to respond to personal attacks or political editorials that a station had aired.⁴³

In the mid-1960s, a small radio station in Pennsylvania challenged the FCC's authority to enforce the Fairness Doctrine. The station argued that the doctrine abridged its First Amendment rights to freedom of speech and

33. *Id.* at 215–16.

34. Public Service Responsibility of Broadcast Licensees, 11 FCC Rcd 1458 (1946).

35. *Id.* at 36–39.

36. *Id.* at 43–47.

37. VICTOR PICKARD, *AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* 71–75 (2015).

38. Editorializing by Broadcast Licensees, *Report*, 13 FCC Rcd 1246, 1249 (1949).

39. *Id.*

40. *Id.*; see also General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 146 (1985).

41. See General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 146 (1985).

42. *Id.*

43. Personal Attacks; Political Editorials, 32 Fed. Reg. 10,303 (1967).

freedom of the press.⁴⁴ In 1969 the Supreme Court unanimously disagreed with the station's argument, holding that the free speech rights of broadcasters were secondary to the rights of listeners: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁴⁵

III. MEDIA OWNERSHIP AS A FOCUS OF REGULATION

Shortly after the decision upholding the Fairness Doctrine, the FCC's interest in content regulation ebbed as it increasingly came to use the level of economic competition in a media market to assess the level of viewpoint diversity and localism broadcast by stations in the market. In 1975, the FCC adopted a so-called "structural" regulation that prohibited future local newspaper/broadcast cross-ownerships.⁴⁶ On the surface, the newspaper/broadcast cross-ownership rule did no more than prohibit a certain kind of media ownership. The FCC's explicit justification for the rule, however, was not to increase economic competition in and of itself, but rather to foster viewpoint diversity in communities or, as the FCC was increasingly calling them, markets.⁴⁷ Media companies mounted a legal challenge to the newspaper/broadcast cross-ownership rule, noting that many studies showed considerable diversity of viewpoints within the content of commonly-owned newspapers and broadcasting stations.⁴⁸ Nonetheless, the Supreme Court once again upheld the FCC.⁴⁹ The Court said, "Notwithstanding the inconclusiveness of the rulemaking record, the [FCC] acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."⁵⁰

The Supreme Court's validation of the FCC's use of diversity of ownership—in other words, economic competition—as a way to assess viewpoint diversity came at the beginning of an unprecedented era of deregulation in American history.⁵¹ Henceforth, the FCC would ease, if not outright eliminate, many of its content regulations in the belief that structural regulations that encouraged greater economic competition among media

44. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

45. *Id.*

46. Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 F.C.C. 2d 1046, 1085 (1975). Economic regulation is often called "structural" because it attempts to influence the structure of media markets on the theory that market structure influences media content. Structural factors that political economists believe influence media content include the size of a media company, the amount of direct and indirect competition it has, its level of horizontal and vertical integration, and the extent of the company's reliance on advertising. See ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999).

47. Newspaper-cross Ownership Ban, FCC 18110, Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 F.C.C. 2d 1046 (1975).

48. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 794 (1978).

49. *Id.*

50. *Id.* at 796.

51. See, e.g., Sam Peltzman et al., *The Economic Theory of Regulation after a Decade of Deregulation*, 1989 BROOKINGS 1 (1989).

owners would lead to content that featured a broader diversity of viewpoints and a stronger focus on stations' local communities. In 1981 newly-elected President Ronald Reagan appointed Mark Fowler to chair the FCC.⁵² Fowler openly favored laissez-faire economics over regulations on broadcast content.⁵³ During Fowler's tenure, the FCC reversed its long-standing "audience first" commitment, stating that regulations on content designed to promote viewpoint diversity limited the free speech of broadcasters, and in turn, reduced the quantity of news and public affairs programming.⁵⁴ Fowler's FCC not only allowed companies to own more stations than ever before, but it also limited the enforcement of content regulations such as the Fairness Doctrine,⁵⁵ which then it finally abolished.⁵⁶ Although the FCC has eliminated most of the content regulations that it had originated, it continues to enforce federal statutes that require or prohibit certain kinds of content.⁵⁷ For example, the FCC adopts and administers rules about candidate appearances and advertising on radio and television,⁵⁸ about indecency in broadcasting,⁵⁹ and about the congressional mandate that television stations serve the educational and informational needs of children.⁶⁰

The FCC's gradual easing of limits on the number of stations individual companies could own was superseded by the Telecommunications Act of 1996, which directed the FCC to allow individual corporations to own large

52. *Commissioners from 1934 to Present*, FCC, <https://www.fcc.gov/general/commissioners-1934-present> [<https://perma.cc/N6HA-SK8A>] (last visited Mar. 10, 2019).

53. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1981).

54. *Id.*

55. Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557 (2001).

56. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

57. 18 U.S.C. § 1464 (indecency regulation); 47 U.S.C. § 303a (Children's Television).

58. 47 U.S.C. §§ 312(a)(7), 315 & 317. *See also* FCC, *Statutes and Rules on Candidate Appearances & Advertising* (Dec. 10, 2015), <https://www.fcc.gov/media/policy/statutes-and-rules-candidate-appearances-advertising> [<https://perma.cc/XV9U-BJD4>].

59. *Broadcasting Obscene Language*, 18 U.S.C. § 1464. ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.") *See also* FCC, *Consumer Guide: Obscene, Indecent and Profane Broadcasts* (Sept. 13, 2017), <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts> [<https://perma.cc/52E3-94RX>].

60. *Children's Television Act of 1990*, 47 U.S.C. §§ 303(a)-(b) (2006). *See also* *Children's Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rulemaking*, 19 F.C.C.R. 22943, para. 2 (2004). In June 2018, the FCC opened a rulemaking procedure to consider easing the requirement that stations broadcast at least three hours every week of programming that serves the educational and informational needs of children. *See* *Modernization of Media Regulation Initiative: Children's Television Programming Rules, Notice of Proposed Rulemaking*, MB Docket Nos. 17-105 & 18-202 (2018), <https://docs.fcc.gov/public/attachments/DOC-351864A1.pdf> [<https://perma.cc/E2EZ-3LLM>].

numbers of radio and television stations nationwide.⁶¹ A firm could own as many stations as it wanted, subject only to limits on the number of radio stations in any individual market (up to eight radio stations in a market, depending on the number of other commercial stations in the community⁶²) and on the percentage of the national television audience that a company's television stations could reach (the law initially set the upper limit at 35% of the national audience; the limit has since been increased to 39%⁶³). The effect of these changes was a shift in the focus of American broadcasting from a business model based on locally-produced content to a business model based on national production.

61. Telecommunications Act of 1996, Pub. L. No. 104-104 (202(b) contains the radio limits: "(b) LOCAL RADIO DIVERSITY- (1) APPLICABLE CAPS- The [FCC] shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that-- (A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market." Section 202(c) contains the television limits: "(c) TELEVISION OWNERSHIP LIMITATIONS- (1) NATIONAL OWNERSHIP LIMITATIONS- The [FCC] shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)- (A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and (B) by increasing the national audience reach limitation for television stations to 35 percent. (2) LOCAL OWNERSHIP LIMITATIONS- The [FCC] shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market. (d) RELAXATION OF ONE-TO-A-MARKET- With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the [FCC] shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity. (e) DUAL NETWORK CHANGES- The [FCC] shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of-- (1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are 'networks' as defined in section 73.3613(a)(1) of the [FCC] regulations (47 C.F.R. 73.3613(a)(1)); or (2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service)").

62. 47 C.F.R. § 73.3555(a)(1)(i) (2016).

63. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629(1) (2004).

The Telecommunications Act required the FCC to review its ownership rules every two years (since increased to every four years⁶⁴) to “determine whether any of such rules are necessary in the public interest as the result of competition.”⁶⁵ The implication was that the competition among media conglomerates enabled by the act would eliminate the need for at least some of the rules that placed limits on media ownership.

The requirement of frequent reviews of ownership rules placed the FCC in a difficult position. On the one hand, the Communication Act of 1934 required the FCC to ensure that stations served the public interest; numerous court decisions had upheld its authority to take bold measures, including requiring stations to air a variety of viewpoints and placing limits on media ownership, to do so.⁶⁶ On the other hand, the Telecommunications Act of 1996 seemed to equate the public interest with minimal limits on media ownership. The FCC reacted by adopting a regulatory approach that tried to balance its three policy objectives of competition, localism, and diversity simultaneously.⁶⁷ Although the agency clearly preferred regulating ownership rather than regulating content directly, it continued to pay lip service to the idea of localism through a lengthy, though ultimately fruitless, rulemaking proceeding,⁶⁸ while at the same time claiming that content diversity was the most important of the three policy goals.⁶⁹

In June 2003, responding to the Telecommunications Act’s requirement of regular reviews of its ownership rules, the FCC released a revised set of rules that relaxed media ownership limits.⁷⁰ Prometheus Radio Project and others challenged the less stringent limits.⁷¹ In June 2004 the U.S. Court of Appeals for the Third Circuit blocked implementation of most of the rules

64. *Id.* § 629(3). In 2004, Congress revised the then biennial review requirement to require such reviews quadrennially. Congress also eliminated the national television multiple ownership rule from the quadrennial review requirement. 2004 Consolidated Appropriations Act, 118 Stat. at 3. 2006 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, 23 F.C.C.R. 2010.

65. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h).

66. *NBC v. United States*, 319 U.S. 190, 225-226 (1943); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 395 (1969).

67. 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Red 13620 (2003).

68. Broadcast Localism, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 F.C.C.R. 1324 (2008) (No action was taken, and the proceeding was concluded).

69. See, e.g., 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620, para. 19 (2003) [hereinafter *2002 Biennial Regulatory Review*] (“a diverse and robust marketplace of ideas is the foundation of our democracy”).

70. *Id.* at para. 501.

71. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 388-389 (3d Cir. 2004) (Prometheus I).

because the FCC had failed to provide an adequate basis for its decisions, and the matter was remanded to the FCC.⁷²

The judges of the Third Circuit could not have imagined that their court would still be dealing with the same issues and the same litigants more than fourteen years later.

IV. A FLAWED UNDERSTANDING OF DIVERSITY

Since the 1940s, the FCC has regularly linked the public interest standard that provides the foundation for broadcast regulation in the United States⁷³ with the idea that broadcast news and information about politics and public affairs is vital to representative democracy.⁷⁴ Unfortunately, neither the Communications Act nor the FCC has defined the concept of “public interest” in any concrete way, leading to challenges that the standard is unconstitutionally vague. Although the Supreme Court has rejected such challenges,⁷⁵ the FCC has come to rely on three policy goals less abstract than “public interest” to guide regulation of broadcasting—competition, diversity, and localism.⁷⁶ The FCC explicitly renewed its commitment to those goals in its November 2017 Report and Order.⁷⁷

The FCC attempts to foster the goal of competition through restrictions on the proportion of the national television audience that any one owner’s stations can reach, as well as by limits on the number of television and radio stations a single entity may own in individual media markets.⁷⁸ The economic competition that results from the FCC’s ownership rules is presumed to lead to content diversity both nationally and locally, as well as greater localism.⁷⁹

Although the FCC has long considered diversity to be an important policy goal, the concept applies so broadly as to be meaningless. A widely cited article published in 1999 identified eight different definitions of diversity used somewhat interchangeably by media policymakers.⁸⁰ One

72. *Id.* at 435.

73. Communications Act of 1934, 47 U.S.C. §§ 151–1473 (2016). On the history of the public interest standard in regulation of broadcasting in the United States, see Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605 (1998); Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813 (2008); Drew Simshaw, *Survival of the Standard: Today’s Public Interest Requirement in Television Broadcasting and the Return to Regulation*, 64 FED. COMM. L.J. 401 (2012).

74. *E.g.*, *The Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340; *Public Service Responsibilities of Broadcast Licensees*, 11 F.C.C. 1458.

75. *E.g.*, *NBC v. United States*, 319 U.S. 190, 225–226 (1943); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 395 (1969).

76. *MBOR Order*, 32 FCC Rcd at para. 15.

77. *Id.*

78. *Reconsideration and Notice of Proposed Rulemaking, Order*, 32 FCC Rcd 9802, para. 1 (2017).

79. *Id.*

80. Philip M. Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM. 7 (1999). See also Benjamin W. Cramer, *Unasked Questions and Unquestioned Answers: The Perils of Assuming Diversity in Modern Telecommunications Policy*, 17 COMM. L. & POL’Y 265 (2012).

scholar expressed concern about “the fetishization of diversity as a policy principle.”⁸¹ Another noted that the FCC has “usually soft-pedaled the conceptual difficulties associated with diversity, sticking to generic praise of the policy.”⁸² Still another scholar concluded that “no one has been able to develop a working definition of diversity—not the content providers, not the policymakers, not the scholars, and not the courts.”⁸³ Even the D.C. Court of Appeals observed that “[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.”⁸⁴

When policymakers talk about means of regulation to foster content diversity, they frequently use an economic metaphor—the “marketplace of ideas.”⁸⁵ Despite the fact that judges and policymakers fail to define the marketplace-of-ideas concept clearly or use it in a consistent fashion,⁸⁶ the metaphor has an undeniable rhetorical power that leads to an antitrust model of regulating the marketplace. Such a model confuses the social goal of diverse media content with the economic goal of fair market competition, creating “an incoherent regulatory standard ripe for judicial reversal.”⁸⁷

The FCC’s whole-hearted embrace of the marketplace-of-ideas metaphor led it to view regulation for viewpoint diversity through the lens of antitrust logic; more competition among owners would inevitably produce a greater diversity of viewpoints, ensuring competition in the marketplace of ideas. Economic theory describes a well-performing market as one in which the output of a product approaches the output that would be attained under ideal conditions of competition.⁸⁸ Monopoly is undesirable because it leads to “suboptimal output.”⁸⁹ However, the normative standards of economic markets “simply do not work well with the production of viewpoints,” one scholar noted.⁹⁰ He added: It seems absurd to talk about a “well-performing”

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

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

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

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

85. The marketplace of ideas metaphor was introduced into American jurisprudence in a famous dissent by Justice Oliver Wendell Holmes, who wrote “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

86. For an overview of how the Supreme Court of the United States has used the marketplace of ideas metaphor see W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 *JOURNALISM & MASS COMM. Q.* 40 (1996). On the FCC’s use of the metaphor, see Philip M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 *J. COMM.* 151 (1999).

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

88. R. JAYARAM & NAMITA R. KOTWANI, *INDUSTRIAL ECONOMICS AND TELECOMMUNICATION REGULATIONS* 53-55 (1st ed. 2012).

89. *Id.* at 1563.

90. *Id.*

marketplace of ideas. While more viewpoints are perhaps better than fewer, the market's efficiency standard does not tell you when there are "enough" viewpoints, given that both their cost of production and utility is obscure.⁹¹

Perhaps because media scholars' understanding of media content is grounded less in abstract theory and more in empirical studies of media production and consumption, they readily recognize the shortcomings of economic theory as a means of understanding media behavior. As Yan and Napoli wrote, "Economics alone . . . is not sufficient for explaining the behavior of media organizations, which operate simultaneously as both economic and political/cultural institutions."⁹²

The FCC has said that the principal goal of its ownership rules is to foster diversity of content.⁹³ It is far from clear, however, that diversity of ownership produces diversity of content either locally or nationally. In fact, concentration of ownership in a media market may produce more programming diversity and more viewpoint diversity in a market than would a greater number of owners. For many, such a statement is rank heresy. But it fits the evidence quite well.

The argument that fewer owners may actually produce *more* diversity—more programming formats, more viewpoints—has a long history. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit outlined the argument in a 1992 decision; his reasoning merits quotation at length:

91. *Id.* at 1563-64.

92. Michael Zhaoxu Yan & Philip M. Napoli, *Market Competition, Station Ownership, and Local Public Affairs Programming on Broadcast Television*, 56 J. COMM. 795, 799 (2006).

93. See, e.g., Review of the [FCC]'s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Rulemaking*, 17 F.C.C.R. 18503, 18518 (2002).

It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity. If all the television channels in a particular market were owned by a single firm, its optimal programming strategy would be to put on a sufficiently varied menu of programs in each time slot to appeal to every substantial group of potential television viewers in the market, not just the largest group. For that would be the strategy that maximized the size of the station's audience. Suppose, as a simple example, that there were only two television broadcast frequencies (and no cable television), and that 90 percent of the viewers in the market wanted to watch comedy from 7 to 8 p.m. and 10 percent wanted to watch ballet. The monopolist would broadcast comedy over one frequency and ballet over the other, and thus gain 100 percent of the potential audience. If the frequencies were licensed to two competing firms, each firm would broadcast comedy in the 7 to 8 p.m. time slot, because its expected audience share would be 45 percent (one half of 90 percent), which is greater than 10 percent. Each prime-time slot would be filled with "popular" programming targeted on the median viewer, and minority tastes would go unserved. Some critics of television believe that this is a fair description of prime-time network television.⁹⁴

Media scholars give the label "rivalrous imitation" to the phenomenon Posner described. A leading media researcher noted, "Strong competition for audiences across a TV network's schedule has resulted in rivalrous imitation, which, in turn, has led to homogeneous content."⁹⁵ The phenomenon has been noted in radio as well as in television. In Milwaukee, Wisconsin, for example, two powerful news-talk AM stations compete vigorously for audience share. One station, WTMJ, features locally-produced news and opinion programming from 5 a.m. until 6 p.m. each weekday.⁹⁶ The other station, WISN, also features local production and a similar weekday schedule except for three hours of Rush Limbaugh's nationally syndicated program every day.⁹⁷ The intense competition between Milwaukee's two news-talk AM stations, each owned by a different national media company, might suggest that one of the stations would highlight politically conservative programming, while the other would target a more liberal audience. But that is not the case. Both stations have had a strong conservative orientation for at least two

94. *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1054 (7th Cir. 1992).

95. John Dimmick, *Media Competition and Levels of Analysis*, in HANDBOOK OF MEDIA MANAGEMENT AND ECONOMICS 355 (Alab B. Albarran et al. eds., 2006).

96. WTMJ's programming schedule can be found here: <https://www.wtmj.com/schedule> [<https://perma.cc/EGF4-WL88>] (last visited July 21, 2018).

97. WISN's programming schedule can be found here: <https://newstalk1130.iheart.com/schedule/> [<https://perma.cc/ML76-TAPC>] (last visited July 21, 2018).

decades,⁹⁸ despite the fact that Milwaukee County is overwhelmingly Democratic.⁹⁹ The situation is an excellent example of how intense competition leads to rivalrous imitation that ignores the interests of a large segment of the local audience.

In contrast, concentration of ownership in a community avoids rivalrous imitation because the commonly-owned media outlets are not rivals. Staying with the Milwaukee example demonstrates the point. While the two powerful AM stations mentioned in the previous paragraph compete for listeners interested in locally-produced conservative talk radio—a large but limited segment of the audience—the cluster of six local stations owned by iHeartRadio (formerly Clear Channel) casts a much broader net. As of July 21, 2018, the conglomerate’s Milwaukee stations targeted the audience for conservative talk (WISN-AM), sports (WOKY-AM), top 40 music (WRNW-FM), country music (WMIL-FM), urban contemporary music (WKKV-FM), and oldies (WRIT-FM).¹⁰⁰ In short, a single media owner’s six different stations provided considerable programming diversity in Milwaukee. Research has also documented viewpoint diversity in the political news and opinion content disseminated by local newspaper-television-radio cross-ownerships during the 2000 presidential campaign in Chicago, Dallas, and Milwaukee¹⁰¹ and during the 2004 presidential campaign again in Chicago and Milwaukee, as well as in Dayton, Ohio.¹⁰²

Meanwhile, in Wisconsin’s capital city, Madison, national radio conglomerate Clear Channel (now iHeartRadio) owned and operated two stations with news-talk formats from 2004 to 2016. Although historically almost all of Clear Channel’s news-talk programming has been conservative,¹⁰³ it made no sense for Clear Channel to compete with itself by running two conservative news-talk stations in Madison. Accordingly, while the stations shared a newsroom and news production staff, one station (WIBA-AM) focused on conservative talk, while the other (WXXM-FM)

98. Christopher Terry, *Milwaukee’s Radio News Trinity: Clear Channel, Journal Communications and Wisconsin Public Radio and Coverage of the 2004 Election* (2005).

99. For example, although Republican candidate Donald Trump won the 2016 Presidential contest in Wisconsin, in Milwaukee County he lost to Democratic candidate Hillary Clinton by a large margin, with Clinton getting 66.4% of the county’s vote to Trump’s 29%. *2016 Wisconsin Presidential Election Results*, POLITICO (Dec. 13, 2016), <https://www.politico.com/2016-election/results/map/president/wisconsin/> [<https://perma.cc/SKJ3-3C3A>]. The last time Milwaukee County voted for the Republican candidate for President was 1956. David Leip, *Atlas of U.S. Presidential Elections*, <https://uselectionatlas.org/RESULTS/> [<https://perma.cc/94HL-69F5>] (last visited July 21, 2018).

100. Our Stations, iHEARTMEDIA, <https://www.iheartmedia.com/iheartmedia/stations?city=Milwaukee> [<https://perma.cc/8XYR-NGFJ>] (last visited July 21, 2018).

101. David Pritchard, *A Tale of Three Cities: “Diverse and Antagonistic” Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 FED. COMM. L. J. 31 (2001).

102. David Pritchard et al., *supra* note 17, at 27.

103. See generally ALEC FOEGE, *RIGHT OF THE DIAL: THE RISE OF CLEAR CHANNEL AND THE FALL OF COMMERCIAL RADIO* (2008).

highlighted progressive/liberal talk.¹⁰⁴ Overall, a considerable body of research on different forms of media in many different media markets across the United States fails to support the assumption that greater competition among media owners leads to greater diversity of content.¹⁰⁵

The previous paragraphs' examples of programming and viewpoint diversity within commonly-owned media in individual markets undermine the longstanding contention of the FCC that one owner equals one media "voice."¹⁰⁶ Competition between media owners both nationally and locally often reduces content diversity, while commonly-owned media outlets often provide a broad range of programming and/or viewpoint diversity. One of the reasons that the FCC has been unable to extricate itself from the mire of litigation over media ownership rules is that it has been reluctant to accept this obvious reality of the modern media environment.

V. THE FCC AND THE COURTS

For most of the 20th Century, courts gave considerable deference to the decisions of the FCC in matters of broadcast regulation. The Supreme Court of the United States led the way, regularly upholding the FCC's decisions about broadcasting in the face of numerous challenges. To cite just a few examples from the past fifty years, the Court upheld the constitutionality of the FCC's Fairness Doctrine,¹⁰⁷ its ruling that broadcasters were not required to accept editorial advertisements,¹⁰⁸ its ban on local cross-ownerships involving daily newspapers and broadcast stations,¹⁰⁹ its decision not to consider proposed changes in entertainment programming when it considered whether to renew a station's license,¹¹⁰ its interpretation of Section 312 (a) (7) of the Communications Act,¹¹¹ and its policies that gave preference to owners from racial and ethnic minority groups.¹¹²

104. Christopher Terry, *Reviewing the 2010 Review: Radio News Production and a Three Market Data Solution* 1 (2013).

105. See, e.g., PROJECT FOR EXCELLENCE IN JOURNALISM, *DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS: A FIVE-YEAR STUDY OF OWNERSHIP AND QUALITY* (2003); Jeffrey Milyo et al., *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (2007); Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781 (2009); Adam D. Rennhoff & Kenneth C. Wilbur, *Market-Based Measures of Viewpoint Diversity*, 26 INFO. ECON. & POL'Y 1 (2014).

106. See, e.g., *FCC Broadcast Ownership Rules*, FCC (Dec. 27, 2017), <https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules> [<https://perma.cc/3TCM-P7DL>] (defining a "media voice" as an independently-owned full power TV station or radio station, a major newspaper, or a cable system in a given market).

107. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400-01 (1969).

108. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

109. *FCC v. National Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

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

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

112. *Metro Broad. v. FCC*, 497 U.S. 547 (1990).

For the Supreme Court during this era, siding with the FCC was something of a no-brainer, as it explained in 1981: “The [FCC] is the experienced administrative agency long entrusted by Congress with the regulation of broadcasting,” and thus its construction of the Communications Act is “entitled to judicial deference” unless there are compelling reasons to believe that an FCC decision was arbitrary and capricious or at odds with the language and/or the purpose of the statute.¹¹³

But then the Telecommunications Act of 1996 was enacted.¹¹⁴ The statute ended the era of judicial deference to the FCC by shifting the burden of proof with respect to media ownership rules. Before 1996, FCC action on ownership rules could be overturned only if a challenger could show that a decision of the FCC had been “arbitrary and capricious.”¹¹⁵ The Telecommunications Act, in contrast, required the FCC to review each of its media ownership rules and to “determine whether any of such rules are necessary in the public interest as the result of competition.”¹¹⁶ The statute added: “The [FCC] shall repeal or modify any regulation it determines to be no longer in the public interest.”¹¹⁷ In other words, parties challenging FCC actions with respect to media ownership no longer had to show that a rule was arbitrary or capricious. Instead, the FCC had to affirmatively demonstrate that the rule was necessary for the public interest.

The new standard made a huge difference. In 2001 and 2002, the Court of Appeals for the D.C. Circuit not only overturned a cable-broadcasting cross-ownership rule,¹¹⁸ but also sent three other rules (the national cable limits,¹¹⁹ the national television ownership caps,¹²⁰ and the local television ownership rule¹²¹) back to the FCC for justification in light of the standards set forth in the Telecommunications Act.

The Prometheus line of cases, which were assigned to the Third Circuit by lot after challenges to the FCC’s revised media ownership rules were filed in multiple circuits in 2003,¹²² illustrated the FCC’s difficulty in adapting to an environment where the burden of proof fell on the FCC rather than on parties who challenged its actions. Applying the new standard, the Third Circuit’s Prometheus I opinion contained several comments harshly critical of certain FCC decisions. Among them:

113. *CBS*, 453 U.S. at 390.

114. Telecommunications Act of 1996, Pub. L. No. 104-104.

115. *Fox Television Stations v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

116. Pub. L. No. 104-104 § 202(h).

117. *Id.* The act initially required the FCC to review each of its rules every two years. In 2004 Congress changed the requirement to a review every four years. Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (amending secs. 202(c) and 202(h) of the Telecommunications Act of 1996).

118. *Fox Television Stations*, 280 F.3d at 1049–53.

119. *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1144 (D.C. Cir. 2001).

120. *Fox Television Stations*, 280 F.3d at 1040–44.

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

122. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 388–389 (3d Cir. 2004) (Prometheus I).

- “(T)he [FCC]’s Cross-Media Limits employ several irrational assumptions and inconsistencies.”¹²³
- “(T)he [FCC] gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results.”¹²⁴
- “A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality.”¹²⁵
- “No evidence supports the [FCC]’s equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share. The modified rule is similarly unreasonable in allowing levels of concentration to exceed further its own benchmark for competition . . . a glaring inconsistency between rationale and result.”¹²⁶

Writing after the initial *Prometheus* decision (but before *Prometheus II*), a law professor who had been an attorney with the FCC observed that “courts, in rejecting virtually every FCC media ownership regulation in recent years, have recoiled at the FCC’s inconsistent, unprincipled answers.”¹²⁷

A few years later, the *Prometheus II*¹²⁸ decision was scathing with respect to what the court saw as the FCC’s procedural laxness. For example:

- “(T)he procedures followed by the [FCC] were irregular.”¹²⁹
- “While the new rule varies limits depending on characteristics of markets—specifically, market size and the number of media voices—it was not clear from the *FNPR* [authors’ note: Further Notice of Proposed Rulemaking] which characteristics the [FCC] was considering or why.”¹³⁰
- “The *FNPR* also did not solicit comment on the overall framework under consideration, how potential factors might operate together, or how the new approach might affect the FCC’s other ownership rules. These were significant omissions.”¹³¹
- “Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership . . . the [FCC] has in

123. *Id.* at 402.

124. *Id.* at 404.

125. *Id.* at 408.

126. *Id.* at 420.

127. Adam Candeub, *supra* note 89, at 1551.

128. *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*).

129. *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*).

130. *Id.* at 450.

131. *Id.*

large part punted yet again on this important issue . . . This is troubling . . . ”¹³²

The Third Circuit’s patience was wearing thin by the time it decided *Prometheus III*¹³³ in 2016. After noting that nearly a decade had passed since the [FCC] had last completed a review of its broadcast ownership rules, an exasperated court wrote:

Although federal law commands the [FCC] to conduct a review of its rules every four years, the 2006 cycle is the last one it has finished; the 2010 and 2014 reviews remain open. Several broadcast owners have petitioned us to wipe all the rules off the books in response to this delay—creating, in effect, complete deregulation in the industry. This is the administrative law equivalent of burning down the house to roast the pig, and we decline to order it. However, we note that this remedy, while extreme, might be justified in the future if the [FCC] does not act quickly to carry out its legislative mandate.¹³⁴

The court pointed out that the FCC’s delaying “keeps five broadcast ownership rules in limbo.”¹³⁵ As an example, the court noted that the 1975 ban on local cross-ownership of daily newspapers and broadcast stations remained in effect even though the FCC had determined more than a decade earlier that the ban was no longer in the public interest.¹³⁶ The delay in justifying a change in the rule “has come at significant expense to parties that would be able, under some of the less restrictive options being considered by the [FCC], to engage in profitable combinations.”¹³⁷ The court also observed that the FCC’s delay “hampers judicial review because there is no final agency action to challenge.”¹³⁸

The FCC’s Report and Order in November 2017 represented final agency action. It abolished several ownership rules, including the Newspaper/Broadcast Cross-Ownership Rule,¹³⁹ the Radio/Television Cross-Ownership Rule,¹⁴⁰ and the Television Joint Sales Agreement Attribution Rule.¹⁴¹ In addition, the Report and Order modified the Local Television

132. *Id.* at 471–472.

133. *Prometheus Radio Project v. FCC*, 824 F.3d 33, 37 (3d Cir. 2016) (*Prometheus III*).

134. *Id.*

135. *Id.* at 51.

136. 2006 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, Report and Order, 23 FCC Rcd 2010(3), para. 13.

137. *Id.* at 52.

138. *Id.*

139. FCC Modernizes Broadcast Ownership Rules, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd 9802, para. 2.

140. *Id.* at 9824.

141. *Id.*

Ownership Rule by eliminating the requirement that a television market have at least eight independently-owned television stations before any entity may own two television stations in that market.¹⁴² Prometheus Radio Project's challenge to the FCC's broad deregulation of media ownership all but ensures a *Prometheus IV* decision, with no guarantee that it will be the last in the series.

VI. LOCALISM AS A REMEDY FOR MARKET FAILURE

The FCC has been trapped in lengthy litigation with Prometheus Radio Project for two related reasons. First, after decades of deference from the courts prior to the passage of the Telecommunications Act of 1996, the FCC has had a difficult time adapting to the post-Telecommunications Act reality in which it has the burden of proving that media ownership rules serve the public interest, a major shift from the previous requirement that challengers could succeed only if they demonstrated that an ownership rule was arbitrary and capricious.¹⁴³ Second, the FCC has based most of its ownership rules upon economic theories that assume that content characteristics such as diversity and localism can be inferred from patterns of ownership. Because such theories lead to inaccurate descriptions of the relationship between media ownership structures and media content,¹⁴⁴ they fail to provide an empirically sound basis for the required public interest justification for the FCC's ownership rules. The FCC will not be able to extract itself from the *Prometheus* line of litigation until it stops depending on theories that prevent it from gaining a true understanding of competition, diversity, and localism in the modern media environment.

This Article's proposal for helping the FCC find its way out of the labyrinth is based on an uncomplicated chain of logic:

1. Since the 1920s, broadcast stations in the United States have been required to serve the public interest, convenience, and necessity.¹⁴⁵
2. The FCC has been given the responsibility for infusing the vague phrase "public interest" with concrete meaning, so that it can serve as a regulatory standard.¹⁴⁶
3. The FCC for decades has defined the public interest in terms of three concrete policy objectives—competition, diversity, and localism.¹⁴⁷
4. The Telecommunications Act of 1996 requires the FCC to review its ownership rules in the context of the public interest (i.e., in the context of competition, diversity, and localism), allowing such rules

142. *Id.*

143. *See supra* notes 115-24 and accompanying text.

144. *See supra* notes 97-109 and accompanying text.

145. The Radio Act of 1927 §§ 9, 11.

146. *FCC v. Pottsville Broad.*, 309 U.S. 138 (1940).

147. *2002 Biennial Regulatory Review*, 18 F.C.C.R. 13620, para. 8; cited with approval in 373 F.3d at 386.

only when the FCC can demonstrate that they are needed because competitive market forces have failed to serve the public interest.¹⁴⁸

5. The modern environment—including not only broadcast content but also content from print, cable, satellite, and web-based outlets—is characterized by vigorous economic competition and a broad diversity of viewpoints about a vast range of topics of national and international interest. Accordingly, the FCC’s November 2017 Report and Order abolishing or substantially modifying ownership rules related to competition and diversity was consistent with the regulatory standard of the Telecommunications Act because market forces were achieving the policy goals of competition and diversity.¹⁴⁹
6. Localism was the loser in the FCC’s November 2017 Report and Order. The satellite, cable, and web-based outlets that provide so much competition and viewpoint diversity on national and international subjects provide very little content about local communities outside of the largest metropolitan areas.¹⁵⁰ The FCC’s assumption that greater economic competition among media outlets will result in a greater amount of content focused on communities served by radio and television stations is not empirically valid, especially in an era when fewer and fewer stations are locally-owned and operated.¹⁵¹
7. The unavoidable conclusion is that in many small and medium-sized American communities, market competition among media outlets is not fostering localism. If the FCC continues to consider localism to be a fundamental component of the public interest, it has an obligation to remedy this market failure with appropriate regulations.

The remainder of this Section will (a) establish the continued importance of media localism, (b) present a proposal for ensuring localism in broadcasting, and (c) consider possible objections to the proposal.

A. Media Localism

In the first few decades of regulation, the regulators actualized the concept “public interest” largely in terms of localism, especially the broadcast of locally-produced content about news and events in a station’s home community.¹⁵² Over time, the FCC’s vision of what constituted the public interest evolved into what an FCC commissioner called the “three pillars of

148. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h).

149. See *supra* notes 141-45 and accompanying text.

150. Philip M. Napoli et al., *Local Journalism and the Information Needs of Local Communities*, 11 JOURNALISM PRACTICE 373-395 (2017).

151. *Local TV News Fact Sheet*, PEW RES. CTR. (July 12, 2018), <http://www.journalism.org/fact-sheet/local-tv-news/> [https://perma.cc/2EYQ-YJ8V].

152. See *supra* notes 18-34 and accompanying text.

the public interest”—competition, diversity, and localism.¹⁵³ In recent decades, unfortunately, the FCC has focused far more on competition (via rules about the economic structure of media markets) and various forms of diversity than on localism. In 2015, one scholar wrote that localism “has been the least understood and the subject of the least amount of research” of the FCC’s policy goals.¹⁵⁴

The FCC’s neglect of localism limits its understanding of the relationship between broadcasting and democratic processes in the United States, whose citizens get their news more from local television than from any other source.¹⁵⁵ Locally-produced news and public affairs content is crucial because local government has always been more important in the United States than in any other major country.¹⁵⁶ In the first half of the nineteenth century, Tocqueville saw strong local government as an essential foundation of democracy in America.¹⁵⁷ More recently, longtime Congressman Thomas P. “Tip” O’Neill, Jr., of Massachusetts—speaker of the U.S. House of Representatives from 1977 to 1987—famously noted that “all politics is local.”¹⁵⁸

Democracy requires informed citizens, but as the journalistic workforce shrinks, fewer and fewer stories are covered.¹⁵⁹ The effect was apparent in 2011, when a federal study about local journalism noted that the “shortage of reporting manifests itself in invisible ways: stories not written, scandals not exposed, government waste not discovered, health dangers not identified in time, local elections involving candidates about whom we know little.”¹⁶⁰

153. Michael J. Copps, *Remarks to the Alliance for Community Media and the New America Foundation* (Oct. 11, 2011).

154. See Danilo Yanich, *Local TV, Localism, and Service Agreements*, 28 J. MEDIA ECON 162, 163 (2015). See also Philip M. Napoli, *The Localism Principle in Communications Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL’Y STUD J. 372, 372 (2001).

155. *Local TV News Fact Sheet*, *supra* note 153.

156. Robert T. Gannett, *Tocqueville and Local Government: Distinguishing Democracy’s Second Track*, 67 REV. POL 721 (2005).

157. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., George Lawrence trans., Harper & Row, 1988) (1835).

158. TIP O’NEILL & GARY HYMEL, *ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME* (1994).

159. Employment in American newspapers dropped from 424,000 people in 2000 to 183,300 in mid-2016, a decline of roughly 56%. Paul Farhi, *The City that Never Sleeps Finds that It’s Running out of Reporters to Report*, WASH. POST (July 23, 2018), https://www.washingtonpost.com/lifestyle/style/the-city-that-never-sleeps-finds-that-its-running-out-of-reporters-to-report/2018/07/23/d4c9410e-8e8f-11e8-bcd5-9d911c784c38_story.html?utm_term=.50c43bfde03e [<https://perma.cc/S23N-JG9Q>].

160. WALDMAN, *supra* note 15, at 30. See also Paul Farhi, *What happens to local news when there is no local media to cover it?*, WASH. POST (July 17, 2017), https://www.washingtonpost.com/lifestyle/style/what-happens-to-local-news-when-there-is-no-local-media-to-cover-it/2017/07/17/84e0692c-4649-11e7-98cd-af64b4fe2dfc_story.html?utm_term=.251328923956 [<https://perma.cc/F5WD-ELLS>].

B. Requiring Localism

Despite the abundance of diverse content on topics of national and international scope in the media environment, satellite, cable, and web-based media outlets do not provide diverse content about local issues in most American communities.¹⁶¹ The market's failure to furnish such crucially important content creates an obligation for the FCC to intervene with rules requiring radio and television stations to (a) adopt Internet-based systems of community ascertainment, and (b) broadcast at least three hours of locally-produced programming each week. Such requirements would not only bring the policy goal of localism to life throughout the United States, but they would also provide a pathway out of the bog of the long-running *Prometheus* line of cases.

The proposed community ascertainment requirement would take a form somewhat different from the ascertainment mandate the FCC adopted in 1971, when it began requiring radio and television stations to engage in regular ascertainment of the "problems, needs, and interests" of the communities they were licensed to serve.¹⁶² Although the ascertainment process provided an important connection between stations and local citizens, the requirement was dropped in the 1980s when the FCC moved into deregulatory mode.¹⁶³

With fewer and fewer stations being locally-owned, ensuring that connection becomes more and more important. The community meeting style of ascertainment of the 1970s was sometimes seen as costly and cumbersome, especially for independent owners and operators of smaller broadcast groups. In the broadband era, however, the FCC could require that stations use a system that allows citizens to communicate with one of their local stations through the station's existing website. Stations operated from out of market would then have a line of communication to the local audiences they are licensed to serve. This kind of online ascertainment system could be deployed at minimal cost and effort, with communications from citizens being

161. Danny Hayes & Jennifer L. Lawless, *The Internet Isn't Saving Local News. Here's How That's Hurting Democracy.*, WASH. POST (Nov. 13, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/13/the-internet-isnt-saving-local-news-heres-how-thats-hurting-democracy/?utm_term=.4900cfb37083 [<https://perma.cc/RG8U-SURX>]. See also Adam Hersh, *Slowing Down the Presses: The Relationship Between Net Neutrality and Local News*, CIS (Dec. 2017), 3 ("The most serious threat to local news in a world without net neutrality would occur incidentally, as the collateral damage of a regime that favors large, established online players and makes it harder for new entrants to break through."). The FCC's elimination of net neutrality rules became effective in June 2018. FCC Releases Restoring Internet Freedom Order, *Declaratory Ruling, Order, Report and Order*, 33 FCC Rcd 311 (2018).

162. Primer on Ascertainment of Community Problems by Broadcast Applicants, *Report and Order*, 27 F.C.C. 2d 650, 682-83 (1971).

163. Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, *Report and Order*, 98 F.C.C. 2d 1076 (1984).

maintained as part of a station's public file, accessible to all via the FCC's website.

Because the essence of localism is content, the FCC should also require radio and television stations to broadcast at least three hours of locally-produced content each week. The programming could take any of many forms (e.g., local news, high-school sports, city council meetings, audience-participation shows). Stations would not be required to produce the content themselves; they could satisfy the requirement by broadcasting local content produced by others.

The requirement to devote a minimum of three hours (of the 168 hours in a week) to locally-produced content would be akin to the current requirement that broadcast television stations air at least three hours a week of educational programming for children.¹⁶⁴ Many radio and television stations already have more than three hours of locally-produced programming on their regular schedules. Those that do not—for example, stations being operated remotely—would have to identify local sources of programming for the local audiences that they are licensed to serve.

While informational or public affairs programming would be most likely to meet the FCC's policy goals, First Amendment considerations would prevent the FCC (or any other public entity) from regulating the content of the locally-produced programming. Stations would be free to choose whatever local content they judged most appropriate. Stations might seek locally-produced content that is consistent with their regular programming. A remotely-programmed country music radio station, for example, could satisfy the proposed requirement by broadcasting three hours of locally-produced country music each week.

Interestingly, the massive consolidation of media ownership since the passage of the Telecommunications Act of 1996 makes this proposal less burdensome than it would have been before 1996. The FCC could develop the rule so that it applies across commonly-owned radio and television stations in each market. In other words, rather than each station in a commonly-owned local cluster of stations being forced to produce its own programming, the FCC could allow a cluster to satisfy the requirement by having one of its stations broadcast all of the cluster's required locally-produced programming. If a company owned eight stations in a market, for example, a single station producing 24 hours of local content each week would satisfy the requirement for all eight stations.

Possible alternatives to the market failure that is at the root of this Article's localism proposal might include greater regulatory focus on public-access channels on local cable systems and/or greater resources for local public radio and television stations. With respect to cable public-access channels, current federal law allows, but does not require, local franchising authorities to require cable operators to set aside channels for public,

164. Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (Supp. III 1991)).

educational, or governmental use.¹⁶⁵ However, the public-access channels on cable systems tend to be underutilized, often featuring amateur programming of uncertain quality. Optimizing their use in various ways could conceivably promote localism,¹⁶⁶ though only large, politically-progressive metropolitan areas seem to be willing to devote the resources needed to produce high-quality local programming on public-access channels.¹⁶⁷

Victor Pickard has argued that the solution to the kind of market failure we have identified is to direct additional resources to public media.¹⁶⁸ This idea is not without merit. However, in the current regulatory environment, the premise that additional resources for public media constitutes a sufficient response to the market's failure to provide adequate localism is both ideological and idealistic.

The FCC and many media reform advocates claim to seek a robust and diverse media environment featuring a broad range of content. Unfortunately, debate over media ownership policy has become the realm of administrative law nerds arguing over measures of consolidation, the legitimacy of "discounts" for certain sections of spectrum, or the levels of acceptable ownership limits. Little attention has been paid to serving communities with locally-produced content.

VII. CONCLUSION

Overall, the FCC's attempts to promote localism via restrictions on media ownership have failed. Some may be nostalgic for the days of direct content regulation that characterized much of the first five decades of American broadcast regulation, but a better solution is this Article's proposal for an uncomplicated quantitative requirement for locally-produced content that leaves decision making about the format and structure of the programming to the licensee. The FCC's long-standing focus on economic competition implemented through ownership limits has restricted its ability to achieve important goals, including increasing the quantity and quality of local news and public affairs programming.

The proposal presented in this Article is a practical regulatory solution that (a) would generate locally-produced content of the kind long considered to be in the public interest, (b) would be consistent with existing legal precedent and statutory delegations of authority, and (c) would even allow for additional ownership consolidation. In addition, the proposal would enable the FCC to escape the mire of litigation caused by its empirically suspect assumptions about the competition-diversity and competition-localism relationships. The result would be policy that relies on market competition to

165. 47 U.S.C. § 611.

166. See Note, *Tilling the Vast Wasteland: The Case for Reviving Localism in Public Interest Obligations for Cable Television*, 126 HARVARD L. REV. 1034, 1041 (2013).

167. See, e.g., Martha Fuentes-Bautista, *Rethinking Localism in the Broadband Era: A Participatory Community Development Approach*, 31 GOV'T INFO. Q. 65 (2014) (discussing Austin, Texas); Siddhartha Menon, *The Role of Civil Society Groups in Improving Access to the DC-CAN*, 19 INFO. SYS. FRONTIERS 361 (2017) (discussing Washington, D.C.).

168. PICKARD, *supra* note 39, at 221-223.

achieve the long-standing policy goals of competition, diversity, and localism whenever possible, as required by the Telecommunications Act of 1996. When the market fails, however, the FCC has the authority and the obligation to intervene.