

**The Public Interest or the Public's Interest:
The Federal Communications Commission's Interpretation of
The Public Interest Standard
With Respect to
Media Ownership Deregulation**

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Introduction

In June of 2005, the Supreme Court of the United States refused to hear multiple appeals by various media groups¹ seeking to restore ownership deregulations as originally passed by the Federal Communications Commission (FCC) in 2003. The deregulations in question had lifted significant restrictions that previously existed on media ownership, within markets and across different media. The FCC's approach was to create a hands-off, less controlled marketplace, in which the media industry—rather than a governmental agency—would organize. A year after the FCC announced the deregulations, the 3rd Circuit Court of Appeals in Philadelphia ruled against the FCC's relaxation of ownership regulations. The court said that the new policy—permitting increased ownership of multiple television and/or radio stations within a single market—was not justified by any compelling arguments made by the FCC.² In other words, as of June 2005, the FCC was mandated to revisit its approach to media ownership limits, either by reducing its deregulation of the media industry or by properly convincing the courts of such a necessity.

This turn of events is part of a complicated process of attempted ownership deregulation on the part of the FCC, and opposition to such deregulation on the part of consumer advocacy groups and, in some cases, federal legislators. Media ownership deregulation first set roots within the FCC's philosophy during the Reagan

¹ *Media Gen., Inc. v. Fed. Commc'ns Comm'n*, 125 S. Ct. 2902 (2005); *Nat'l Ass'n of Broadcasters v. Fed. Commc'ns Comm'n*, 125 S. Ct. 2903 (2005); *Tribune Co. v. Fed. Commc'ns Comm'n*, 125 S. Ct. 2903 (2005); *Newspaper Ass'n of Am. V. Fed. Commc'ns Comm'n*, 125 S. Ct. 2902 (2005).

² *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 373 F.3d 372 (2004).

administration, though it was not until the Clinton administration that the most broadly sweeping changes in sixty years of media regulation were made. The Telecommunications Act of 1996³ marked a distinct shift in the FCC's approach to the media industry, and is considered among even objective observers to be an overhaul of telecommunications regulation.⁴ Since 1996, the FCC has tried to continue its deregulation of ownership limits. In arguing for a libertarian, free-market approach to mass communication regulation, the FCC in recent years has stated that the public interest is best served by unfettered competition, which would theoretically result in media groups providing the public with the programming it desires.⁵ In 2003, FCC Chairman Michael Powell explicitly told an audience of newspaper owners that the public interest is not served by regulating media ownership concentration.⁶

Consumer advocacy groups and other opponents of ownership deregulation argue that ownership concentration would diminish the marketplace of ideas, as articulated by Justice Holmes, upon which democratic speech and the dissemination of truth rely.⁷ Federal restrictions on ownership, they argue, do serve the public interest; if media consolidation were to be permitted as desired by the current FCC, fewer voices in mass communication would mean less viewpoint diversity.

In the nine years since the passage of the Telecommunications Act of 1996, there has been much political and legal activity—via legislation and litigation—addressing the

³ 47 U.S.C.S. § 69.117.

⁴ J.A. Hendricks, *The Telecommunications Act of 1996: Its Impact on the Electronic Media of the 21st Century*, COMM. & LAW, June 1999, 39, 40 (1999).

⁵ R.W. McChesney, *Media Policy Goes to Main Street: The Uprising of 2003*, 7 COMM. REV. 223, 232 (2004).

⁶ *Id.* at 231.

⁷ *Id.* at 235-239. See also *Abrams v. United States*, 250 U.S. 616 (1919) (articulating marketplace-of-ideas metaphor in defense of First Amendment protection of free speech).

legitimacy of the FCC's actions regarding ownership deregulation. However, both sides argue for the same interest—the public interest. The Communications Act of 1934—by which the FCC was first created—charged the FCC with protecting the public interest,⁸ yet that term remains vaguely defined. As a result, the FCC, media companies, and consumer advocates all claim that their interests serve the public interest. Thus far, in federal court cases addressing the FCC's attempts to permit more media ownership by single parties, courts have focused on the FCC's right to regulate such activity and the reasoning by which the Commission does so. Courts have yet to articulate whether the public interest standard is best served by limited media ownership by individual companies, or rather by a free-market approach.

The purpose of this study is to analyze court rulings and legal arguments related to media ownership regulation and deregulation, in order to determine the likely future course of action within the court system. This is of utmost importance, as a concrete understanding of the FCC's role in protecting and serving the public interest will have substantial effects not only on FCC media ownership policy, but consequently on the future media landscape, as well.

Literature Review

This section will review arguments made in law review and journal articles that deal expressly with the FCC's application of the public interest standard, both historically and in the wake of the recent deregulation of the past ten years. First, a history of the FCC's interpretation of the public interest standard will be provided, followed by arguments stating that this interpretation shifted in the 1980s. Next, arguments by legal

⁸ Communications Act of 1934, 47 U.S.C.S. § 151 (2005).

scholars against and in support of ownership deregulation, through the lens of the public interest standard, will be presented. Finally, scholarly legal literature will be discussed, which analyzes the way in which the FCC has reacted to recent legislation and court holdings, all dealing with media ownership regulation and the public interest. This will lead to a better understanding of the ways in which both supporters of deregulation—FCC commissioners and media industry leaders—and opponents of media ownership deregulation—consumer advocates and smaller media companies—apply the public interest standard to their respective arguments.

Historical Application of the Public Interest Standard

The FCC is charged with protecting the public interest in the area of mass communication.⁹ There is considerable disagreement, however, over how this concept should be applied by the FCC. As one scholar articulated, the FCC's traditional goals in protecting the public interest have focused on three main issues: diversity, competition, and localism.¹⁰ The first issue, diversity, can be broken down into four categories: viewpoint diversity, outlet diversity, source diversity, and program diversity.¹¹ In *Red Lion v. FCC*, the Supreme Court held that because the broadcast spectrum is a limited resource—and the FCC (as mandated by the Radio Act of 1927 and the Communications Act of 1934) is charged with protecting and serving the public interest—the public's right to access free speech means that the FCC has the constitutional right to protect viewpoint

⁹ Communications Act of 1934, 47 U.S.C.S. § 151 (2005).

¹⁰ C.C. McLintock, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 585 (2004).

¹¹ *Id.*

diversity in broadcast media.¹² This has henceforth been referred to as the “scarcity argument.” As a result, the FCC has historically sought to make sure that a wide variety of viewpoints, outlets, sources, and programming are made available to the public. This serves the public interest because, as another legal scholar wrote in the *Journal of Law and Policy*, “antagonistic and broad-ranging debate over questions of public importance has long been considered an indispensable element of a self-governing society.”¹³ The same scholar argued that historically, the FCC has created rules based on the idea that diversity of media ownership leads to a diversity of viewpoints.¹⁴

A large shift in this philosophy occurred when, in 1982, FCC Chairman Mark Fowler called for complete ownership deregulation of broadcast media. According to Fowler, a “marketplace approach,” in which the marketplace itself naturally serves the public interest, would be more reliable than the historical “trusteeship model,” in which the FCC protects the public interest via its regulations.¹⁵ Fowler articulated this idea when he announced at a meeting of the International Radio and Television Society, “I believe that we are at the end of regulating broadcasting under the trusteeship model.... Under the coming marketplace approach, the Commission should, so far as possible, defer to a broadcaster’s judgment about how best to compete for viewers and listeners

¹² *Red Lion Broadcasting Co., Inc., Et Al. v. Fed. Commc’ns Comm’n*, 395 U.S. 367 (1969).

¹³ M. Keller, “*Damn the Torpedoes! Full Speed Ahead*”: *The FCC’s Decision to Deregulate Media Ownership and the Threat to Viewpoint Diversity*, 12 J.L. & POL’Y 891, 894 (2004).

¹⁴ *Id.* at 901. See *FCC v. Nat’l Citizens Comm. for Broad.* 436 U.S. 775, 795 (1978) (holding that FCC limit on ownership is a reasonable interpretation of the public interest standard).

¹⁵ *Id.* at 909.

because this serves the public interest.”¹⁶ One scholar described this statement as a shift toward economic efficiency as a means of providing for the public interest.¹⁷ Such a philosophical approach to the public interest relies on the idea that personal freedom is best served by little to no government regulation.¹⁸ This new approach toward the public interest, as articulated by Fowler, paved the way for media ownership deregulation in the 1980s and beyond.

The Public Interest as Argument Against Deregulation

Many scholars point to this new approach, as embodied by the Telecommunications Act of 1996 and subsequent deregulation, as failure on the part of the FCC to truly uphold the public interest standard. Scholars, including Robert McChesney—a noted scholar on the issue of FCC policy and the public interest standard—argue that the public interest is not best served by a free market, but rather by a properly watchful FCC—what Fowler previously described as the “trusteeship model.”

In 2003, FCC Chairman Michael Powell argued that the proliferation of cable and satellite television channels made concerns over media concentration a moot point. He also declared that media companies must be allowed to own more broadcast media, in order to stay profitable and maintain television as a free service for the public. Finally, Powell declared that the FCC’s proposed ownership relaxation in 2003 would not create a big shake-up in the industry; he did not believe there would be enough ownership consolidation to warrant any “public policy concerns.”¹⁹ In dissecting Powell’s

¹⁶ M. S. Fowler, *The Public’s Interest; Address at a Meeting of the International Radio and Television Society (September 23, 1981)*, 4 COMM. & L. 51, 52 (1982).

¹⁷ Keller, *supra* note 13, at 908.

¹⁸ *Id.*

¹⁹ McChesney, *supra* note 5, at 231-3.

arguments for the deregulation of media ownership, Robert McChesney argued that allowing corporations cross-media holdings within markets and larger shares of local and national audiences goes against the public interest. Such a policy would limit viewpoint, outlet, and source diversity. There may be a multitude of cable and satellite television channels, satellite and AM/FM radio stations, and Internet websites, McChesney pointed out, but they are still owned by a small handful of corporations.²⁰

Some scholars have also pointed out the failure of media deregulation to protect the fourth type of diversity: program diversity. The deregulation of radio station ownership proves to scholars such as Todd Chambers that program diversity suffers as a result. Chambers arrived at this conclusion in *Radio Programming Diversity in the Era of Consolidation*, a study in which he analyzed radio programming diversity within heavily consolidated markets. The results challenge the FCC's assumptions regarding the effects of ownership consolidation:

In general, the findings in this study showed the relationship between the loss of competition within a radio market and the loss of audience choice in terms of the number of different formats, and in some cases, the number of different types of songs played within that market. The results confirmed that markets with more competition played a wider variety of radio formats and provided a larger selection of gold unique titles than markets operating in more concentrated markets.²¹

²⁰ *Id.* at 232.

²¹ Todd Chambers, *Radio Programming Diversity in the Era of Consolidation*, 10 J. RADIO STUD. 33, 43 (2003).

One scholar pointed to local news as having also suffered from the consolidation of radio ownership: more evidence for him of the lack of application of the public interest standard in media ownership deregulation.²² In 1982, according to the author, 98 percent of all radio stations in the United States had news operations. In 2003, seven years after radio ownership regulations were relaxed as part of the Telecommunications Act of 1996, that figure was down to 67 percent.²³ This is consistent with the observations of McChesney, who declared that most everyone agrees that the effect of ownership deregulation on the quality and diversity of radio has been negative.²⁴

McChesney also challenged the FCC's argument for supporting the public interest by allowing media corporations to expand, thus remaining free to consumers. The FCC, McChesney argued, should not be in the business of aiding firms in "a dying industry."²⁵ McChesney saw the FCC's deregulation of media ownership as supporting businesses with which the Republican-majority of the FCC is in bed, to the detriment and neglect of the public interest.

The Public Interest as Argument For Deregulation

Not all scholarly arguments—though definitely a majority of them—argue against deregulation with respect to upholding the public interest standard. Anthony Varona, for example, has argued for complete broadcast deregulation. "Despite its lofty aspirations," he wrote in an article, "the public trustee doctrine has been a failure since its inception."²⁶

²² N. Hickey, *Power Shift: As the FCC Prepares to Alter the Media Map, Battle Lines Are Drawn*, COLUM. J. REV., March/April, 26, 29 (2003).

²³ *Id.*

²⁴ McChesney, *supra* note 5, at 237.

²⁵ *Id.* at 233.

²⁶ A.E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 5 (2004).

According to Varona, the free speech clause of the First Amendment and the anti-discrimination clause within the Communication Act of 1934 are both in tension with the idea that the FCC should serve as active protector of the public interest.²⁷ Varona not only argued that the tension between maintaining free speech and guarding the public interest proves them to be incompatible, but that it is also unrealistic to charge media companies with the duty of acting as trustees of the public interest.²⁸ This is not to say that Varona agreed with the industry argument that technological growth has made the scarcity argument moot—he openly declared that such attacks “misconstrue the meaning of scarcity as defined by the Supreme Court in *Red Lion*”²⁹—only that he concluded that “time has taught that broadcasters cannot serve the two gods of public interest programming and the maximization of advertising revenue.”³⁰ In other words, following Varona’s argument, broadcast media companies cannot simultaneously serve the public interest and their own financial self-interests.

Not all scholars, however, believe that ownership consolidation in the media will decrease programming diversity. Legal scholar Stuart Benjamin, for example, has argued that the public interest with respect to broadcast programming would be best served by a monopoly. Otherwise, he wrote, only the most popular tastes or demands will be served. As a hypothetical example, Benjamin considered the effect of broadcast ownership consolidation on the quality and diversity of viewpoints in local news:

²⁷ *Id.* at 53.

²⁸ *Id.* at 115.

²⁹ *Id.* at 59. See also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (defining the broadcast spectrum as a scarce, public resource, thus permitting content and structural regulation on the part of the FCC).

³⁰ *Id.* at 115.

There is no a priori reason to expect that changing the identity of one or more owners will lead to less program diversity. In fact, and perhaps ironically, the main change in ownership rules that might have a chance of increasing program diversity would be to allow one entity to own all the stations in a given market. If viewing preferences are skewed (e.g., at a given hour 70% of viewers want to watch sports, 20% want to watch entertainment news, and 10% want to watch an arts program) and there are four local broadcasters, we would not expect any of them to broadcast an arts program. Only if there were a monopolist would we expect one of these four stations to show the arts program.³¹

This argument is precisely in line with that of the current FCC.

(Mis)interpretations of Recent Public Interest Mandates

Such an argument, however, changes the original interpretation of the public interest standard. If the FCC follows Benjamin's model, it will serve the public's interests, and not the public interest. For example, the public's interests might mean a desire for more polarizing, political shows with lots of yelling and screaming, while the public interest would be for there to be deeper and more thoroughly enlightening political discussion. Because of this fundamental difference between the public's interests and the public interest, some scholars argue that the FCC has misinterpreted its own charge of protecting the public interest. Scholar Willard D. Rowland, Jr., for example, wrote that while language exists in the Telecommunications Act of 1996 that relates to the public

³¹ S. M. Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting Is Good For the Country*, 46 WM. & MARY L. REV. 439, 453-454 (2004).

interest standard, it does not advance the public service aspect of that standard.³²

Rowland argued that the FCC's invocation of the public interest standard in defense of ownership deregulation "entailed a misunderstanding of its [public interest standard] real meaning."³³ The standard's real meaning for Rowland is to protect the greater social good and foster a healthy, democratic environment, rather than to just make sure that the public gets the programming it desires.

Matthew Keller made a similar argument in his discussion of the Telecommunications Act of 1996, subsequent biennial reviews conducted by the FCC (as mandated by the Act), and lawsuits brought against the FCC in reaction to such legislation.³⁴ Part of the Telecommunications Act of 1996 stipulates that, every two years, the FCC conducts a biennial review: a review of all ownership rules, in order to "determine whether any of such rules are necessary in the public interest as the result of competition."³⁵ Subsequently, two court cases arose after the first biennial review, in which large media companies filed suit against the FCC on the basis of arbitrary limits for ownership.³⁶ In *Fox v. FCC* and *Sinclair v. FCC*, both Fox and Sinclair (two large media companies) argued that the FCC's limits on what percentage of a market's media they could own were arbitrary—that is, that the FCC randomly picked a number without showing why. The federal courts in both cases declared the FCC's limits as indeed arbitrary. The FCC interpreted this as a mandate to remove all limits, rather than show

³² W. D. Rowland, Jr., *The Meaning of "The Public Interest" in Communications Policy, Part I: Its Origins in State and Federal Regulation*, 2 COMM. L. & POL'Y. 309, 312-313 (1997).

³³ *Id.* at 313.

³⁴ Keller, *supra* note 13, at 925.

³⁵ 47 U.S.C.S. § 69.117 section 202 (h).

³⁶ See *Fox Television v. FCC*, 280 F.3d 1027 (2002); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (2002) (In-depth discussion to follow).

why they needed limits in the first place, and further decreased ownership restrictions in the 2003 biennial review. Keller declared this reaction by the FCC to be “unsound and reflect an inappropriately broad interpretation of the Fox and Sinclair decisions.”³⁷ Though a federal court in 2004 struck down parts of the 2003 biennial deregulations³⁸, it did so not on the grounds of unsound interpretation of the public interest standard, but rather on the basis that the FCC yet again did not provide compelling evidence that the new ownership deregulation was more than an arbitrary decision.

Research Questions

1. What were the ownership rules before the Telecommunications Act of 1996?
2. How did the FCC apply the public interest standard to ownership regulations, following the passage of the Telecommunications Act of 1996 and the court challenges to those rules?
3. What are the legal and constitutional grounds that litigants have asserted in court challenges to FCC media ownership rules enacted since the Telecommunications Act of 1996 as part of the deregulation trend?
4. What is the potential legal impact of recent court rulings on media ownership rules, including the FCC’s ability to make rules on ownership in the future?
5. What are the lessons to be learned by Congress and the FCC, from the recent court rulings?

Methods and Limitations

This paper will provide a focused history of FCC legislation, with regard to media ownership regulation. A brief discussion of significant and relevant ownership rules will

³⁷ Keller, *supra* note 13, at 925.

³⁸ *Supra* note 2.

create a basis for understanding the historical approach of the FCC in serving the public interest with regard to ownership regulation.

This paper will discuss two historically significant and relevant cases brought against or by the federal government that affirmed that the FCC has the right to limit network control of television stations, and affirmed that the FCC has the power to limit ownership. The paper will then discuss recent cases brought against the government since the rule changes of 1996, that declared limits on television and cable ownership arbitrary and declared deregulation arbitrary, respectively.

For purposes of focus, this paper will not include sections of the Telecommunications Act of 1996, or subsequent biennial reviews, that deal with regulatory issues beyond ownership. Furthermore, while the paper will provide the reader with an overview of the specifics of the ownership deregulations, analysis will not focus too heavily on the quantitative specifics, in an effort to avoid non-relevant legislative minutia. The purpose of the study is to address the rationale and application of the public interest standard to ownership deregulation, and not to deconstruct the legislation.

A History of Ownership Regulation

The Communications Act of 1934, which created the FCC, charged it with serving the “public interest, convenience, and necessity.”³⁹ The FCC interpreted that charge to mean that it must protect a diversity of viewpoints in broadcast media. This is evident in the many regulatory ownership rules that the FCC implemented, beginning with the Duopoly Rule of 1940. Except for in special cases, such as when it was the only

³⁹ Communications Act of 1934, 47 U.S.C.S. § 151 (2005).

way a radio station could remain financially stable, the Duopoly Rule limited ownership to only one broadcast station—AM, FM, or television—in any single market.⁴⁰

In 1941, the FCC issued its “Report on Chain Broadcasting,” which found that networks had too much content control over their affiliated stations. As a result, Commission Order No. 37 was given, which mandated that networks could not force their affiliates to carry specific programming.⁴¹ NBC and CBS took the FCC to court over this Order, under the argument of their First Amendment right to free speech.

In *NBC v. United States*⁴², argued and decided in 1943, the Supreme Court affirmed that it is indeed within the FCC’s power to put limits on broadcast media, beyond technical assignments of signal strength and frequency. This power resides in the FCC’s charge of serving the public interest. In the majority decision, as written by Justice Frankfurter, the FCC’s “Report on Chain Broadcasting” consistently articulated its interest in maintaining viewpoint diversity as a means of serving the public interest. Quoting the Report, Frankfurter wrote:

The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated... A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable.⁴³

⁴⁰ ROGER L. SADLER, *ELECTRONIC MEDIA LAW* 101 (2005).

⁴¹ *Id.* at 102.

⁴² *Nat’l Broad. Co., Inc. Et Al. v. United States*, 319 U.S. 190 (1943).

⁴³ *Id.* at 199.

The media companies in the case argued that the restrictions on network control were arbitrary and limited their constitutional free speech. In addressing the complaint of arbitrariness, the Supreme Court found that the FCC's interest in viewpoint diversity within broadcast media was sufficient to allow it such control. "Our duty is at an end," wrote Justice Frankfurter, "when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress."⁴⁴ Frankfurter was careful to articulate that the Supreme Court did not argue that the regulations did indeed serve the public interest, only that the FCC had the right to pass such regulations in an effort to serve public interest.⁴⁵

In addressing the First Amendment argument, the Supreme Court also found in favor of the FCC. The media companies said that the FCC was acting unconstitutionally when it denied or revoked licenses when networks exercised too much control over their affiliates. However, the right of free speech, said the Court, does not include broadcasting without a license, meaning that not everyone is guaranteed access to the broadcast spectrum. "The standard it [FCC] provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the Act, is not a denial of free speech."⁴⁶ Therefore, as a result of this case, the FCC could continue to pass regulations stipulating specific use of the broadcast spectrum, as long as the Commission argued that it served the public interest.

As television and radio continued to grow throughout the United States, the FCC began relaxing its ownership regulations to account for the wider variety of outlets that

⁴⁴ *Id.* at 224.

⁴⁵ *Id.* at 224.

⁴⁶ *Id.* at 227.

the public had to choose from. In 1944, the FCC changed its regulations to allow one party to own five television stations nationwide, up from three.⁴⁷ However, the Dual TV Network Ownership Prohibition of 1946 restricted a party from owning more than one national television network.⁴⁸ In 1953, the FCC implemented what came to be known as the “Rule of Sevens,” a regulation stipulating that one party could own up to seven FM stations, seven AM stations, and seven television stations, nationwide. The regulation also stipulated that one party could not reach more than twenty-five percent of the national audience in any one medium, or else licenses would be denied or revoked.⁴⁹ Not long after this regulation was passed, the FCC denied a television station license to Storer Broadcasting Company, and the company took the FCC to court, on the grounds of ownership restrictions being beyond the FCC’s limits of power.

In *United States v. Storer*⁵⁰, argued and decided in 1956, both parties argued with the public interest in mind. The respondent, Storer Broadcasting Company, claimed that the ownership restrictions conflicted with the Communication Act of 1934’s stipulation that a license should be granted if it would benefit the public interest.⁵¹ The FCC, meanwhile, argued that the new rules themselves served the public interest, and that the respondent had no right to a hearing regarding the denial of its license, because the applicant admittedly did not meet the standards set by the “Rule of Sevens.”⁵² The Supreme Court found the rules not to be in conflict with, but rather in support of the FCC’s public interest standard. “Congress sought to create regulation for public

⁴⁷ SADLER, *supra* note 40, at 104.

⁴⁸ SADLER, *supra* note 40, at 103.

⁴⁹ SADLER, *supra* note 40, at 104.

⁵⁰ *United States v. Storer Broad. Co.* 351 U.S. 192 (1956).

⁵¹ *Id.* at 195.

⁵² *Id.* at 201.

protection,” wrote Justice Reed, “with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities.”⁵³ Thus, in protecting competition in media markets, the FCC was serving the public interest, and the Supreme Court found the Multiple Ownership Rules to be reconcilable with the Communications Act of 1934 and the FCC’s mandate of serving the public interest.

In the years following the “Rule of Sevens,” as the media industry continued to expand, the FCC expanded the AM-FM-TV station ownership limits to 12-12-12 in 1985, 14-14-14 (with a new 30% audience limit for media serving minority communities) also in 1985, 18-18-12 in 1992, and 20-20-12 in 1994.⁵⁴

Telecommunications Act of 1996 and Beyond

Then the Telecommunications Act of 1996 was passed, and a dramatic shift in ownership restrictions occurred. Among the many changes made to ownership regulations was the removal of the Radio Duopoly Rule, allowing media companies to own multiple radio stations within a single market.⁵⁵ The limit on national radio market-share was dropped, as well. The result was over one thousand radio mergers within one year.⁵⁶ By 2003, Clear Channel Communications owned more than 1250 radio stations.⁵⁷

Television also saw significant deregulation as a result of the Telecommunications Act of 1996. The ban that had previously prohibited national networks from owning cable systems was lifted, as was the ban on telephone companies

⁵³ *Id.* at 203.

⁵⁴ SADLER, *supra* note 40, at 105.

⁵⁵ *Id.* at 108.

⁵⁶ *Id.* at 108.

⁵⁷ *Id.* at 108.

owning cable companies.⁵⁸ The “Big Four”—ABC, NBC, CBS, and Fox—were kept from owning smaller broadcast television networks, but they were permitted to own cable networks.⁵⁹

Perhaps most contentiously, the Act gave the FCC the ability to adjust its twenty-five percent audience limit, which had remained in place since the original “Rule of Sevens” was enacted in 1953. As a result, the FCC increased the limit to thirty-five percent of the national television audience. Fox then took the FCC to court, hoping that the court system would see the new limit as arbitrary, thus leading the FCC to increase the limit to an even higher percentage.⁶⁰

In *Fox v. FCC*⁶¹, decided in 2002, the D.C. Federal District Court heard arguments given by Fox that were quite similar to those given by broadcasters in *NBC v. United States* in 1943. Just as NBC did, Fox argued that the FCC’s limit of thirty-five percent was arbitrary, and that the Commission’s defense of ensuring competition as a means of serving the public interest was ill-founded, because the FCC provided no evidence of any threat to competition as a result of a company reaching thirty-five percent of the national audience.⁶² The networks also argued that no evidence existed showing that a national ownership cap was needed, nor was it in the FCC’s power to regulate such ownership “in the name of diversity alone.”⁶³

⁵⁸ *Id.* at 112.

⁵⁹ *Id.*

⁶⁰ *Id.* at 114.

⁶¹ *Fox Television Stations, Inc. v. Fed. Comm’n Comm’n* 280 F.3d 1027 (D.C. Cir. 2002).

⁶² *Id.* at 1041.

⁶³ *Id.* at 1042.

This second argument, against the legitimacy of the FCC’s regulation in the name of diversity, was defended against by the National Association of Broadcasters (NAB) and the Network Affiliated Stations Alliance (NASA), who supported the FCC in arguing that the public interest standard had historically embraced diversity—a position the courts have legitimized in *NBC v. United States* and *United States v. Storer*.⁶⁴ In *Fox v. FCC*, the D.C. Federal District Court stated, in the majority opinion by Chief Judge Ginsburg, that the FCC was persuasive in its defense of protecting diversity and competition as a means of serving the public interest.⁶⁵ “The question, therefore,” wrote Ginsburg, “is whether the Commission adequately justified its retention decision as necessary to further diversity.”⁶⁶ The answer, the Court found, was no. “We agree with the networks,” Ginsburg wrote, “that the Commission has adduced not a single valid reason to believe the NTSOP Rule is necessary in the public interest, either to safeguard competition or to enhance diversity.”⁶⁷

The networks also argued that the ownership restrictions infringed on their constitutional rights to free speech, and that the scarcity argument in support of regulating broadcast media was moot in today’s vast world of media outlets. The Court did not agree with this point, however, and merely ordered the FCC to remove the ownership limits due to a lack of any evidence as to why they are necessary.⁶⁸

The FCC’s response, in 2003, rather than providing a more convincing argument for an ownership limit of thirty-five percent of the viewing audience, instead instituted a

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1043.

⁶⁸ *Id.* at 1047.

higher limit of forty-five percent of total television households in the United States. The new rules, as part of the FCC's 2002 Biennial Regulatory Review Notice of Proposed Rulemaking, also lifted the TV Duopoly ban in all but the smallest markets. Furthermore, the FCC created a hierarchy of television station ownership restrictions, based on market size. The more stations there are in a market, the more stations one company would be allowed to own. No matter how large the market, however, one company could not own more than one of the four largest stations (in terms of viewer ratings).⁶⁹

The Telecommunications Act of 1996 mandated biennial reviews such as this, for the express purpose of deciding whether media concentration rules are "necessary in the public interest," and repealing those rules decided to be unnecessary.⁷⁰ The FCC, based on the 2002 biennial, obviously felt many of the regulations restricting ownership were not in the public interest. Several public interest and consumer advocacy groups disagreed, and took the FCC to court over the new deregulations.

In *Prometheus v. FCC*⁷¹, the D.C. Court of Appeals reviewed each regulatory change made by the FCC in its 2002 Regulatory Review, upholding some and remanding others. Significantly, the court affirmed the FCC's power to regulate media ownership with respect to serving the public interest, but rejected the notion that the Constitution or the Telecommunications Act of 1996 restricts the way in which the FCC goes about enforcing such regulations.⁷² While the court upheld many of the FCC's newly relaxed regulation of cross-media ownership, it found that the FCC had not properly justified the

⁶⁹ SADLER, *supra* note 40, at 113-115.

⁷⁰ *Prometheus v. Fed. Comm'n. Comm'n.* 373 F.3d 372 391-394 (2004).

⁷¹ *Id.*

⁷² *Id.* at 382.

specific limits it had put on local television and radio ownership, as well as cross-ownership of media within local markets.⁷³ While citizen petitioners argued that the new limits the FCC set for radio ownership, for example, were too high, deregulatory petitioners argued that the new limits were still too low.⁷⁴ They therefore both argued that the limits were arbitrary and capricious, just as had been argued in other cases addressing the FCC’s ownership limits. In this case, the court agreed with both petitioners, finding that the FCC showed no evidence to prove the necessity of the specified limits.⁷⁵ The FCC argued that the increased limits on ownership did not hinder competition or diversity, because of the availability of other media outlets. This argument, wrote the court, has an “essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets.”⁷⁶ The FCC was ordered to revisit these limits once again, a position it still finds itself in today.

Conclusion

The effect of the recent FCC regulations and the resulting court cases discussed above is that there remains a stalemate—between proponents of deregulation and proponents of strict governmental control—over what the public interest is. There has been no conflict in cases regarding the FCC’s duty and jurisdiction. All sides agree that the FCC is charged with serving the public interest, and may do so by regulating content and/or ownership. The disagreement lies with how well the public interest is served by ownership regulation.

⁷³ *Id.* at 382.

⁷⁴ *Id.* at 432.

⁷⁵ *Id.* at 432.

⁷⁶ *Id.* at 435.

This is evident in the recent shift in philosophy by the FCC. Historically, as illustrated by regulations and court cases based on those regulations, the FCC has argued for its right to restrict ownership as a means of protecting competition and diversity within broadcast media. With the Telecommunications Act of 1996, the 2002 Biennial Review, and the FCC's position in *Prometheus v. FCC*, the FCC now believes that it no longer needs to protect competition and diversity in broadcast media. The FCC now argues that the variety of media available to the consumer ensures fair competition and viewpoint diversity.

The courts, meanwhile, have not necessarily agreed or disagreed with the FCC's new position. This is because the role of the courts has never been to decide what is or is not in the public interest. The courts only decide on whether the decisions the FCC makes are in its power, and whether those decisions are justifiable based on that power given to the FCC. Furthermore, nowhere is it written that the FCC may not change its collective mind or approach or philosophy. Therefore, while its deregulatory actions of the past ten years may conflict philosophically with the Commission's early actions in the 1940s through the 1980s, it does not signify any wrongdoing.

What it does signify is a change in philosophy and a different interpretation of the meaning of the public interest. The only way to avoid argument over the validity of the FCC's philosophical approach to the public interest would be for Congress to define in explicit terms what the public interest is. Unfortunately, this would eliminate the elasticity that makes the United States legal system so successful. By concretizing the public interest based on today's understandings and beliefs, unanticipated situations in

the future would likely suffer. Therefore, the public interest needs to remain a fluid and malleable concept.

The only recourse for opponents of the FCC's current maneuverings is to continue to argue against the deregulations by using arguments that the FCC uses in its own positioning—namely the support of competition and diversity. The FCC has yet to claim that competition and diversity are no longer in the public interest—an incredible shift that would almost assuredly never happen. Therefore, just as was done in *Prometheus v. FCC*, opponents of deregulation—if they are to succeed in further blocking media ownership deregulation—must successfully argue that competition and diversity are hindered by deregulating media ownership and that, as a result, the public interest is not properly served.