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## Prometheus Radio Project v. FCC: The Persistence of Scarcity

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# PROMETHEUS RADIO PROJECT V. FCC: THE PERSISTENCE OF SCARCITY

*By Aaron Perzanowski*

A well-informed citizenry forms the very basis of a functioning democracy.<sup>1</sup> Newspapers, radio, television, and, more recently, the Internet serve as essential wellsprings of information for the American public. Media concentration, because it results in an ever-decreasing number of sources of publicly available information, poses a serious threat to the development of an informed public.

Not surprisingly, the recent efforts by the Federal Communications Commission (FCC) to allow further consolidation among already concentrated sources of news and information have met with harsh and sustained criticism.<sup>2</sup> In 2003, the FCC called for significant deregulation of its limits on media concentration. This Note examines these rule changes, their historical context, the litigation they sparked, and their underlying justification.

Part I traces the history of broadcast regulation, emphasizing the development of the scarcity doctrine and the subsequent deregulatory trend. Part II examines the FCC's 2003 rule changes and the Third Circuit's analysis of those modifications in *Prometheus Radio Project v. FCC*.<sup>3</sup> Part III analyzes the assumptions underlying the FCC's proffered explanation for its rule changes, ultimately concluding that they lack justification, and offers suggestions for responsible ownership deregulation. Part IV calls on Congress to reassert itself as the final arbiter of media policy.

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1. See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (stating "an informed public is the essence of working democracy").

2. See Gregory M. Prindle, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, Note, 14 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 279, 306-20 (2003); Brian Lowry, *Viewers, It's Time to Wake Up and Smell the Mergers*, *L.A. TIMES*, Feb. 27, 2002, at 6-1; *Media Conglomeration*, *N.Y. TIMES*, Aug. 23, 2003, at A4.

3. 373 F.3d 372 (3d Cir. 2004).

## I. A BRIEF HISTORY OF BROADCAST REGULATION

Two trends mark the history of the FCC's efforts to regulate broadcasters. The first tracked a steady increase in regulatory power. Initial structural regulations gave way to content-based rules, both of which found their justification in spectrum scarcity. The second trend, beginning in the 1980s and continuing today, reversed the course charted by the FCC in its first fifty years.<sup>4</sup> Deregulation emerged as a primary goal of the FCC, and the scarcity rationale, the basis for the regulations of the past, came under fire.

### A. The Development of the Scarcity Rationale

Since the early development of radio, the government has imposed regulatory limits on use of the broadcast spectrum.<sup>5</sup> As the incipient medium's popularity grew, the inherent limitations of the broadcast spectrum both motivated and justified increased federal oversight.<sup>6</sup> Broadcasting provided a means of mass communication with a finite carrying capacity. The widespread adoption of radio coupled with the scarcity of broadcast frequencies created an environment that jeopardized the very functionality of the technology. "The number of stations increased . . . rapidly, . . . and the situation became . . . chaotic."<sup>7</sup> Without regulation, the crowded radio spectrum risked incoherence.

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4. The FCC's enforcement of broadcast decency standards, rather than decreasing as part of the general deregulatory trend, has grown more aggressive. See Mathew C. Holohan, Note, *Politics, Technology, and Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341 (2005) (reviewing recent FCC enforcement of decency standards and concluding that such enforcement is politically motivated); Emily Fredrix, *Viacom to Pay \$3.5m in FCC Decency Cases*, BOSTON GLOBE, Nov. 24, 2004, available at [http://www.boston.com/news/nation/washington/articles/2004/11/24/viacom\\_to\\_pay\\_35m\\_in\\_fcc\\_decency\\_cases](http://www.boston.com/news/nation/washington/articles/2004/11/24/viacom_to_pay_35m_in_fcc_decency_cases); Marilyn Geewax, *FCC Chairman Raises Profile; Powell Hardens Stance on Broadcast Decency*, ATLANTA J. CONST., Sept. 24, 2004, at 1F.

5. See Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912) (requiring sea-based radio operators to obtain a license from the Secretary of Commerce and Labor).

6. Some have argued that broadcast regulations need not rely on the scarcity rationale. One commentator has suggested that regulations imposed on broadcasters could find "firmer First Amendment footing" in the public forum doctrine. See Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CALIF. L. REV. 1687 (1997). This result is justified by viewing the First Amendment to allow active governmental promotion of robust debate on issues of public concern, or alternatively, by emphasizing the quid pro quo of broadcast licensing, whereby the access to a valuable and limited public resource granted to broadcasters is conditioned upon their agreement to serve the public interest. See *id.*

7. *NBC v. United States*, 319 U.S. 190, 211 (1943).

The Communications Act of 1934 created the Federal Communications Commission, granting it the authority to regulate broadcasters.<sup>8</sup> The FCC's initial rules, required under the Act to further the "public interest, convenience, or necessity," found their justification in the need to maintain radio's usability.<sup>9</sup> In addition to awarding licenses, the FCC limited signal power, antenna height, and frequency.<sup>10</sup> These structural regulations guarded against interference resulting from overcrowded spectrum.

The FCC's rulemaking soon expanded to include limits on media ownership. When the FCC denied a broadcast license in 1938 on the basis of the applicant's control of another station, it established its first ownership rule.<sup>11</sup> The duopoly rule prohibited the owner of a broadcast station from controlling two stations in the same broadcast area.<sup>12</sup> While the duopoly rule imposed limits on local concentration of broadcast facilities, the first national ownership limits emerged in the 1940s. Under these regulations, the FCC denied licenses to any entity controlling six radio stations or three television stations nationwide.<sup>13</sup>

As the Supreme Court's decision in *NBC v. United States* demonstrated, even the FCC's power to deny broadcast licenses found its justification in spectrum scarcity.<sup>14</sup> Disposing of NBC's First Amendment challenge to the denial of its license application under the Chain Broadcasting Regulations,<sup>15</sup> the Court explained, "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."<sup>16</sup> Employing an inherently limited medium of expression, broadcasters enjoy lessened First Amendment protections and can be encumbered with greater regulatory burdens.

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8. See Communications Act of 1934, 47 U.S.C. § 151 (2000).

9. *Id.*

10. See FCC Broadcast Radio Services, 47 C.F.R. § 73.603 to .614 (2004).

11. See C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 863 (2002).

12. High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (June 26, 1940).

13. *In re* Amendment of Section 73.3555, [formerly 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 F.C.C.2d 17 (1984).

14. 319 U.S. 190, 226 (1943).

15. The Chain Broadcasting Regulations were meant to limit the influence of networks on individual broadcast stations. The rules barred licensing of stations that agreed, *inter alia*, to the following: exclusive network affiliation, territorial exclusivity, terms of affiliation longer than two years, and network penalization for alterations of broadcast airtime rates. See *id.* at 198-209.

16. *Id.* at 226.

In the 1970s, these regulatory burdens reached their peak. The FCC instituted a number of cross-ownership bans that prevented entities from owning various media combinations. It established the first such rule in 1970, prohibiting television station owners from controlling cable systems in the same broadcast area.<sup>17</sup> Shortly thereafter, it barred common ownership of television and radio stations in local communities.<sup>18</sup> Finally, a prohibition against newspaper and broadcast cross-ownership took effect in 1975.<sup>19</sup>

The FCC's regulatory efforts included not only structural requirements, but content-based rules as well. In 1969, the Supreme Court examined the Fairness Doctrine, a long-standing FCC policy requiring broadcasters to allocate equal time to both sides of issues of public concern.<sup>20</sup> Red Lion, a radio broadcaster, brought suit after the FCC demanded it provide free airtime to an individual disparaged by Reverend Billy James Hargis' "Christian Crusade" series broadcast by Red Lion.<sup>21</sup> In upholding the Fairness Doctrine, the Court offered its most perspicuous statement of the scarcity rationale. Given the demand for access to limited spectrum, the Court explained:

[I]f there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.<sup>22</sup>

Permitting unregulated use of spectrum would result in "chaos."<sup>23</sup> The FCC was therefore justified, according to the Court, in imposing content-based duties on those granted broadcast licenses.<sup>24</sup>

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17. See *In re* Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 23 F.C.C.2d 816, 820 (1970).

18. See *In re* Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 28 F.C.C.2d 662, 662 (1971).

19. See *In re* Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046, 1089 (1975).

20. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969).

21. *Id.* at 371.

22. *Id.* at 389.

23. *Id.* at 375.

24. *Id.* at 401.

## B. The Deregulatory Trend

The 1980s marked a turning point in broadcast regulation. While its first five decades were characterized by a steady expansion of its regulatory powers, the FCC initiated a march towards the deregulation of broadcast media during the Reagan era. Among the first targets were the content-based requirements of the Fairness Doctrine. In 1985, the FCC released its Fairness Report, repudiating the doctrine and claiming that it no longer served any purpose and that it chilled expression.<sup>25</sup> When Congress passed legislation reinstituting the Fairness Doctrine in 1987, President Reagan vetoed it.<sup>26</sup>

By the mid-1990s the deregulatory fervor had reached Congress. The Telecommunications Act of 1996 codified the congressional preference for broadcast deregulation. It eliminated the National Radio Cap,<sup>27</sup> which limited the total number of radio stations an entity can control.<sup>28</sup> Further, the Act required the FCC to conduct biennial reviews of its regulations in order to eliminate any rules no longer necessary to the public interest.<sup>29</sup>

The FCC's biennial review process sparked litigation from its inception. In 1998, in its first such review, the FCC determined that the national television ownership rule and the cable/broadcast cross-ownership rule furthered the public interest and announced their retention.<sup>30</sup> The Fox network brought suit in the D.C. Circuit challenging this decision. The court in *Fox Television Stations v. FCC* held that the FCC had failed to provide

25. See *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 147 (1985).

26. See S. 742, 100th Cong. (1987).

27. Telecommunications Act of 1996 § 202(a), Pub L. No. 104-104, 110 Stat. 56 ("The [FCC] shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.").

28. Since the elimination of the National Radio Cap, concentration of the radio market has increased markedly. Clear Channel Communications, the nation's largest radio broadcaster, owns over 1200 radio stations, and according to many accounts is largely responsible for the homogenization of radio programming throughout the United States. See Loren Steffy, *KLOL Just Wasn't Music to Ears of Radio Marketers*, HOUSTON CHRON., Nov. 19, 2004, Business, at 1.

29. See 47 U.S.C. 161 (2000); Telecommunications Act of 1996 § 202(h), Pub L. No. 104-104, 110 Stat. 56.

30. *In re 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 F.C.C.R. 11,058, 11,061 (2000).

adequate justification for its decision.<sup>31</sup> The court vacated the cross-ownership rule but remanded the national television ownership rule to the FCC for further justification or revision.<sup>32</sup>

Shortly after its decision in *Fox*, the D.C. Circuit evaluated the FCC's retention of the local television ownership rule in *Sinclair Broadcast Group v. FCC*.<sup>33</sup> The court upheld the FCC's retention of the rule despite Sinclair Broadcasting's contention that the "eight independent voices" rule, which barred any merger that would result in fewer than eight station owners in a given market, lacked sufficient justification.<sup>34</sup> It did, however, remand on the issue of excluding non-broadcast media from the eight voices rule.<sup>35</sup>

The FCC addressed the rules remanded in *Fox* and *Sinclair*, among others, in its 2002 biennial review. This review culminated with the most sweeping deregulatory changes yet introduced by the FCC: the 2003 Order<sup>36</sup> scrutinized by the Third Circuit in *Prometheus*.

## II. THE ORDER AND PROMETHEUS

The Report and Order and Notice of Proposed Rulemaking ("The Order") issued by the FCC on July 2, 2003 marked a new zenith in the FCC's push towards the deregulation of broadcast media. While it did not call for an end to ownership regulation, The Order marked a significant step towards total deregulation, a position advocated by some commentators, among them, former FCC Chairman Mark Fowler.<sup>37</sup> It called for significant loosening of the FCC's restrictions on media ownership and allowed previously prohibited levels of concentration both within and between media.<sup>38</sup> The Order significantly increased the national television owner-

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31. 280 F.3d 1027, 1053 (D.C. Cir.), *amended en banc* by 293 F.3d 537 (D.C. Cir. 2002).

32. *Id.*

33. *See* 284 F.3d 148 (D.C. Cir. 2002).

34. *Id.* at 169.

35. *Id.*

36. *In re* 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, 18 F.C.C.R. 13,620 (2003) [hereinafter *The Order*].

37. *See* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1981-82); Note, *Paying Attention to Justice: The FCC and the Failure to Deregulate*, 11 MEDIA L. & POL'Y 62 (2002); James Gattuso, *The Myth of Media Concentration: Why the FCC's Media Ownership Rules Are Unnecessary* (May 29, 2003), available at <http://www.heritage.org/Research/InternetandTechnology/wm284.cfm>.

38. *See* *The Order*, *supra* note 36, at 13,953 (Commissioner Copps, dissenting).

ship cap<sup>39</sup> and eliminated the remaining cross-ownership rules, replacing them with a new rule that allowed greater control and concentration across media.<sup>40</sup> The Order relaxed the local television ownership rule, allowing owners to control up to three stations in the same market and created a new method of calculating market size for the purpose of controlling local radio concentration.<sup>41</sup>

The proposed rulemaking met with immediate and vocal opposition. The public spoke out,<sup>42</sup> Congress legislated,<sup>43</sup> and litigants filed suit. Dozens of petitioners filed to challenge the FCC's Order, and those challenging the rules fell into two distinct categories. The citizen petitioners, among them the Prometheus Radio Project, argued, *inter alia*, that The Order violated the FCC's public interest obligation and sacrificed diversity of media sources and viewpoints by allowing increased concentration of ownership. The deregulatory petitioners, composed of networks, broadcasters, and industry associations, insisted that The Order failed to go far enough in removing regulatory impediments. Pursuant to the random lottery selection process for challenges to administrative rulemakings,<sup>44</sup> the suits of these petitioners were consolidated and heard by the Third Circuit.

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39. *Id.* at 13,815.

40. *Id.* at 13,790.

41. *Id.* at 13,668.

42. The public reaction to the FCC's efforts to reform its media ownership regulations was swift and unambiguous. Prior to the official publication of The Order, the FCC received comments from nearly two million citizens in response to its review of ownership regulations. *Id.* at 13,977-78. Over 99.9% of those comments voiced objections to increased consolidation. Membership-driven organizations ranging from the American Civil Liberties Union to the National Rifle Ass'n opposed further concentration among media owners, as did city councils in cities such as Chicago, Philadelphia, and San Francisco. *Id.*

43. In the months following The Order, a bipartisan effort to reverse the FCC's new rules took shape in Congress. Although the vast majority of Democrats and a significant Republican minority sought a rollback of The Order, ultimately the "aggressive political tactics" of the pro-FCC minority in Congress blocked such attempts. Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U. L. REV. 645, 655 (2004). The Senate passed a bill stripping The Order's rules of any force or effect that languished in the House and was never put to a vote. See 108 S.J. Res. 17, 108th Congress (2003). In the end, the Congressional concern over media concentration resulted in only minor alterations of the FCC's rules. In 2004, Congress set the national television ownership cap at 39%, choosing a limit between the FCC's prior 35% cap and the proposed 45% limit. See Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004). Additionally, Congress exempted the national television cap and related rules, including the UHF discount, from further review under § 202(h). *Id.*

44. See 28 U.S.C. § 2112(a) (2000).



## A. The Third Circuit's Analysis

The *Prometheus* court examined The Order's revisions of the cross-ownership, local television, and local radio regulations, ultimately finding significant deficiencies in the rationale underlying each of the FCC's rule changes.<sup>45</sup> In evaluating the rules, the court was bound by both the Administrative Procedure Act and § 202(h) of the 1996 Telecommunications Act. The Administrative Procedure Act requires courts to set aside administrative actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>46</sup> The Telecommunications Act in § 202(h) calls for periodic review of FCC rules to determine their continued importance to achieving the public interest, defined primarily in reference to the FCC's three core values: diversity, competition, and localism.<sup>47</sup> Any rule failing to advance the public interest must be repealed or modified.

The court's inquiry focused on each of the Order's rule changes in turn, outlining both the prior regulations and their modification, and analyzing the propriety of the rule changes under the relevant standards.

### 1. Cross Ownership

The FCC's previous rules governing cross-ownership applied two distinct regulations to owners depending on the forms of media at issue.<sup>48</sup> The newspaper/broadcast rule prohibited the owner of a daily newspaper from owning any broadcast station in the same market.<sup>49</sup> The radio/television rule provided market-relative limits to the number of radio stations, if any, the owner of a television station could possess.<sup>50</sup>

The new rule promulgated by the FCC eliminated both of these cross-ownership restrictions, replacing them with a new comprehensive market-relative cross-ownership regulation.<sup>51</sup> In markets of three or fewer television stations, the new standard permitted no cross ownership of television,

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45. The court deemed moot the changes made to the national television ownership rule in light of the intervening legislation readjusting the numeric limit and exempting the rule from further biennial review. *See supra* note 43.

46. 5 U.S.C. § 706(2)(A) (2000).

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

48. The *Fox* court previously eliminated the cable/broadcast rule, which prevented common ownership of cable and broadcast stations in the same community. *See Fox Television Stations v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir.), *amended en banc* by 293 F.3d 537 (D.C. Cir. 2002).

49. 47 C.F.R. § 73.3555(d) (2004).

50. *Id.* § 73.3555(c).

51. *See The Order, supra* note 36, at 13,790.

radio, or newspapers.<sup>52</sup> In markets with four to eight television stations, the rule permitted a single entity to own a newspaper and either (1) a television station and 50% of the radio stations permitted under the local radio ownership rules, or (2) 100% of the radio stations allowable under the local radio rule.<sup>53</sup> In the largest markets, those with more than eight TV stations, cross-ownership was left entirely unregulated.<sup>54</sup>

In examining the new cross-ownership rule, the *Prometheus* court found that because the merger of local broadcast and newspaper ventures can potentially increase local news coverage by increasing efficiency and does not necessarily create significant harms to diversity, the FCC offered sufficient justification for its elimination of the newspaper/broadcast rule.<sup>55</sup> In addition, according to the court, the FCC's retention of some regulations over media ownership violated neither the First nor the Fifth Amendment, despite the contention of the deregulatory petitioners.<sup>56</sup> While the language of the regulation is couched in terms of restrictions placed on newspaper owners, the court held that the regulations applied equally to all media owners, and therefore, did not violate the Fifth Amendment's equal protection clause.<sup>57</sup> Although the rule may hamper the ability of potential media cross-owners to speak to a larger audience, the court, relying on the Supreme Court's decision in *National Citizens Committee for Broadcasting*,<sup>58</sup> justified such restrictions on First Amendment protections on the basis of spectrum scarcity.<sup>59</sup>

Despite sanctioning the general approach of the FCC's new rule, the court remanded on the issue of the specific numeric limits created by the cross-ownership rule.<sup>60</sup> The court objected to the assumptions made by the FCC in creating the Diversity Index, a metric used to determine speaker diversity within communities for the purpose of establishing the appropriate cross-ownership regulations.<sup>61</sup> Specifically, the court found that the weight given to Internet news sources in calculating the Diversity Index lacked justification.<sup>62</sup> Further, the court objected to the unrealistic assumption made by the FCC of equal market share between stations within a

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52. *Id.* at 13,799.

53. *Id.* at 13,803.

54. *Id.* at 13,804.

55. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 397 (3d Cir. 2004).

56. *Id.* at 400.

57. *Id.* at 401.

58. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978).

59. *Prometheus*, 373 F.3d at 401.

60. *Id.* at 403.

61. *Id.*

62. *Id.* at 405.

given medium.<sup>63</sup> Finally, the court found that the FCC applied the results of the Index in an inconsistent manner, allowing increases of Diversity Index scores in some instances that were larger than increases prohibited under other circumstances.<sup>64</sup>

## 2. *Local Television Ownership*

Prior to its 2003 rulemaking, the FCC allowed duopolies, ownership of two television stations by the same firm within a given market, if two stipulations were satisfied: (1) no owner can control two of the top four most-viewed stations in a market and (2) at least eight "independent voices" must remain after the proposed merger.<sup>65</sup> In contrast, the FCC's new rule allowed much greater consolidation by permitting triopolies in markets of eighteen or more stations and duopolies in markets of seventeen or fewer stations.<sup>66</sup> The "top four" rule remained applicable, effectively precluding duopolies in markets with fewer than five television stations.<sup>67</sup>

The court upheld the retention of the "top four" rule despite the de-regulatory petitioners' claim that it unfairly prevented stations in small markets from achieving the efficiencies of consolidation.<sup>68</sup> The court agreed with the FCC's determination that the likely harm to viewpoint diversity resulting from consolidation in such markets outweighed the likely benefits of increased efficiency.<sup>69</sup>

However, the court found the specific numerical limits created by the rule arbitrary.<sup>70</sup> In formulating its rule, the FCC failed to account for the actual market share of the stations at issue, considering mergers of the seventeenth, eighteenth, and nineteenth most watched stations as equivalent to common ownership of the fourth, fifth, and sixth rated stations in a given market. Further, the court insisted the FCC provide justification for allowing market concentration that exceeds the FCC's own target Diversity Index score.<sup>71</sup>

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63. *Id.* at 409.

64. *Id.* at 411.

65. See 47 C.F.R. § 73.3555(b) (2000); *In re Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12,903, 12,907-08 (1999).

66. The Order, *supra* note 36, at 13,668.

67. *Id.*

68. *Prometheus*, 373 F.3d at 417.

69. *Id.*

70. *Id.* at 420.

71. *Id.*

### 3. Local Radio Ownership

Finally, the court considered the local radio rule. The Telecommunications Act of 1996 stipulated that in markets of forty-five or more stations, a single entity may own up to eight stations, with up to five in any one service (AM or FM).<sup>72</sup> The rule permitted firms to own seven stations (up to four in one service) in markets with 30-44 stations, six stations (four in a service) in markets of 15-29 stations, and five stations (three in a service) in markets of less than fifteen stations provided no company controls more than 50% of the local market.<sup>73</sup>

The new rule made no changes to the numerical restrictions, but it did significantly alter the method used to calculate the total number of stations in a market, the “denominator.” While the previous method considered only commercial stations in calculating the denominator, the new approach included both commercial and noncommercial stations.<sup>74</sup> Secondly, the new method abandoned the transaction-specific “contour overlap” method for counting stations in a market, instead employing an objective geographic standard employed by Arbitron.<sup>75</sup>

The court upheld the FCC’s decision to make use of the Arbitron system because of demonstrated flaws in the contour overlap method that created a “perverse incentive” to merge the largest, most powerful stations in a market.<sup>76</sup> Despite the objections of the citizen petitioners, the court also held that the inclusion of noncommercial stations in the denominator calculation posed no threat to diversity because the net effect of the new approach was a decrease in denominators in most markets.<sup>77</sup>

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

73. *Id.*

74. *See* The Order, *supra* note 36, at 13,713.

75. Arbitron is the nation’s leading provider of radio ratings. It has established geographic radio markets for most U.S. urban areas. *See id.* at 13,712.

76. *Id.* at 13,719. The contour overlap method involved first calculating the “numerator,” the number of commonly owned stations within a market, by adding all commonly owned stations with overlapping principal community signal contours. Next the “denominator,” the total number of stations in the relevant market, was calculated by adding to the numerator any stations whose contours overlap with at least one of the stations in the numerator. A party was “deemed to own only those stations . . . that have mutually overlapping principal community contours.” *Id.* at 13,718. The denominator calculation, however, included all stations “whose principal community contour overlaps the principal community contour of at least one of the radio stations in the numerator . . . regardless of who owns that station.” *Id.* The denominator, therefore, could include radio stations owned by the same party that owns the radio stations represented in the numerator but were not counted against the party’s ownership limit. *See id.*

77. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 426 (3d Cir. 2004).

Although the numerical limits were not revised, the court remanded them for further justification by the FCC. The court expressed doubt as to the effectiveness of the regulations in promoting the FCC's goal of creating five equal-sized competitors in each market and, further, questioned the propriety of that particular goal in achieving the public interest.<sup>78</sup>

## **B. Arbitrary Rule or Unwise Policy?**

At first glance, the Third Circuit's ruling in *Prometheus* appears to be an unremarkable application of the standards of administrative review. Upon closer inspection, while the court couched its decision in the language of administrative law, it remanded each of the FCC's numeric limits on the basis of policy concerns rather than any failure to meet the relevant administrative standards. The court's decision reflects its disapproval of the FCC's policy choices rather than a determination that the rules were "arbitrary and capricious" or violated the FCC's public interest obligation.

In *NBC*, the Supreme Court addressed the application of both the "arbitrary and capricious" and "public interest" standards in regard to a challenged FCC regulation, clearly outlining the appropriate role of the courts in such determinations.<sup>79</sup> Denying NBC's challenge to the Chain Broadcasting Regulations, the court explained:

The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade v. United States*, 319 U.S. 534, 548 [1942], is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations.<sup>80</sup>

The *Prometheus* court disregarded the narrow test formulated in *NBC* and applied its own contradictory standard of review. The Supreme Court warned against questioning the wisdom of the FCC's rules, their likelihood of success, or the quality of their evidentiary support. The *Prome-*

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78. See *id.* at 432-34.

79. *NBC v. United States*, 319 U.S. 190, 224 (1943).

80. *Id.*

*theus* court, however, challenged the FCC's rulemaking on each of these proscribed grounds.

The FCC justified its local radio rule, in part, by contending that the rule furthered its goal of achieving five equal-sized competitors in each radio market. The Third Circuit, in conflict with the Supreme Court's directive in *NBC*, doubted the effectiveness of the local radio limits in achieving the FCC's five equal-sized competitor goal<sup>81</sup> and questioned that goal's importance to the public interest.<sup>82</sup> The FCC relied on game theory justifications to support the five equal-sized competitor goal.<sup>83</sup> The court, citing an apparent discrepancy between the scholarly research upon which the FCC's goal relied and recent Merger Guidelines introduced by the Federal Trade Commission, questioned the expedience of the five equal-sized competitor goal.<sup>84</sup> In doing so, the court doubted both the wisdom of the FCC's objective and the sufficiency of the evidence supporting it.

Further, the court disapproved of the methodology used to calculate the Diversity Index, a metric central to both the cross-ownership and local television ownership rules, citing empirically flawed assumptions employed in calculating the index.<sup>85</sup> In calculating the Diversity Index, the FCC considered the impact of the Internet on viewpoint diversity. The court contended that the FCC was incorrect in its assumption that the Internet significantly increased the availability of diverse viewpoints on local issues. It questioned the accuracy of the FCC's survey that indicated Internet sites as a source of news programming because that survey failed to distinguish between independent news sources, which increase source and viewpoint diversity, and those that merely republish information available from more traditional sources, which do not.<sup>86</sup> The court then attempted to distinguish between the quality of the content created by traditional media sources and individual online contributors, ultimately concluding that such independent voices cannot be considered "media outlets."<sup>87</sup> In attempting to define what sources of news and information are

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81. The court found that the numerical limits could not "rationally be derived" from a five equal-sized competitor goal. This determination comports more closely with the Supreme Court's directive in *NBC*. The limits failed to result in such equally divided markets in the past. Further, the FCC ignored actual market share, a statistic essential to its goal, in formulating the numerical limits. *Prometheus*, 373 F.3d at 433-34.

82. *Id.* at 432-34.

83. The Order, *supra* note 36, at 13,731.

84. *Prometheus*, 373 F.3d at 433.

85. *Id.* at 405.

86. *Id.*

87. *Id.* at 407.

appropriately considered media outlets and criticizing the studies conducted by the FCC, the court presumed a "technical competence" explicitly denied by the Supreme Court.<sup>88</sup>

The *Prometheus* court, by providing a policy-driven determination in a case requiring application of administrative standards and deference to administrative expertise, ignored its proper role and "substituted its own policy judgment for that of the Federal Communications Commission."<sup>89</sup> The court's overreaching decision points to deep misgivings regarding the FCC's rule changes and the policy goals that prompted them. In the discussion below, this Note suggests a likely source of the concern that motivated the *Prometheus* court to remand the rule changes. The Note also endeavors to show that while the court failed to apply the appropriate standard of review, its decision was far from misguided as a matter of media policy.

### III. SCARCITY IN THE NEW MEDIA MARKETPLACE

The scarcity rationale has long faced criticism.<sup>90</sup> Technological developments in recent decades have increased the calls for its abandonment. Notwithstanding these criticisms, the FCC's attempt to deny the relevance of scarcity rests on untenable assumptions. Impartial reflection on the current media marketplace reveals that the scarcity doctrine remains both applicable and essential despite recent changes in the distribution of content.

#### A. The Denial of Scarcity

Although the FCC offered numerous justifications for its rule changes, one assumption underpins the sweeping deregulations called for in *The Order*: the diminished relevance of scarcity in establishing ownership limits. While the dearth of available spectrum continues to limit speech opportunities for would-be broadcasters, according to the FCC scarcity no longer justifies the ownership restrictions of the past because changes in the media marketplace have diminished its importance. As *The Order* explained:

Today's media marketplace is characterized by abundance. . . . [N]ew modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history. Today we can access news, information,

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88. *NBC v. United States*, 319 U.S. 190, 224 (1943)

89. *Prometheus*, 373 F.3d at 435 (Scircia, J., dissenting).

90. See e.g., R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

and entertainment in many enhanced and non-traditional ways via: cable and satellite television, digital transmission, personal and portable recording and playback devices, handheld wireless devices, and perhaps the most extraordinary communications development, the Internet. In short the number of outlets for national and local news, information, and entertainment is large and growing.<sup>91</sup>

Today, information consumers enjoy access to an unprecedented volume of media content. The local newspaper and broadcast stations no longer form the limits of our media exposure. Cable and satellite television offer hundreds of channels, satellite radio supplies new content, and the Internet provides access to a seemingly infinite number of information sources. Since these new distribution channels provide greater access to more information, the FCC contends, the need for diversity in broadcast media is lessened and relaxed regulations are justified. Two propositions underlie the FCC's denial of the continued importance of scarcity: the abundance of new outlets and the substitutability of media. Under inspection, both of these assumptions fail.

## **B. The Continued Relevance of Scarcity**

Despite the FCC's quixotic belief in the power of new technology to radically restructure the media marketplace, scarcity remains a vital consideration in crafting thoughtful regulatory policies. The availability of new distribution channels alone fails to justify the FCC's de-emphasis on scarcity because such an increase cannot guarantee concomitant increases in media outlets or, by extension, diverse viewpoints. Even where new methods of content distribution do give rise to new outlets, implicit in the FCC's reasoning is an unsupported belief in the substitutability of media.<sup>92</sup> In order to reduce the importance of spectrum scarcity, consumers must treat these newly available outlets as equivalents of the traditional broadcast media. Only by serving as market substitutes can these new outlets decrease the burden on the limited electromagnetic spectrum, justifying relaxed regulation. The failure of the FCC's assumptions, coupled with the continued demand for access to the limited broadcast spectrum, requires recommitment to the scarcity rationale and the regulatory obligations it demands.

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91. The Order, *supra* note 36, at 13,647.

92. See Enrique Armijo, *Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 N.C. L. REV. 1482, 1494 (2004).



### 1. *Outlets, Sources, Distribution, and Diversity*

While the FCC is undoubtedly correct that more media outlets exist today than at any point in our past, its conclusion that viewpoint diversity is adequately served in the new media environment lacks justification. The FCC recognizes several types of diversity. Viewpoint diversity, chief among the FCC's diversity goals, ensures that the public is exposed to competing and differing perspectives on important issues.<sup>93</sup> Both outlet diversity (the presence of multiple independent media owners in a market) and source diversity (the availability of content from a variety of producers) serve the greater goal of achieving a multiplicity of viewpoints.<sup>94</sup> While increases in outlet and source diversity tend to yield greater viewpoint diversity, the abundance of non-broadcast media content offers no guarantee of viewpoint diversity.

The ownership of non-broadcast media receives far less scrutiny than that of broadcast stations. As a result, the same corporations that dominate broadcasting control many non-broadcast media providers. While cable and satellite provide hundreds of unique channels to viewers, 90% of the most watched non-broadcast television channels are owned by the same corporations that control the broadcast networks and cable systems.<sup>95</sup> In fact, just six owners control 80% of the top ninety-one cable channels.<sup>96</sup> Because nearly all of the top twenty news sites are owned by large media conglomerates, the Internet fares no better.<sup>97</sup>

Technology provoked a rapid increase in availability of news and information. This technology, however, provides merely a means of distribution. It offers both new and existing media owners an additional method by which they can disseminate the content they license, purchase, or create. Technology alone cannot ensure diversity of outlet ownership nor can it guarantee the independent production necessary for source diversity. Consequently, the technology of the new media marketplace fails to secure greater viewpoint diversity, and cannot justify the loosening of broadcast regulations meant to safeguard such a variety of viewpoints.

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93. See *The Order*, *supra* note 36, at 13,627.

94. See *id.* at 13,632-33.

95. See *id.* at 13,953 (Commissioner Copps, dissenting).

96. See *id.* at 13,981 (Commissioner Adelstein, dissenting).

97. See *Newspapers Run 8 of Top 20 News Sites*, EDITOR & PUBLISHER MAG., Feb. 20, 2003, LEXIS, Nexis Library, Editor & Publisher Magazine File; American Press Institute, *Top 20 Current Events & Global News Sites Nielsen//NetRatings*, November 2002, at <http://www.cyberjournalist.net/features/netratings/1102netratings.htm> (last visited Mar. 10, 2005) (citing Nielsen//NetRatings).

A daily newspaper with an Internet presence provides the same information via two vehicles for delivery. Although the ready accessibility of information offers a public benefit, the two distribution channels offered by the *New York Times* and [www.nytimes.com](http://www.nytimes.com), for example, represent neither two independent media sources nor two distinct outlets. Instead, they offer only two centrally controlled distribution channels for nearly identical content and, therefore, cannot materially contribute to increased viewpoint diversity. On a larger scale, the fifteen national cable channels and thirty-nine broadcast television channels owned by Viacom present a similar concern.<sup>98</sup> As the number of channels offered by local cable systems increases, the number of media conglomerates controlling their content does not.

The FCC's understanding of the media marketplace is tainted by a crucial conflation. The FCC misconstrues newly created means of distributing content as newly developed and independent outlets for information providing diverse viewpoints. The media marketplace is characterized not by an abundance of viewpoints, but by an abundance of distribution channels through which media owners can pump a single point of view. This mischaracterization of the media marketplace undermines the central justification for the FCC's relaxation of the ownership rules.

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98. Viacom's cable holdings include: BET (Black Entertainment Television), CMT (Country Music Television), Comedy Central, Flix, MTV (Music Television), MTV2 (Music Television 2), Nick at Nite, Nickelodeon, NOGIN, Showtime, Spike TV, TMC (The Movie Channel), The Sundance Channel, TV Land, VH1. Its broadcast television holdings include: KAUT-TV (Oklahoma City, Okla.), KBHK-TV (San Francisco, Cal.), KCAL (Los Angeles, Cal.), KCBS-TV (Los Angeles, Cal.), KCCO (Alexandria, Minn.), KCCW (Walker, Minn.), KCNC-TV (Denver, Colo.), KDKA-TV (Pittsburgh, Pa.), KEYE-TV (Austin, Tex.), KMAX-TV (Sacramento, Cal.), KPIX-TV (San Francisco, Cal.), KSTW-TV (Seattle, Wash.), KTVT-TV (Dallas-Fort Worth, Tex.), KTXA-TV (Dallas, Tex.), KUSG (Washington, Utah), KUTV-TV (Salt Lake City, Utah), KYW-TV (Philadelphia, Pa.), WBBM-TV (Chicago, Ill.), WBFS-TV (Miami, Fla.), WBZ-TV (Boston, Mass.), WCBS-TV (New York, N.Y.), WCCO-TV (Minneapolis, Minn.), WFOR-TV (Miami-Ft. Lauderdale, Fla.), WFRV-TV (Green Bay, Wis.), WGNT-TV (Norfolk-Portsmouth, Va.), WJMN (Escanaba, Wis.), WJZ-TV (Baltimore, Md.), WKBD-TV (Detroit, Mich.), WLWC-TV (Providence, R.I.), WNDY-TV (Indianapolis, Ind.), WNPA-TV (Pittsburgh, Pa.), WPSG-TV (Philadelphia, Pa.), WSBK-TV (Boston, Mass.), WTOG-TV (Tampa, Fla.), WTVX-TV (West Palm Beach, Fla.), WUPA-TV (Atlanta, Ga.), WUPL-TV (New Orleans, La.), WWHO-TV (Columbus, Ohio), and WWJ-TV (Detroit, Mich.). Viacom's other holdings include Paramount Pictures, Paramount Home Entertainment, publisher Simon & Schuster, television producer and distributor King World Productions, and over 150 radio stations nationwide. See *Who Owns What: Viacom*, at <http://www.cjr.org/tools/owners/viacom.asp> (last visited Jan. 26, 2005).

## 2. *The Non-Fungibility of Media*

The FCC's assumption that non-broadcast media can serve as equal substitutes for traditional broadcast channels faces significant difficulty. Broadcasters occupy a unique place in our culture. Broadcast content is pervasive, popular, responsive, and valuable. For these reasons, non-broadcast media are unlikely to fulfill the same needs for the viewing public.

As the Court noted in *Red Lion*, "[L]ong experience in broadcasting [and] confirmed habits of listeners and viewers . . . give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible."<sup>99</sup> Few American homes lack a television.<sup>100</sup> Nearly every home and automobile in America has a radio.<sup>101</sup> The freely available content broadcast over the air presents few barriers to viewing and listening. As a result of the pervasive character of broadcasting, 90% of American adults watch television on a daily basis,<sup>102</sup> and more than 75% of Americans listen to the radio every day.<sup>103</sup> Not only do Americans regularly tune in to broadcast programming, they rely on it as their primary source of news and information. A recent study conducted by the Pew Internet and American Life Project showed that 89% of Americans received most of their news about the war in Iraq from television programming, while only 17% of Internet users cited Internet sites as their primary source of information.<sup>104</sup> Although television viewing among Internet users continues to decline, television remains the dominant source of news and information.<sup>105</sup>

While the statistics above fail to differentiate between broadcast and non-broadcast television, two key characteristics differentiate these media. Broadcast television provides free over-the-air access to news and information. Cable and satellite providers, on the other hand, charge fees for access to the channels they deliver. Continued emphasis on maintaining diversity of broadcast viewpoints serves a crucial role in assuring quality

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

100. See Media Info Center, at <http://mediainfocenter.org/compare/penetration> (last visited on Mar. 9, 2005).

101. *Id.*

102. *Id.*

103. *Id.*

104. LEE RAINIE ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, THE INTERNET AND THE IRAQ WAR: HOW ONLINE AMERICAN HAVE USED THE INTERNET TO LEARN WAR NEWS, UNDERSTAND EVENTS, AND PROMOTE THEIR VIEWS 2 (2004), available at [http://www.pewinternet.org/pdfs/PIP\\_Iraq\\_War\\_Report.pdf](http://www.pewinternet.org/pdfs/PIP_Iraq_War_Report.pdf).

105. Online Publishers Ass'n, *Generational Media Study* (Sept. 21, 2004), at [http://www.online-publishers.org/pdf/opa\\_generational\\_study\\_sep04.pdf](http://www.online-publishers.org/pdf/opa_generational_study_sep04.pdf).

programming for all. Secondly, broadcast stations, along with daily newspapers, provide essential coverage of local issues. Cable networks, because of their national audience and centralized facilities, are unmotivated and ill equipped to cover issues of local concern. Similarly, widely read Internet news sources focus on national and international news and fail to serve as a substitute for the local coverage offered by broadcasters.

The continued value of broadcast stations provides perhaps the clearest evidence of the non-substitutability of broadcast and non-broadcast media. If Internet sites, for example, served as equal substitutes for broadcast stations, we should expect to see station owners abandoning their expensive broadcast enterprises and adopting a low cost Internet-only media strategy. Instead, the value of broadcast stations continues to soar. Stations in major markets have sold at prices approaching \$1 billion.<sup>106</sup> The continued demand for broadcast stations, even in the face of low cost online dissemination, demonstrates the unique value of broadcasting.

The *Prometheus* court's decision finds ample support in an examination of the FCC's underlying justification for The Order's rule changes. Although new technology has provoked rapid and widespread changes in the media marketplace, those developments fail to undermine the importance of spectrum scarcity. Because new distribution methods can neither promise viewpoint diversity nor offer substitutability with broadcast media, the inherent limitations of broadcast media continue to justify the regulation of media owners who enjoy access to a limited and valuable public resource.

### C. The Future of Deregulation

The FCC's attempts at deregulation, while premature, may not be fundamentally misguided. Under the appropriate circumstances, the deregulation of broadcast ownership may prove a responsible policy.

The emergence of independent, widely available, and popular non-broadcast media provide the most likely justification for ownership deregulation. In a media environment truly characterized by abundant, independent, and pervasive non-broadcast media outlets, the criticisms leveled against the FCC's rule changes hold less sway. This is particularly so if those outlets offer local content, because each of the FCC's overarching policy goals—diversity, localism, and competition—would be satisfied. While such a shift appears likely in time, it is not guaranteed. Nor would it remove all justification for regulating the use of broadcast spectrum.<sup>107</sup>

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106. See The Order, *supra* note 36, at 13,983 (Commissioner Adelstein, dissenting).

107. See Logan, *supra* note 6, at 1687.

Secondly, the development and adoption of efficiency enhancing spectrum technology, coupled with a democratization of spectrum allocation, could reduce the need for broadcast media ownership rules. Developing technologies offer more economical use of available spectrum. Spread spectrum<sup>108</sup> and cognitive radio<sup>109</sup> both hold the promise of allowing more individuals to communicate over the air and reducing the impact of spectrum scarcity. While these technologies are not designed to operate with existing radio and television broadcasting, the principles underlying them could form the basis of efficient next generation media distribution technologies. In the short term, the transition from analog to digital transmission offers the promise of freeing "vast quantities of additional . . . spectrum" that could greatly increase viewpoint diversity.<sup>110</sup>

Lessening the need for regulation requires greater access to spectrum by new entrants through not only technology but also through the FCC's spectrum allocation policies. The approval of Low Power FM (LPFM) technology provides the most apt example of this approach. In 2000, the FCC created the LPFM service, which allows community broadcasters to operate stations powered with 100 watts or fewer.<sup>111</sup> By limiting these stations to noncommercial educational broadcasters and explicitly excluding current broadcast license holders and newspaper owners, the FCC helped to ensure viewpoint diversity.<sup>112</sup> Unfortunately, by requiring a separation of three channels between new LPFM stations and existing broadcasters, Congress and the FCC prevented the creation of LPFM stations in most major markets, where the station's small broadcasting range could reach the largest audiences.<sup>113</sup>

Finally, the FCC could reduce the need to regulate ownership of broadcast stations by reinstituting the division between the creation and distribution of content. The Financial Interest and Syndication Rules

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108. See generally Raymond L. Pickholtz et. al., *Theory of Spread-Spectrum Communications—A Tutorial*, [COM-30 No.5] IEEE TRANSACTIONS ON COMMUNICATIONS (May 1982).

109. See generally Joseph Mitola III, *Cognitive Radio: An Integrated Agent Architecture for Software Defined Radio*, Royal Institute of Technology, May 8, 2000, available at [http://www.it.kth.se/~jmitola/Mitola\\_Dissertation8\\_Integrated.pdf](http://www.it.kth.se/~jmitola/Mitola_Dissertation8_Integrated.pdf).

110. Media Access Project, *Digital TV and the Spectrum Grab of 1997*, at <http://www.mediaaccess.org/programs/digitaltv> (last modified Aug. 24, 2000).

111. See *In re Creation of Low Power Radio Service*, 15 F.C.C.R. 2205, 2206 (2000).

112. See *id.* at 2206, 2217.

113. See 47 C.F.R. § 73.807 (2004) (modified by the 2001 Appropriations Act to require third adjacent channel separation). In 2004, Sen. John McCain introduced legislation to eliminate the third-adjacent minimum distance separation requirements. See S. 2505, 108th Cong. (2004).

("Fin-Syn Rules"), created by the FCC in 1970 and eliminated in the 1990s, precluded networks from obtaining a financial interest in the programs they broadcast beyond their initial airing and prohibited the development of network controlled syndication enterprises.<sup>114</sup> The FCC in creating the Fin-Syn Rules hoped to encourage production of content independent from the control of the networks that aired it. In the wake of the elimination of the rules, the feared consolidation of production and distribution has occurred. After the establishment of the Fin-Syn Rules, of the top three television networks, only CBS was among the twenty leading suppliers of prime time network content, accounting for just 2% of programming.<sup>115</sup> In 2002, years after the end of Fin-Syn, the CBS, ABC, and NBC networks served as the top three prime time content suppliers, accounting for over 63% of programming hours.<sup>116</sup> Re-imposition of rules that limit the control networks can exert over the production of the programming they air could contribute to program and viewpoint diversity, lessening the need for media ownership regulation.

While none of the above suggestions could likely suffice to justify complete deregulation of broadcast ownership, without these or similar changes the need for continued stringent limits on media concentration will remain pressing.

#### IV. THE NEED FOR CONGRESSIONAL INTERVENTION

The FCC's authority, as a federal administrative agency, derives from Congress. The FCC serves as an agent of the legislature and its regulations must comport with congressional goals. The FCC, however, has faced ambivalence and inaction from Congress. After passing the Telecommunications Act of 1996, which eliminated the national radio cap and paved the way for further deregulation by demanding biennial reviews, Congress has offered the FCC little guidance despite the continual litigation facing FCC rulemakings.

While the deregulations of the early 1980s faced congressional opposition, those of the late 1990s were encouraged, if not demanded, by Congress.<sup>117</sup> The FCC, in calling for further deregulation, is simply following

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114. 47 C.F.R. § 73.659 (1994).

115. Mara Einstein, *Program Diversity and the Program Selection Process on Broadcast Network Television*, Federal Communications Commission, Media Ownership Work Group, Sept. 2002, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC226838A10.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC226838A10.pdf).

116. *Id.*

117. *See supra* Part I.B.

Congress's most recent mandate. Congress has yet to provide the FCC with a clear signal that it no longer favors aggressive deregulation of broadcasting. The initial Congressional outcry over The Order resulted in only minor concessions to the apparent majority favoring a wholesale rejection of the new rules. Such congressional waffling sends a mixed message to the FCC.<sup>118</sup>

The need for clear and decisive legislation is compounded by the courts' difficulty in resolving the disputes arising out of the FCC's rule changes. As *Prometheus* makes clear, courts lack both the expertise and authority necessary to adequately and effectively address the FCC's failure to craft appropriate media ownership policy. Courts are limited by both the standard of administrative review as well as the binary decision-making required in judicial proceedings. Courts may only accept or reject the rules devised by the FCC, and, even then, only as demanded by the "public interest" and "arbitrary and capricious" standards. Only Congress is free to craft context-sensitive and creative solutions to issues of ownership regulation that escape perpetual reviews by both the FCC under § 202(h) and the courts in suits such as *Sinclair* and *Prometheus*. Congress must base its legislation on a careful consideration of the public good and a sober evaluation of the existing media marketplace, one that accounts for, but does not overestimate, the opportunities for diversity created by new and developing technologies.

## V. CONCLUSION

The decision in *Prometheus Radio Project v. FCC*, though it resulted from the misapplication of the standards of administrative review, finds justification as a matter of policy. The faulty reasoning underlying the FCC's rule changes explains the court's skepticism of the overzealous deregulatory efforts embodied in The Order. Ultimately, Congress must reassert itself as the ultimate authority responsible for the regulation of broadcasters and provide the FCC with legislative guidance. While deregulation may prove an appropriate policy in the future, Congress must recognize that until the media marketplace can secure widespread "dissemination of information from diverse and antagonistic sources" to the American public in the absence of broadcast media ownership rules, the regulations must remain.<sup>119</sup>

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118. See *supra* note 43.

119. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).