



3-1-2006

RADIO REGULATION: THE EFFECT OF A PRO-LOCALISM AGENDA ON BLACK RADIO

LaVonda N. Reed-Huff

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/crsj>



Part of the [Communications Law Commons](#)

Recommended Citation

LaVonda N. Reed-Huff, *RADIO REGULATION: THE EFFECT OF A PRO-LOCALISM AGENDA ON BLACK RADIO*, 12 Wash. & Lee J. Civ. Rts. & Soc. Just. 97 (2006).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol12/iss2/4>

This Article is brought to you for free and open access by the Washington and Lee Journal of Civil Rights and Social Justice at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

RADIO REGULATION: THE EFFECT OF A PRO-LOCALISM AGENDA ON BLACK RADIO

LaVonda N. Reed-Huff*

I.	Introduction	98
II.	Radio and Television Ownership Rules.....	104
III.	The Pro-Localism Agenda, the Public's Expectations of the Broadcast Media, and Broadcast Diversity	112
	A. The Pro-Localism Agenda	112
	B. Public Expectations of the Broadcast Media	118
	C. Broadcast Diversity.....	120
IV.	History of Black Broadcasting.....	126
	A. The Influence of Syndicated Radio Personalities	131
	B. The Impact of Black Television Broadcasting and the Black Print Media.....	135
	C. The Kerner Commission's Report on the Media's Influence on the Riots of the 1960's and the Civil Rights Movement.....	136
	D. The Local-National Interplay.....	140
	E. Impediments to Black Broadcast Ownership	142
	1. Cost.....	142
	2. License Renewals	145
V.	Beyond Localism.....	146
	A. Can Diversity Exist in an Environment of Excessive Consolidation?.....	146
	B. Must Broadcasters be Diverse to Produce Diverse Programming?	148
	C. Will Blacks Have a Voice at all Without Black Ownership?	150
VI.	Conclusion	153

* Assistant Professor of Law, Louis D. Brandeis School of Law, University of Louisville; University of Virginia, B.A., 1990; University of Southern California, J.D., 1997. Thank you to Professor Serena M. Williams of the Widener University School of Law, Professor Blake D. Morant of the Washington and Lee University School of Law, Professor Enid Trucios-Haynes of the Louis D. Brandeis School of Law, Dean Laura Rothstein of the Louis D. Brandeis School of Law, and my research assistants Meghan Talbott and Christy Osborne.

I. Introduction

For the past three years, the Federal Communications Commission (FCC or Commission) and the American public have been embroiled in a debate about the future of the radio and television broadcast industries. In the summer of 2003, the FCC removed significant ownership limits permitting unprecedented consolidation in the broadcast and print media industries.¹ After publication of the FCC's proposed rules and prior to enactment, there were a record number of comments filed opposing the Commission's deregulation efforts.² Most commentators in the agency's rulemaking proceeding expressed concerns about the growing influence of a small number of individuals who have gained unprecedented control of huge portions of the American airwaves and thus, exert overwhelming control over news, music, advertising and concert promotion.³ They also lamented the lack of access for citizens in local communities to their own local radio airwaves and overwhelmingly called for a rollback of the Commission's rules to reflect a time when there was greater local ownership and control of the nation's airwaves, and consequently, greater overall broadcast diversity.⁴

¹ 2002 Biennial Regulatory Review, *Report and Order*, 18 F.C.C.R. 13,620 (2003) [hereinafter 2002 Biennial Review], *aff'd in part and remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

² 2002 Biennial Review, *supra* note 1, ¶ 9. The Commission received over 500,000 comments and letters from industry participants and private citizens; Statement of Commissioner Michael J. Copps, Dissenting, 2002 Biennial Regulatory Review, 18 F.C.C.R. 13620, 13952–53 (2003), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A5.pdf [hereinafter Copps' Dissent]. Commissioner Copps claimed that the Commission received close to 750,000 comments, a significant number in opposition to the Commission's proposed rules. *Id.*; Statement of Commissioner Jonathan S. Adelstein, Dissenting, 2002 Biennial Regulatory Review, 18 F.C.C.R. 13620, 13978 (2003) [hereinafter Adelstein's Dissent]. Commissioner Adelstein stated that the Commission had heard from nearly 2 million people in opposition to the rules counting all of the comments, letters, e-mails, and postcards. *Id.*

³ *Media Ownership: Radio Industry, Before the Senate Committee on Commerce, Science & Transportation*, 108th Cong. (2003) (statement by Don Henley, Recording Artists' Coalition); see generally *Media Ownership: Radio Industry, Before the Senate Committee on Commerce, Science & Transportation*, 108th Cong. (2003) (statement by Jenny Toomey, Future of Music Coalition); Comments of Fairness & Accuracy in Reporting, Will the FCC Help Big Media Get Even Bigger?, May 20, 2003, <http://www.fair.org/index.php?page=1610>. One organization argued that a number of television broadcast stations have either ended their news programming or have merged their news departments with those of other local stations, thereby reducing the amount of news programming and variety of opinions provided to the public. *Media Ownership: Radio Industry, Before the Senate Committee on Commerce, Science & Transportation*, 108th Cong. (2003) (comments by Fairness & Accuracy in Reporting).

⁴ Comments of American Federation of TV & Radio Artists and Writers Guild of America, East, In the Matter of 2002 Biennial Regulatory—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast and Newspapers, and Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, http://www.democraticmedia.org/news/wga_aftra_comments.doc (last visited Apr. 3, 2006); Comments of Americans for Radio Diversity, www.radiodiversity.com (last visited Apr. 3, 2006); Comments of Minority Media & Telecommunications Council, Civil Rights Organizations Prevail on all Issues in Landmark Third Circuit Media Ownership Decision, June 24, 2004, <http://www.mmtconline.org/pc/04/MMTCPR3dCir.pdf>; Comments of National Association of Black-

Largely missing from the discourse was the impact of the rule changes, be they negative or positive, on Black broadcasters and the Black radio format. While greater local ownership and control, commonly referred to as "localism," is a laudable goal, one must ask whether a rollback of the FCC's ownership limits necessarily will benefit traditional Black radio and the communities it serves.⁵ As used here, the term "Black radio" refers to radio broadcast stations owned or operated by Blacks, or in a broader sense, all radio stations delivering programming targeting Black audiences. The chances that the rollback of ownership limits will benefit Black radio are slim, or at least not as significant as they could be. Trends, even prior to 1996, when the FCC completely overhauled many of its radio multiple-ownership rules, showed a shrinkage in the number of African-American radio station owners due to a number of systemic problems including, but not limited to, lack of financing options, the inability to secure advertising dollars, and the FCC's licensing policies, rules, and procedures.⁶

Traditional Black-owned radio must be preserved and Black broadcasters must have a hand in its preservation. Since its inception, Black-owned radio stations have provided a valuable service to the communities they serve. Greater minority ownership and localism are separate and distinct issues; therefore, law and policy makers must not assume that greater broadcast localism will result in greater minority ownership. Further, increased localism generally will not result in the type of programming diversity that racially diverse ownership is likely to produce. In fact, balanced media coverage of Black and other minority communities is largely invisible in the mainstream broadcast and cable media. The Commission must seek to increase the variety of voices in the market as well as encourage broadcasters to offer a variety of programming choices. It has been suggested that stations owned by minorities contribute to viewpoint and

Owned Broadcasters, In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, May 08, 2002, http://www.nabob.org/Press_Releases/5_8_02.pdf.

⁵ See 2002 Biennial Review, *supra* note 1, ¶ 73 (2003) (noting that the FCC solicited comments related to the goal of localism in broadcasting). The Commission believes that localism is an important policy objective, a belief it clearly articulated in the 2002 Biennial Review. *Id.* The Commission states "[w]e hereby reaffirm our commitment to promoting localism in the broadcast media." *Id.* Some scholars have noted the dearth of African-American journalists and have criticized Black radio station owners for scaling back news programming focusing on local communities and the goings on therein; Todd Burroughs, *Who Killed Black Radio News?*, 44 *The Black Commentator*, May 29, 2003, http://www.Blackcommentator.com/44/44_cover.html. Burroughs reminisces about how he was influenced by popular Black-oriented news programming on broadcast radio in cities like New York, Newark, and Philadelphia in the 1970s and 1980s. *Id.* He argued that he personally has not seen a Black commercial radio newscaster at a press conference since the mid-1980s and suggests that today's commercial radio owners have trained listeners to find contentment in a more watered-down news format he calls "infotainment." *Id.*

⁶ The terms "African-American" and "Black" will be used interchangeably to describe those identifying themselves as Black Americans of African descent.

programming diversity in the media. It is also argued that these stations are more sensitive to issues important to the minority communities they serve, and the minority community at large, than non-minority-owned broadcast entities.⁷

The FCC's current rules do not promote minority ownership.⁸ The Commission, however, has not completely disposed of issues of media diversity and localism, having initiated yet another round of inquiry on the matters.⁹ This Article contends that, while the FCC's current rules are ineffective at promoting minority ownership and the type of diverse programming resulting from such ownership, those rules will be equally ineffective even if they are rolled back to effect greater local ownership absent a re-focus on a means of actually increasing minority ownership and a historical analysis of how the Black media has served the Black community over time.

Even though the 2002 Biennial Review largely left unchanged the existing radio broadcast multiple ownership rules, a significant portion of the opposition to more relaxed ownership rules focused almost exclusively on the rampant consolidation in the radio industry.¹⁰ While most of those arguments opposing the FCC's new rules are worthy of consideration, there are several aspects of the pro-localism argument that have received little attention to date. These aspects all relate to the impact of the Commission's

⁷ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579–84 (1990). In *Metro Broad., Inc.*, the Supreme Court agreed with the FCC's contention that there is a link between minority ownership and broadcast diversity, and that such a conclusion is supported by empirical evidence and "does not rest on impermissible stereotyping." *Id.* at 579. The Commission argued, and the Court agreed, that this empirical evidence suggests that minority ownership impacts news coverage, editorial viewpoints, and employment decisions. *Id.* at 580–81. Minority broadcasters tend to devote more news time to topics of interest to minority communities and tend to avoid racial stereotyping. *Id.* The Court noted that minorities have particular viewpoints and interests worthy of protection. *Id.* at 583.

⁸ Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979, 980, n. 8 (1978). The FCC's definition of "minority" includes "those of Black, Hispanic surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction"; Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 849 n.1 (1982) (citing 47 U.S.C. § 309(i)(3)(C) (1982)).

⁹ See *In re Broadcast Localism*, Notice of Inquiry, 19 F.C.C.R. 12425 (2004) [hereinafter NOI 12425] (soliciting comments as to how the FCC may act to ensure that broadcasters best serve their communities). The Commission has sought comment on the extent to which commercial broadcasters are meeting the needs of their communities of license. *Id.* Specifically, they sought comment on the extent to which broadcasters communicate with communities, provide political programming, meet the needs of underserved audiences, and handle disaster warnings. *Id.* The NOI also sought input on the relationship of local stations with their national network affiliates, the prevalence of payola, or payments to broadcast stations for airplay of specific programming, the prevalence of national playlists on radio stations. *Id.* Additionally, the NOI sought comment on the impact of the Commission's license renewal policies on local stations and some broadcast spectrum allocation issues. *Id.*

¹⁰ See 2002 Biennial Review, *supra* note 1 (indicating the 2003 rules would largely affect multiple and cross ownership of television broadcast outlets and newspapers).

rules on, and the economic realities of, the broadcast industry in minority communities. The Commission has articulated racial and gender diversity as an important policy goal, but the Commission has not sufficiently considered or articulated the impact on the minority-owned broadcasting industry of a singular focus on greater localism without other regulatory reforms addressing greater diversity in the media.¹¹

Local markets that fairly give minorities opportunities for meaningful access to and participation in broadcasting are ideal. Even though, in theory, a local model of radio ownership complete with a diverse array of owners is ideal, the reality is that the number of market participants, regardless of race, has dropped precipitously since 1996.¹² Therefore, the Commission's attention to localism must include minority ownership issues in order to effectively encourage minority access and participation. Even if minority ownership finds its way to the Commission's short list of concerns, one might reasonably conclude that the implementation of a narrowly focused pro-localism agenda may not necessarily be in the best interest of minorities and the minority community as a whole. Even with a return to greater local ownership and less consolidated markets, it is uncertain whether smaller minority owners will be able to compete in local markets to an extent where those markets will reflect significant minority ownership and consequently result in greater program diversity and more meaningful coverage of minority issues. The critical issue of racial diversity of ownership must not be lost or overlooked in fulfilling a pro-localism agenda. The FCC must take into account the important role of Black radio on America's national minority community as demonstrated throughout history as it crafts future broadcast media ownership policy, and it must issue policies and regulations that support its continuance.

This Article will focus primarily on Black ownership, but is relevant to all similarly situated minority groups.¹³ For instance, much has been said about the importance and influence of ethnic media generally. In the wake

¹¹ See 2002 Biennial Review, *supra* note 1, ¶¶ 46–52 (discussing the potential impact of a greater number of small businesses participating in local communications markets); see also *Metro Broad., Inc.*, 497 U.S. at 569–72 (stating that the FCC has encouraged minority participation in broadcasting in order to serve the needs of the entire viewing and listening community—both minority and non-minority communities); Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979, 981 (noting that without greater minority participation a large segment of the population will not be sufficiently represented).

¹² Copps' Dissent, *supra* note 2, at 13952, 13959. The number of radio station owners has decreased 34% since 1996. *Id.*; George Williams & Scott Roberts, Radio Industry Review 2002: Trends in Ownership, Format, and Finance, Media Bureau Staff Research Paper, Media Ownership Working Group, Sept. 2002, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A20.doc.

¹³ Center For American Progress, "Ethnic Media in America: The Giant Hidden in Plain Sight," June 30, 2005, <http://www.americanprogress.org> (search "Ethnic Media in America"). New California Media, a national association of ethnic media groups, estimates that ethnic media reaches fifty-one million people nationwide. *Id.*

of the 2005 Hurricane Katrina, ethnic media, which is in large part a foreign-language media, played a significant role in filling in the gaps left unfilled by the mainstream media. Asian media covered the plight of Koreans and Vietnamese displaced by the storm, drawing similarities between the experiences of Katrina victims and refugees from war-torn Asian countries.¹⁴ Black media raised national awareness of the race and class disparities of those affected by the storm. Black media also raised the question of whether race and class influenced the government's planning prior to the storm and its slow response to the victims in the storm's aftermath.

Black and Hispanic media also heightened awareness of the issue that while millions of dollars were being raised by various mainstream relief organizations, many Blacks and Hispanics could very likely slip through the cracks and receive little or none of the monies being donated to large charities for Hurricane victims. For example, radio personality Tom Joyner of the Tom Joyner Morning Show established a non-profit relief fund for hurricane victims and created a network of Black churches to ensure that Blacks in the affected areas got needed relief.¹⁵ Joyner and ethnic media outlets also have been helping people reunite with family members separated during the evacuations of the towns in the storm's path and have highlighted the need for greater intra-community self-reliance.¹⁶ The historical development of Black broadcast ownership provides an ideal model for studying the relevant role of media ownership on struggles for social and economic change on a national level. There may be parallels to other minority communities. In fact, Latino and Hispanic radio formats are the fastest growing.¹⁷ These formats have the potential to impact similarly the communities they serve and to be impacted by communications and regulatory policy.¹⁸

Since the earliest radio regulations, the overwhelming trend has been toward a relaxation of multiple broadcast ownership restrictions. If history is any indication as to future trends, consideration should be given to how the

¹⁴ Brian Skoloff, *Ethnic Media Find New Angle on Katrina*, MSNBC, Sept. 12, 2005, <http://msnbc.msn.com/id/9316248>.

¹⁵ Hurricane Katrina, <http://www.blackamericaweb.com/relief/> (last visited Apr. 2, 2006).

¹⁶ Amadi Ajamu, *Katrina's Lesson: Self-Determination for Blacks Everywhere*, SAN FRANCISCO BAY VIEW, Sept. 20, 2005, <http://news.newamericamedia.org/news> (follow "all news topics" hyperlink; then follow "Hurricane Katrina" hyperlink to page 6 of articles).

¹⁷ See Nicole Serratore, Note, *How Do You Say "Big Media" in Spanish?: Spanish-Language Media Regulation and the Implications of the Univision-Hispanic Broadcasting Merger on the Public Interest*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 203 (2004) (arguing that the FCC failed to act in the public interest by approving the merger of two of the largest Spanish-language broadcasters, Univision and Hispanic Broadcasting Corporation). The author asserts that the merger effectively created a monopoly in the U.S. Spanish-language broadcasting market, shutting out other Spanish-language market participants. *Id.*

¹⁸ See, e.g., Brian Skoloff, *supra* note 14 (describing the different angles provided by ethnic media on coverage of public events).

current structure of nationally consolidated broadcast ownership can work to the advantage of minority communities and to how meaningful minority ownership can be created within this framework. By meaningful minority ownership, this Article suggests ownership of stations with adequate technical power, financial backing, and connection to the local community or the minority community as a whole to meet the needs of that community, while affording the owner or owners of the station the ability to compete in the highly competitive industry.

This Article does not argue against localism. It advocates for more minority ownership, and argues that localism, if it is to be pursued at all, should be pursued in conjunction with the pursuit of greater racial diversity in broadcast ownership. Such diversity, it argues, will translate into greater source and programming diversity. It cautions minority communities against mindlessly jumping on the anti-consolidation pro-localism bandwagon without fully understanding what is at play and who the players are. This Article illustrates how the Black community has used and benefited from national networks and national news and event reporting to affect social change from the World War I era to the present. As it relates to any proposed rule changes or maintaining the status quo, African-Americans and all other minorities should ask, "What is in it for me?" In sum, the issue is not simple. The issue cannot be reduced to a simple equation of localism equals better. Greater localism is better only if there is diversity in ownership, a diversity of sources, and ultimately, diversity in programming choices.

Part II of this Article addresses the FCC's radio and television ownership rules, including those changes enacted in 2003. Part III addresses the pro-localism agenda. It explores the public's expectations of broadcasting and discusses the issue of diversity in broadcast programming and ownership. Part IV outlines the history of Black ownership of broadcast outlets. It explores the influence of syndicated radio personalities and their impact on social issues—both local and national. It examines the past and current impact of the Black press, television, and radio on Black communities nationwide. This Part considers the role of the broadcast media in the quest for recognition of civil rights and racial equality. This Part addresses the shortcomings of a myopic localism agenda and discusses the benefits to the African-American community of a national broadcast ownership framework. It examines the role of the national broadcast media in bringing attention to issues of importance to the African-American community. It addresses how national exposure to seemingly local issues often results in action, awareness, and change. Finally, this Part explores the impediments to greater minority ownership.

Part V looks beyond the localism agenda, raising several rhetorical questions regarding localism and diversity and making several recommendations to preserve traditional Black radio. Specifically, this Article asks (i) whether diversity can exist in an environment of excessive consolidation; (ii) whether broadcasters must be diverse to produce diverse programming; and (iii) whether Blacks will have a voice at all without Black ownership of broadcast outlets.

II. Radio and Television Ownership Rules

Congress has regulated broadcast in earnest since its passage of the Radio Act of 1912, which regulated wireless technology, and the Radio Act of 1927.¹⁹ The Radio Act of 1927 addressed the issue of ownership of airwaves and broadcast licenses.²⁰ The regulatory framework was built upon two key principles: (1) the requirement of a broadcast license to broadcast across the national airwaves, and (2) the declaration that the airwaves were publicly owned, and that no private ownership rights would be granted in them.²¹ Congress determined that there would be no fee charged for granting these limited duration broadcast licenses, and that the standard for awarding a broadcast license would be whether the grant furthered the "public interest, convenience, or necessity."²² Just what this standard means remains within the discretion of the Federal Communication Commission. Some years later, Congress replaced the Radio Act of 1927, without substantial change, with the Communications Act of 1934 (1934 Act) and replaced the Federal Radio Commission with the modern-day Federal Communications Commission.²³

In the early years of broadcast regulation, the Commission expressed reluctance to permit a single entity to hold more than one broadcast license, citing public interest concerns that diversity would suffer from undue concentration.²⁴ In response to these concerns, the Commission enacted what has been referred to as the "one-to-a-market" rule.²⁵ By the 1950s,

¹⁹ Radio Act of 1912, 37 Stat. 302 (1912); Radio Act of 1927, 44 Stat. 1162 (1927).

²⁰ Radio Act of 1927, 44 Stat. 1162 (1927).

²¹ *Id.*; THOMAS KRATTENMAKER AND LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 6 (1994).

²² Radio Act of 1927, 44 Stat. 1162 (1927).

²³ Communications Act of 1934, 47 U.S.C. 151 (creating the Federal Communications Commission).

²⁴ See *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190, 206–08 (1943) (upholding a decision by the FCC to enforce its Chain Broadcasting Regulations, which regulated the simultaneous broadcast of the same program on affiliated radio stations). Although it lacked the technical competence and the legal authority to determine whether the public interest was indeed furthered by the regulations, the Court found that the administrative action was based upon findings supported by evidence and did not constitute an abuse of discretion. *Id.* at 224–27.

²⁵ 5 Fed. Reg. 2382, 2384 (June 26, 1940) (FM radio); 6 Fed. Reg. 2282, 2284–85 (May 6, 1941) (television); 8 Fed. Reg. 16065) (Nov. 27, 1943) (AM radio).

regulations were relaxed, permitting common ownership of seven AM, seven FM, and seven television stations.²⁶ This rule is commonly known as the Seven Station Rule. The earliest media cross-ownership rules were adopted in the 1970s.²⁷ For example, in 1975, the Commission adopted rules prohibiting common ownership of a daily newspaper and a television or radio station in the same market.²⁸ Multiple ownership rules were relaxed further in the 1980s and 1990s, including a relaxation of the one-to-a-market rule limiting cross-ownership of radio and television stations.²⁹ In response to market and industry concerns about undue governmental regulation, the FCC relaxed the radio ownership limits in 1992, adopting a tiered system of multiple ownership of media outlets that is still used today.³⁰

Seeking to update antiquated regulations that inadequately addressed modern and emerging technology, Congress crafted a voluminous, complicated, and arguably ineffective piece of deregulatory legislation.³¹ In 1996, the broadcasting industry saw the largest regulatory overhaul to date with the passage of the Telecommunications Act of 1996 (1996 Act).³² The 1996 Act brought sweeping deregulatory changes to the 1934 Act as Congress sought to promote "pro-competitive, deregulatory" telecommunications markets.³³ The 1996 Act led to unprecedented

²⁶ See *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956) (upholding an FCC rule limiting the number of stations in which an applicant for a new station license may have an interest).

²⁷ Amendment of §§ 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C. 2d 306, ¶ 5 (1970); Amendment of §§ 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 (1975) (upheld in *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802 (1978)).

²⁸ Amendment of §§ 73.35, 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 (1975).

²⁹ Amendment of § 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 F.C.C. 2d 74, ¶¶ 38, 39 (1985). In the early 1990s, a single licensee was limited to twenty AM and twenty FM commercial radio stations. *Id.* No single entity could own more than one AM or more than one FM radio station with overlapping signal contours; see *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 F.C.C.R. 19861, 19863-64, ¶¶ 5-7 [hereinafter *Local Radio Ownership NPRM*] (describing rules relating to multiple ownership).

³⁰ See 1992 Radio Ownership Report and Order, 7 F.C.C.R. at 2757-60, ¶¶ 4-10; 47 C.F.R. § 73.3555(a)(1) (1995) (regulating ownership of stations). A single entity was permitted to own more than one AM and two FM stations in larger radio markets and fewer stations in smaller markets. *Id.* In markets with fifteen or more commercial radio stations, a single owner could own two AM and two FM stations. *Id.* In smaller markets, ownership was limited to three stations of which no more could be in the same service. *Id.* A national ownership limit also was put in place. *Id.* A single entity was limited to a 25% audience share in large markets. *Id.*; see also *Revision of Radio Rules and Policies*, 7 F.C.C.R. 6387, ¶ 27 (1992) (discussing issues raised in petitions for reconsideration and modifying local and national ownership limits).

³¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³² *Id.*

³³ S. Rep. No. 104-230, at 1-2 (1996).

consolidation in the radio and television broadcast industries as well as consolidation in the hands of a few with considerable influence on the type, quality, and tone of programming offered to the American public. The 1996 Act removed all national radio ownership limits and raised the national television audience reach cap from 25% to 35%.³⁴ By 1997, over 800 radio stations were owned and operated by only ten owners.³⁵ The FCC retained yet modified its tiered system of multiple ownership of media outlets under the 1996 rules.³⁶ In markets with a large number of AM, FM, and television broadcast stations, a single entity could have a "cognizable interest" in a greater number of media licenses.³⁷ Pursuant to the 1996 Act, the FCC limited cross ownership of a daily newspaper and commercial television and radio stations.³⁸

³⁴ See Telecommunications Act of 1996, *supra* note 31, at §§ 202(a), (c)(1)(B) (discussing broadcast ownership).

³⁵ KOFI OFORI, ET AL, BLACKOUT? MEDIA OWNERSHIP CONCENTRATION AND THE FUTURE OF BLACK RADIO: IMPACTS OF THE TELECOMMUNICATIONS ACT OF 1996, 24 (1997).

³⁶ 47 C.F.R. § 73.3555.

³⁷ 47 C.F.R. § 73.3555 n.1. A "cognizable interest" includes "any interest, direct or indirect, that allows a person or entity to own, operate or control, or that otherwise provides an attributable interest in, a broadcast station." *Id.* Ownership interests in cable television systems, broadcast licensees, time brokerage agreements, Local Marketing Agreements (LMAs), Joint Sales Agreements (JSAs), and daily newspapers are attributable to their holders, subject to certain limitations based on voting power in the cable television system, licensee, or daily newspaper. *Id.*; 47 C.F.R. § 73.3555, n.2. Licensees use time brokerage agreements to fill airtime on their stations by selling available airtime to a broker who fills the time with programming and advertisements. *Id.* LMAs are used by licensees to provide programming for another licensee's station and to sell advertisement time during that programming. *Id.* Joint Sales Agreements authorize brokers to sell advertising time for a brokered station. *Id.* In a radio market with forty-five or more stations, a single entity could have a cognizable interest in eight stations, not more than five of which may be in the same service. *Id.* At the other end of the spectrum, in radio markets with fourteen or fewer stations, a single entity could have an interest in not more than five stations and not more than three in the same service, but no entity could have an interest in more than 50% of the stations in a market except that an entity could have an interest in one AM and one FM station. *Id.* As applied to television stations, the 1996 rules prohibited ownership of more than one station in a Designated Market Area (DMA) that is among the top four stations in the DMA based on Nielsen Media Research (Nielsen) audience share measures; 47 C.F.R. § 73.3555(b). *Id.* A DMA is a measure used by Nielsen to define broadcast markets. *Id.*; Nielsen Media Research, Frequently Asked Questions, <http://www.nielsenmedia.com/> (follow "FAQs" hyperlink; then follow "TV Ratings" hyperlink). There are 210 DMAs covering the continental United States, Hawaii, and Alaska. *Id.* New York City is the largest DMA with 7,355,710 television homes, representing 6.712% of the U.S. television households. *Id.*; In larger markets a single entity could own up to three stations. 47 C.F.R. 73.3555(d); see also § 202(c) of the 1996 Act (discussing limitations on television station ownership).

³⁸ 47 C.F.R. § 73.3555(d)(1). When originally adopted in 1975, all such combinations were completely prohibited. 1975 Multiple Ownership Second Report and Order, 50 F.C.C. 2d 1046, 1074 (1975). Certain combinations were grandfathered. A daily newspaper is defined as an English language newspaper published four or more times per week. 47 C.F.R. § 47.73555, n.6. Where there were three or fewer television stations in a DMA, no single entity could own a newspaper and a broadcast station or a radio and television station. 47 C.F.R. § 73.3555(c)(1). Where there were four to eight television stations, a single entity who owned or controlled a daily newspaper could have an interest in one commercial television station and up to 50% of the radio station limit for that market, or 100% of the allowable radio stations but no television stations; 47 C.F.R. § 73.3555(c)(2).

One of the most significant and controversial sections of the 1996 Act is § 202(h). This section directs the FCC to review "all of its [broadcast] ownership rules every two years."³⁹ This frequent review schedule has been the source of dismay and delay in fully achieving the competing goals of the 1996 Act. Section 202 has resulted in somewhat of a regulatory nightmare as the Commission attempts to undertake this huge task on such a tight time schedule, which has been hindered further by federal litigation.⁴⁰ The Commission conducted its first biennial review in 1998 and its second in 2000 without significant controversy.⁴¹ The 2002 Biennial Review, however, gave way to the significant rule changes adopted by the FCC in 2003 and has resulted in a public outcry for regulatory changes and agency restraint.⁴²

In its 2002 Biennial Review, the Commission considered the continued necessity of six rules.⁴³ When it released its revised rules in 2003, the Commission reiterated its ongoing policy objectives of promoting competition, diversity, and localism. Simultaneously, the FCC further relaxed certain key rules, paving the way for greater media consolidation, which undermines its policy goals.⁴⁴ The cross ownership rules were significantly relaxed by the Commission's 2003 rules.⁴⁵ In the 2002 Biennial Review, the Commission replaced both the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule with a single set of rules applicable to cross-ownership of the print and broadcast media.⁴⁶ In 2003, the FCC repealed the longstanding limitation prohibiting ownership of a newspaper and a broadcast station in the same market, concluding that the newspaper/broadcast cross-ownership rule was no longer

³⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). In § 202(h), Congress instructed the Commission to review biennially its rules to "determine whether any of such rules are necessary in the public interest as the result of competition, . . . and to repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

⁴⁰ See, e.g., *Prometheus Radio Project v. FCC.*, 2003 U.S. App. LEXIS 18390 (issuing a stay of the new rules pending judicial review and ordering that the ownership rules in place prior to the effective date of the new rules remained in effect); *Prometheus Radio Project v. FCC.*, 373 F.3d 372 (3d Cir. 2004) (remanding a significant portion of the new rules for further agency consideration).

⁴¹ 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to § 202 of the Telecommunications Act of 1996, 15 F.C.C.R. 11058 (2000); 2000 Biennial Review, *supra* note 1, ¶ 32.

⁴² See generally 2002 Biennial Review, *supra* note 1.

⁴³ See generally *id.* The 2002 Biennial Review considered all six of the broadcast ownership rules including: (1) the radio/television cross-ownership rule; (2) the newspaper/broadcast cross-ownership rule; (3) the national television multiple ownership rule; (4) the local television multiple ownership rule; (5) the dual network rule, and (6) the local radio ownership rule. *Id.*

⁴⁴ 2002 Biennial Review, *supra* note 1, ¶¶ 2-9.

⁴⁵ *Id.* ¶¶ 327-90.

⁴⁶ See 2002 Biennial Review, *supra* note 1, ¶¶ 432-33 (describing the Commission's new media cross-ownership rules, which rely on a Diversity Index methodology for identifying markets at risk for excessive market concentration and at risk for diminished broadcast diversity).

necessary to promote localism.⁴⁷ Repeal of the prohibition on cross ownership of a daily newspaper and television or radio stations in the nation's largest markets opened the door for unprecedented multiple and cross ownership of various critical media outlets.⁴⁸ Additionally, the Commission again raised the national television audience reach cap from 35% to 45% of the national viewing audience.⁴⁹ This part of the 2002 Biennial Review was appealed to the Court of Appeals for the District of Columbia, which held that the Commission failed to justify raising that limit and remanded the rule to the agency.⁵⁰ In response to the D.C. Circuit Court's decision, Congress passed the 2004 Consolidated Appropriations Act. This Act modified § 202(c)(1)(B) of the 1996 Act, directing the FCC to implement a more modest increase in the national audience reach limitation for television broadcast stations from 35% to 39%, instead of 45%.⁵¹

The Commission retained the Dual Network Rule, which prohibits mergers of the country's four major broadcasting networks.⁵² The Commission found that this rule remained in the public interest, necessity, and convenience.⁵³ With respect to local television multiple ownership, the Commission modified its existing rule to permit entities to have ownership interests in a greater number of television broadcast stations in local markets.⁵⁴ The Commission adopted a sliding scale, permitting a single entity to have an attributable interest in more stations in larger local markets and limiting multiple ownership in small markets.⁵⁵ The Commission also retained an earlier adopted 50% UHF Discount, which discounted the

⁴⁷ See 2002 Biennial Review, *supra* note 1, ¶¶ 327–90 (suggesting that the newspaper/broadcast cross-ownership prohibition actually might harm localism as the quality of local news coverage is enhanced where cross media combinations exist).

⁴⁸ *Id.* ¶ 330.

⁴⁹ *Id.* ¶ 500.

⁵⁰ *Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (Fox I), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) (Fox II).

⁵¹ Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004); see 2002 Biennial Review, *supra* note 1, ¶¶ 499–500 (demonstrating that the FCC still is under the directive). As a result, the agency's 45% cap is no longer applicable. *Id.*

⁵² 2002 Biennial Review, *supra* note 1, ¶¶ 592, 134. While the top four broadcasting networks, ABC, CBS, NBC, and FOX were expressly prohibited from merging with one another, local television stations were permitted to affiliate with more than one network, but no more than one of the four largest networks. *Id.* The amended rules would now permit television station triopolies in the largest markets. *Id.* The new rule would allow such triopolies in only nine of the largest DMAs, and duopolies would be permitted in the largest 162 DMAs, accounting for 95.4% of the nation's population. *Id.*; Duopolies and triopolies refer to two or three dominant entities in a single market. 2002 Biennial Review, *supra* note 1, ¶ 592; see Adelstein's Dissent, *supra* note 2, at 13997–98 (describing the public response to the Commission's proposed rules).

⁵³ 2002 Biennial Review, *supra* note 1, ¶ 592.

⁵⁴ 2002 Biennial Review, *supra* note 1, ¶ 134.

⁵⁵ *Id.* ¶ 134.

audience reach of UHF television stations such that two UHF television stations are the equivalent of one VHF television station.⁵⁶

The FCC's 2003 rules left unchanged the existing local radio broadcast multiple ownership rules. The Commission kept its existing numerical limits on broadcast radio station ownership adopted in the 1996 Act, but with several important changes to the methodology for defining markets.⁵⁷ By retaining the existing numerical limits, the Commission signaled to the public its lack of concern about the current trend of excessive consolidation and homogenization of radio broadcasting. The Commission adopted a formula it is calling the "Diversity Index" to measure viewpoint diversity in local markets.⁵⁸ The Commission designed the Diversity Index to identify markets "at risk" of excessive viewpoint concentration and to identify where cross-ownership limits were justified.⁵⁹ The Diversity Index is modeled after the Herfindahl-Hirschman Index (HHI) used by the Department of Justice and the Federal Trade Commission to analyze anti-competitive effects of corporate mergers.⁶⁰ Furthermore, noncommercial radio stations would be included in the total number of stations in a market.⁶¹ The Diversity Index relies on Nielsen market designations and Arbitron ratings.⁶²

The Commission concluded in the 2002 Biennial Review that limits on local ownership remained "necessary in the public interest," but that its methodologies for defining radio markets and counting stations did not adequately protect local competition or take into account the effect of competition from noncommercial radio stations on the commercial radio market.⁶³ These conclusions, as well as others in the 2002 Biennial Review,

⁵⁶ *Id.* ¶ 500. "UHF" stands for Ultra High Frequency, and "VHF" stands for Very High Frequency. *Id.* Ultra High Frequency stations operate in the 300 MHz to 3 GHz spectrum. *Id.* Very High Frequency stations operate in the range of 30MHz to 300 MHz. *Id.*

⁵⁷ 2002 Biennial Review, *supra* note 1, ¶ 239. The Commission discarded the "contour-overlap" market definition in favor of a geographic method used by Arbitron. *Id.* Arbitron is a radio market data research company. *Id.*

⁵⁸ *Id.* ¶ 391.

⁵⁹ Prometheus Radio Project, 373 F.3d at 372.

⁶⁰ 2002 Biennial Review, *supra* note 1, ¶ 428. $HHI = f \sum i + 1 S_i^2$. In this formula, f represents the number of firms in an industry, S_i represents each firm's market share, and i represents a firm in a given industry. *Id.*

⁶¹ *Id.* ¶ 239.

⁶² *Id.* ¶ 428-431; see Philip M. Napoli, Audience Measurement and Media Policy: Audience Economics, the Diversity Principle, and the Local People Meter, 10 COMM. L. & POL'Y 349 (2005) (suggesting that communications policymakers should at best cautiously rely on Nielsen data as a means of measuring diversity). Napoli argues that Nielsen's research methods and data is wrought with problems—most notably the undercounting of minority audiences. *Id.*

⁶³ FCC 03-127, ¶ 239. The Commission found that its contour-overlap method used to define radio markets and for determining how many stations were in each market was flawed as was its method of not including noncommercial stations in its counting of radio stations in a local market. *Id.* The Commission replaced its contour-overlap method with an Arbitron Metro Survey Area market definition

have come under criticism from various groups, including many in minority communities, expressing skepticism about the integrity and reliability of Arbitron ratings and methodologies.

The Commission's action has also triggered a political backlash that could potentially eliminate its ability to regulate in the broadcast arena. In September 2003, the Senate voted fifty-five to forty by resolution of disapproval to quash the FCC's 2003 rules.⁶⁴ The bill, introduced by Senator Byron L. Dorgan (D-North Dakota) was an attempt to "halt the galloping concentration" of media outlets.⁶⁵ If Congress decides to cut funding for the agency, the stage may be set for a few tumultuous years in communications regulation that could aggravate detrimental effects to the American public. Congress, however, must act responsibly in response to the Commission's action so as not to further harm the general public or sound the death knell of Black radio.

Prometheus Radio Project eventually appealed the rules, and in early 2004, the U.S. Court of Appeals for the Third Circuit stayed the rules pending further review of the agency's rulemaking.⁶⁶ Later, in 2004, in a rare and unusual exercise of authority and judicial review of a federal agency's decision making, the Third Circuit, in a very detailed opinion, scrutinized the FCC's rules and affirmed, rejected, or remanded significant parts of the Commission's rules.⁶⁷ Most important was the court's remand of the agency's cross-media limits because of the Commission's flawed Diversity Index.⁶⁸ The Third Circuit also remanded the FCC's numerical limits on local radio and television ownership because they were not supported by empirical evidence.⁶⁹

Equally notable was the court's decision to remand the Commission's repeal of a rule regarding the sale and solicitation of failed stations.⁷⁰ This rule had been used by the Commission to increase minority ownership by making known to minority broadcasters when failed stations or stations experiencing financial troubles became available for sale.⁷¹ The

methodology and determined to count noncommercial radio stations in the number of radio stations in a given local market. *Id.*

⁶⁴ S.J. Res. 17, 108th Congress, 1st Session, (Sept. 16, 2003). The resolution read as follows: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that Congress disapproves the rule submitted by the Federal Communications Commission relating to broadcast media ownership (Report and Order FCC 03-127, received by Congress on July 10, 2003), and such rule shall have no force or effect." *Id.*

⁶⁵ Frank Ahrens, *Senate Vote Could Kill FCC's New Media Rules*, WASH. POST, Sept. 16, 2003, at E1.

⁶⁶ *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390, 2003 WL 22052896.

⁶⁷ *Prometheus Radio Project*, 373 F.3d at 372.

⁶⁸ *Id.* at 402-03.

⁶⁹ *Id.* at 380-81.

⁷⁰ *Id.* at 420.

⁷¹ 1999 Television Rule Review, 14 F.C.C.R. 12903, ¶¶ 13, 14, 74.

Third Circuit expressed concern that the FCC, in its 2003 rules, sought to eliminate a rule that the agency itself had touted was designed to benefit minorities.⁷² The Third Circuit found this disturbing because the Commission failed to even consider the effect of eliminating the rule on minority ownership, particularly since minority ownership had declined despite the Commission's failed station rule.⁷³ To date, the Commission has not adopted new rules.

Every two years, the FCC requires all radio and television broadcast licensees to file an ownership report reflecting, among other things, the race and gender of its owners.⁷⁴ Prior to the passage of the Telecommunications Act of 1996, African-Americans accounted for ownership of less than 2% of radio and television broadcast stations.⁷⁵ As of 1993, there were 11,334 radio stations, 313 of which were African-American or a member of another minority group.⁷⁶ Of those 313 stations, 181 were owned by Blacks.⁷⁷ By 1995, this number declined to 176.⁷⁸ Blacks owned nineteen and twenty-seven television stations, in 1993 and 1995 respectively.⁷⁹

In 2001, 8751 licensees filed ownership reports. Of these, 380, or 4.3% disclosed ownership by at least one female having a 50% or greater voting interest.⁸⁰ Three hundred and three (303), or 3.5%, reported ownership by at least one minority having a 50% or greater voting interest in the licensed entity.⁸¹ The most recent statistics available are for the 2003 reportable year.⁸² Those statistics reflect a slight decline in the percentage of

⁷² Prometheus Radio Project 373 F.3d at 420–21 (citing 1999 Television Rule Review, 14 F.C.C.R. 12903, ¶ 14).

⁷³ *Id.*

⁷⁴ 47 C.F.R. § 73.3615. The Commission compiles the information reported pursuant to 47 C.F.R. § 73.3615 in two reports: the Minority Ownership Report and the Female Ownership Report. *Id.* These reports are released biennially. *Id.*

⁷⁵ MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES, NTIA, U.S. DEP'T. OF COMMERCE, Apr. 1996, Table 2 [hereinafter Table 2]; OFORI, ET AL., *supra* note 35, at 30, 179; CHARLES LOUIS NERO TARVER, THE EFFECTS OF DEREGULATION ON BLACK RADIO OWNERSHIP 71–74 (1994) (stating that 2.7% of radio stations were Black-owned if non-commercial stations, which previously were not counted, also were included).

⁷⁶ TARVER, *supra* note 75, at 71–74.

⁷⁷ Table 2, *supra* note 75; see also OFORI, ET AL., *supra* note 35, at 30, 179 (analyzing the concentration of media ownership in relation to the Telecommunications Act of 1996).

⁷⁸ Table 2, *supra* note 75; see also OFORI, ET AL., *supra* note 35, at 30, 179 (analyzing the concentration of media ownership in relation to the Telecommunications Act of 1996).

⁷⁹ Table 2, *supra* note 75; see also OFORI, ET AL., *supra* note 35, at 30, 179 (analyzing the concentration of media ownership in relation to the Telecommunications Act of 1996).

⁸⁰ See generally FCC, OWNERSHIP MINORITY REPORT FOR 2001, Jan. 21, 2003, <http://www.fcc.gov/mb/ownership/ownminor.pdf>.

⁸¹ *Id.*

⁸² FCC, OWNERSHIP MINORITY REPORT FOR 2003, July 14, 2004, http://www.fcc.gov/ownership/owner_minor_2003.pdf [hereinafter MINORITY REPORT]; FCC, OWNERSHIP REPORT FOR 2003: FEMALE OWNERSHIP, July 14, 2004, http://www.fcc.gov/ownership/owner_female_2003.pdf [hereinafter FEMALE REPORT].

female and minority broadcast owners.⁸³ In 2003, 11,609 licensees filed ownership reports, of which 412 identified ownership by at least one female.⁸⁴ That is only 3.55% of all licensees. Three hundred eighty-nine licensees reported ownership by at least one minority—representing only 3.35% of all licensees.⁸⁵ Therefore, while the overall number of broadcast licensees filing ownership reports increased by 2858 stations or 32.66%, and while the number of female and minority-owned stations increased by 8.4% and 28.38% respectively from 2001 to 2003, the proportion of female and minority owners to the total number of stations actually declined.⁸⁶

Nationally, the number of different owners overall has decreased 34% since 1996.⁸⁷ Today, there are roughly 3400 to 3800 different radio station owners nationwide.⁸⁸ As a result of the 1996 amendments, radio ownership has been consolidated largely in the hands of only ten owners in a typical radio market.⁸⁹ Since 1996, large radio conglomerates such as Clear Channel Communications and Infinity Broadcasting have dominated the industry.⁹⁰ Clear Channel currently owns over 1200 radio stations, or roughly 9% to 10% of the total of the nation's radio stations.⁹¹ While this excessive consolidation has caused considerable consternation among many industry insiders and citizens in general, the Commission attributes the financial strength of the industry, as evidenced by the efficiencies and economies of scale and increased profits associated with consolidation, to its relaxation of the radio ownership rules.⁹²

III. The Pro-Localism Agenda, the Public's Expectations of the Broadcast Media, and Broadcast Diversity

A. The Pro-Localism Agenda

Concerns about localism and diversity have been recorded since the earliest days of radio. For example, Tennessee Congressman E.L. Davis, in a 1928 amendment to the Radio Act of 1927, suggested that radio stations

⁸³ *Id.*

⁸⁴ MINORITY REPORT, *supra* note 82.

⁸⁵ FEMALE REPORT, *supra* note 82.

⁸⁶ Radio One did not file a report. If Radio One's stations are factored in for 2003, minority ownership increases slightly by 44%.

⁸⁷ Copps' Dissent, *supra* note 2, at 13959; Williams & Roberts, *supra* note 12, at 3.

⁸⁸ Williams & Roberts, *supra* note 12, at 7.

⁸⁹ OFORI, ET AL., *supra* note 35, at 24.

⁹⁰ See FCC, MEDIA OWNERSHIP POLICY REEXAMINATION, Feb. 27, 2003, http://www.fcc.gov/ownership/enbanc022703_docs/Mays.pdf (reporting that Mark P. Hays, an executive for Clear Channel Communications, testifies that Clear Channel owns more than 9% of all radio stations).

⁹¹ *Id.*

⁹² 2002 Biennial Review, *supra* note 1, ¶ 236.

should be equitably distributed across the United States rather than being concentrated in the populous eastern part of the country.⁹³ Such distribution, he hoped, would localize and diversify ownership as well as programming.⁹⁴ The Commission consistently has chosen to focus more on the principal of localism and has given short shrift to the import of diversity of sources of information and diversity of ownership by race and gender. Most recently, it seems that the FCC has abandoned the racial and gender diversity goal. The 2002 Biennial Review scarcely even mentions minority ownership.⁹⁵ Similarly, the Commission's Broadcast Localism Notice of Inquiry released in July 2004 barely considers the impact of its relaxed rules on Black-owned radio entities.⁹⁶ Commissioners Michael J. Copps and Jonathan S. Adelstein point out this oversight in their dissents to the Biennial Review.⁹⁷ With the new relaxed rules, both Copps and Adelstein suggest that minorities will have an even more difficult time entering the industry and competing with industry giants.⁹⁸

The majority of those lamenting the loss of localism and fretting over the lost opportunities of local bands and Boy Scout troops to have access to the local airwaves are not Black.⁹⁹ Those complaining the loudest tend to be white, with the exception of the recent FCC hearing in San Antonio, Texas, at which a large number of Latinos voiced dissenting opinions.¹⁰⁰ Therefore, one must ask whether a regulatory agenda favoring greater localism will necessarily result in greater Black ownership or

⁹³ 45 Stat. 373 (1928).

⁹⁴ *Id.*

⁹⁵ 2002 Biennial Review, *supra* note 1, ¶¶ 46–52. The Commission's discussion of this issue has been reduced to seven paragraphs on three pages of a six hundred eighty-three paragraph, nearly three hundred page order. The recently released Broadcast Localism Notice of Inquiry devotes only three paragraphs to the general topic of "Underserved Audiences." It does not squarely invite comment on minority ownership issues. The Commission promised in the 2002 Biennial Review to issue a Notice of Proposed Rulemaking to address this issue; 2002 Biennial Review, *supra* note 1, ¶ 39.

⁹⁶ NOI 12425, *supra* note 9, ¶ 24. The 2004 Notice of Inquiry solicits comment on the impact of its rules on underserved audiences. It does not expressly consider the issue of minority ownership, focusing instead on the extent to which minority audiences are served by current broadcasters.

⁹⁷ See Copps' Dissent, *supra* note 2, at 13959–60, 13966–67, 13970–71 (recognizing the importance of racial diversity in broadcast ownership and chastise the Commission for its lack of attention to the issue in the 2003 rules, the Commissioner urged the Commission to deal adequately and forthrightly with the issue without undue delay). The Commissioner argued that the new rules create a huge loophole with its decision to grandfather certain radio clusters that exceed existing caps and further by its permitting such grandfathered licensees to transfer their stations exceeding the caps to small businesses who may after three years convey these stations to anyone including the huge conglomerates. *Id.* He contended that the rule does little to help small and minority industry participants or clear the massive hurdles to entrance into the broadcasting industry, including the astronomical cost of stations and the difficulty in securing financing; Adelstein's Dissent, *supra* note 2, at 13995–97 (same).

⁹⁸ Copps' Dissent, *supra* note 2, at 13966–67, 13970–71; Adelstein's Dissent, *supra* note 2, at 13995–97.

⁹⁹ Henley Testimony, *supra* note 3.

¹⁰⁰ Transcript of Field Hearing Broadcast Localism Hearing, San Antonio, Texas, Jan. 28, 2004, http://www.fcc.gov/localism/sanantonio_transcript.pdf.

coverage of issues from a perspective unique to Blacks. Because of the relevant role of traditional Black-owned and Black-oriented broadcasting, the Commission must consider the impact of its rules on this segment of the public. The Commission must study thoroughly the historical effects of non-minority ownership on the portrayal of minorities in the media and the quality of information of interest to minorities delivered via minority-owned and controlled versus non-minority-owned and controlled media outlets.

The FCC speaks now almost exclusively in terms of "firms" owning broadcast licenses.¹⁰¹ Unfortunately, the regulators have abandoned even the notion of a market in which individuals or small businesses will own broadcast stations in any meaningful way. There are exceptions though for women and minorities, who the Commission feels possess some super powers enabling them to miraculously compete against the Goliaths in the industry and save the day for all Americans and democracy. Additionally, the Commission's decision to grandfather existing groupings is analogous to the post-slavery period when former slaves gained the right to own property, yet there was no requirement that property-owning whites divest themselves of any property acquired when Blacks were barred from property ownership. The playing field is not level because of past and present inequality inherent in policies and statutory and regulatory schemes. Competition and diversity cannot flourish where some are given an unfair advantage, yet where effective remedial efforts are disallowed.

Just what is this thing called "localism"? Scholars have concluded that it refers to responsiveness to geographically local needs, politics, news, entertainment, culture, and more.¹⁰² It goes without saying that local ownership of radio outlets generally is best for local communities. A local broadcaster, presumably, will focus on local public affairs, including state and local politics, local events, personal achievements of local citizens, and the intersection of local and national issues. Additionally, local broadcasters may provide more meaningful opportunities for citizen commentary on issues of local concern. Many nationally owned radio stations tend to pay

¹⁰¹ 2002 Biennial Review, *supra* note 1, ¶¶ 20, 38, 58, 69, 70.

¹⁰² See Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 265 (2005) ("It means providing opportunities for local self-expression and reaching out to, developing and promoting local talent. It means making programming decisions to serve local needs. It means allocating resources to address the needs of the community."). The FCC has described localism as broadcast licensees' obligation to carry programming responsive to the local communities they serve. FCC, Report and Order and Notice of Proposed Rulemaking on Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, Rules and Regulations, 47 C.F.R. Part 73 (MB Docket 02-277, and MM Dockets 01-235, 01-317, and 00-244; FCC 03-127) (Aug. 5, 2003) 80. FCC, In the Matter of Broadcast Localism (MB Docket No. 04-233, FCC 04-129) Notice of Inquiry, June 7, 2004 http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-129A1.txt.

less attention to those seemingly more mundane events of everyday life in local communities—particularly small and rural communities.

Radio conglomerates, on the other hand, seeking to maximize economies of scale, may broadcast the same radio show to many of its stations across the country while the show's disc jockey sits in a studio in another city or state.¹⁰³ This type of absentee ownership and management has caused some to argue that local broadcasters whose owners have no ties to the local community increasingly pay greater attention to national and global issues to the exclusion of many local stories in an effort to compete with national 24-hour news networks.¹⁰⁴

Examples of complete inattention to significantly newsworthy events in small and remote localities have been cited to support greater regulation of radio broadcasters and limits on the number of licenses any particular entity can hold.¹⁰⁵ Prior to the rules' enactment, the Senate and the Commission undertook an initiative to gain an understanding of the public's view on the issue.¹⁰⁶ The Senate held several hearings, and the FCC even held forums across the country, taking the public pulse on the issue.¹⁰⁷ To the Commission's surprise, the public was much more charged over this issue than anticipated. Senate leaders including, Senator John McCain (R-Arizona) and Senator Russell Feingold (D-Wisconsin) were appalled by the gross consolidation in the media industry. Most citizens at the FCC's public forums felt and continue to feel that the consolidation of the nation's airwaves by huge corporate conglomerates undercuts democracy as well as an essential component of broadcasting—localism.¹⁰⁸ For instance, at a 2003

¹⁰³ UCC Reply Comments in MM Docket No. 01-317 at 17; Transcript, Field Hearing, Broadcast Localism Hearing, Charlotte, North Carolina, Oct. 22, 2003, Testimony of Hon. Michael Price, at 29 (stating that "many local stations these days are essentially run by remote control."), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-242307A1.doc.

¹⁰⁴ Transcript, Field Hearing, Broadcast Localism Hearing, Charlotte, North Carolina, Oct. 22, 2003, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-242307A1.doc [hereinafter Broadcast Localism Hearing]; Ted Turner, *My Beef with Big Media*, WASH. MONTHLY, Aug. 2004, available at <http://www.washingtonmonthly.com/features/2004/0407.turner.html>.

¹⁰⁵ Transcript, Field Hearing, Broadcast Localism Hearing, Testimony of Senator Russell Feingold, Jan. 30, 2003; Turner, *supra* note 102.

¹⁰⁶ Copps' Dissent, *supra* note 2, at 13956. The only official Commission hearing was held in Richmond, Virginia. Commissioner Michael J. Copps and Commissioner Jonathan S. Adelstein used their own office resources to hold hearings in New York, Seattle, Austin, Durham, North Carolina, Phoenix, Arizona, Chicago, Burlington, Vermont, San Francisco, Los Angeles, Philadelphia, Marin County, California, Detroit, and Atlanta. *Id.*

¹⁰⁷ The U.S. Senate Committee on Commerce, Science & Transportation held four hearings on media ownership between January 2003 and July 2, 2003 when the 2003 rules were released. See generally U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION, <http://commerce.senate.gov/newsroom/index.cfm>.

¹⁰⁸ *Media Ownership: Radio Industry: Hearing Before the Senate Commerce, Science & Transportation Committee*, 108th Cong. 7–12 (2003) (statement of Sen. Russell Feingold). Senator Feingold indicated that he had received numerous angry calls from constituents and others including local concert promoters, local radio station owners, average citizens, artists, consumer groups, unions, and

Senate hearing, residents of a Mid-Western community explained the frustration they and their fellow citizens experienced by their inability to reach the local radio station by telephone to report and get updates about a huge train derailment and chemical spill that affected their town.¹⁰⁹ The local station was owned and operated by a large out-of-state corporation, and the station did not even have an employee physically present in the local studio to respond to listeners' calls.¹¹⁰ This scenario is undoubtedly replayed in countless communities nationwide, particularly during the late night and early morning hours when radio as well as television stations are more apt to scale back on personnel and broadcast repeats of earlier programming, rely on national network programming, broadcast infomercials, or sign off the air altogether.

The numerous FCC hearings filling the months leading up to the passage of the FCC's 2003 rules, as well as hearings held since then, focused primarily on consolidation in the radio industry.¹¹¹ The Commission issued a list of five questions to which it solicited responses. They included:

- 1) How do your broadcasters use radio and television to respond to the community's needs and interests? What are they doing well?
- 2) Are there certain kinds of local programming that you believe should be available but that are not being provided by local broadcasters? If so, what are they?
- 3) Are broadcasters well informed about important issues and events in the community?

religious organizations who were concerned about anti-competitive practices and a loss of diversity caused by excessive concentration in the hands of large corporate broadcasting conglomerates. *Id.* At the same hearing, Senator McCain expressed concern about allegations of anti-competitive behavior and cautioned the committee and other branches of government to give thoughtful consideration to any newly proposed rules. *Media Ownership: Radio Industry: Before the Senate Commerce, Science & Transportation Committee*, 108th Cong. (2003) (statement of the Sen. John McCain, Chairman). Testimony from Robert Short, President of Short Broadcasting Co., illustrated significant losses of viewpoint diversity in its local market of license due to excessive consolidation in the radio broadcast industry. *Media Ownership: Radio Industry: Before the Senate Commerce, Science & Transportation Committee*, 108th Cong. (2003) [hereinafter Short Statement] (statement of Robert Short, Jr., President, Short Broadcasting Co.).

¹⁰⁹ Turner, *supra* note 102.

¹¹⁰ *Id.*

¹¹¹ Copps' Dissent, *supra* note 2, at 13956. The FCC held localism hearings canvassing the country seeking the public opinion and input related to its broadcast ownership rules, and the Senate held a number of subcommittee hearings on the issue of media consolidation. The only official hearing was held in Richmond, Virginia. The Commission continues to hold such hearings as it considers in greater detail the issue of localism in its Broadcast Localism proceeding.; NOI 12425, *supra* note 9. The Commission has held hearings in cities such as Charlotte, NC, San Antonio, TX, and the state of South Dakota. Broadcast Localism Hearing, *supra* note 102.

- 4) Are there any segments of the local community that you believe are not being adequately served? How could broadcasters meet the needs of such groups?
- 5) What, if anything, should the FCC do to promote more localism in broadcasting?¹¹²

Among the thousands of comments filed in the rulemaking proceeding, public statements made during Senate hearings, and comments made at the agency-sponsored localism forums were complaints from industry participants, musicians, and the public in general, addressing the effects of widespread national ownership and consolidation in the radio industry.¹¹³ For instance, many up and coming musicians have claimed that they cannot get any airtime at all in today's mega-consolidated radio industry.¹¹⁴ They argue that they cannot even reach the ears of listeners in their local hometowns because all programming decisions—including approval of playlists—are made by corporate executives in far away places who have no idea of local perception in any given town or city.¹¹⁵ Also, many citizens complain of the inability to bring attention to local events and local causes because those with decision-making authority at radio and television stations now have no connection to the communities they serve and thus no interest in, or sensitivity to, local issues.¹¹⁶

Unfortunately, the Commission inexplicably did not give much, if any, weight to these concerns in the 2002 Biennial Review or in any order subsequent to its release. In July 2004, the Commission finally sought to address some of the issues raised by citizens and community groups. The Commission issued a Notice of Inquiry seeking comment on a variety of localism topics such as licensees' communication with communities, political programming, needs of underserved audiences, handling of disaster warnings, network affiliation rules, payola and other sponsorship identification, voice tracking, national playlists, license renewal procedures, and spectrum allocation.¹¹⁷ To date, this inquiry has not produced any proposed rules.

¹¹² NOI 12425, *supra* note 9. The five inquiries also are part of the Commission's ongoing efforts to adequately assess and deal with the issue of broadcast consolidation.

¹¹³ Broadcast Localism Hearing, *supra* note 102.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See NOI 12425, *supra* note 9 (describing the Commission's response to issues raised in the 2002 Biennial). The Commission also has established a Localism Task Force that is researching this issue in greater detail.

B. Public Expectations of the Broadcast Media

Important to the discussion of localism is identifying exactly what the public expects from radio and what radio actually delivers. The public's consumption of radio has changed significantly over time, influenced in no small part by other technologies, the most obvious of which are cable, satellite television, and satellite radio. In the early years of radio, families tuned in to radio to hear soap operas and other serial shows. They also listened to syndicated talk programs and sporting events. They also tuned in for music. Over time, however, Americans have come to rely less on radio for these purposes.

Today, with a few exceptions, few listeners tune in to radio for serial and soap opera-type shows.¹¹⁸ Television has replaced radio nearly entirely for this type of entertainment.¹¹⁹ A notable exception is the growing popularity of satellite radio, which offers a range of entertainment, news, and talk programming. With the introduction of around-the-clock cable television news channels, very few people rely solely on the few minutes each hour dedicated by radio stations to news programming for their news. Still widely popular are call-in radio talk shows, as television has not usurped radio's hold on that programming format. The C-SPAN cable channel generally provides the only significant opportunity for television viewers to call in and voice opinions on the air about a variety of issues of public concern. Some cable and broadcast licensees and networks have encouraged the public to comment on its programming via e-mail. Of course, Americans still tune in to the radio for music, and sports fans tune in for untelevised sporting events and sports talk shows. There remains an insatiable appetite for sports programming, and sports-related news despite the popularity of television sports broadcasts. Consequently, the popularity of cable sports television stations has not completely displaced the radio sports show in large part because radio fills a particular void not addressed by cable television sports programs. Radio sports programming tends to be very local in focus, broadcasting sporting events in which national television broadcasters take little or no interest, or which cannot be worked into crowded national network programming schedules.

One could conclude based on statements made at public forums that, in addition to national news reports, the public also might desire greater advanced notice and reporting of events occurring in their local communities. Radio stations are great at promoting big entertainment events such concerts,

¹¹⁸ The radio serial "It's Your World" produced by the Tom Joyner Morning Show has been heard daily by the show's listeners for a number of years. Transcripts of "It's Your World" are available at <http://blackamericaweb.com/site.aspx/tjms/missed/world>.

plays, and fundraisers such as walks to raise money for charities, but do little in the way of promoting other community events that are so much of what average citizens do in their everyday lives.¹²⁰ Most in the community are made aware of upcoming events via the newspaper and to a lesser extent television, as television and radio tend to describe what has already happened rather than what will happen.

Similarly, the public probably has great interest in what others in their communities feel about local issues as well as the impact of national policy on their local communities. Listener call-in programming has been a mainstay in minority communities for decades, but this type of public affairs exchange currently is largely missing on the local level, particularly as it relates to commercial radio.¹²¹ National public affairs exchange programming also has benefited minority communities, as many issues faced by African Americans across the country bear certain commonalities, even if only regionally. National Public Radio and other talk radio programs do an outstanding job of raising awareness of national issues, but there is a void when it comes to raising the same level of awareness about more local issues, including political and social issues.¹²² Radio could fill this void, but in most cases it does not. Arguably, AM stations offer more opportunities for an exchange of ideas. However, these stations have grown progressively conservative and one-sided rather than fair, balanced, and well-rounded. This problem is compounded when the local radio station is in fact not local at all, but is owned and operated by people who can barely find the local town on a map. Greater local ownership and a shift in focus towards programming content that consists of more than spinning the tunes would curb many of these problems and address many of these public concerns.

Public expectations about radio broadcasting also vary based on gender, age, and ethnicity. For instance, foreign-language programming—particularly Spanish language programming—has become the fastest growing format in many markets.¹²³ Similarly, public affairs programming

¹²⁰ See Broadcast Localism Hearing, *supra* note 102, at 72 (citing lack of coverage of local elections).

¹²¹ *Id.* at 68.

¹²² Tavis Smiley recently announced his departure from National Public Radio based in part on the broadcasters' inability to reach out to a broad range of listeners. *Disenchanted Tavis Smiley Is Leaving NPR After Three Years*, HOUSTON CHRONICLE, Dec. 1, 2004, at 6. Smiley inked a new deal in 2005 with Public Radio International for broadcast of a two-hour weekly radio program called "The Tavis Smiley Show."

¹²³ In 2003, Pappas Telecasting Companies, the country's largest privately held commercial television broadcaster entered into a Local Marketing Agreement under which Azteca America agreed to provide programming for KAZA-TV, a Spanish-language station in Los Angeles. Press Release, Pappas Telecasting Companies, Telecasting Companies Announces Local Marketing Agreement with TV Azteca Subsidiary for Operation of Los Angeles Television Station, June 30, 2003, <http://www.pappastv.com/PressReleasesdetail.asp?ID=25>. Pappas also owns KAZH, a Spanish-language television station in Houston, Texas. According to Nielsen, Pappas operates stations in markets reaching

is popular among certain demographics, including African-American communities, while country music and talk radio may be popular among others. Certainly, many formats span geographic and ethnic lines. Broadcasters and advertisers have been aware of these personal preferences for years and have developed their business models around these important demographics and geographic preferences.¹²⁴

With respect to radio, even though the number of available licenses is finite, a sufficient number of licenses are available for initial licensing or assignment at any given time such that studying radio ownership remains a meaningful exercise.¹²⁵ With respect to television on the other hand, because there are so few outlets, a small set of industry participants will inevitably dominate the medium.¹²⁶ While diversity of ownership in television cannot be ignored, solutions to the problem may be much more elusive and difficult to achieve. Nevertheless, the Commission is on the right path as it attempts to educate itself on this highly charged issue.

C. Broadcast Diversity

At the inception of broadcast regulation, the Commission identified diversity, competition, localism, and regulatory certainty as goals relevant to guiding media ownership policy.¹²⁷ The Commission has since identified five different types of diversity relevant to broadcast and print media ownership: (1) viewpoint diversity; (2) program diversity; (3) outlet diversity; (4) source diversity; and (5) race and gender diversity.¹²⁸

32% of Hispanic households; Press Release, Pappas Telecasting Companies, Pappas Telecasting Companies KAZH-TV57 Turns Houston On With 5,000,000 Watts of Spanish, Spanish Television Station is City's Most Powerful UHF Ever, Apr. 23, 2003, <http://www.pappastv.com/PressReleases/detail.asp?ID=24>.

¹²⁴ Press Release, Clear Channel Communications Clear Channel Radio Creates Bilingual "Hurban/CHR" Format for Hispanic Youth, Nov. 15, 2004, <http://www.hispaniebusiness.com/news/newsbyid.asp?id=19228>. This new format is an attempt by Clear Channel to further tap into the Spanish-language radio market. The Hurban/Contemporary Hit Radio format is targeted at Latino's in the 18 to 34 age demographic. *Id.* It promises to be an upbeat combination of "Spanish-Hip Hop, Raggaeon and Pop/Dance music." *Id.*

¹²⁵ In November 2004, the FCC auctioned 258 FM radio station construction permits. Such permits are a precursor to award of a broadcast license. News Release, FCC, *FCC Announces Close to Unprecedented FM Auction—110 Bidders Win 258 Construction Permits for New FM Stations*, Nov. 24, 2004, http://braunfoss.fcc.gov/edocs_public/attachmatch/DOC-254665A1.doc. The Commission plans to auction more FM construction permits over the next few years. *Id.* The Commission reports that many of the winning bidders in the auction are new entrants in the radio market. *Id.*

¹²⁶ Currently, there are approximately 2,000 television stations and nearly 13,000 radio stations in the United States. FCC, LICENSED BROADCAST STATION TOTALS IN THE USA-1990 TO PRESENT, <http://www.fcc.gov/mb/audio/totals/index.html> (last visited Apr. 2, 2006).

¹²⁷ 2002 Biennial Review, *supra* note 1, ¶ 17.

¹²⁸ *Id.* ¶ 18.

Diversity of ownership in terms of a variety of sources and voices in the marketplace of ideas, as well as diversity of ownership in terms of race and gender are of utmost importance to the public and presumably to the FCC as well.¹²⁹ Viewpoint diversity refers to a "variety of perspectives" and a "robust marketplace of ideas" both of which are fundamentally important in democratic societies.¹³⁰ Therefore, the government seeks to license broadcast spectrum in such a way that a number of voices may be heard.¹³¹ "Program diversity refers to a variety of programming formats and content."¹³² The Commission seeks to achieve this goal by enacting rules that promote variety in television programming and radio station formats.¹³³ Diversity in television programming is evidenced by topical television channels such as cooking, news, decorating, sports, and movie channels, and by different types of shows such as dramas, talk shows, and comedies.¹³⁴ Diversity in radio programming would include different stations devoted to certain formats such as jazz, classical music, talk, or sports.¹³⁵

Outlet diversity refers to diversity in the number of market participants. Ideally, outlet diversity would be evidenced by "multiple independently-owned firms" operating media outlets in a given market as opposed to common ownership of varied outlets by the same people or various combinations of related people or entities.¹³⁶ Source diversity refers to a variety of sources of programming content.¹³⁷ This means that programming should come from different producers.¹³⁸ Source diversity is achieved where content is produced independently of, and by, a producer unaffiliated with the network that airs the program.¹³⁹

¹²⁹ Broadcast Localism Hearing, *supra* note 102; *see also* 2002 Biennial Review, *supra* note 1, ¶ 26 ("We adhere to our longstanding determination that the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity.").

¹³⁰ 2002 Biennial Review, *supra* note 1, at ¶ 19; *see also* Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943, 967 (2004) (stating that democracy depends on the recognition of expressive rights of all members in a society); *see generally* Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL.L.REV. 813 (2000) (supporting viewpoint diversity as an essential component of a democratic society but arguing for the abandonment of viewpoint diversity as a rationale for the FCC's race-based regulatory programs designed to increase minority participation in the broadcast industry).

¹³¹ 2002 Biennial Review, *supra* note 1, ¶¶ 305–06.

¹³² *Id.* ¶ 36.

¹³³ *See id.* ¶ 307 (noting that some commentators argue that programming diversity is the most important form of diversity).

¹³⁴ *Id.* ¶ 36.

¹³⁵ *Id.*

¹³⁶ *Id.* ¶ 38.

¹³⁷ *Id.* ¶ 42.

¹³⁸ *Id.* ¶ 42.

¹³⁹ *Id.* ¶ 43.

Finally, race and gender diversity refer to ownership and control of broadcasting outlets by women and minorities, or non-whites. The U.S. Supreme Court has concluded that such racial and, to a lesser extent, gender diversity of ownership does translate into programming and formats sensitive to the concerns of those groups.¹⁴⁰ In *Metro Broadcasting, Inc. v. Federal Communications Commission*,¹⁴¹ the Court stated that a licensee's race does bear some correlation to the type of programming that licensee is likely to carry.¹⁴²

The media has been referred to as the "Fourth Estate" or an independent entity embodying First Amendment principles which checks and balances abuses in the three branches of government.¹⁴³ Democracy, it has been argued rightfully, depends on the successful implementation of this concept.¹⁴⁴ In other words, a democracy is at its best when all of its participants have an opportunity to be heard and to hear from fellow participants in the democratic system. There is an opportunity to convey information from as many others as possible. Each of these concepts of diversity, while possessing independent significance, work together to produce a wide array of varied programming choices. Diversity of viewpoint depends on a multiplicity of voices participating in the marketplace of ideas at any given time.¹⁴⁵ It is achieved in a number of ways, including but not limited to, diversity of sources and particularly racial diversity in broadcast ownership and management. The goal to further diversity of viewpoints has been used by the FCC to support and justify its initiatives designed to promote greater minority ownership.¹⁴⁶ While actively seeking to meet its

¹⁴⁰ *Metro Broad., Inc.*, 497 U.S. at 579–84. *But see* *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354–55 (D.C. Cir. 1998) (casting doubt about the nexus between race and programming but failing to provide any evidence to contradict the Commission's assertion).

¹⁴¹ *Metro Broad., Inc.*, 497 U.S. at 579–84.

¹⁴² *Id.*

¹⁴³ Krotoszynski, Jr. & Blaiklock, *supra* note 130; Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L. J. 245, 333–34 (2003); Jonathan W. Lubell, *Are New Media Really Replacing Old Media? Broadcast Media Deregulation and the Internet: the Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunications Act*, 17 ST. JOHN'S J. LEGAL COMMENT, 11, 44 (2003).

¹⁴⁴ Morant, *supra* note 130, at 962.

¹⁴⁵ *Id.* at 963–65. The author contends that "multiplicity of voices" in media "consists of the dissemination of information that is reflective of the variant range of views and perspectives of a diverse constituency . . . the furtherance of multiplicity, which embraces ideas that appeal to a diverse audience, fosters deliberative democracy's emphasis on full and robust public debate Voice multiplicity encourages sensitivity to issues that are important to traditionally marginalized groups and heightens awareness of the effects of prejudice and stereotypes." *Id.*; Adelstein's Dissent, *supra* note 2.

¹⁴⁶ The Commission has used this policy objective to defend its tax certificate program and its comparative hearing preferences designed to increase minority ownership. 47 C.F.R. § 73.4140; Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979, 981 (1978) [hereinafter Policy on Minority Ownership]; WPIX, Inc., 68 F.C.C. 2d 381, 411–12 (1978); *see* 47 C.F.R. § 73.2080(a) (1997) (prohibiting discrimination by broadcasters); 47 C.F.R. § 73.2080(b) (1997)

diversity objectives, however, the Commission seems to have concluded that diversity, in large part, is best achieved when left to market forces rather than government regulation.¹⁴⁷

Diversity of viewpoints and racial diversity are thought to produce diverse programming. Diversity of programming, Commissioner Adelstein argues, has numerous benefits including positive portrayal of minorities and greater attention to minority issues.¹⁴⁸ Adelstein correctly criticizes the majority for its cursory attention to the role of media outlet diversity in protecting the public interest and the political branches of government—particularly as it relates to minority ownership.¹⁴⁹ The Commission received a number of comments encouraging the agency to find ways to enhance the opportunities for women and minorities to acquire ownership of broadcast stations in the hope that such diverse ownership will translate into greater diversity in programming.¹⁵⁰ Unfortunately, to date, the Commission effectively has relegated the issues of racial and gender diversity to the sidelines of regulatory policy reform.

While no longer a top priority, the Commission has, at various times, attempted to diversify radio and television programming by diversifying ownership by race. The Commission has imposed equal employment opportunity reporting requirements, a distress sale policy, tax certificates, comparative hearing preferences, and bidding credits as methods of increasing the number of small and minority licensees.¹⁵¹ These regulatory

(establishing equal employment opportunity programs); see *TV9, Inc. v. FCC*, 495 F.2d 929, 937–38 (D.C. Cir. 1973) *cert. denied*, 419 U.S. 986 (1974) (upholding the Commission's practice of affording minority applicants additional consideration in comparative licensing hearings); Implementation of § 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 9 F.C.C.R. 2348 (1991); Reexamination of the Policy Statement on Comparative Broadcast Hearings, 57 Fed. Reg. 14683 (Apr. 22, 1992) (to be codified at 47 C.F.R. pt. 1); Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 13 F.C.C.R. 15920, 15994–95 (1998) [hereinafter *Proposals to Reform*] (adopting new entrant bidding credits).

¹⁴⁷ 2002 Biennial Review, *supra* note 1, ¶¶ 37, 43, 45.

¹⁴⁸ Adelstein's Dissent, *supra* note 2.

¹⁴⁹ *Id.*

¹⁵⁰ MMT/NABOB Motion for Further Extension of Time, filed Dec. 9, 2002 at 4–5; NABOB Comments at 3–4, 17–25; NABOB Reply Comments at I–ii, 2–5, 9–11; IPI Comments at 58; AWRT Comments at 5–7; UCC Comments at 17–19.

¹⁵¹ 47 C.F.R. § 73.4140; Policy on Minority Ownership, *supra* note 146; WPIX, Inc., 68 F.C.C. 2d 381, 411–12 (1978); 47 C.F.R. § 73.2080(a) (1997) (prohibiting discrimination by broadcasters); 47 C.F.R. § 73.2080(b) (1997) (establishing equal employment opportunity program); *TV9, Inc. v. FCC*, 495 F.2d 929, 937–38 (D.C. Cir. 1973) *cert. denied* 419 U.S. 986 (1974) (upholding the Commission's practice of affording minority applicants additional consideration in comparative licensing hearings and acquiescing to the conclusion that there is a connection between diversity of ownership of media outlets and the diversity of ideas in the marketplace—particularly as it relates to the presentation of news and editorial comment); Implementation of § 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform, *supra* note 146 (adopting new entrant bidding credits).

programs successfully increased the number of minority licensees but were repealed by the Commission based on constitutional equal protection grounds.¹⁵² Each of the programs was defended by the FCC on diversity grounds.¹⁵³ The agency argued that greater diversity in programming would be achieved by greater racial diversity.¹⁵⁴ Black radio station owners, for instance, were presumed to offer programming more appealing to and more relevant to other Blacks.¹⁵⁵ These stations addressed the concerns of other Blacks in ways non-Black owned radio stations did not.¹⁵⁶ The soundness of this argument, however, has been challenged by scholars who doubt a reliable nexus between a licensee's race and his or her programming choices.¹⁵⁷ Others doubt the relevance of the viewpoint diversity justification used to support certain race-based ownership rules altogether, suggesting instead that the Commission should get straight to the heart of the issue which is, in fact, to facilitate the licensing of greater numbers of minority owners, regardless of their programming choices, in direct response to past discrimination and in recognition of the fact that America will be at its best when all members of American society are able to put their talents to the most productive use, unimpeded by the vestiges of past and current discrimination.¹⁵⁸ Certainly, such a straightforward approach would be the most efficient means of achieving this objective, but all past attempts at

¹⁵² Each of these race-based diversity initiatives have been repealed based on constitutional challenges. See *Adarand v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broad., Inc.* and holding that race-based programs were subject to strict scrutiny); *Lutheran Church-Missouri Synod*, 141 F.3d at 356 (holding that although intermediate scrutiny had been applied to these regulatory programs in *Metro Broadcasting*, pursuant to *Adarand*, race-based programs were subject to strict scrutiny, and the FCC's equal employment opportunity regulations were not narrowly tailored to achieve the agency's purpose of promoting program diversity which in and of itself was not a compelling governmental interest); *Metro Broad., Inc.*, 497 U.S. at 600-01 (holding that the FCC's distress sale policy which limited the transfer of certain broadcast stations to minorities and its policy of awarding an enhancement in comparative proceedings for new licensees did not violate the Equal Protection Clause because they were substantially related to the important governmental objective of achieving greater broadcast diversity).

¹⁵³ 47 C.F.R. § 73.4140; *Metro Broad., Inc.*, 497 U.S. at 569; *Lutheran Church-Missouri Synod*, 141 F.3d at 354-55; Statement of Policy on Minority Ownership of Broadcasting Facilities, *supra* note 144, at 981; Minority Ownership in Broadcasting, *supra* note 8, at 849-50; see also *Radio Jonesboro, Inc.*, 100 F.C.C. 2d 941, 945, n.9 (1985) (stating that minority ownership is essential to achieving program diversity).

¹⁵⁴ 47 C.F.R. § 73.4140; see generally *Metro Broad., Inc.*, 497 U.S. at 569; *Lutheran Church-Missouri Synod*, 141 F.3d at 354-55.

¹⁵⁵ 47 C.F.R. § 73.4140; see generally *Metro Broad., Inc.*, 497 U.S. at 569; *Lutheran Church-Missouri Synod*, 141 F.3d at 354-55.

¹⁵⁶ 47 C.F.R. § 73.4140; see generally *Metro Broad., Inc.*, 497 U.S. at 569; *Lutheran Church-Missouri Synod*, 141 F.3d at 354-55.

¹⁵⁷ *Krotoszynski & Blaiklock*, *supra* note 130.

¹⁵⁸ *Id.* at 834-35, 853-55. The authors doubt the strong connections between the race of a licensee and the programming of that licensee's station arguing that such a nexus lacks empirical support. *Id.* The authors argue instead for the FCC's adoption of alternative methods of remedying minority ownership deficiencies and ownership diversity generally. *Id.*

racial affirmative action at the Commission have been quashed.¹⁵⁹ Therefore, the Commission has been forced to contrive other constitutionally sound approaches to solving the problem of shrinking racial and gender diversity.

While some scholars and courts are suspicious of the conclusion that there is a nexus, anecdotal history and evidence indicates that there has been a direct correlation between Black ownership and Black-oriented programming.¹⁶⁰ Others also doubt any presumption of a link between ownership concentration and broadcast diversity.¹⁶¹ Some scholars and commenters point to the lack of empirical evidence to support a conclusion that a licensee holds a predictable point of view based on the licensee's race.¹⁶² Along the same vein, opponents of this argument offer no persuasive empirical evidence that a station owner's race does not influence programming. Surely, there is no reliable evidence that minorities have any particular homogenous point of view on any matter, nor does this article so suggest. No two people, let alone an entire race of people share the same point of view on all or any matters. What these scholars fail to acknowledge, however, is that minority groups represent subcultures unto themselves, similar to geographic or regional subcultures. What many members of cultural minority groups know intuitively is that there are indeed some uniquely cultural understandings that strike a common cord among members of a cultural minority that need neither explanation nor vocalization for all in the group to understand. Majority communities often are oblivious to or underestimate the cultural understandings and connections that link those who share nothing by a common racial ancestry or a common experience as a minority in a larger community of people. So while it would be wise to avoid broad sweeping generalizations or negative stereotypes associated with race, the effects of positive generalizations and stereotypes should not be too quickly dismissed.¹⁶³ It would be naïve to think that some common cultural

¹⁵⁹ See generally *Lutheran Church-Missouri Synod*, 141 F.3d at 356.

¹⁶⁰ See generally Krotoszynski & Blaiklock, *supra* note 130, at 880. The authors are reluctant to concede that there is a strong connection between a licensee's race and the programming that licensee tends to broadcast over the airwaves. *Id.*; see generally *Lutheran Church-Missouri Synod*, 141 F.3d at 354–55. While not completely discounting the assertion, the court suggests that there might not be a nexus between ownership and choice of programming. *Id.*

¹⁶¹ See, e.g., Ryan H. Weinstein, *The Diversity Paradox: Media Ownership Regulation and Program Variety*, 10 STAN. J.L. BUS. & FIN. 150, 157 (2004) (arguing that the FCC's methodology and presumption regarding competition and diversity depends on outdated logic).

¹⁶² Krotoszynski & Blaiklock, *supra* note 130, at 880. The authors concede that "there is a kernel of truth to the assertion that people from different backgrounds view the same event from different perspectives." *Id.*

¹⁶³ See Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color By the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 301–07, 326–27 (2003) (warning of the widespread and destructive results of negative stereotyping in television and

understandings do not exist at all. Without greater racial diversity of ownership, the impact and influence of common cultural perspectives are lost. Furthermore, these perspectives are difficult to be recaptured by someone with a view outside that minority subculture or by someone who has experienced life through a different colored lens.¹⁶⁴

Additionally, even if minority status does not produce a homogenous view of the world, such status colors the experiences of members in that group regardless of where on the sliding scale of race consciousness that particular individual stands. Race and matters of race affect the consciousness of those at both ends of the race consciousness spectrum. Those for whom everything is about race clearly prove the point. However, race also matters to those individuals who think we live in a colorblind society, and that minority status is irrelevant, because they must constantly defend their staunch view in the face of widespread skepticism of the validity of that perspective.

A democracy also includes the meaningful opportunity for one to tell one's own story. In other words, minority groups should not be shut out of history by being shut out of meaningful participation in broadcasting and denied the opportunity to tell their own story with many voices. Black radio traditionally has been a vehicle that has recognized these correlations and has provided the opportunity to tell the story of the Black experience from various internal perspectives. Without greater legislative and administrative efforts to sustain Black radio, the format could be lost altogether, which would be a devastating loss to all underrepresented groups, to all of broadcasting, and to American democratic society at large.

IV. History of Black Broadcasting

Throughout the history of the United States the media has had significant influence on attitudes toward social, political, and moral issues. This significance has been particularly notable in the African-American community. Quite a bit has been written about the influence of television and the print media on the population's views and opinions, yet little has been written about radio's influence on popular opinion and social and political movements. In radio's early years, white ownership of Black-

arguing that the absence of and negative stereotyping of Blacks on television shape the global perceptions of Blacks by other ethnicities as well as within the race).

¹⁶⁴ See, e.g., D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L. J. 437, 500 (1993) ("The metaphor of race as embedded in historical narrative becomes a lens that polarizes and colors how we see the social world."); see also Ian F. Haney Lopez, *Race Ethnicity & Nationhood: Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 10 LARAZA L. J. 1143, 1146 (1998) (suggesting that race and language color the experience of Latinos in the United States).

oriented radio stations was the norm. In fact, during these early years, whites owned most of the stations targeting Black audiences.¹⁶⁵ Programming decisions were in the hands of the white owners, yet the "face" of these stations was Black, as most of the stations employed Black disc jockeys. Blacks at this time did not hold management positions or ownership of radio stations. Most radio stations targeting Black audiences played to negative racial stereotypes by broadcasting shows featuring bumbling Black characters that were inarticulate buffoons.¹⁶⁶ Others appealed to a more "refined" audience by showcasing talents such as Duke Ellington and his sophisticated orchestra.¹⁶⁷ These white-owned stations attempted to address the entertainment interests of the Black communities they served, but by and large, disallowed open discussion of controversial topics such as race relations. This begs the question: "What exactly is 'Black radio'?"

Black-oriented stations may or may not be also Black-owned. Programming on Black-oriented stations is intended to appeal to Black listeners. Generally, this programming would include music by Black artists, radio shows hosted by Black disc jockeys, advertisements targeting the Black community, and discussion of community affairs with a greater focus on the impact on Blacks. Black-owned, Black-oriented stations do many of the same things as white-owned, Black-oriented stations. However, research has shown that there are some differences. Black-owned stations tend to have a wider, more substantial offering of diverse community affairs programming tailored to Black communities.¹⁶⁸ Such community affairs programming arguably is the most important function of all broadcast radio. FCC Chairman Michael Powell recently acknowledged that

minority broadcast station owners, when compared to non-minority owners, provide more public affairs programming on events or issues concerning ethnic or racial minority audiences, are more likely to broadcast in languages other than English, are more likely to staff their station with minority employees and are more likely to participate in minority-related events in their communities.¹⁶⁹

¹⁶⁵ TARVER, *supra* note 75, at 18.

¹⁶⁶ *Id.* at 10–11. In the 1940s, white broadcasters shifted into Black-oriented radio in greater numbers in order to deal with competition from television. *Id.*

¹⁶⁷ Michael H. Burchett, The History of Black Radio, <http://www.terraplanepub.com/century12.htm> (last visited Apr. 2, 2006).

¹⁶⁸ See W. LaNelle Owens, Comment, *Inequities on the Air: the FCC Media Ownership Rules—Encouraging Economic Efficiency and Disregarding the Needs of Minorities*, 47 HOW. L.J. 1037, 1061 (2004) (noting the discrepancy in public affairs programming between minority broadcast station owners and non-minority owners).

¹⁶⁹ *Id.* at 1061 (citing John McCain & Michael K. Powell, *Clear Signal, Static Response*, WASH. TIMES, Mar. 3, 2004, <http://washingtontimes.com/op-ed/20040302-085047-6972r.htm>).

The FCC and Congress have for years accepted the assumption that Black-owned stations, in large part, tend to program more material geared toward the Black community.¹⁷⁰ These stations program material generally targeted to the interests of the Black community, and these stations often report stories of general interest from a perspective of relevance to the Black audience. Black-owned stations offer more news, public affairs, and call-in programming targeted specifically at a Black audience.¹⁷¹

The Black press and Black broadcast media historically have provided a unique means of connecting remote communities and informing and empowering its listeners while instilling a sense of cultural pride and consciousness raising. Black media has for years connected members in the Black community to each other by bridging economic and geographic barriers. Most notable has been radio's role in connecting rural Black communities to Black communities in larger American cities. Black-owned newspapers reported on issues often ignored by the mainstream press including civic events, educational news, health-related issues, and Black social life.¹⁷² The social pages in local Black-owned newspapers shed light on Black socialites and movers and shakers across the country who were completely ignored by majority newspapers. Additionally, and probably more importantly, from their inception, the Black press served the important role of educator and defender of social movements in Black communities.¹⁷³ At their inception, the papers' general goal was not business profit but rather to "uplift . . . their race through breaking down accepted stereotypes and supporting policies of political and economic improvement."¹⁷⁴ The most popular Black periodicals continue to serve many of the same purposes today, reporting not only on local news, but reporting on events occurring

¹⁷⁰ The same has not been said as it relates to programming by broadcast outlets owned or controlled by women. *But see* Yale M. Braunstein, *The FCC's Financial Qualification Requirements: Economic Evaluation of a Barrier to Entry for Minority Broadcasters*, 53 FED. COMM. L.J. 69, 85 (2000) (stating that no clear agreement exists on the degree to which ownership influences programming patterns). *See also* *Metro Broad., Inc.*, 497 U.S. at 579–84 (agreeing with the Commission's finding of a link between minority broadcast ownership and program diversity). *But see* *Lutheran Church-Missouri Synod*, 141 F.3d at 354–55 (suggesting that the nexus between race and programming may not be as strong as the Commission argues but failing to provide any evidence refuting the Commission's claim).

¹⁷¹ *Metro Broad., Inc.*, 497 U.S. at 581.

¹⁷² CHARLOTTE GWEN O'KELLY, *THE BLACK PRESS AND THE BLACK PROTEST MOVEMENT: A STUDY OF THE RESPONSE OF MASS MEDIA TO SOCIAL CHANGE, 1946–1972* (1975).

¹⁷³ *Id.* at 26–70. O'Kelly points to the role the Black mass media had in bringing together Black communities in "collective action" and "group solidarity" to deal with their plight in America. *Id.* Through a case study of the Black print media's handling of what she calls the Black protest movement between the years of 1827 and 1945 and beyond, she tests her generalizations about the mass media and its role on social change. *Id.* She suggests that the Black press began in the context of the need for self-definition and social change over time as Blacks moved from slavery to freedom, during the migration from the rural south to urban northern cities, and as Blacks navigated the Jim Crow south and survived the Great Depression and two world wars. *Id.*

¹⁷⁴ *Id.* at 44–45.

across the globe connecting those who share the bond of African ancestry.¹⁷⁵
Disc jockeys at Black-owned stations:

Working from an extensive African American oral tradition . . . shaped black (and often white) musical tastes and created a social grapevine that contributed largely to the empowerment of the growing civil rights movement. Southern black stations in particular became clearinghouses for information and forums for discussion among black communities cut off from each other by segregation or geography.¹⁷⁶

Therefore, in the purest sense, "Black radio" would be Black-owned as well as Black-oriented. However, "Black radio" always has included Black-oriented stations owned by whites. Modern trends also might indicate that more Black-owned stations are branching out into other formats other than traditional Black-oriented formats.

In 1949, Memphis, Tennessee radio station WDIA became the first radio station to broadcast an all-Black on-air announcing staff.¹⁷⁷ Meanwhile, the wheels were churning in the Black business community of Atlanta, Georgia. That same year, Jesse B. (J.B.) Blayton, a former professor at Atlanta University and one of the first Black Certified Public Accountants in the State of Georgia, purchased the controlling interest in Radio Atlanta, Inc., which owned WERD-AM, to become the first Black to own a commercial radio station.¹⁷⁸ An astute businessman, Blayton acquired the station in Atlanta from white owners for \$50,000.¹⁷⁹ Blayton was active in Atlanta's business community, and along with fellow Atlanta businessmen, Clayton Yates and Lorimer Milton, had previously been elected to the first Board of Directors of Citizens Trust Bank, one of the first and today one of the country's largest Black-owned banks.¹⁸⁰ The trio, in 1937, had collaborated on another business venture by opening the Top Hat Club, a nightclub on Atlanta's famed Auburn Avenue.¹⁸¹

¹⁷⁵ Such examples are JET, EBONY, BLACK ENTERPRISE, and ESSENCE magazines, as well as local newspapers such as the LOUISVILLE DEFENDER, and the Afro American Newspapers of Baltimore and Washington.

¹⁷⁶ Burchett, *supra* note 167.

¹⁷⁷ *Id.*; see generally Smithsonian Productions: Black Radio Program Descriptions, Program 4: WDIA, <http://www.si.edu/sp/onair/radpgms.htm> (last visited Apr. 3, 2006).

¹⁷⁸ TARVER, *supra* note 75, at 17; see generally *Negro Buyer Plans to Run Radio Station—WERD Here*, ATLANTA JOURNAL-CONSTITUTION, Sept. 15, 1949, at 1.

¹⁷⁹ TARVER, *supra* note 75, at 17.

¹⁸⁰ Exiled One, Unknown Radio Giant: DJ Al Benson and Bronzeville, Black Waves—A Tribute to DJ Al Benson, http://www.geocities.com/realsoul_music/albenson.htm (last visited Apr. 3, 2006).

¹⁸¹ The Apex Museum, African American Panoramic Experience, Green Ice Cream, http://www.wpba.org/history/green_yates.html (last visited Apr. 3, 2006).

Upon acquiring ownership of WERD radio, Blayton displaced the white on-air radio personalities and brought on board his son and a popular radio personality Jack Gibson, a.k.a. "Jack the Rapper," as part of his management team. He changed the station's format to a Black-oriented format including rhythm and blues and religious programming. Additionally, Gibson hosted a daily news program addressing many issues, with particular relevance to Atlanta's Black community. The station's programming, including Gibson's daily show, broke new ground by openly discussing racism, a topic generally off limits on white-owned Black-oriented radio outlets.¹⁸² Some years later, after many successful years of operation, Blayton sold the station back to white owners.¹⁸³

During the 1970s and 80s, Black radio ownership increased significantly from fewer than 70 owners to more than 100.¹⁸⁴ The format of Black stations largely consisted of news, public affairs, church and social events, and of course, music.¹⁸⁵ Three Black-owned radio networks emerged during the 1970s, Mutual Black Network, Sheridan Broadcasting Network (Sheridan), and the National Black Network.¹⁸⁶ At their peak the networks had a listenership estimated at over ten million.¹⁸⁷ Sheridan joined with the National Black Network in 1991 to become what is now the American Urban Radio Networks.¹⁸⁸ The American Urban Radio Networks continues to broadcast Black college sporting events, news, music, and other entertainment programming.¹⁸⁹

The number of Black-owned radio outlets increased nationwide during this time, and Augusta, Georgia was a booming market. Among the new owners of radio stations in the city was soul singer James Brown.¹⁹⁰ In the 1970s James Brown's radio station, WRDW-AM, in Augusta, Georgia used the slogan "Truth and Soul" and covered the integration efforts of

¹⁸² Donna L. Halper, *African Americans and Radio: An Overview*, 2002, <http://www.bjmjr.com/aaradio/part1.htm>.

¹⁸³ TARVER, *supra* note 75, at 17.

¹⁸⁴ TARVER, *supra* note 75, at 24; Burchett, *supra* note 167.

¹⁸⁵ Burchett, *supra* note 167.

¹⁸⁶ Sheridan bought the Mutual Black Network in the 1970s. *See generally* American Urban Radio Networks, *Our History*, http://www.aurnol.com/company_information/history.asp (last visited Apr. 3, 2006).

¹⁸⁷ Burchett, *supra* note 167.

¹⁸⁸ American Urban Radio Networks, *Our History*, http://www.aurnol.com/company_information/history.asp (last visited Apr. 3, 2006).

¹⁸⁹ *Id.*; Sheridan Gospel Network, "About The Light," <http://www.sgnthelight.com/about/thelight.asp> (last visited Apr. 3, 2006). The Sheridan Gospel Network, a division of Sheridan Broadcasting Corporation, produces 24-hour nationally syndicated web stream of gospel programming under the name "The Light." *Id.*

¹⁹⁰ *See* FM Broadcast Station Construction Permit, Sept. 28, 1989, http://svartifoss2.fcc.gov/prod/cdbs/pubacc/Auth_Files/115868.pdf [hereinafter *Station Construction*] (granting Brown Family Broadcasting, Inc., by way of permittee Frank Neely, permission to construct a radio transmission tower in Williston, South Carolina).

citizens in that community.¹⁹¹ The FCC granted James Brown's company, Brown Family Broadcasting, Inc., a license to another station, WAAW-FM, in Augusta, Georgia in 1989.¹⁹² The Brown family owned and operated this station until 2002 when the license was assigned to Frank Neely, also an African American.¹⁹³ Little is known about Brown's radio enterprise and why he ultimately decided to sell his holdings.

A. *The Influence of Syndicated Radio Personalities*

Syndicated programming always has been wildly popular and cost effective for radio outlets. Consider the popularity of Wolfman Jack during the Vietnam War, Paul Harvey, who is piped to Americans abroad via the military radio network Armed Forces Radio, Rush Limbaugh, Neil Bortz, Howard Stern, Tom Joyner, Laura Schlessinger, and Tavis Smiley. These personalities are to radio what Oprah Winfrey, Phil Donahue, and Bill O'Reilly are to television. They are modern day Pied Pipers able to mobilize large numbers of viewers and listeners to focus on issues they see as having larger societal relevance.

The Tom Joyner Morning Show, for instance, boasts eight million listeners each week in over 115 radio markets.¹⁹⁴ Until recently, the Tavis Smiley Show was heard daily on over sixty National Public Radio (NPR) stations nationwide as well as on satellite radio and over the Internet.¹⁹⁵ Additionally Smiley offers commentary twice a week on the Tom Joyner Morning Show. Tom Joyner and his morning show crew embrace a communication style employed for centuries in the Black community as a means of coping with degrading, dehumanizing, and disgraceful circumstances—the art of humor. The crew dispenses a daily dose of side-splitting laughter, general silliness, lessons in Black history, and discussions of issues of national importance, often infused with more side-splitting humor. Despite the levity with which Joyner's show treats many serious issues, he manages to plant the seeds of activism and gets listeners and non-listeners nationwide talking about important issues and his cause *du jour*.

¹⁹¹ Burroughs, *supra* note 9.

¹⁹² Station Construction, *supra* note 190.

¹⁹³ See generally Consent to Assignment of Broadcast Station Construction Permit or License for WAAW-FM, May 28, 2002, http://svartifoss2.fcc.gov/prod/cdbs/pubacc/Auth_Files/600700.pdf.

¹⁹⁴ See Tom Joyner's Company Assumes Ownership of "The Tom Joyner Morning Show," JET, Jan. 26, 2004, <http://www.abcradio.com/index.cfm?bay=content.view&catid=73&cpid=104> (stating that at the time of its publication, Joyner reached approximately 5 million listeners weekly).

¹⁹⁵ In November 2004, Smiley announced that he would not be renewing his contract with NPR to produce "The Tavis Smiley Show" citing NPR's failure to appeal to a wider multicultural audience. *Disenchanted Tavis Smiley Is Leaving NPR After Three Years*, *supra* note 120.

Over the years, Joyner and Smiley have taken up a number of causes and crusades on behalf of the African-American community, including challenges to Christie's auction house, Katz Media Group, CompUSA, and FOX Television.¹⁹⁶ In 1999, the pair successfully lobbied Congress to award civil rights hero Rosa Parks with the Congressional Gold Medal. Additionally, the pair have sponsored numerous national forums relating to the state of Black America and has advocated on behalf of historically Black colleges and universities (HBCUs), having raised millions of dollars to support the colleges and their students.¹⁹⁷ Politicians courting the Black vote routinely make stops to chat with Tom and his listeners. Arguably, any national candidate who fails to address the morning show audience probably will not get the vote of those five million listeners. Courting the "Black vote" on Joyner's morning show has taken on nearly, if not as much, relevance and importance as visiting Black churches on election eve. Most recently, the pair have brought attention to the racial and class aspects of Hurricane Katrina relief efforts and have established a nationwide network to facilitate the distribution of aid to the largely African-American evacuees from Louisiana, Alabama, and Mississippi.¹⁹⁸ They also have established a fund to help displaced students at HBCUs in the region.¹⁹⁹

While Joyner and Smiley certainly provide an outlet for expression and discussion of issues relevant to the Black community, there is room at the table for more diverse opinions and perspectives. Joyner and Smiley are coming from the same place on most political and social issues, as they rarely publicly disagree. Opportunities must be created for more in-depth, meaningful, and critical analysis of Black issues via Black-owned media outlets. Notwithstanding their similar views on most issues, the two can do only so much and must do that at which they are skilled. Joyner, for the most part, is a comedian. While he raises important issues, he generally deals with them from a broad and humorous manner. He is not a scholar or activist in the traditional sense of the words. Smiley is more of a scholar, but

¹⁹⁶ Joyner and Smiley encouraged all listeners to mail their cash register receipts to CompUSA in protest of the company's suggestion that it need not market to Blacks because they do not buy computers. *The Tom Joyner Morning Show: On Air Advocacy Campaigns*, TAVISTALKS.COM, 2002, http://www.tavistalks.com/CONTENT?Tom_Joyner_Show/link3.html. The pair challenged listeners to bombard Christie's auction house with telephone calls protesting its planned sale of slave "memorabilia." *Id.*

¹⁹⁷ *Id.* In 2001, Joyner and Smiley successfully attacked a Congressional subcommittee established to address higher education issues. *Id.* Excluded from the jurisdiction of the subcommittee were HBCUs, Hispanic institutions and tribal colleges which were to be studied by a separate subcommittee dedicated to the study of issues such as juvenile justice, youth volunteer programs, and child abuse. *Id.*

¹⁹⁸ See generally *The BlackAmericaWeb.com Relief Fund, Hurricane Katrina*, <http://www.Blackamericaweb.com/relief/> (last visited Apr. 2, 2006).

¹⁹⁹ *Id.*

again, he is but one voice. Together they represent only a limited perspective. There must be outlets for more radical as well as more conservative views, and Blacks should seek to own the media outlets that provide the platform for the expression of those views. Simply put, there should be intra-racial viewpoint diversity as well. FCC administrative policy should not impede this opportunity.

A persistent problem with many syndicated shows is that the radio personalities do not always own the rights to their shows, nor do they own the stations that broadcast their shows. This could result in conflict if a disc jockey's message is not approved by the station's ownership. Ownership has already been proven to impact the type of programming. Owners get to decide what actually goes out over the airwaves. Therefore, even though large radio conglomerates such as ABC, Clear Channel, and Infinity Broadcasting may have mastered the so-called "urban" music format from an economic dollar and cents perspective, when disc jockeys choose to deviate from approved music playlists or get into substantive discussions of the issues of the day, the "urban" voice can swiftly be silenced.²⁰⁰ If, for instance, a disc jockey on a Clear Channel station chooses to speak out against a particular political figure who might not have the interests of the Black community at heart, that disc jockey could be silenced by management and the entire Black community—not just listeners in a local community—and would be harmed by not having had the benefit of hearing vital information and the opportunity to ponder and debate the issue. This problem can be reduced to a simple analogy: if you come into the master's house, you can stay and speak only as long as you do not offend the master to the point of his ejecting you.

In 2004, Tom Joyner's company REACH Media, Inc. side-stepped, only in part, this issue when it acquired the ownership rights to Joyner's morning show from ABC Radio Networks, Inc.²⁰¹ In 2001, Smiley became embroiled in a bitter battle with his employer Black Entertainment Television (BET) over his handling of certain issues on his popular cable television program.²⁰² BET ultimately canceled Smiley's show leaving a

²⁰⁰ See Broadcast Localism Hearing, *supra* note 102 (discussing how the "urban" format has been used in recent years to describe programming formatted to appeal to Black audiences).

²⁰¹ Dianne Solis, *Joyner Assumes Contro: Popular DJ Gets Greater Share in Syndicating His Hit Urban Show*, DALLAS MORNING NEWS, Jan. 6, 2004, at 7B; *Tom Joyner's Company Assumes Ownership of "The Tom Joyner Morning Show,"* JET, Jan. 26, 2004, at 64.

²⁰² See, e.g., *Low Ratings Cited in Exit of BET Host*, ATLANTA JOURNAL-CONSTITUTION, Mar. 24, 2001, at 7C (describing BET's decision not to renew Smiley's contract for dwindling rating and an aging audience); see also Lisa de Moraes, *BET Head Explains Firing*, WASH. POST, Mar. 28, 2001, at C7 (stating that BET cited low ratings and the fact that Smiley, an employee of BET, failed to offer BET an interview with alleged Symbionese Liberation Army fugitive Sara Jane Olson before selling the interview to the ABC television network). BET, which is owned in part by Viacom, conceded that Smiley was not under an exclusive contract with BET with respect to his independently produced programming. *Id.* BET

tremendous void in the marketplace of ideas and public discourse.²⁰³ This incident underscored the threat to Black voices who do not own the medium through which they communicate. BET, at the time, was less than 50% Black-owned.

Indeed many local issues have larger implications as well, and over time, broadcasters have struck a balance between devoting adequate attention to local issues while keeping their audiences adequately informed of national and global issues. Local programming certainly can have a national impact on the African-American community. For example, the Tom Joyner Foundation has raised millions of dollars for HBCUs and has donated scholarship money to a number of deserving students at those institutions nationwide.²⁰⁴ The Tom Joyner Foundation has taken local problems and provided a national platform for drawing attention to and mobilizing the community to solve many troubling issues. For instance, a struggling Black student in Alabama has the support of Blacks in California who contribute to the fund, and a struggling Black college benefits from Blacks worldwide, many of whom may not even be alumni of the school. Tom Joyner has been instrumental in bringing some financially strapped colleges back from the brink of closure.²⁰⁵ That is localism gone national.

This national model has proven effective for Black Americans over time. The people pleading most loudly for greater localism hearken back to the "good ole' days" that were not necessarily so good for Blacks who were isolated from each other in their localism. More national ownership of the media and syndication actually helps Blacks get their message out in ways the civil rights leaders of the 50s and 60s did not have available to them. Therefore, Blacks need not be dismayed completely by the current state of radio, but must acknowledge that the proverbial train of consolidation and deregulation has left the station, most likely never to return, and must come up with creative, effective, and economically sound means of maneuvering the current business and regulatory landscape.

also argued though that Smiley should have "made an effort in the best interest of our business relationship" to offer the program first to BET. *Id.*

²⁰³ Smiley's talk show on BET was one of only a few news programs targeted to African Americans. Keith Owens, *Tavis Smiley's Tighrope*, METROTIMES, Oct. 23, 2002, <http://www.metrotimes.com/editorial/story.asp?id=4185>.

²⁰⁴ Each month Joyner selects an HBCU as the beneficiary of a national fundraising campaign. His foundation also awards scholarships to deserving students at that institution. The Tom Joyner Foundation, <http://www.tomjoyner.com/site.aspx/foundation/index> (last visited Apr. 3, 2006).

²⁰⁵ In 2002 and 2003, Tom Joyner raised funds to keep open Morris Brown College. *Tom Joyner Gives 1 Million to Morris Brown College*, JET, Sept. 15, 2003.

*B. The Impact of Black Television Broadcasting
and the Black Print Media*

The Black press and Black television have been influential in shaping Black attitudes and opinions since the 1800s through coverage of such notable events and movements as those spearheaded, by Marcus Garvey, the National Urban League, Booker T. Washington, A. Philip Randolph, and the National Association for the Advancement of Colored People (NAACP).²⁰⁶ During both World Wars I and II, the Black print and broadcast media played instrumental roles in shaping public opinion about the racial politics of war. The National Urban League used the national radio to broaden its traditional platforms of vocational training and job opportunities to include equal opportunity in civilian and military employment sectors.²⁰⁷ Activists took to the airwaves to highlight the contributions of Blacks and women to the war efforts as justification for greater civilian and military opportunities and to bring to the attention of the public, the sorry work conditions of many Blacks—particularly Black women.²⁰⁸ The Urban League even used national radio to turn the mirror on the radio industry to illustrate the radio industry's reluctance to hire more Blacks in various employment capacities, highlighting radio's influence on both Blacks and whites as it related to "Black self-perceptions as well as white opinions" of Blacks.²⁰⁹ The NAACP also used radio for political

²⁰⁶ See WILLIAM G. JORDAN, *BLACK NEWSPAPERS & AMERICA'S WAR FOR DEMOCRACY, 1914–1920*, at 10–14, 18, 43 (Chapel Hill, University of North Carolina Press, 2001) (describing Black Journalist Trotter's encounter with President Wilson as an illustration of the power of the Black press); see also BARBARA DIANNE SAVAGE, *BROADCASTING FREEDOM: RADIO, WAR, AND THE POLITICS OF RACE 1938–1948*, at 157–60 (1999) (stating that the national media attention helped the NAACP's anti-lynching campaign); BOOKER T. WASHINGTON, *UP FROM SLAVERY: AN AUTOBIOGRAPHY* 217 (1901) (describing Booker T. Washington's address as a representation of the Black race at the Atlanta Exposition in 1895). Booker T. Washington has been labeled an accommodationist because of his post-slavery call for Blacks in his so-called "Atlanta Compromise" speech in 1895 to "[c]ast down your bucket where you are." Washington advocated hard work, self-reliance, and manual labor as a means for newly-freed slaves to prove their worth and value and to establish themselves in the larger American society. He cautioned Blacks against forced agitation to achieve social equality. Boston Guardian editor William Monroe Trotter's position strongly contrasts with Washington's accommodationist approach, espoused in his role as advisor to Presidents Roosevelt and Taft; see generally JORDAN, *supra* note 206. Trotter capitalized on Booker T. Washington's declining influence on public policy as he met with President Woodrow Wilson several times in the early 1900s to demand that the President end the practice of segregation in his administration and to demand an end to the humiliation dealt to Blacks as a result of the practice. *Id.*; see also O'KELLY, *supra* note 172, at 58–70 (discussing the increasing movement among Black leaders and organizations to address and correct the oppression they experienced between 1915 through World War II).

²⁰⁷ See generally SAVAGE, *supra* note 206, at 157.

²⁰⁸ *Id.* at 171–77.

²⁰⁹ *Id.* at 157–58.

broadcasts and to encourage a more favorable image of Blacks.²¹⁰ Civil rights groups made forays into television broadcasting with variety shows showcasing talented Black entertainers as well as other shows attempting to make a racial statement.²¹¹

As would be the case in the decades to come, race riots erupted in the summer of 1943 gaining national attention via national radio.²¹² Leaders in Black communities in a number of cities pleaded with the radio and television industries to take proactive steps to stave off violence and to promote racial tolerance.²¹³ CBS television network dedicated 30 minutes of carefully scripted and rehearsed free airtime to this developing story.²¹⁴

C. The Kerner Commission's Report on the Media's Influence on the Riots of 1960s and the Civil Rights Movement

The media played a significant role in the civil rights movement of the 1960s. The Black print and radio broadcast media were instrumental in shaping Blacks' views of the movement and the nation's response to demands for equal rights. Many Black Americans informed themselves about what was going on in other cities across the nation from the print media and the radio broadcasting media. While the print media recounted story after story of civil disobedience, student demonstrations, and segregationist activities, the television broadcast media, changed the tides of the movement capturing the attention of Blacks and whites alike. The television media brought local activities to the national stage engaging whites across the nation and bringing into the homes of Americans nationwide, the vivid images of police abuses and brutality, the venom spewed by many white protesters, and the bravery of Black and white civil rights activists who employed non-violent means to achieve change and who remained steadfast in their non-violent tactics even in the face of obscene and inhumane treatment by segregationists.

Few were unaffected when confronted with images and sounds of dogs attacking women and children. Few were unaffected when confronted with images and sounds of women and men being knocked to the ground by the powerful force of fire hoses aimed directly at them. Few were unaffected when confronted with the bloody images of men being hit by rocks propelled

²¹⁰ *Id.* at 158. The Urban League used radio to attempt to change the public's perception of Blacks' abilities, skills, and worth to American society. *Id.*

²¹¹ *Id.* at 160–64. Variety shows featured artists such as Louis Armstrong, Ethel Waters, Duke Ellington, and Marian Anderson. *Id.* Often the shows combined entertainment with political speeches. *Id.*

²¹² SAVAGE, *supra* note 206, at 177. Riots occurred in Los Angeles, Detroit, and Harlem. *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 177–78.

directly at their heads. Few could deny the humiliation of Blacks being spat upon while attempting to integrate schools and restaurants. Television made all of this very real for many who by fortune of geography or race did not personally confront these issues on a daily basis.²¹⁵ Television footage produced a national outrage.²¹⁶

While considerable civil rights strides were made, the era was marked by significant incidents of civil unrest as well. The 1968 Report of the National Advisory Commission on Civil Disorders, better known as the Kerner Commission, so named for Otto Kerner, Chairman of the Commission, addressed the causes of the riots and other civil disorder that occurred in numerous American cities in the 1960s. The Kerner Commission was created by President Lyndon B. Johnson for the purposes of identifying "a profile of the riots—of the rioters, of their environment, of their victims, of their causes and effects."²¹⁷ The Kerner Commission report not only addressed the causes of the civil disobedience, but also foretold the status of race relations in the country and proposed solutions to the discord in many of the country's larger cities.²¹⁸

A significant component of the Kerner Commission's report addressed the role of the media in race relations in the United States.²¹⁹ The Commission addressed the media's coverage of race riots including the extent and accuracy of the media's reporting, the conduct of the press, the relationships between local communities and national and out-of-town reporters, the problems of communications across racial lines, and the response of ghetto communities to the media's coverage.²²⁰ The Kerner Commission found high levels of distrust between ghetto communities and the media.²²¹ The Kerner Commission also found that national media focused on the role of law enforcement during the riots rather than the underlying causes of the riots.²²² The Kerner Commission Report

²¹⁵ JUAN WILLIAMS, *EYES ON THE PRIZE* 159–62 (Penguin 1988).

²¹⁶ *Id.* at 154.

²¹⁷ See generally TOM WICKER, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 19 (Bantam 1968).

²¹⁸ See *id.* (describing the Commission's findings on the media's treatment of Blacks, Black communities and racial attitudes).

²¹⁹ *Id.* at 201–13.

²²⁰ *Id.* at 206–07.

²²¹ *Id.*

²²² See *id.* at 204–05 (stating that the Kerner Commission found that television reports tended to emphasize responses by law enforcement to the riotous activity rather than focusing on the "underlying grievances and tensions" in the communities). Additionally, the Kerner Commission found that the coverage characterized the riots as "confrontations between Negroes and whites rather than responses by Negroes to underlying slum problems." *Id.* The Kerner Commission found that the print media focused on the national rather than local aspects of the riots particularly when the riot occurred in the same city in which the newspaper was located. *Id.* Newspapers tended to report more on riots in other cities than on riots in their own cities. *Id.*

predominantly addressed the television and print media, having acknowledged the somewhat diminished role of radio news broadcasting.²²³ The Commission found that most people—Blacks and whites—listened to the radio primarily for music rather than for news or public affairs programming.²²⁴ The Kerner Commission noted, however, that radio had taken on a role as "a constant background accompaniment" with significant influence on public opinion.²²⁵ The Report did note the influence of talk radio on communities experiencing civil unrest, and concluded that radio simultaneously had an incendiary effect as well as the ability to assuage fear, to calm listeners and to discourage overreaction to events in a community.²²⁶

The source of distrust between local communities and the media was a perceived lack of fair and accurate coverage of events occurring in the Black communities.²²⁷ The Commission characterized this chasm as an imbalance between reality and impression, and a sense that the media rarely reported events as they actually occurred.²²⁸ Because the majority of media outlets were not Black-owned, and the majority of reporters were not Black, a sense prevailed among the nation's Blacks that there was no sensitivity to accurate reporting of events occurring in their communities. The Commission Report questioned whether reporters actually engaged in unethical conduct for the sake of the story for example, by inciting bystanders to violence or stoking the fires in already volatile situations.²²⁹ The Commission concluded that the lack of Black journalists contributed to the problems of distrust and inadequate coverage of newsworthy events.²³⁰ The report determined that the media had not communicated to "a majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of living in the ghetto."²³¹ Similarly, the Commission noted that the media failed to communicate effectively with its Black audience by ignoring Blacks' activities, by failing to hire Black journalists, by failing to devote sufficient resources to deal thoroughly and candidly with the issues of Black life, and by failing generally to meet the expectations of the Black audience.²³²

²²³ See WICKER, *supra* note 217, at 207 (noting that radio was, "listened to less for news than for music and other programs").

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See WICKER, *supra* note 217, at 206–07 (listing reasons Blacks cited for distrusting the media).

²²⁸ See *id.* at 202 (stating factors the Commission identified as creating inaccurate impressions about the riots).

²²⁹ See *id.* at 208 (citing examples of newsmen encouraging disturbances to create a story).

²³⁰ *Id.* at 210–12.

²³¹ *Id.* at 210.

²³² See *id.* at 203 (criticizing the news media's handling of race relations).

Far too often, the press acts and talks about Negroes as if Negroes do not read the newspapers or watch television, give birth, marry, die, and go to PTA meetings. Some newspapers and stations are beginning to make efforts to fill this void, but they have still a long way to go.²³³

The Commission concluded that treatment of Blacks by the media ignored Blacks as part of the audience by failing to "portray the Negro as a matter of routine and in the context of the total society."²³⁴ The Kerner Commission acknowledged the dearth of Blacks in decision-making positions in the media.²³⁵ Notably, it said that editors make decisions about which stories the station will pursue, yet few Blacks held any supervisory editorial positions.²³⁶ Unfortunately, the Kerner Commission said nothing about the need to increase Black ownership of media outlets.

Many of the problems and concerns found by the Commission in 1968 continue today. While there is an increasing number of Black broadcast journalists, the increase in the number of media outlets and the number of journalists overall negates any proportional growth. A recent survey conducted by the Radio and Television News Directors Association and Ball State University showed a decline in the percentage of people of color, which includes African Americans, Hispanics and Native Americans, employed in local broadcast television and radio.²³⁷ The overall percentage of people of color working in local broadcast television newsrooms decreased to 21.2% in 2004 from 21.8% in 2003. The number of minority journalists working in local radio dropped to 7.9% in 2004 from 11.8% in 2003. The number of minorities in local radio has fallen precipitously since 1998 when journalists of color represented 16% of radio employees. Since the Commission's Equal Employment Opportunity rules were repealed in 1998, the number has dropped 50%. The decrease in the number of African Americans working in local radio is even more startling—falling from 7.3% in 2003 to 0.7% in 2004. The number of African-American radio news directors dropped below 1% in 2004 from 2.7% in 2003. Only the number of Hispanics and Native Americans in radio increased from 2003 to 2004, with Hispanics representing 6.0% of the radio workforce in 2004.

²³³ WICKER, *supra* note 217, at 211.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 211.

²³⁷ See generally *Minority Journalism Group Discouraged by Slow Progress of Diversifying Broadcast Newsrooms: Blacks Working in Radio Dropped from 7.3 percent in 2003 to 0.7 percent in 2004*, BLACK ISSUES IN HIGHER EDUCATION, Aug. 11, 2005, at 13, available at <http://www.diverseeducation.com/>.

Notwithstanding the recent increase, the number of Native Americans in radio is still lower than a decade ago.²³⁸ Little has changed since the Kerner Commission's 1968 report.

D. The Local-National Interplay

Examples abound of seemingly local issues that have much larger national implications and gain such exposure through the national print and broadcast media. These include the Montgomery Bus Boycott, the murder of Emmett Till, the dragging death of James Byrd in Texas in 1998, voting irregularities in various states the 2000 and 2004 national elections, Washington DC residents' quest for representation in Congress, and most recently the racial, class and economic disparities associated with Hurricane Katrina. Reverend Martin Luther King, Jr. gained national attention and stature based on a local issue in Montgomery, Alabama where a tired Rosa Parks decided not to give up her seat on a bus, thereby sparking the Montgomery Bus Boycott and the modern-day Civil Rights Movement. There would have been no national movement had the national press not picked up on that story and others similar to it, illustrating the ugliness of Jim Crow laws that the local press would have preferred to ignore.

As it relates to the recent devastation wrought by Hurricane Katrina, the majority white broadcast and print media has been criticized for its insensitive, if not blatantly racist, news coverage of the public's behavior immediately prior to and after the storm. Hints of racism were revealed when some print and television news outlets characterized Blacks and whites engaged in the same activities entirely differently. This difference in characterization became all too apparent when two photographs were juxtaposed on an Internet website—one describing a Black man wading through the waters left by the storm surge as "looting," and another depicting a white couple engaged in the activity of "finding."²³⁹ Other print outlets captioned pictures of Blacks searching for food, water, diapers, shoes and clothing as "looters," while whites photographed engaged in the same endeavors were characterized in captions as "searching for" or "having found" supplies and sustenance.²⁴⁰ Similarly, the mostly Black, poor and

²³⁸ *Id.*

²³⁹ Gregory Kane, *Two Photos Pose Puzzle: When Is It Not Looting*, BALTIMORE SUN, Sept. 3, 2005 at 1B.

²⁴⁰ An image captured by an Associated Press Photographer showing a Black man wading through water after the hurricane was captioned "A young man walks through chest deep flood water after looting a grocery store in New Orleans on Tuesday, Aug. 30, 2005." *Id.* Another photograph taken by a photographer for Agence France-Press/Getty Images (AFP/Getty Images) depicted two whites, engaged in similar activity, yet the caption read, "Two residents wade through chest-deep water after finding bread and soda from a local grocery store after Hurricane Katrina came through the area in New Orleans,

largely American citizen evacuees in New Orleans were routinely called "refugees," a term that, while perhaps not technically misused, conjures up images of individuals fleeing political persecution in foreign countries and seeking refuge in a country willing to offer them protection.²⁴¹ The use of the description "refugee" appeared to relegate the Hurricane victims to a status less than that of an American citizen victimized in their own country by a natural disaster.

Most Black issues are not as uniquely local as are many majority issues. Black Americans are creators of the national movement to make social change, having recognized that most Black local issues have a certain level of national character and that the most effective responses to local Black issues generally come with national exposure and understandings of local problems and with the throwing of the weight of the national Black community behind the issue. There is power in numbers. For instance, a police shooting of a Black citizen, in Louisville, New York City, Cincinnati, or elsewhere that receives only local media attention and that is discussed and debated only by the locals rarely brings change or a better living environment for the Blacks of that locality. But, when the issue receives national exposure via nationally syndicated programming targeted at a national Black community, the entire national Black community takes an interest in the issue and the wheels of change and progress start churning.

Louisiana." *Id.* The comparison has drawn criticism because the pictures were derived from different sources, and when asked about the self-captioned photographs, both photographers said that they had merely described what they had seen. An AP spokesperson said that the outlet would ascribe the term "looting" where a person enters a business and emerges with goods in the wake of the hurricane. *Id.* The AFP/Getty photographer said that the items at issue in his photograph had floated out to the street, and he drew a logical conclusion as to the nature of the incident, describing it as "finding." *Id.* We do not know for certain how each of the photographers would have characterized what they had seen had the race of the subjects been different.; Tania Ralli, *Who's a Looter? In Storm's Aftermath, Pictures Kick Up a Different Kind of Tempest*, N.Y. TIMES, Sept. 5, 2005 at C6; Clarence Page, *Outrageous: Looters, Snipers, Feds' Sluggish Response*, SAN GABRIEL VALLEY TRIBUNE, Sept. 8, 2005, Opinion; Mark Caudill, *Opinions Vary on Coverage of Black Storm Victims*, MANSFIELD NEWS JOURNAL, Sept. 4, 2005, at 1A.

²⁴¹ THE AMERICAN HERITAGE DICTIONARY (2d College Ed., 1985) defines a "refugee" as "a person who flees unusually to another country for refuge. Esp. from invasion oppression, or persecution." Webster's Online Dictionary defines a "refugee" as "an exile who flees for safety." It defines "exile" as (1) "Voluntarily absent from home or country"; (2) "Expelled from home or country by authority"; and (3) "the act of expelling a person from their native land." The Merriam-Webster OnLine dictionary defines "refugee" as "one that flees; especially a person who flees to a foreign country or power to escape danger or persecution." Merriam-Webster OnLine, <http://www.m-w.com/dictionary/refugee> (last visited Apr. 3, 2006).

E. Impediments to Black Broadcast Ownership

1. Cost

Without some government constraint, a single entity could easily control all of the nation's airwaves and the messages heard thereon. The revenue stream for commercial broadcast radio derives almost entirely from the sale of airtime to advertisers.²⁴² Large conglomerates have an advantage over smaller licensees when it comes to securing the essential advertising revenue that drives the business model of most commercial stations. Over time, Black-owned radio stations have faced difficulty securing advertising dollars due to several factors including the inability to aggregate multiple stations guaranteeing advertisers' reach to large numbers of listeners, as well as unfortunate blatant racism. Take for instance the Katz Media Group debacle in 1998.²⁴³ In 1998, Katz issued a memorandum to its client companies warning them against purchasing advertisement time on Black and Latino radio stations. The memo allegedly said:

When it comes to delivering prospects, not suspects, the urbans [urban radios] deliver the largest amount of listeners who turn out to be the least likely to purchase. Buying too many ads on ethnic stations would mean losing the more important 'white' segment of the population. Advertisers can reach all the ethnics you need without even using an ethnic station.²⁴⁴

The Katz memo debacle caused an outrage throughout the Black community leaving many with their mouths agape. Joyner and Smiley took on the company, publicly shaming them into apologizing and taking corrective measures.²⁴⁵ The Katz Media Group incident prompted the FCC to initiate a study called the Minority Broadcast Advertising Study conducted by the Civil Rights Forum on Communications Policy.²⁴⁶

Blacks have had a significantly difficult time acquiring radio stations for a number of reasons. These reasons go beyond the blatant racism of

²⁴² Short Statement, *supra* note 106; *see generally* 2002 Biennial Review, *supra* note 1, at 13,640.

²⁴³ Katz Media Group is the largest media representation firm in the United States, selling commercial time to radio stations, television stations, and cable systems. Katz Media Group, General Information, <http://www.katz-media.com/geninfo/index.asp> (last visited Apr. 3, 2006). It is a subsidiary of Clear Channel Communications, the largest radio station owner in the United States. *Id.*

²⁴⁴ The Tom Joyner Morning Show, On-Air Advocacy Campaigns, http://www.tavistalks.com/CONTENT/Tom_Joyner_Show/link3_E.html (last visited Feb. 6, 2006).

²⁴⁵ *Id.*

²⁴⁶ Robert Millar, *Racism Is In The Air: The FCC's Mandate to Protect Minorities From Getting Shortchanged By Advertisers*, 8 COMM. LAW CONSPPECTUS 311, 312 (2000). The study addressed the radio industry advertising practices. *Id.*

some advertisers and the Commission's regulatory policies such as its license renewal policies and multiple ownership rules. Inflated prices for radio stations and difficulty in acquiring financing have often been stated as the primary impediments.²⁴⁷ Today, the average cost of radio stations varies widely depending on various factors, the most important of which is the size of the radio market. Recent acquisitions have ranged from \$200,000 in a small market to over \$7 million for a station in one of the largest markets.²⁴⁸ In November 2004, the FCC auctioned licenses for construction permits for FM radio stations. The bids ranged in price from \$5,500 to \$7,131,000.²⁴⁹ The fact that J.B. Blayton had access to \$50,000 to purchase an Atlanta radio station in 1949 is nothing less than remarkable.

Another impediment to greater Black ownership is related to the high concentration of African Americans in larger metropolitan areas where the prices of radio stations are high. Historically, a large segment of the Black population was heavily concentrated in rural areas where prices of radio stations were relatively low. Today, a large amount of Black wealth and a significant portion of the Black community's buying power are found in some of the country's largest and most expensive markets such as New York, Chicago, Detroit and Washington, DC.²⁵⁰

While the overall number of Black radio stations has significantly declined since the 1980s due to changes in radio ownership limits and problems of access to capital, one particular Black-owned corporation has embraced the changed radio paradigm and has established itself as a major player in today's radio and cable television markets. Radio One, Inc., founded in 1980 by an African-American woman, Catherine L. Hughes, currently owns and/or operates sixty-nine radio stations in twenty-two major

²⁴⁷ OFORI, ET AL, *supra* note 35.

²⁴⁸ See generally FCC, Public Notice, FM Broadcast Construction Permits Auction Closes, Auction No. 37 Winning Bidders Announced, http://wireless.fcc.gov/auctions/default.htm?job=releases_auction&id=37&page=P (last visited Apr. 3, 2006); Payment and Application Deadlines Established, Nov. 30, 2004, Attachment A: FCC FM Broadcast Auction Round Results, High Bids, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-04-3694A2.pdf.

²⁴⁹ *Id.* Approximately 20 of the permits were auctioned at a price in excess of \$2 million. *Id.* Winning bidders received only a right to file an application to construct a broadcast tower. *Id.* The Commission makes no assurance that the application will be granted and advises participants to conduct thorough due diligence to ascertain, among other things, applicable local zoning laws and permitting requirements. *Id.*

²⁵⁰ TARVER, *supra* note 75, at 51, 52; JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, POPULATION AND GEOGRAPHIC DISTRIBUTION, RESIDENCE AND REGION FACT SHEET, <http://www.jointcenter.org/DB/factsheet/resident.htm> (last visited May 11, 2006); Jesse McKinnon, The Black Population: 2000, Aug. 21, 2001, <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>. As of 2000, 88% of African Americans live in metropolitan areas, 53.1% lived inside the urban core of cities, and 34.9% lived in city suburbs. *Id.* Sixty percent of the Black population was concentrated in the New York City, Chicago, Washington, DC, Philadelphia, Detroit, Los Angeles, Atlanta, Houston, Baltimore, and Dallas metropolitan areas. *Id.*

U.S. markets.²⁵¹ Radio One also provides programming for a satellite radio station and owns a 40% stake in cable television station TV One.²⁵² By its estimate, Radio One is the seventh largest radio ownership group in the country and the largest primarily targeting African-American listeners.²⁵³ With an audience of roughly thirteen million listeners, Hughes has established Radio One as a formidable player in the Black radio industry and the United States broadcasting industry in general.²⁵⁴ Hughes has masterfully played the game dominated by the industry's biggest and most powerful players such as Clear Channel and has almost single-handedly preserved the last vestiges of Black-owned radio while looking forward toward new ways to remain competitive in the ever-changing broadcast industry. Hughes, who started out as a radio personality in Washington, DC and who purchased her first radio station in 1980 which she operated out of a trailer, took her company Radio One public with an initial offering in 1999, becoming the first African-American woman to own a publicly traded company.²⁵⁵ To date, Radio One continues to be the only publicly traded company owned by an African-American woman. Radio One has continued to acquire radio stations nationwide, steadily diversifying its holdings and maintaining favorable stock ratings. In October 2004, Radio One acquired New Mabelton Broadcast Corporation, paying \$35 million for all of the company's common stock.²⁵⁶ In February 2005, Radio One bought a 51% controlling interest in REACH Media, Inc., the media company founded by radio personality Tom Joyner.²⁵⁷ Radio One paid \$55.8 million for this controlling interest as it moved forward by diversifying its holdings and securing its place as the leading and largest Black-owned and Black-oriented media company. Acquisition of REACH Media, Inc. opens the door for Radio One to become more involved in radio programming by vertically integrating program production into its existing ownership structure. The

²⁵¹ See generally Radio One: The Urban Media Specialist, <http://www.radio-one.com> (last visited Apr. 3, 2006) [hereinafter Urban Media Specialist]. Radio One owns or operates stations in the following markets: Louisville, Richmond, Raleigh/Durham, Augusta, Dayton, Atlanta, Indianapolis, Baltimore, Washington, DC, Detroit, Cleveland, Philadelphia, Columbus, Boston, Houston, Dallas, Cincinnati, Los Angeles, St. Louis, Charlotte, Miami, and Minneapolis. *Id.*

²⁵² *Id.* TV One, a joint venture between Comcast and Radio One, is a 24-hour cable television channel devoted to Black-oriented programming. *Id.* It produces original programming in addition to reruns of syndicated popular television series as well as movies. *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Krissah Williams, *Radio One Makes Its Move*, WASH. POST, Nov. 22, 2004 at E01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A3112-2004Nov21.htm>. The stock trades on the NASDAQ Stock Market under the symbols "ROIA" and "ROIAK" and has had steady success since the 1999 IPO. *Id.*; see also Urban Media Specialist, *supra* note 251 (stating that the company will own and operate 26 radio stations in some of the country's top markets).

²⁵⁶ See generally Urban Media Specialist, *supra* note 251.

²⁵⁷ Williams, *supra* note 255.

acquisition also gives Radio One an Internet presence on BlackAmericaWeb.com, which boasted over 500,000 visitors in October 2004.²⁵⁸

Interestingly, the economic paradigm of the Black community has changed significantly over the last twenty years with the mass appeal of the hip-hop culture. Blacks have complained about the effect hip-hop and rap cultures have had on young people and about the excessive materialism and consumption promoted by the culture. However, these segments of American culture have drastically altered the economic realities of the modern Black community. In today's economy, the young so-called urban Blacks are well-situated to invest in such costly endeavors as clothing lines, recording and distribution companies, and radio stations. These young investors who embrace a less refined culture, ironically, often are looked down upon as an embarrassment to the race by many in the middle-class, educated Black elite.

Many, such as Robert Johnson of BET, have made large fortunes hawking images of scantily clad gyrating women to viewing audiences. They know what sells and have flooded the market with their product. Their product has generated the type of funds necessary to buy broadcast outlets. There may be a few others who can amass the money to purchase a station in today's market, but even those who owned Black radio stations twenty years ago will attest that they had to sell their holdings because they no longer could compete against the biggest players in the industry because they could not afford syndicated programming, could not afford to produce enough quality programming of its own to compete with wealthier competitors, or could not attract sufficient advertising revenue.²⁵⁹

2. License Renewals

The FCC's presumption of renewal licenses is yet another reason increased localism will not necessarily translate into greater Black ownership or greater attention paid to issues of importance to the Black community.²⁶⁰ Licensees seeking renewal of their broadcast licenses were once subjected to

²⁵⁸ *Id.*

²⁵⁹ Short Statement, *supra* note 106. Short lamented the loss of viewpoint diversity in the city of Syracuse, New York where he had once held a license to WRDS. *Id.* He stated that his company had to sell its station when it became apparent that it could no longer compete with Clear Channel and Citadel which were able to use their size to exert market power with advertisers, stifling others in the market. *Id.* Short testified that his station broadcast public service announcements, interviewed African-American elected officials and political candidates that other stations did not. *Id.* His station provided educational and employment opportunities to local students, sponsored health initiatives. *Id.* More importantly, he testified that he and his company had ties to the local community and a vested interest in its success. *Id.*

²⁶⁰ Copps' Dissent, *supra* note 2.

intense agency review that often included hearings during which licensees had to prove that they had successfully served the public interest of their community of license.²⁶¹ Overtime, the FCC has reduced license renewal to a perfunctory postcard style renewal process based on duly filed petitions to deny.²⁶² Absent community objection, rarely does the Commission fail to renew a broadcaster's license.²⁶³ The FCC articulates sound reasons for this procedural policy, namely the expectation of the licensee.²⁶⁴ Because huge amounts of money and other resources must be poured into broadcast stations including expenditures on facilities, equipment, staffing, and contracts, few investors would enter the business and expend the necessary resources absent some assurance that in eight years, the licensee's investment would not be diminished by non-renewal or a transfer of the license to someone else. While this presumption of renewal and the streamlined renewal process make sense; unfortunately, they place the licenses in the hands of a designated select few for a potentially indefinite duration. Because of this systemic problem, new entrants to the market are rare. This is particularly true of the television broadcast market and is increasingly true of the radio industry considering the excessive consolidation that has occurred in the last eight to ten years.

V. Beyond Localism

A. Can Diversity Exist in an Environment of Excessive Consolidation?

While a focus on greater localism will curb some of the problems created by widespread consolidation in the radio industry, it must not be forgotten that localism is but one of the FCC's policy goals and considerations. One must not forget the Commission's goal of diversity, which includes not only viewpoint and source diversity, but also racial and gender diversity in ownership.²⁶⁵ It is not entirely clear that the focus on localism will translate into greater ownership by women and minorities. Governmental policy must adequately address multiple concerns of diversity

²⁶¹ 47 U.S.C. § 307(c)(1); 47 U.S.C. § 309(k).

²⁶² See generally *In re Deregulation of Radio*, 84 FCC 2d 968 (1981); *In re Deregulation of Commercial Television*, 98 FCC 2d 1076 (1984); Copps' Dissent, *supra* note 2; 47 C.F.R. § 73.3539 (outlining license renewal procedures); 47 C.F.R. § 73.1020 (defining license period); 47 C.F.R. § 73.3580 (detailing local public notice of filing of application); 47 C.F.R. § 73.3584 (filing of petitions to deny).

²⁶³ Copps' Dissent, *supra* note 2.

²⁶⁴ See *In re Deregulation of Radio*, 84 FCC 2d 968 (1981) (describing the licensee's legitimate renewal expectancy).

²⁶⁵ 2002 Biennial Review, *supra* note 1, ¶ 26.

in furthering the public interest. Localism is not a proxy for ownership diversity, nor is race a perfect proxy for viewpoint diversity. Likewise, there is no suggestion, not to mention any guarantee that more localism will translate into a greater focus on issues of concern to minority communities. This being the case, the Commission and Congress must give greater consideration to the larger implications of a focus on localism. Congress and the Commission must give greater consideration as to whether minorities can purchase stations under the local or national ownership frameworks. Additionally, the Black community might not be wisely served by putting all of its proverbial eggs into one basket by blindly lining up behind the pro-localism campaign.

Minority communities might be better served by remaining involved in the regulatory movement and staging opposition to gross amounts of consolidation, while simultaneously setting their sights on how to effectively use the new paradigm of radio ownership to their advantage.²⁶⁶ The FCC has an effective mechanism for public participation in its rulemaking proceedings. The Commission files public notices of its proceedings and members of the public may file comments and reply comments in these proceedings.²⁶⁷ There must be greater minority involvement at all stages of policy and rulemaking and greater coordination among licensees and organizations with like goals. The overwhelming absence of African Americans involved in the discussion of radio regulation and localism is striking, bringing several things to mind.²⁶⁸ First, perhaps African Americans are satisfied with the status of radio today. Second, perhaps African Americans are ambivalent about the status of radio today and do not view a pro-localism agenda as potentially detrimental to their interest. Neither the eleventh nor the thirteenth hour is the time to become involved. By then, policy has been set and the rules have all but been inked into law. Minority communities would be wise to figure out ways to use the new national ownership framework to benefit their communities. The Congress and the Commission must work with current and would-be minority licensees. However, considering the unlikely probability that such meaningful collaboration will materialize prior to the end of the second Bush administration, minorities must consider creative means of self-help. For instance, minorities could seek to form consortia of owners, create more

²⁶⁶ See David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N.U.L. REV. 747, 776–77 (2002) (suggesting that greater public participation and FCC consideration of comments filed by individuals should be considered in agency policymaking and rulemaking).

²⁶⁷ William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1 (1988).

²⁶⁸ Fewer than 10 minority organizations filed comments in the 2002 Biennial Review proceedings. 2002 Biennial Review, *supra* note 1.

partnerships, and partner with other minorities across racial lines. Interestingly, of those stations filing ownership reports, less than 1% of the licensees reported multi-minority ownership, or ownership by persons of different minority status.²⁶⁹

B. Must Broadcasters Be Diverse To Produce Diverse Programming?

Many scholars would point to the diverse offerings on radio today and conclude that broadcasters need not be diverse to produce diverse programming.²⁷⁰ These scholars would argue that market forces and public preferences necessarily will result in diverse program offerings even where excessive consolidation exists.²⁷¹ The "Black Community According To Clear Channel" or any other broadcasting conglomerate is indeed a laughable proposition and is inherently dangerous. Because Black formatted radio sells, there will always be at least one non-minority wealthy market competitor that will know how to market Blackness better than Blacks.²⁷² So, perhaps African Americans would do well to attempt to work within the existing national framework and work that system to its benefit, as a more local focus may not be any better for the community—that is unless Blacks also own a greater number of local stations. Unfortunately, more local ownership may not automatically translate into more African-American ownership. So, Blacks should take a step back and consider the implications of local ownership on the Black community.

Clear Channel, specifically, has been criticized for throwing its weight and political clout around and for being the mouthpiece for George Bush and all things white, conservative, big and Texan to the exclusion of other points of view.²⁷³ If true, such a characterization raises skepticism about the influence of the owner's views on the station's programming. But if the owner were someone more in tune with liberal views, there would be

²⁶⁹ MINORITY REPORT, *supra* note 82. Only six licensees filing 2003 Minority Ownership Reports indicate ownership by individuals of different minority races. *Id.* These licensees own stations in Alabama, Puerto Rico, Washington, Florida, and Missouri. *Id.* On the other hand, a large number of minorities co-own stations with whites. *Id.*

²⁷⁰ Krotoszynski & Blaiklock, *supra* note 130; *see generally* 2002 Biennial Review, *supra* note 1, ¶ 3 (2003). The FCC contends that, with the widespread availability of traditional broadcasting, the Internet, cable television, and satellite video service, the media is more diverse today than ever before. *Id.*

²⁷¹ *See* Weinstein, *supra* note 101, at 161 (explaining how the FCC's reliance on outmoded economic theory results in counterproductive measures).

²⁷² *See* Burchett, *supra* note 167 (describing that as of 1990, only 206 of 600 radio stations targeting Black audiences were actually owned by Blacks).

²⁷³ *See generally* Media Ownership: Radio Industry Before the Senate Commerce, Science and Transportation Committee, 108th Cong. (2003); 2002 Biennial Review, *supra* note 1, at 13640; Broadcast Localism Hearing, *supra* note 102.

the same outcry—just from a different political camp. Possessing considerable business savvy, most large companies like Clear Channel do not pander only to one group. Instead, they use their diverse holdings to produce diverse programming formats. Because they often own more than five of the largest stations in a market, they see the benefits of not competing with themselves in the same radio format in the same market. Thus, each of their stations is different in format. For instance, they may own a smooth jazz, urban contemporary, rock, and country station, allowing them to cover all of their bases and capture large market shares. Because Clear Channel, Radio One, and other companies like them own so many radio stations, there is some incentive for them to diversify their formats.²⁷⁴ Broadcasters make money by reaching as many different listeners as possible. Competing with themselves is not necessarily the best way to make money.

Even Black-owned Radio One recognizes the economic diversity dynamic of national radio ownership. Although the majority of Radio One's stations broadcast gospel, urban and jazz music formats, in February 2004, Radio One actually changed a station in Louisville, Kentucky from urban to country, and in April 2003, changed an Augusta, Georgia station's format from rhythm and blues/oldies to modern rock.²⁷⁵ These format changes respond to the economic realities of the communities they serve. Where there is money to be made in country music, money will be invested in switching to that format. Likewise, where there is money to be made in formats like hip-hop or urban contemporary, two formats that in recent years, have been cash cows for most radio conglomerates, the resources are channeled toward those formats.

Local stations owned by numerous local owners may not have that built-in diversity incentive. Locals will air what sells, but what sells may be disproportionately conservative. Therefore, they may try to compete in the same conservative arenas turning a deaf ear to other perspectives altogether—just as has occurred in AM radio. Currently, the majority of programming on the AM frequencies is conservative, and in significant part, AM listeners tend to be some of the same angry white males who want back control of local airwaves.²⁷⁶ The better solution would be to have more minority-owned broadcast companies like Radio One able to aptly compete in the new highly competitive and high-stakes national market. Contrary to

²⁷⁴ Clear Channel programs over 50 stations classified as "Urban" in format, 10 as "Rhythmic," 17 as "Gospel," 6 as "R&B," 2 as "Hip Hop," and 12 as "Spanish." See generally Clear Channel, <http://www.clearchannel.com/Radio> (last visited Apr. 3, 2006).

²⁷⁵ See generally Urban Media Specialist, *supra* note 251.

²⁷⁶ Michael Ortner, *Current Public Law and Policy Issues: Serving a Different Master-The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139, 159-62 (2000). Ortner suggests that radio stations have become increasingly conservative with greater ownership consolidation. *Id.*

what often seems to be popular belief, America has room for more than one successful Black in the broadcast industry.

That Hughes changed the format of her Louisville station from urban to country raises the question of whether race is a proxy for diversity. Radio One's decision to diversify derives from the success of the company in gaining ownership of multiple stations in many markets. It only makes sense for the company to, at some point, diversify its holdings in the same way as any other large conglomerate so as not to compete with itself in certain markets. Some criticize Hughes for effectively "dumbing down" Black radio.²⁷⁷ This may or may not be true. If true, the case for more competition from other Black owners, corporate or otherwise, is bolstered.

Currently, Clear Channel has too much control over the entertainment industry. In an ideal world, ownership would not be so concentrated in the hands of so few. The economies of scale, however, cannot be ignored. Stricter ownership rules would curb their influence, but might have other unintended consequences as well—namely, even less access of minority groups to radio airwaves. Clear Channel could drop some of its formats or may be reluctant to create new ones. It could decrease its offerings targeting Blacks and other minorities. To address critics, Clear Channel and broadcast companies like it, including Radio One, should place a higher priority on adequately addressing local issues while pursuing their national agendas.

C. Will Blacks Have a Voice at All Without Black Ownership?

Of the 389 current minority-owned licensees, Radio One owns 69. Radio stations have never come cheap. Today the cost is astronomical due in large part to the problems of spectrum allocation and scarcity. The cost is not associated entirely with the license itself. The costs are associated with the assets of a licensee that are sold when the rights to the license are transferred from one holder to another. These assets include, for example, the radio studio, broadcasting equipment, contracts and any other assets of the broadcaster. In 2003 and 2004, Radio One purchased a Philadelphia radio station for \$35 million in cash and a station in Dayton, Ohio for \$9.2 million cash—no small undertaking.²⁷⁸ Even J.B. Blayton had to amass over \$50,000 to become the first Black radio station owner in 1949.²⁷⁹ As has always been and will be the case, only those with the money to buy a station—Black or otherwise—will be able to acquire a license. Therefore, it is clear

²⁷⁷ See generally Burroughs, *supra* note 9; Halper, *supra* note 182.

²⁷⁸ *Id.*

²⁷⁹ TARVER, *supra* note 75, at 17.

that the cost of stations in addition to other barriers such as the Commission's license renewal policies threaten the very survival of Black radio.

Will Blacks necessarily agree that a Black owner adequately represents the "Black view" or a "Black voice?" Probably not, but that is not the issue. Even Joyner and Smiley are criticized for not adequately representing "Black views."²⁸⁰ The Black press, in its infancy through the present day has continually been criticized for only addressing the concerns and interests of the more mainstream elite Black middle class—those who were "more likely to have the money, time and ability to purchase and read the press."²⁸¹ Clearly, there is not one Black view. Blacks often complain that Tom Joyner's comedic approach to serious issues does not sufficiently represent Black issues and interests.²⁸² Similarly, some have complained about the low level of Black Entertainment Television's content and about the limited offerings of the fledgling TV One and the Atlanta-based Black Family Channel.²⁸³ However, each presents a Black view, and there should be opportunities for more Black voices to be heard.

Because companies like Clear Channel and Radio One have a number of stations of differing formats, Black issues and Black radio are heard. Radio conglomerates are rushing to purchase "urban" or Black radio stations.²⁸⁴ These stations are such hot commodities due to the influence radio has on Black communities and the buying power of the community.²⁸⁵ Also, the Black community drives popular culture, so Black radio is a good predictor of the future success or failure of many products, services, artists, and genres of entertainment. Black-oriented radio programming sells and always has. Black radio continues to be a big business, and it is only fitting that Black ownership correspond with this market influence. Black broadcasters and would-be Black broadcasters should be afforded the opportunity to participate in the telling of their story and the writing of Black history.

Black-oriented radio is vulnerable. For example, Tom Joyner's radio show could be affected adversely by deregulation. Since Joyner owns his

²⁸⁰ Burroughs, *supra* note 9.

²⁸¹ O'KELLY, *supra* note 172 (quoting Nathaniel D. Williams, a Black journalist, who concluded that the Black press pandered to the Black middle class and "for the mass Negro, it ain't nothing.").

²⁸² Burroughs, *supra* note 9.

²⁸³ Kara Kridler, *Lanham-based Cable-television Network TV One Targets Black Market With Distribution Its Main Goal*, DAILY RECORD (Baltimore), Nov. 19, 2004, http://www.findarticles.com/p/articles/mi_qn4183/is_20041119/ai_n10064545; *Charter Offers Choices for Black Families*, PRESS ENTERPRISE, Nov. 18, 2004. The Black Family Channel, formerly known as Major Broadcasting Cable, is a 24-hour cable network that provides movies, news, sports, music, and family programming targeting African Americans of all ages. *Id.*

²⁸⁴ Short Statement, *supra* note 106.

²⁸⁵ *Id.*

show but does not own the radio stations on which the show is heard, he could be silenced altogether. This threat will be diminished considerably with Radio One's purchase of an interest in the company.²⁸⁶ Lucky for Joyner, Hughes' Radio One broadcasts his syndicated show on stations in most major cities, but it is unclear what will happen to Black radio if Radio One were to be consumed by another radio giant that does not share an appreciation for Joyner's methods or style. More likely than not, a personality as popular and successful as Joyner would be picked up by a competitor, but if the owner does not share some of the fundamental understandings about Black life in America, Joyner may be forced to tone down his message.²⁸⁷

There are no guarantees in business. We have witnessed such a silencing in the case of radio "shock jock" Howard Stern, *albeit* under different circumstances. In 2004, Howard Stern was silenced by Clear Channel whose tolerance for Stern's edgy radio antics ran short.²⁸⁸ That Clear Channel dropped him from its stations was a potentially big blow for the entertainer. Stern subsequently thumbed his nose at traditional broadcast radio altogether in favor of a much more lucrative contract and greater creative license by moving to the largely unregulated satellite radio arena.²⁸⁹ This move suggests a viable and lucrative option for minority entertainers and programmers, but two problems remain. One is that the critical component of distribution is not owned by the person seeking to speak. Second is that forcing minority-oriented programming to pay or subscription services is unfair and entirely unnecessary.

²⁸⁶ Williams, *supra* note 255.

²⁸⁷ SAVAGE, *supra* note 206. Savage illustrates that this has been an ongoing problem by pointing to the National Urban League's toning down of its rhetoric on national radio because of its "guest status" on radio. *Id.* The league's rhetoric in its official magazine, "Opportunity" was notably more aggressive. *Id.*

²⁸⁸ Stern's radio antics cost Infinity Broadcasting fines totaling \$ 1.7 million in 1995 alone. *Radio Chain Bumps Howard Stern*, CBSNews.com, Feb. 26, 2004, <http://www.cbsnews.com/stories/2004/02/26/entertainment/main602462.shtml> (describing the response to Stern's on air content). Stern's former employer is facing fines in excess of \$1 million for more recent sexual references in his radio show; generally Kristen Crawford *Pricing Howard Stern*, CNNMoney, <http://money.cnn.com/2004/07/09/news/newsmakers/stern/> (last visited Apr. 3, 2006); see also Lisa Dollinger and Andrew Levin, *Clear Channel Pulls Howard Stern Show Permanently*, Apr. 8, 2004 ("Mr. Stern's show has created a great liability for us and other broadcasters who air it The Congress and the FCC are even beginning to look at revoking station licenses. That's a risk we're just not willing to take."). Until the FCC's recent intense focus on broadcast indecency, most licensees who carried Stern's show apparently simply figured his fine-inducing brand of humor into their cost of doing business. However, with the stakes much higher under current FCC policy and in terms of pressure from a seemingly hyper-moral U.S. citizenry, which translates into jeopardizing advertising revenue, Clear Channel chose the safe route of protecting its image and bottom line by dismissing the shock jock.

²⁸⁹ Bill Carter & Jeff Leeds, *Howard Stern Signs Rich Deal in Jump to Satellite Radio*, N.Y. TIMES, Oct. 7, 2004, at A1; see also Paul Farhi, *Sirius Plans Double Dose of Stern*, WASH. POST, Aug. 26, 2005, at C07 (describing how Stern will begin working for Sirius Satellite Radio in January, 2006, and Sirius will be devoting two channels to Stern's show and other programming he develops).

If the Commission adopts a more pro-localism agenda, Black Americans must be ready for all that local radio entails for it to be meaningful and to have a positive effect on the community including acknowledging the changing economic realities in the Black community. Even with a local voice, local Black issues still may not be given greater consideration. Nor may the Black voice be heard more than it currently is. If all of local radio goes the way of conservative AM radio, homogenous conservatism may rule the day. There, in fact, could be less overall viewpoint diversity.

Unfortunately, the reliance on the rule of law in American society has over time demonstrated Americans' inability to act morally or in a socially conscious manner without the government's enacting laws compelling or prohibiting certain behavior. There are many examples of this in American history.²⁹⁰ Deregulation of radio stations and an increased focus on localism may have some interesting side effects that many people may not have considered.

VI. Conclusion

In the words of Commissioner Adelstein, paraphrasing Winston Churchill, "This is not the end, or even the beginning of the end, but just the end of the beginning."²⁹¹ With the adoption of the new media ownership rules, the Commission has launched the broadcast media on a destructive course with respect to the quality and diversity of news and entertainment the American public can expect. The response to the Commission's problematic 2003 rulemaking proceeding will be worth considerable attention for many reasons. First, the agency has established itself as disingenuous with respect to preserving a diversity of voices in the free—not subscription—media. Second, the FCC has failed to comprehend who comprises the public it is charged with protecting, and has conducted its rulemaking in a disturbingly clandestine and closed manner despite overwhelming written opposition to the rule changes. Third, the Commission has set upon a destructive path with respect to ownership of media outlets by minorities and small business owners. The Commission's adoption of the new ownership rules has set the

²⁹⁰ The immoral institution of slavery did not end until the passage of the Emancipation Proclamation and passage of the Thirteenth Amendment. U.S. CONST. amend. XIII (1865). Women and minorities were not given the rights to vote until the government ordered recognition of this right. U.S. CONST. amend. XV (1870), U.S. CONST. amend. XIX (1920); Legalized segregation was the law of the land in many states in the United States until repeal by government action. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (adopting the "separate but equal" doctrine); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (rejecting the "separate but equal" doctrine).

²⁹¹ Adelstein's Dissent, *supra* note 2, at 14013.

stage for unprecedented broadcast media consolidation and the possible death of traditional Black radio broadcasting.

Foretelling the future for broadcast ownership requires only a look to the consolidation that has occurred already in the radio industry. Despite proclamations by the Commission that localism is a principle to be preserved, it has ignored the evidence of loss of localism and minority-owned stations in the radio broadcast industry since 1996 and the questionable quality of local programming and newspaper reporting under the current regulatory scheme. The Commission offers no clear explanation of why we should expect any different outcome going forward.

Sadly, the Commission seemingly has abandoned any real efforts to increase minority ownership of broadcast entities, choosing instead to focus on easier issues. Without greater attention to the issue of Black ownership of broadcast entities and the preservation of Black radio, traditional Black radio, which has served the nation so well over time, could be lost altogether. The Commission has an obligation not to facilitate this unfortunate result. Congress must strengthen the obligation of the Commission to provide opportunities for meaningful public participation in proceedings of significant public interest. Congress must impress upon the Commission that it acts not only in the interest of large corporations, but more importantly, acts in the interest of the American citizens to whom the airwaves belong and who have an unequal bargaining power to protect themselves compared to large corporate interests.

The Commission should explore more effective means of educating the public about the work it is doing. The 2002 Biennial Review has underscored the fact that the government must inform the public of issues of significance, particularly when the mass media fails to inform the populace due to its own self-interest in the outcome of a proceeding. More importantly, the Commission must not abandon the goal of promoting minority broadcast ownership nor lose sight of continued importance of Black radio to all of American society.