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No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism

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No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism

Gregory M. Prindle*

The great cacophony of different sounds and voices is being amalgamated and homogenized.[1]

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[1] William Safire, *On Media Giantism*, N.Y. TIMES, Jan. 20, 2003, at A19 (arguing that "media mergers have narrowed the range of information and entertainment available to people of all ideologies").

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INTRODUCTION

The Communications Act of 1934[2] empowered the Federal Communications Commission ("FCC") to issue licenses and enact regulations in accordance with the "public interest, convenience, or necessity."[3] Subsequently, the FCC and federal courts interpreted the "public interest" standard as requiring the promotion of competition, diversity, and localism in the radio marketplace.[4] While these three goals have remained unchanged, the means of trying to achieve them has evolved. The rise and fall of radio ownership restrictions reflect these changing views.

The FCC began placing restrictions on radio ownership soon after the Communications Act of 1934 in order to promote diversity and protect against anti-competitive behavior that may

[2] Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–615 (2000)).

[3] 47 U.S.C. § 303.

[4] *See, e.g.*, NBC v. United States, 319 U.S. 190 (1943) (accepting the Federal Communications Commission's (FCC) determination that the principles of competition and localism fall within the scope of "public interest"); *see also* Fed. Communications Comm'n [FCC] v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978) (holding that the "public interest" standard encompasses the goal of providing the "widest possible dissemination of information from diverse and antagonistic sources" (quoting AP v. United States, 326 U.S. 1, 20 (1945)); *infra* notes 63–89 and accompanying text.

accompany large-scale consolidation.[5] Likewise, the FCC cited goals of promoting diversity and furthering competition when it started loosening these very restrictions in the 1980s.[6] This apparent contradiction reflects a transformation in the philosophy of the FCC from the theory that competition, diversity, and localism are best protected through regulation, to the marketplace theory.[7] The marketplace theory suggests that deregulation spurs more competition for listeners, thereby promoting the audience interests of diversity and localism.[8]

The pinnacle of the marketplace theory and deregulation is embodied in the Telecommunications Act of 1996,[9] which severely loosened local ownership restrictions and completely eliminated the national ownership cap.[10] Now, a single entity may own up to eight stations in the largest markets and an unlimited amount nationwide.[11] As a result of these relaxed ownership restrictions, the radio industry consolidated rapidly.[12]

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[5] *See* Michael J. Aguilar, Note, *Micro Radio: A Small Step in The Return to Localism, Diversity, and Competitiveness in Broadcasting*, 65 BROOK. L. REV. 1133, 1158 (1999) (suggesting that the licensing of micro-radio stations could compensate for the recent move away from localism, diversity, and competition). Initially, a person or entity with a broadcasting license was prohibited from obtaining another license in the same broadcast service, unless the applicant could demonstrate that the issuance would advance competition and not result in concentration of control harmful to the public interest. *Id.* In 1940, the FCC began setting absolute limits, restricting common ownership of FM radio stations to six. *Id.* The FCC created national and local ownership restrictions in order to "promote diversity of ownership . . . and to safeguard against the undue concentration of economic power." *Id.* (quoting Henry Geller, *Ownership Regulatory Policies in the U.S. Telecom Sectors*, 13 CARDOZO ARTS & ENT. L.J. 727, 729 (1995)).

[6] *See* Benjamin J. Bates & Todd Chambers, *The Economic Basis for Radio Deregulation*, 12 J. MEDIA ECONS. 19, 23 (1999) (evaluating the theories behind the trend toward deregulation).

[7] *See id.*; *see also infra* notes 121–124 and accompanying text.

[8] Bates & Chambers, *supra* note 6, at 23.

[9] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending 47 U.S.C. § 151 (1934)).

[10] 47 U.S.C. § 202(a).

[11] *Id.*

[12] *See* Bates & Chambers, *supra* note 6, at 29. For example, from March 1996 to March 2002, the number of radio stations nationwide increased 5.4 percent, while the number of owners decreased 33.6 percent. George Williams & Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance*, FCC, *at* http://www.fcc.gov/ownership/studies.html (last visited Nov. 13, 2003); *see also infra* notes 180–96 and accompanying text.

While the Telecommunications Act's deregulation of ownership restrictions undoubtedly caused this large-scale consolidation, there is debate as to whether consolidation furthers or restricts the public interest goals of promoting competition, diversity, and localism.[13] Critics of deregulation charge that consolidation of radio ownership has resulted in a less competitive marketplace, where diversity and localism suffer.[14] On the other hand, proponents maintain that consolidation allows for operational efficiency and produces a superior, more diverse product for listeners without harming competition.[15]

The debate over deregulation and resulting consolidation is reviewed by the FCC every two years as required by the Telecommunications Act.[16] In the review, the FCC must determine "whether any of such rules are necessary in the public interest as a result of competition."[17] In September 2002, the FCC initiated its third biennial review of its media ownership rules.[18] As a result, on June 2, 2003, the FCC proposed further relaxation of media ownership restrictions while leaving radio ownership rules virtually unchanged.[19]

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[13] With the passage of the Telecommunications Act, the debate has moved out of economic theory and into economic reality. *See infra* Part III.

[14] Among the most vocal critics is the Future of Music Coalition, which produced a scathing critique of the industry as moving away from the goals of localism, diversity, and competition. *See* FUTURE OF MUSIC COALITION, RADIO DEREGULATION: HAS IT SERVED CITIZENS AND MUSICIANS? 24 (2002), *available at* http://www.futureofmusic.org/research/radiostudy.cfm (last visited Nov. 21, 2003); *see also infra* Part III.

[15] For example, money saved through operational efficiencies has led to new and innovative products like voice-tracking, which allows big-city disc jockey talent to reach smaller markets that otherwise would not be able to afford it. *See* Jeff Leeds, *Clear Channel: An Empire Built on Deregulation*, L.A. TIMES, Feb. 25, 2002, at B1; *see also infra* notes 150–64 and accompanying text.

[16] Telecommunications Act of 1996 § 202(h).

[17] *Id.*

[18] *See* Press Release, FCC, FCC Initiates Third Biennial Review of Broadcast Ownership Rules (Sept. 12, 2002) [hereinafter FCC Press Release], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226188A1.doc (last visited Nov. 13, 2003).

[19] Broadcast Ownership Rules, Cross-Ownership of Broadcast Statutes of 2002 Biennial Regulatory Review, 68 Fed. Reg. 46,286 (Aug. 5, 2003). The FCC's decision faced immediate opposition in Congress and the imposition of the new rules was stayed by a federal court order. This overwhelming response—as well as the FCC's decision to

As part of the review process, the FCC adopted a Notice of Proposed Rulemaking ("Notice") on September 12, 2002.[20] In the Notice, the FCC affirmed its traditional goals of promoting the three principles of public interest: competition, diversity, and localism in the local media market.[21] The FCC investigated whether (1) the marketplace provided a sufficient level of competition to protect and advance the above policy goals; (2) the current ownership rules achieved these goals; and (3) the revisions to the rules were required to protect and advance competition, diversity, and localism in the media market.[22]

Part I of this Note discusses the early days of radio and the need for regulation, including the creation of the FCC and the passing of the Communications Act of 1934. It then examines the interpretation of the Communications Act of 1934's public interest standard as encouraging competition, diversity, and localism through radio ownership restrictions. Part II observes how the marketplace theory and the benefits of economies of scale and scope led the FCC and Congress to move from favoring regulation to viewing deregulation as the best means to promote these three public interest principles, culminating in the Telecommunications Act of 1996. Part III examines the resulting consolidation of radio ownership and explores how deregulation of ownership restrictions impedes the "public interests" of competition, diversity, and localism in the radio marketplace. Part IV concludes that the current radio marketplace does not provide sufficient competition to protect and advance the goals of diversity and localism. It advocates that the FCC retain local ownership restrictions and re-evaluate a national ownership cap, as well as calls upon Congress to curb current anti-competitive behavior.

avoid further radio deregulation—is likely the direct result of deregulation's adverse effect on the radio industry. *See infra* notes 166–76.

[20] *See* FCC Press Release, *supra* note 18.

[21] *See id.*

[22] *See id.* The FCC chairman, Michael Powell, reportedly likes to say, "The market is my religion." Safire, *supra* note 1.

I. REGULATION AND THE PUBLIC INTEREST STANDARD

A. Early Radio and Regulation

Radio began as little more than a utilitarian device, functioning primarily to increase safety on ships and as a tool for government and businesses to transmit information more efficiently.[23] The first federal regulation of radio emphasized its utility as a safety device, requiring certain ocean-going vessels be equipped with radio equipment managed by a skilled operator, so that the operator would be able to promptly notify persons on shore and in other nearby vessels if an emergency arose.[24] In addition, radio enabled U.S. Navy personnel to coordinate entire fleets and receive weather reports and storm warnings.[25] Radio also gave some businesses a competitive advantage by allowing them to operate more efficiently.[26] For example, rather than having its ships stop in ports to pick up telegraph messages, the United Fruit Company used radio to direct its ships to the best markets.[27]

Government and business use of radio, however, soon conflicted with amateur radio operators, who interfered with official broadcasts and crowded out naval and business communications.[28] A few agitators even posed as admirals and issued phony orders to naval ships.[29]

In response, Congress passed the Radio Act of 1912, forbidding radio broadcast without a license and giving the

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[23] Michael Ortner, Note, *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, 140 (2000).

[24] Wireless Ship Act of June 14, 1910, Pub. L. No. 61-262, 36 Stat. 629 (1910) (codified at 46 U.S.C. §§ 484–87) (repealed 1934).

[25] ANN E. WEISS, TUNE IN, TUNE OUT: BROADCASTING REGULATION IN THE UNITED STATES 12 (1981) ("It did not take navy officers long to see how useful it would be to have ships linked to each other, and to shore, by wireless.").

[26] *See id.*

[27] *Id*. ("Thanks to radio, they could receive that information while at sea. This gave them an edge over competitors, and helped boost United Fruit profits.").

[28] *Id.*

[29] *Id.* "Government officials soon made up their minds that such frivolous uses of radio must be stopped, and in 1912 Congress passed the nation's first radio law," the Radio Act of 1912. *Id.*

Secretary of the Department of Commerce and Labor the power to determine who could broadcast on specific frequencies at specific times.[30] The statute also allocated certain frequencies for exclusive government use.[31] Although nearly 9,000 Americans had broadcast licenses by 1917,[32] interference was rare because there were more than enough frequencies for all the stations then in existence.[33]

World War I accelerated the development of radio.[34] The early 1920s brought the first standard broadcasting stations with scheduled programming.[35] By 1923, several hundred stations were broadcasting across the country,[36] and in 1924 Americans spent $358 million on radio sets and parts.[37] To deal with the rapid growth in radio stations and resulting frequency interference, "then-Secretary of Commerce Herbert Hoover called for a series of national radio conferences."[38] In each year of the early 1920s the industry called for the government to step in.[39] In May of 1923, Hoover announced a major reallocation of radio frequencies.[40]

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[30] Radio Act of 1912, ch. 287, 37 Stat. 302 (1912). This statute was also largely in response to the Titanic disaster of April 14, 1912. *See* KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 52 (4th ed. 2003).

[31] Radio Act of 1912, ch. 287.

[32] WEISS, *supra* note 25, at 14.

[33] *See* NBC v. United States, 319 U.S. 190, 210 (1943).

[34] *See id.* The Navy gave contracts to the Westinghouse Corp., the General Electric Corp. (GE), and the American Telephone & Telegraph Co. (AT&T) to produce radio parts and equipment during World War I. Each company made vast improvements and obtained patents. Westinghouse Corp., GE, and AT&T, along with the United Fruit Co., united to create a company to use their more than two thousand patents to their best advantage. The company, later broken up by the federal government, was called the Radio Corp. of America (RCA). WEISS, *supra* note 25, at 14–15.

[35] *See NBC*, 319 U.S. at 211

[36] *Id.*

[37] WEISS, *supra* note 25, at 18. The $358 million spent by Americans on radio sets and parts in 1924 is a significant increase from the $60 million spent on radio sets and parts in 1920. *Id.*

[38] Ortner, *supra* note 23, at 141. Meanwhile, both licensed and unlicensed broadcasters continued to broadcast any material at any time and on any wavelength, causing "the radio landscape [to become] so cluttered with interference and conflicting information that the public was fortunate to find any sustained, palatable programming." *Id.*

[39] CREECH, *supra* note 30, at 53. "Everyone, it seemed, conservative and liberal alike, was extolling the need for more regulation." Ortner, *supra* note 23, at 142.

[40] *NBC*, 319 U.S. at 211. Herbert Hoover's decision was based on the recommendation of the National Radio Conferences. *Id.*

Hoover divided the frequencies into three classes and assigned them to particular stations.[41] The third class of frequencies included stations that served small local areas, were on the same spot on the dial, and had to share time.[42] The second class included stations that were a little larger and had to share time and frequencies as necessary.[43] The first class of frequencies carried little interference, broadcast over wide areas, and had almost no time-sharing.[44] This most powerful class of radio stations was called "clear channels."[45]

These measures proved insufficient in the face of the astonishing development of radio.[46] At the Third National Radio Conference in 1924, Hoover responded to the radio industry's calls for regulation by noting that radio "is probably the only industry of the United States that is unanimously in favor of having itself regulated."[47] More than 400 broadcasters attended the final National Radio Conference in November of 1925.[48] They opposed accommodating new stations through extending the standard broadcast band at the expense of other types of services or by imposing greater limitations on time and power, and instead called upon Congress to find a legislative solution.[49]

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[41] WEISS, *supra* note 25, at 27.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* Appropriately, the most powerful radio owner is named Clear Channel Communications, with over 1,200 radio stations, the nation's largest live-concert promotions firm, 19 television stations and 770,000 billboards. Leeds, *supra* note 15.

[46] *See* NBC v. United States, 319 U.S. 190, 211 (1943). Every channel in the standard broadcast band was occupied by at least one station, and there were 175 applications for new stations. *Id.* In order to accommodate the new stations, Hoover could either extend the standard broadcast band at the expense of other services or impose even greater limitations on time and power. *Id.*

[47] ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, THE POLITICS OF BROADCAST REGULATION 11 (3d ed. 1982). "The industry had come to demand such controls as the increase in stations continued unchecked . . . . With every channel filled in urban areas, most stations were experiencing considerable interference from other stations and had been forced to work out complex time-sharing schemes." *Id.*

[48] CREECH, *supra* note 30, at 52. Only twenty-two broadcasters attended the First National Radio Conference in 1922. *Id.*

[49] *See NBC*, 319 U.S. at 211–12.

Hoover's hands were tied. In 1926, a U.S. federal court ruled that the Radio Act of 1912 did not give the Secretary of Commerce the right to allocate radio frequencies.[50] The court declared all of Hoover's new assignments invalid.[51] Months later, Acting Attorney General William Donovan released an opinion stating that the Secretary of Commerce had no authority, under the Radio Act of 1912, to regulate the power, frequency, or hours of operation of the radio stations.[52] The next day, the Secretary of Commerce issued a statement urging the stations to undertake self-regulation.[53] Instead of self-regulating, however, station owners began broadcasting wherever and whenever they pleased, resulting in pandemonium.[54]

Amid the chaos, Congress responded to the demands of both courts and station owners by enacting the Radio Act of 1927.[55] The act created a "unified and comprehensive regulatory system for the [radio] industry."[56] The statute took radio-licensing power away from the Department of Commerce and gave it to a newly formed five-member Federal Radio Commission ("FRC").[57] The

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[50] United States v. Zenith Radio Corp., 12 F.2d 614, 617 (N.D. Ill. 1926) (finding "no express grant of power in the act to the Secretary of Commerce to establish regulations"). Zenith Radio Corp. was licensed to operate WJAZ on a frequency of 930 kHz for only two hours per week, as part of Hoover's solution to overcrowding. CREECH, *supra* note 30, at 53. Zenith then applied for a license to broadcast on 910 kHz, but—under an agreement between the United States and Canada—the frequency was limited to Canadian use. *Id.* Zenith rebelliously jumped to 910 kHz without a license, prompting other stations to declare similar intentions. *Id.* Siding with Zenith, the court found that the U.S. Commerce Department had no authority to establish radio regulations under the Radio Act of 1912. *Zenith*, 12 F.2d at 614.

[51] *Id.* at 618.

[52] 35 Op. Att'y. Gen. 126, 135 (1926) (advising Hoover that "[i]f the present situation requires control, I can only suggest that it be sought in new legislation, carefully adapted to meet the needs of both the present and future").

[53] *NBC*, 319 U.S. at 212.

[54] *See id.* "With everybody on the air, nobody could be heard." *Id.*

[55] Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (codified at 47 U.S.C. §§ 81–121) (repealed 1934). Even President Calvin Coolidge had appealed to Congress to pass legislation that would respond to the diminishing authority of the Department of Commerce, noting that "the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value." *NBC*, 319 U.S. at 213 (citing H.R. DOC. NO. 483, at 10 (2d Sess. 1926)).

[56] *NBC*, 319 U.S. at 214.

[57] Radio Act of 1927 § 3.

statute specifically gave the FRC the authority to assign frequencies and to regulate broadcasting hours, time-sharing, and general use of the airwaves.[58] Significantly, Congress mandated that the standard for licensing radio stations was that the broadcaster's goals served the "public interest, convenience, or necessity" of the people in the local broadcast market.[59]

Congress updated the 1927 law with the Communications Act of 1934.[60] This statute replaced the FRC with a seven-member FCC and delegated regulation of both the telephone and telegraph industries to the FCC.[61] The Communications Act of 1934 retained the Radio Act of 1927's requirements that: (1) stations be licensed by a government agency; (2) licenses be of a definite and temporary duration; and (3) licenses be granted in accordance with the "public interest, convenience, or necessity."[62]

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[58] *Id.* § 4.

The FRC faced virtually insuperable problems: its temporary status, with powers expiring after one year; the danger of internal strife, because of each Commissioner's appointment from a geographical zone; the great vagueness of the act and the lack of a specific mandate from Congress; the slowness of Senate confirmation of the Commissioners; constant court challenges to its decisions; and the claim of 'prior rights' by stations already on the air.

KRASNOW & LONGLEY, *supra* note 47, at 13.

[59] *Id.* § 4. The phrase "public interest, convenience, or necessity" originated in an 1887 Illinois railroad statute and resurfaced in the Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920). CREECH, *supra* note 30, at 55.

[60] Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–615 (2000)). The objectives of the 1934 legislation remained substantially unchanged from the goals of the Radio Act of 1927: to regulate the use—not ownership—of radio frequencies in order to allow "a rapid, efficient, nationwide, and world-wide communication service with adequate facilities at reasonable charges." *NBC*, 319 U.S. at 214.

[61] Communications Act of 1934 § 4. Today, the FCC regulates television, too. The FCC began formal operations on July 11, 1934. CREECH, *supra* note 30, at 55.

In 1982, Congress reduced the number of members to five. Commissioners are appointed by the president, confirmed by the Senate and serve five-year terms. . . . [N]o more than three members may be from the same political party and terms are staggered so that no two terms expire in the same year. . . . The chairperson of the FCC is chosen by the president and is responsible for setting the agenda of the FCC.

Id. at 8.

[62] Communications Act of 1934 § 303.

B. Defining Public Interest: Competition, Diversity, and Localism

Congress did not define the "public interest, convenience, or necessity" in the Communications Act of 1934.[63] Courts, however, have granted the FCC wide latitude in determining what is in the public interest.[64] Courts have repeatedly held that the authority conferred upon the FCC by Congress supplies a statutory basis for the FCC to issue regulations codifying "its view of the public-interest licensing standard."[65] The FCC's regulations reveal the its view of the public interest standard to be the promotion of competition, diversity, and localism in the marketplace.[66] Courts endorsed this standard by repeatedly upholding regulations as consistent with the statutory scheme of advancing the public interest, as well as establishing the concept that the public interest is superior to the private interests of the licensee.

In *NBC v. United States*,[67] the Supreme Court accepted the FCC's determination that the principles of competition and localism fell within the scope of public interest.[68] Thus, the Court dismissed a challenge to the FCC's Chain Broadcasting Regulations, which prohibited local stations from entering into network affiliation contracts that resulted in the station surrendering control of its programming to a network.[69] The FCC felt that the exclusive affiliation of the station impeded competition

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[63] *See id.*

[64] *See* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953) (holding that the FCC is not required to make specific findings of tangible benefit when concluding that duplicating authorizations are not in the public interest).

[65] *See, e.g.*, United States v. Storer Broad., 351 U.S. 192, 203 (1956) (sustaining regulations placing limits on the total number of stations a single entity could own in each broadcast service based on the FCC's policy of promoting diversification of ownership); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 793 (1978) (upholding regulations governing the permissibility of common ownership of a radio or television broadcast station and a daily newspaper located in the same community based on the FCC's policy of promoting diversification of mass media).

[66] *See* cases cited *supra* note 65.

[67] 319 U.S. 190 (1943).

[68] *Id.* "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations." *Id.* at 224.

[69] *Id.*

by hindering the growth of new networks.[70] Also, the principle of localism—or local program service—suffered when a station broadcast a high percentage of its programming from a national network.[71] Calling local program service a "vital part of community life," the FCC determined that a licensee must maintain freedom of action to service the programming and advertising needs of the local community.[72] The Court noted "an important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by [its] broadcasts."[73] Significantly, the Court left it to the FCC to determine the "best practicable service," which reflects the deference that most courts give to the FCC in determining how to serve the public interest.[74]

Likewise, in *FCC v. National Citizens Committee for Broadcasting*,[75] the Supreme Court resolved that the public interest standard encompasses the policy goal of the "widest possible dissemination of information from diverse and antagonistic sources."[76] The Court upheld regulations governing common ownership of radio or television stations and newspapers in the same community, concluding that the FCC's determination that diversification of mass media would benefit the public interest was consistent with the Communications Act of 1934.[77]

Furthermore, in *Metro Broadcasting, Inc. v. FCC*,[78] the Supreme Court held that the FCC's interest in enhancing broadcast diversity was a sufficient basis for upholding minority ownership policies aimed at promoting programming variety.[79] According to

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[70] *Id.* at 199.
[71] *Id.* at 203.
[72] *Id.* at 202.
[73] *Id.* at 216 (quoting FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940)).
[74] *Id.*; *see, e.g.*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 793 (1978); United States v. Storer Broad., 351 U.S. 192, 203 (1956); FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953).
[75] 436 U.S. 775 (1978).
[76] *Id.* at 785.
[77] *Id.* at 795.
[78] 497 U.S. 547 (1990).
[79] *Id.* at 567–68.

the Court, the public benefited by having access to a wider diversity of information sources.[80] Thus, the FCC properly placed diversity within the scope of the public interest standard.[81]

Recently, it has not been sufficient for the FCC to merely opine that certain regulations would promote the public interest goals of competition, diversity, and localism in the radio market. In *Fox Television Stations, Inc. v. FCC*,[82] a federal court demanded that the FCC illustrate valid reasons why regulations would promote the public interest.[83] The court noted that protecting diversity remains a permissible policy, but observed that the FCC failed to demonstrate any reason why national television ownership and cable/broadcast cross-ownership rules would encourage competition and diversity.[84] Thus, while the promotion of competition, diversity, and localism remains within the scope of public interest, the FCC must also show how regulations might actually promote these policy goals.

As courts have sanctioned the FCC's definition of the public interest standard as promoting competition, diversity, and localism in the radio market, courts also have reiterated the concept that the ownership rights of the public outweigh the licensee rights of the broadcaster.[85] The Communications Act of 1934 provides only for the use of radio channels, "but not the ownership thereof."[86] Clearly, the licensee is merely a fiduciary for the public.[87] In *Red*

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[80] *Id.* at 568. "From its inception, public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience." *Id.* at 570.

[81] *See id.*

[82] 280 F.3d 1027 (D.C. Cir. 2002).

[83] *Id.* at 1043.

[84] *Id.* "Although we agree with the Commission that protecting diversity is a permissible policy, the Commission did not provide an adequate basis for believing the [National Television Station Ownership] Rule would in fact further that cause." *Id.*

[85] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding regulations requiring radio stations to provide time for a response to a personal attack).

[86] Communications Act of 1934, ch. 652, § 301, 48 Stat. 1064, 1081 (1934) (codified as amended at 47 U.S.C. §§ 151–615 (2000)).

[87] *See Red Lion*, 395 U.S. at 389 ("There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."); FCC v. League of Women Voters, 468 U.S.

Lion Broadcasting Co. v. FCC,[88] the Supreme Court reminded that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[89] According to the Court, public interest is superior to private benefit.

Through regulations the FCC has defined the public interest standard of the Communications Act of 1934 as promoting competition, diversity, and localism in the radio market. Courts have endorsed this interpretation and recently demanded evidence that regulations would advance these principles. Although the standard has remained unchanged, the FCC's philosophy of the most effective means of reaching the public interest goals has shifted from regulatory to free market.

C. Ownership Regulations in the Public Interest

Soon after the passage of the Communications Act of 1934, the FCC believed that regulating local and national radio ownership was the best method of promoting competition, diversity, and localism in the radio market.[90] Thus, the FCC began placing limits on radio ownership "to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming, and to safeguard against undue concentration of economic power."[91] The concern that unlimited ownership would cause harmful concentration of economic power is reflected throughout

364, 377 (1984) ("[T]hose who are granted a license to broadcast must serve in a sense as fiduciaries for the public.").

[88] 395 U.S. 367.

[89] *Id.* at 390.

[90] *See In re* Matter of Review of the Commission's Regs. Governing Television Broad., 10 FCC Rcd. 3524, 3527 (1995). The earliest ownership rules "prohibited the issuance of a license to anyone already possessing a license in the same broadcast service unless the applicant could demonstrate that the [second] license would have a pro-competitive impact and would not result in the concentration of control . . . inconsistent with the public interest." *Id.* at 3526–27.

[91] *Id.* at 563.

the early ownership regulations,[92] in stark contrast to the FCC's adoption of a free market philosophy during recent deregulation.[93]

In 1940, the limit on the national common ownership of FM radio stations was six.[94] In 1946, the de facto limit on the national common ownership of AM radio stations was seven, after the FCC denied the application of CBS for an eighth station.[95] In its decision, the FCC determined that "[it was] against the public interest to permit a concentration of control of broadcasting facilities in any single person or organization."[96] In 1953, the FCC adopted national multiple ownership rules that limited the common ownership of radio stations to seven AM and seven FM.[97]

On a local level, the FCC regulated duopolies, the common ownership of multiple radio stations in the same service (AM or FM) in a particular community.[98] In 1938, the FCC utilized the "diversification of service" rationale when adopting a strong presumption against granting licenses that would result in duopolies.[99] That is, the FCC believed that the greater the number of separately owned outlets, the greater the promotion of the public interest of diversity.[100] Accordingly, the FCC prohibited FM duopolies in 1940 and AM duopolies in 1943.[101]

The national and local ownership rules remained substantially unchanged until the early 1980s, when the FCC began to

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[92] *See, e.g.*, Sherwood B. Brunton, 11 F.C.C. 407, 413 (1946) ("[I]t's against the public interest to permit a concentration of control of broadcasting facilities in any single person or organization.").

[93] The free market philosophy—marketplace theory—as applied to the radio industry suggests that deregulation spurs more competition for listeners, thereby promoting the audience interests of diversity and localism. *See* Bates & Chambers, *supra* note 6, at 23; *see also infra* notes 106–33 and accompanying text.

[94] Rules Governing High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940).

[95] *Brunton*, 11 F.C.C. at 413.

[96] *Id.*

[97] Amendment of Multiple Ownership Rules, 9 Fed. Reg. 1563 (1953).

[98] *See In re* Matter of Review of the Commission's Regs. Governing Television Broad., 10 FCC Rcd. 3524, 3528 (1995).

[99] *See id.*

[100] *See id.*

[101] *See id.*

deregulate.[102] Although the FCC still defined the public interest as promoting competition, diversity, and local ownership, the FCC no longer saw ownership regulations as the best means of achieving these goals.[103] Instead, the FCC embraced the marketplace theory, which suggests that an increase in stations would spur competition and encourage the principles of diversity and localism as station owners compete for audience.[104] Thus far, the peak of radio deregulation is the Telecommunications Act of 1996.[105]

II. DEREGULATION AND THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 relaxed local radio ownership restrictions and eliminated the national ownership cap.[106] A single entity can now own up to eight radio stations in the largest markets.[107] Congress intended this amendment to the Communications Act of 1934 to spur competition in the radio market, which, in turn, would promote service to narrower segments of the community and increase diversity and localism.[108]

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[102] This was part of a nationwide trend of deregulation—or regulatory reform—begun during the Ford administration and continuing through the Reagan era. "Deregulation . . . sought to protect the public interest by commercial competition, rather than by regulatory defense of the 'public interest.'" JEREMY TUNSTALL, COMMUNICATIONS DEREGULATION: THE UNLEASHING OF AMERICA'S COMMUNICATIONS INDUSTRY 3 (1986); *see also infra* notes 109–49 and accompanying text.

[103] *See* Bates & Chambers, *supra* note 6, at 23. This "represented the policy shift from the trusteeship model (where it was difficult for the government to define the public interest), to the marketplace model (where the industry would rely on market forces to determine the public interest)." *Id.*

[104] *Id.*

[105] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending 47 U.S.C. § 151 (1934)).

[106] Telecommunications Act of 1996 § 202(a).

[107] *Id.* In markets with greater than 45 stations, one entity may own up to 8 stations with no more than 5 in one service (AM or FM); in markets with between 30 and 44 stations, one entity may own up to 7 stations with no more than 4 in one service; in markets with between 1,529 stations, one entity may own up to 6 stations with no more than 4 in one service; in markets with up to 14 stations, one entity may own up to 5 stations with no more than 3 in one service, as long as the entity does not own more than 50 percent of the stations in the market. *Id.*

[108] *See* Bates & Chambers, *supra* note 6, at 24. The new ownership rules provide "incentives for the development of market power within local radio markets by allowing owners to consolidate or cluster groups of stations . . . ." *Id.* at 25.

The Telecommunications Act of 1996 and its massive deregulation represent the FCC's ideological shift from attempting to advance the public interest through regulation to pursuing the public interest in a deregulated marketplace.

The shift to deregulation began in the 1980s, when the FCC began relaxing radio ownership limits.[109] When it raised the ownership ceiling to twelve AM and twelve FM stations nationally in 1984, "the FCC maintained that diversity was an important consideration."[110] By 1992, a single owner could acquire up to two AM and two FM stations in markets with at least fifteen stations, as long as the combined audience did not exceed twenty-five percent.[111] In markets with less than fifteen stations, a single owner could own up to three stations, provided that no more than two were in the same service (AM or FM) and that the stations represented less than half of the total number of stations in the market.[112] Nationwide, no more than forty stations could be owned by a single entity.[113]

By the mid-1990s, many complained that the Communications Act of 1934 was outdated and unable to effectively regulate communications in a world with new technologies such as cable and satellite television, the Internet, and cellular.[114] Congress

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[109] *See id.* at 23.

[110] *See* Aguilar, *supra* note 5 at 1159. However, "the FCC did not want the objective of diversity to work to exclude the benefits of group ownership." *Id.* at 1159 n.234.

[111] Richard E. Wiley, *The Telecommunications Act of 1996*, *in* COMMUNICATIONS LAW 1996, at 7, 14 (Patents, Copyrights, Trademarks, and Literary Property Course, Handbook Series No. 461, 1996) (arguing that the Telecommunications Act of 1996 "address[es] the realities of today's converging communications marketplace by eliminating legal barriers that inhibit or preclude the entry of new competitors").

[112] *Id.* at 44.

[113] *In re* Revision of Radio Rules and Policies, 9 FCC Rcd 7183 (1994). The FCC revised the national limits to increase the cap for minority owners to twenty-five FM stations and twenty-five AM stations. *Id.*

[114] *See* Ortner, *supra* note 23, at 146. President Clinton, when signing the 1996 act into law, remarked: "this revolution has been held back by outdated laws designed for a time when there was one phone company, three TV networks, no such thing as a personal computer. Today with the stroke of a pen our laws will catch up with our future." *Id.* at 146 n.37 (quoting Federal News Service, Remarks by President Bill Clinton and Vice President Al Gore at the Signing of the Telecommunications Reform Act of 1996 (Feb. 9, 1996)).

agreed and passed the Telecommunications Act of 1996.[115] Although much attention went to the restrictions that the Telecommunications Act of 1996 lifted from the common carriers and cable companies, the new legislation lifting restrictions on radio station ownership received relatively little attention.[116]

The FCC, however, determined that the public interest principles of competition, diversity, and localism were best served through deregulation of ownership restrictions.[117] Proponents of deregulation agreed with this marketplace theory, advocating that fewer restrictions would improve competition, as well as allow companies to benefit from the efficiencies found with large-scale consolidation.[118] Meanwhile, critics of deregulation argued that loosening the ownership restrictions would actually stifle competition, causing diversity and localism to suffer.[119]

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[115] Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending 47 U.S.C. § 151 (1934)). The law passed by a vote of 414 to 16 in the House of Representatives, and a vote of 91 to 5 in the Senate. Wiley, *supra* note 111, at 16 n.1.

[116] *See* Ortner, *supra* note 23, at 146 (opining that the lack of attention mirrored the lack of understanding that radio—unlike television and common carriers—still has a ceiling on the number of available options).

[117] *See In re* Deregulation of Radio, Report and Order, 84 F.C.C.2d 968 (1981), stating:

> [P]olicies that may have been necessary in the early days of radio may not be necessary in an environment where thousands of licensees offer diverse sorts of programming and appeal to all manner of segmented audiences . . . . We believe that given conditions in the radio industry, it is time to heed that sentiment and to reduce the regulatory role played by Commission policies and rules, and to permit the discipline of the marketplace to play a more prominent role. It is our conclusion that the regulations that we are retaining and the functioning of the marketplace will result in service in the public interest that is more adaptable to changes in consumer preferences and at less financial cost and with less regulatory burden.

[118] *See, e.g.*, Robert B. Ekelund et al., *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J.L. & ECON. 157, 158 (2000) (contending that empirical analysis of increased concentration shows increased efficiency); *see also infra* notes 122–63 and accompanying text.

[119] *See, e.g.*, Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violations of Equal Protection*, 5 COMM. LAW CONSPECTUS 269, 278 (1997) (arguing that deregulation of ownership restrictions destroys broadcasting ideals); *see also infra* notes 134–43 and accompanying text.

Furthermore, any efficiencies that benefit private interests are inferior to the public interest.[120]

A. The Marketplace Theory: Serving the Public Interest

Economics—specifically the marketplace theory—provided the foundation for the deregulation movement of the 1970s and 1980s, as the government dissolved regulatory bodies that set prices and routes for airlines, trucks, and railroads.[121] The marketplace approach to broadcast regulation proposes that a marketplace without ownership restrictions serves the public interest by creating a competitive environment.[122] Increased competition promotes diversity and localism in programming as stations seek out specific niche markets to gain the greatest audience share.[123] Thus, the public interest principles of competition, diversity, and localism can be achieved through deregulation of ownership restrictions.[124]

The theory that competition would increase is directly related to the expansion of radio from 583 stations in 1934[125] to over 10,000 today.[126] The increase in the number of stations, combined with the evolution of cable and the Internet, has made the industry

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[120] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

[121] ROBERT COOTER, LAW & ECONOMICS 3 (4th ed. 2003). "Much of the impetus for 'deregulation' has come from the realization that much government activity concerns private goods where markets should be lubricated, rather than government intruding directly in the process of allocation." *Id.* at 109. One unexpected difficulty was that many industry spokespersons initially opposed to regulation found themselves against deregulation, as old regulations became "woven securely into the fabric of the economy . . . . What first looked like a straightjacket now felt more like an old tweed suit." Roger E. Meiners & Bruce Yandle, *Regulatory Lessons from the Reagan Era: Introduction*, *in* REGULATION AND THE REAGAN ERA: POLITICS, BUREAUCRACY AND THE PUBLIC INTEREST 3, at 7. (Meiners & Yandle eds., 1989).

[122] *See* Bates & Chambers, *supra* note 6, at 24.

[123] *See id.* at 24. "[T]he competition for audience would ensure that audience interests were served." *Id.* at 23.

[124] *See id.* at 23 (noting that this position "embodies a shift in the definition of public interest from something determined by regulators to something determined by the marketplace").

[125] *See In re* Deregulation of Radio, Report and Order, 84 F.C.C.2d 968 (1981).

[126] Williams & Roberts, *supra* note 12.

more competitive.[127] Thus, proponents of the marketplace theory argue that there is no longer a need for regulations to create competition.[128] In most markets, there are enough stations and competition among them that relaxed ownership restrictions would allow market forces to ensure that stations operate in the public interest.[129] Hence, the FCC argued that the radio marketplace would provide a better and more responsive public interest control mechanism than governmental regulations designed to monitor programming decisions.[130]

According to the marketplace theory, a deregulated radio marketplace furthers the public interests of diversity and localism.[131] Diversity is achieved by different profit-minded broadcasters competitively seeking out and serving targeted audiences.[132] As the number of stations increases, there is a greater likelihood that minority and niche audiences are served.[133] Likewise, listeners who prefer a station that has local programming would create a market for localism.

The marketplace theory is premised on sufficient competition.[134] Critics contend that this fundamental assumption underlying deregulation is flawed.[135] They argue that there may not be sufficient competition and, consequently, market forces would not compel operation in the public interest.[136] The assumption that competition would increase through deregulation is speculative, and there is little supporting evidence.[137] Given the lack of evidence, critics point out, deregulation should be pursued

[127] *See* Bates & Chambers, *supra* note 6, at 23.
[128] *See id.* at 20.
[129] *See id.*
[130] *See In re* Deregulation of Radio, Report and Order, 84 F.C.C.2d 968 (1981).
[131] *See* Bates & Chambers, *supra* note 6, at 24.
[132] *See id.*
[133] *See id.*
[134] *See id.* at 20.
[135] *See id.*
[136] *See id.*
[137] *See* Harvey J. Levin, *U.S. Broadcast Deregulation: A Case of Dubious Evidence*, 36 J. COMM. 25 (1986).

in moderation.[138] Abrupt deregulation may result in large-scale consolidation and anti-competitive behavior, which would harm the public interest.[139]

Critics of deregulation also dispute the contention that increased competition would promote diversity.[140] Even if there is sufficient competition, instead of monopolistic behavior, there is no evidence that stations would actually provide service to all of the niche groups without regulations.[141] For example, television's Public Broadcasting Service ("PBS") has programming that is widely recognized to be cultural, informational, and educational, but "often has audiences so small as to be nonratable by the established ratings services."[142] A station seemingly has no monetary incentive to reach out to such a small listener audience.[143] Furthermore, with relaxed local ownership restrictions, it is difficult to explain why a single entity owning upwards of eight stations in the largest markets would reach out to the smallest groups without the government telling them to do so.

To the contrary, economist Peter O. Steiner theorized that relaxed ownership regulations would result in increased programming diversity even in markets where a single entity owned multiple stations.[144] A single entity owning multiple stations in a single market would not want to compete with itself for the same group of listeners.[145] Thus, the owner would program the multiple stations in various ways to appeal to a variety of

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[138] *See* Howard, *supra* note 119, at 278 (stating that "it is a presumptive leap of logic . . . to conclude that increased competition warrants complete abandonment of national ownership caps which have existed for over half a century").

[139] *See id.*

[140] *See, e.g.*, Aguilar, *supra* note 5, at 1164 (arguing that the Telecommunications Act has caused the broadcast industry to stray from the goals of localism, diversity, and competitiveness).

[141] *See* Levin, *supra* note 137, at 29.

[142] *Id.*

[143] *See id.*

[144] Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q. J. ECON. 194 (1952) (theorizing that increased ownership concentration on the local level would lead to a subsequent increase in formats in order to reach more listeners).

[145] *Id.* at 212.

listeners.[146] In contrast, multiple owners of single stations in the same market may all compete against each other within the same format, targeting the same group of listeners.[147]

Steiner, however, concluded that, although competition generally leads to greater diversity, markets with limited numbers of stations and barriers to entry would lead to program duplication which would not serve the public interest of diverse programming.[148] Thus, consolidation could be harmful to smaller markets and markets with existing anti-competitive behavior.[149] Once again, sufficient competition within a marketplace proves to be the foundation necessary to ensure diverse programming.

The marketplace theory and corresponding deregulation of ownership restrictions look to the market to promote the public interest. The theory only works, however, within a genuine competitive marketplace. Without competition, there is minimal incentive to act in the public interest.

B. Economies of Scale and Scope: Serving the Private Interest

Deregulation of ownership restrictions should serve the public interest, according to marketplace theory proponents.[150] Likewise, deregulation could also serve the private interests of

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[146] *Id.* If there is a monopoly, where the only two stations in a market are owned by the same entity, and eighty percent of the audience wants to listen to a country music format and twenty percent wants to listen to a classical music format, the entity would not want to compete against itself. Thus, one station would have a country music format and the other station would have a classical music format in order to reach the most possible listeners.

[147] *Id.* at 211. If there are only two separately owned stations in a market where eighty percent of the audience wants to listen to a country music format and twenty percent wants to listen to a classical music format, the two stations would have no motivation to have a classical music format. Sharing the country music format could give each station forty percent of the listeners in the market, compared to a maximum of twenty percent of the listeners with a classical music format.

[148] *Id.* at 215 ("The conclusion here is that even given perfect shiftability (the situation that makes diversity most likely to appeal to stations) there is likely to be substantial duplication and repetition; the number of stations required to achieve production of relatively less popular program types is quite large.").

[149] *See id.* (concluding that "the great duplication of repetition of programs . . . serves not at all to increase satisfaction").

[150] *See supra* notes 122–33 and accompanying text.

broadcasters.[151] Without ownership restrictions, conglomerates can consolidate radio ownership and profit from resulting benefits of economies of scale and scope.[152]

The efficiency theory proposes that larger entities "achieve greater product efficiency through economies of scale."[153] That is, as a company grows larger, it can consolidate its resources to operate more efficiently than a smaller firm.[154] For example, an owner of five radio stations can consolidate its news department so that each station only bears one-fifth of the cost. Conversely, an entity that owns one station must bear the entire cost of its news department or choose to eliminate it.

Deregulation of ownership restrictions and the resulting consolidation of the radio industry would create new operational efficiencies, including the sharing of management and production and programming personnel, as well as clerical staff.[155] Additionally, bulk discounts on services and supplies as well as shared advertising, promotions, and technical facilities decrease the costs of doing business.[156] Proponents of deregulation argue that these efficiencies resulting from consolidation do not solely benefit the broadcasters.[157] The profits can be passed on to the

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[151] For example, using one news department to bring the news to multiple stations saves money for the owner. *See also infra* notes 152–63 and accompanying text.

[152] An economy of scale occurs when there is "a reduction in long-run average cost as a result of an expansion in output which leads to increasing returns to scale." DONALD RUTHERFORD, DICTIONARY OF ECONOMICS 141 (Routledge 1992). An economy of scope occurs when there is "a reduction in average cost brought about by the joint production of two or more goods (or services) by a single firm, rather than by several firms. The similarities of the products permit the use of the same factor inputs for the different products." *Id.*; *see also infra* notes 153–63 and accompanying text.

[153] Sarah Elizabeth Leeper, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 FED. COMM. L.J. 473, 490 (2000) (arguing that broadcast ownership regulations increase the costs of doing business at a time when cost-saving efficiencies may be critical to a station's survival).

[154] *See id.*

[155] *See* Ekelund, *supra* note 118, at 158 (arguing that concentration, collusion, and profits will rise if concentration results in long-run cost savings).

[156] *Id.*

[157] *See Media Ownership: Radio Industry Before the House Comm. on Commerce, Sci. & Transport.*, 108th Cong. (Jan. 30, 2003) [hereinafter *Hearings*] (testimony of Lowry Mays). Mays is chairman of the board and chief executive officer of Clear Channel Worldwide. Lowry, a former investment banker, began Clear Channel Communications with the purchase of a single station in San Antonio, Texas in 1972. ClearChannel, *Lowry*

consumer through improved facilities, stronger signals, and more expensive talent.[158]

Radio station owners also benefit from economies of scope.[159] "Economies of scope are created when a [company] is able to create new and innovative products due to efficiencies produced by its expanded production."[160] For example, an owner of multiple stations has the resources to form a "creative services team" to share ideas and improve creative efforts, in contrast to a single station owner who may only be able to afford one creative writer who would not be as consistent.[161]

Furthermore, large radio conglomerates have more financial capital to reinvest in local radio stations and markets than smaller owners.[162] Thus, advances in radio such as voice-tracking and new formats arise from the consolidation of resources and can bring the audience a better product.[163] Also, larger companies are better equipped to maintain costs of growing news departments than smaller owners.[164]

III. CONSOLIDATION OF OWNERSHIP AND THE PUBLIC INTEREST

With the marketplace theory and the benefits of economies of scale and scope in mind, Congress passed the Telecommunications Act of 1996.[165] No longer merely speculation, the marketplace theory was being put to the test in the radio market. Since then, the debate over radio ownership regulations has centered upon the validity of the marketplace theory; that is, whether deregulated

Mays Biography, *at* http://www.clearchannel.com/company_execbio_lowry.php (last visited Nov. 21, 2003).

[158] *Hearings*, *supra* note 157 (testimony of Mays).

[159] *See* Leeper, *supra* note 153, at 492.

[160] *Id.*

[161] *Id.*

[162] *See Hearings*, *supra* note 157 (testimony of Mays).

[163] Another potential benefit is syndication. *See infra* notes 282–90 and accompanying text.

[164] Steve Knoll, *Radio Station Consolidation: Good News for Owners, But What About Listeners?*, N.Y. TIMES, Dec. 30, 1996, at D5.

[165] Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending 47 U.S.C. § 151 (1934)).

ownership restrictions have resulted in a competitive market that promotes diversity and localism.

U.S. Senator Russ Feingold (D-Wis.) views the deregulated ownership restrictions as spurring harmful consolidation and anti-competitive practices by companies that control large portions of the radio and concert industries.[166] Consequently, he introduced a bill to curb any further deregulation.[167] The Competition in Radio and Concert Industries Act of 2003 calls for, among other things, enhanced scrutiny of further consolidation in radio.[168] Furthermore, Congress continues to evaluate deregulation, as the Senate Committee on Commerce, Science, and Transportation held media consolidation hearings chaired by U.S. Senator John McCain (R-Ariz.) throughout 2003.[169]

Meanwhile, the Telecommunications Act requires the FCC to review its media ownership rules biennially to determine "whether any of such rules are necessary in the public interest as a result of competition."[170] The FCC initiated its third biennial review of its media ownership rules in September 2002.[171] On June 2, 2003, the FCC voted to enact new rules further relaxing media ownership restrictions: allowing television networks to acquire enough stations to reach forty-five percent of the nation's viewers instead of thirty-five percent, permitting the same company to own newspapers and broadcast stations in the same city and to own as many as three television stations and eight radio stations in the

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[166] Craig Gilbert, *Music Industry Consolidation Has Feingold Singing the Blues*, JS ONLINE: MILWAUKEE JOURNAL SENTINEL (Jan. 8, 2003), *at* http://www.jsonline.com/news/nat/jan03/108839.asp (Feingold said, "We must speak out to give our airwaves back to the public.").

[167] Competition in Radio and Concert Industries Act, S. 221, 108th Cong. (2003).

[168] *Id.* § 4.

[169] *See Media Ownership (Radio Consolidation) Before the House Comm. on Commerce, Sci. & Transport.*, 108th Cong. (July 8, 2003); *Media Ownership Before the House Comm. on Commerce, Sci. & Transport.*, 108th Cong. (May 22, 2003); *Media Ownership (Broadcast Television) Before the House Comm. on Commerce, Sci. & Transport.*, 108th Cong. (May 13, 2003); *Media Ownership (Video Markets) Before the House Comm. on Commerce, Sci. & Transport.*, 108th Cong. (May 6, 2003); *Hearings*, *supra* note 157.

[170] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996) (amending 47 U.S.C. § 151 (1934)).

[171] *See* FCC Press Release, *supra* note 18.

same market.[172] Reflecting Senator Feingold's concerns about the dangers of excessive deregulation, however, Congress rallied against the FCC.[173] In addition, the U.S. Court of Appeals for the Third Circuit issued an order staying the enactment of the proposed rules only one day before the rules were scheduled to take effect.[174] Amidst the drama surrounding the FCC's "aggressive agenda of deregulation,"[175] radio ownership rules were left virtually unchanged.[176]

As part of the review process, the FCC adopted a Notice of Proposed Rulemaking on September 12, 2002.[177] In it, the FCC affirmed its traditional goals of promoting the three principles of "public interest": competition, diversity, and localism in the local

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[172] Broadcast Ownership Rules, Cross-Ownership of Broadcast Statutes of 2002 Biennial Regulatory Review, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73) ("The Commission believes these actions are necessary . . . to protect the Commission's chief goals in effectively regulating broadcasting, to promote diversity, localism, and competition.").

[173] Senator John Edwards (D-N.C.) said the FCC's decision "betrayed the public trust." Eric Boehlert, *Congress to Big Media: Not So Fast*, Salon, *at* http://archive.salon.com/news/feature/2003/07/23/fcc/print.html (July 23, 2003). On June 19, 2003, the Commerce Committee passed legislation that would undo the FCC vote, and the House Appropriations Committee voted to attach a rider to an appropriations bill that would prohibit the FCC from implementing its ownership rules at the cost of forfeiting its annual budget from Congress. Stephen Labaton, *U.S. Court Blocks Plan to Ease Rule on Media Owners*, N.Y. TIMES, Sept. 4, 2003, at A1. William Safire wrote:

> Here is what made this happen. Take the force of right-wingers upholding community standards who are determined to defend local control of the public airwaves; combine that with the force of lefties eager to maintain diversity of opinion in local media; add in the independent voters' mistrust of media manipulation; then let all these people have access to their representatives by e-mail and fax, and voila! Congress awakens to slap down the power grab.

Localism's Last Stand, N.Y. TIMES, July 17, 2003, at A27.

[174] Prometheus Radio Project v. FCC, 2003 WL 22052896 (3d Cir. Sept. 3, 2003) ("Given the magnitude of this matter and the public's interest in reaching the proper resolution, a stay is warranted pending thorough and efficient judicial review.").

[175] Boehlert, *supra* note 173.

[176] *See* Jennifer Lee, *Left Out of the FCC Feast: Rules Are Eased for All Media Except Radio*, N.Y. TIMES, June 10, 2003, at Finance 12. Perhaps Clear Channel Corporation is to blame. The company's rapid growth in radio and other industries "has drawn the wrath of musicians, who accuse it of using its concert division to strong-arm musicians, and the scrutiny of Congress, where many members contend that the company has engaged in anti-competitive practices." *Id.*

[177] FCC Press Release, *supra* note 18.

media market.[178] The FCC investigated whether: (1) the marketplace provides a sufficient level of competition to protect and advance the above policy goals; (2) current ownership rules achieve these goals; and (3) revisions to the rules are required to protect and advance competition, diversity, and localism in the media market.[179]

A. How Consolidation Stifles Competition

Because the marketplace theory is a basis for the trend toward deregulation, sufficient competition is an integral foundation.[180] Although the Telecommunications Act of 1996 intended to open up competition, the deregulation of ownership limits has led to an increased concentration of ownership.[181] This increased concentration resulted in anti-competitive behavior, undermining Congress' intent for a competitive marketplace.

The massive consolidation of the radio industry began immediately after the passage of the Telecommunications Act of 1996.[182] In the subsequent two years, about 4,000 of the nation's 11,000 radio stations changed hands.[183] In 1998, Clear Channel Communications ("Clear Channel") merged with Jacor Communications for $4.4 billion in the biggest media transaction of the year.[184]

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[178] *Id.*

[179] *Id.*

[180] *See supra* notes 121–49 and accompanying text.

[181] Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q. J. ECON. 1009, 1010 (2001) (noting that the increase in concentration of ownership in the radio market was substantial and largely driven by deregulation).

[182] *See infra* notes 183–84 and accompanying text.

[183] Christopher Parkes, *Change of Tack Takes Radio into the US Media Mainstream: Chancellor's $1.5bn Lin Buy Highlights Operator's Strategy*, FINANCIAL TIMES (London), July 10, 1998, at 24. As of March 2002, fifty entities owned twenty or more stations, compared to twenty-five in March 1996. Williams & Roberts, *supra* note 12.

[184] Elizabeth A. Rathbun, *Going, Going, Gone . . . Slowdown in Radio Consolidation Offset by Broadcasting Megadeals*, BRDCST. & CABLE, Feb. 15, 1999, at 33 (adding that the second-largest deal of the year occurred when Chancellor Media Corporation bought out Capstar Broadcasting Partners, Inc.—a radio company—for $3.9 billion).

From March 1996 to March 2002, the number of radio stations in the nation increased 5.4 percent from 10,257 to 10,807.[185] During the same period, however, the number of owners decreased 33.6 percent, from 5,133 to 3,408.[186] In that time, the two largest radio chains grew from fewer than 65 stations[187] to over 1,400.[188] Clear Channel currently operates approximately 1,225 stations,[189] up from just 36 prior to the passage of the Telecommunications Act.[190] That is an ownership increase of 3,288 percent in seven years.

With the remarkable expansion of radio station ownership comes a dramatic increase of listeners falling within the influence of a limited number of entities. Four radio groups—Chancellor Media Corporation, Clear Channel, Infinity Broadcasting Corp. (owned by Viacom) and Capstar—control access to 63 percent of contemporary hit radio/top 40 formats and their 41 million listeners, as well as 56 percent of the country format and their 28 million listeners.[191] In total, Clear Channel has 103.4 million listeners, or a 27 percent nationwide listener share.[192] Viacom has

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[185] Williams & Roberts, *supra* note 12, at 3.

[186] *Id.* There was a cumulative decline of the average number of owners per market, from 13.5 to 9.9. *Id.* at 6.

[187] William Glanz, *Radio-Market Consolidation Hits Sour Note*, WASH. TIMES, Jan. 8, 2003, at C8 (chronicling Senator Russell D. Feingold's efforts to secure tighter restrictions on radio ownership).

[188] Safire, *supra* note 1.

[189] Clear Channel, *Company Information*, *at* http://www.clearchannel.com/company.php (last visited Nov. 21, 2003).

[190] Leeds, *supra* note 15.

[191] AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS ET AL., JOINT STATEMENT ON CURRENT ISSUES IN RADIO 3 (May 24, 2002) [hereinafter JOINT STATEMENT], *available at* http://www.aftra.org/resources/pr/0502/stmt524.html (last visited Nov. 21, 2003). The American Federation of Television and Radio Artists ("AFTRA"), the American Federation of Musicians ("AFM"), and eight other groups delivered this statement to the FCC and Congress. Press Release, AFTRA, Artists Group Delivers "Joint Statement on Current Issues on Radio" to FCC and Congress (May 24, 2002), *available at* http://www.aftra.org/resources/pr/0502/pr0524.html (last visited Nov. 21, 2003).

[192] FUTURE OF MUSIC COALITION, *supra* note 14, at 24. The Future of Music Coalition is a not-for-profit organization which "seeks to educate the media, policymakers, and the public about music/technology issues, while also bringing together diverse voices in an effort to come up with creative solutions" to current issues. Future of Music Coalition, *at* http://www.futureofmusic.org (last visited Nov. 21, 2003).

59.1 million listeners, giving them a 15.4 percent share.[193] Clear Channel had $3.25 billion in revenue in 2001, which accounted for 27.5 percent of the nationwide revenue share.[194] Likewise, Viacom had $2.081 billion of revenue for 17.6 percent of the nationwide revenue share.[195] The largest firm in each market averages 47 percent of the market's total radio advertising revenue, while the two largest firms in each radio market average 74 percent of the market's advertising revenue.[196] It pays to consolidate.

There is no doubt that the radio market has seen large-scale concentration of ownership in a short period.[197] Because consolidation facilitates anti-competitive behavior, diversity and localism suffer, as there are no outside forces—neither marketplace competition nor regulation—forcing corporations to seek out and serve the smaller audiences. A glaring example of anti-competitive behavior enhanced by consolidation is the continuing practice of payola, effectively shutting out small labels and new and independent artists.[198]

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[193] FUTURE OF MUSIC COALITION, *supra* note 14, at 24.

[194] *Id.* at 25.

[195] *Id.*

[196] Williams & Roberts, *supra* note 12, at 3. In 180 of the 285 Arbitron radio markets, one entity controls more than forty percent of the market's total radio advertising revenue. In 93 of the 285 Arbitron radio markets, the top two entites control more than eighty percent of the market's total radio advertising revenue. *Id.* at 5.

[197] The Herfindahl-Hirschman Index ("HHI") and the four-firm concentration ratio are commonly accepted measures of market concentration which both show heavy concentration in the radio market. The HHI is "calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers . . . [taking] into account the relative size and distribution of the firms in a market . . . . [Markets] in which the HHI is in excess of 1800 points are considered to be concentrated." Department of Justice, *Herfindahl-Hirschman Index*, *at* http://www.usdoj.gov/atr/public/testimony/hhi.htm (last visited Nov. 21, 2003). Between 1993 and 1997 the average HHI across 243 major media markets increased 64.7 percent from 1,272 to 2,096. Berry & Waldfogel, *supra* note 181. The four-firm concentration ratio is calculated by combining the percentage of market revenue held by the four firms in each market with the largest revenue. For the period March 2001 to March 2002, the top 4 firms held 86 percent of the market revenue in the 50 largest markets, and 96 percent of the market revenue in the 100 smallest markets. Williams & Roberts, *supra* note 12.

[198] Payola—also called "pay for play"—refers to the practice of record labels paying radio stations for increased exposure or promotion of a particular song or artist. *See* Eric Boehlert, *Pay for Play*, Salon, *at* http://archive.salon.com/ent/feature/2001/03/14/payola (Mar. 14, 2001). Since payola is illegal, independent record promoters have become the

For a recording artist, getting commercial airplay is the "holy grail" of the recording industry.[199] Without airplay, it is virtually impossible to sustain a career.[200] Radio consolidation has made it more difficult—and more expensive—for an artist to get radio airplay.[201] Payola is the long-time practice of exchanging money for increased exposure or promotion of a particular song or artist.[202] Despite laws prohibiting undisclosed payments for broadcast, legal loopholes allow payola to continue.[203] Independent record promoters—called "indies"—act as "high-priced toll collector[s]" and lobbyists between record labels and radio stations, allowing stations to be one-step removed from label money and, thus, payment no longer falls within the technical definition of payola.[204] In return for airplay, promoters often give the radio stations money in the form of "promotional support."[205]

Since there are more songs produced than can be heard by the listening public, record companies feel pressured to practice payola

middlemen between the labels and stations. *See id.* The record labels hire independent labels, or "indies," to promote an artist, and the indies promise stations promotional payments. *See id.* Deregulation and subsequent consolidation has resulted in more powerful independent record promoters, higher costs to record labels and artists, and the shutting out of smaller artists and labels. *See id.*

[199] *Hearings*, *supra* note 157 (testimony of Don Henley on behalf of the Recording Artists Coalition). Henley has won six Grammy Awards and sold over 100 million albums worldwide as a singer and songwriter, first as a member of the Eagles, and then as a solo artist. *Don Henley Biography*, *at* http://www.wbr.com/donhenley/bioreal.html (last visited Nov. 21, 2003).

[200] *See* Eric Boehlert, *Record Companies: Save Us From Ourselves!*, Salon, *at* http://archive.salon.com/ent/feature/2002/03/13/indie_promotion/index.html (Mar. 13, 2002) (fearing that musicians who complain about independent promoters will be kept off radio).

[201] *See Hearings*, *supra* note 157 (testimony of Henley) (arguing that stations are able to charge more money to record labels and artists, since consolidation has limited their options).

[202] Lauren J. Katunich, Comment, *Time to Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 LOY. L.A. ENT. L. REV. 643, 644 (2002) (concluding that payola laws must be updated to better reflect the economic realities of the music industry).

[203] *Id.* at 655–56.

[204] *Id.* at 656. In other words, radio stations and record labels are subverting the law simply by using middle men.

[205] *Id.* at 658 ("The promotional budget supplied by the indie, supposedly used by the radio station to buy T-shirts, billboard ads, and station vans, is in reality spent by the station in any manner that it sees fit.").

to secure airtime.[206] Although the Internet, touring, and other alternative marketing techniques help generate sales, "mainstream radio play is still the engine that drives the media business."[207] Radio airplay creates exposure and should help the artist, not provide excessive benefits to the corporation. When independent labels forgo seeking expensive radio airplay, they guarantee lower sales and limit the ability of small labels to expand.[208]

The pressure on record companies increased with the loosening of ownership restrictions by the Telecommunications Act of 1996.[209] With multiple stations in multiple markets controlled by the same company, the number of station outlets to turn to for airplay is drastically reduced, especially if one entity were to reject a particular artist or song.[210] Consolidated radio stations have gained leverage in negotiating programming and advertising contracts, because they control a larger audience.[211] Therefore, the consideration sought for radio airplay has increased due to less competition among radio stations.[212] Promoters charge record companies as much as $4,000 per song to obtain airplay for new releases.[213] Major record conglomerates put up an estimated $100 million a year, which small labels simply cannot match.[214]

Clear Channel, the nation's largest radio conglomerate, holds a 27 percent nationwide listener share of 103.4 million listeners.[215] They suggest that record companies that are dissatisfied with the system discontinue the practice of making payments to

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[206] *See id.* at 645. "[R]ecord companies rely on approximately 1,000 of the largest [commercial radio stations] to create hits and sell records. Each of these 1,000 stations adds roughly three new songs to its playlist each week." Boehlert, *supra* note 198.

[207] Boehlert, *supra* note 198.

[208] Jeff Leeds, *Small Record Labels Say Radio Tunes Them Out*, L.A. TIMES, Sept. 16, 2001, at Business 1 (finding that consolidation puts fewer programmers in control of playlists, which creates fear among independent labels that prices may continue to rise).

[209] *See Hearings*, *supra* note 157 (testimony of Henley) (stating "the more powerful the radio network, the greater the pressure on artists and labels to spend promotion money").

[210] Katunich, *supra* note 202, at 654.

[211] *Id.* at 653–54.

[212] *See Hearings*, *supra* note 157 (testimony of Henley).

[213] Leeds, *supra* note 208.

[214] *Id.*

[215] FUTURE OF MUSIC COALITION, *supra* note 192, at 24.

independent promoters in the pursuit of airplay.[216] That may not be possible, however, if conglomerates like Clear Channel take advantage of their size. For instance, Clear Channel has suggested a policy of selling song identification as a form of advertising, by making record labels pay for the identification of the song title and artist name.[217] Additionally, the company has discussed charging record labels for airplay statistics.[218]

Another potential abuse of consolidation may be in the form of an alliance between a radio conglomerate and a large independent promotion firm.[219] The resulting clout could allow the radio owner to institute national buys for new singles at excessive prices.[220] Any label or artist that does not pay could find its song out of the rotations of some of the largest radio stations in every market.[221]

In its Joint Statement on Current Issues in Radio, issued May 2002, a coalition of performing artists, record labels, songwriters, community broadcasters, and others condemned the anti-competitive practices of radio conglomerates, noting that "[d]ue to

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[216] *See* Gilbert, *supra* note 166 (noting that Clear Channel spokesperson Andy Levin said any perceived homogenization on the radio has more to do with record labels choosing which artists to promote rather than radio station programming).

[217] JOINT STATEMENT, *supra* note 191, at 3.

[218] Chuck Philips, *Company Town: Clear Channel Fined Just $8,000 by FCC for Payola Violation*, L.A. TIMES, Oct. 20, 2000, at C1 (stating that "[m]eanwhile, artist managers continue to privately complain that numerous pop acts are being pressured by Clear Channel and other radio giants to perform without pay at radio station benefit shows, which though providing income for local charities, also bolster ratings and advertising revenue for broadcasters").

[219] In 2001, there were rampant rumors that Clear Channel would create a strategic alliance with Tri State Promotions & Marketing, one of the largest independent promotion firms in the nation. Boehlert, *supra* note 198 The firm has been closely aligned with Clear Channel for years, but such an agreement would make Tri State the exclusive promoter working with Clear Channel. *Id.* In April 2003, Clear Channel announced that it will sever ties with independent promotion firms in order to distance itself from the payola stigma. Adrian McCoy, *Pay-for-Play Static Cuts Clear Channel Indie Ties*, PITTSBURGH POST-GAZETTE, Apr. 26, 2003, at C6 ("In the end, the shift away from independent promoters may be imperceptible to radio listeners.").

[220] One radio insider opined, "Labels would pay $100,000 or $200,000 to get a single added to all the Clear Channel format stations one week. . . . And if they don't pay, there is no chance . . . they're getting that song on the radio without Tri State. If it's not on the list, it's not on the stations." *Id.*

[221] *Id.* (noting that if a song is not played on the radio, it will not make the record company any money).

sheer market power, radio station groups now have the ability to make or break a hit song."[222] Dave Lebental, the president of small rock label Pinch Hit Records, reflects the concerns of small record labels as consolidation drives up promoters' prices, commenting, "It's not set up for outsiders to come in. It's not a wide-open marketplace."[223]

Radio ownership consolidation can lead to anti-competitive behavior that reaches beyond the broadcast radio market as an entity expands into other industries and has incentives to behave monopolistically.[224] Along with owning more radio stations than any other company, Clear Channel is the nation's largest live entertainment company—after a $4.4 billion merger with SFX Entertainment, Inc. in 2000[225]—with 135 American venues and a concert-booking arm that purchases entire tours.[226] The company promotes or produces 26,000 events annually, with attendance reaching 62 million.[227] The conglomerate is also the nation's largest outdoor advertising company, with 776,000 billboards, airport signs, and public transportation signs around the world.[228] Thus, Clear Channel controls the talent, distribution, booking, venues, and advertising of an entire industry.[229]

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[222] JOINT STATEMENT, *supra* note 191, at 3.

[223] Leeds, *supra* note 208.

[224] In order for an owner of concert venues and radio stations to ensure sell-outs at the venues, the entity may threaten limited airplay for artists unless they play when and where the entity so desires.

[225] *See* Keri Mattox, *SFX Entertainment Agrees to $4.4 Billion Merger*, TIMES UNION (Albany, N.Y.), July 28, 2000, at E1.

[226] Rob Hotakainen & Jon Bream, *Wrestling with Rock, Radio, and Revenue: The Rise—and Some Say Dominance—of Clear Channel Has Led to Calls for Change*, STAR TRIBUNE (Minneapolis), June 30, 2002, at 1A (noting that the 135 venues account for seventy percent of major concert ticket sales).

[227] Maureen Dezell, *Is Bigger Better? In the Entertainment Business Clear Channel Is Everywhere, and Critics Say That Is the Problem*, BOSTON GLOBE, Jan. 27, 2002, at L1 (noting that "[s]ize matters in the entertainment industry, and by this standard alone, Clear Channel is unparalleled").

[228] *See* Roy Bragg, *Concert Behemoth Clear Channel Accused of Not Playing Fair*, SAN ANTONIO EXPRESS-NEWS, Feb. 3, 2003, at 1A (stating that "[a] global leader in outdoor advertising, its. . .holdings worldwide range from taxi tops in Boston, to bus stop displays in China, to the brightest, most technically enhanced billboards in Times Square"); Dezell, *supra* note 227.

[229] Dezell, *supra* note 227.

Critics worry that the company misuses its power over the radio and music industries.[230] They believe Clear Channel "overpays for bands and buys up entire tours," driving smaller competitors out of business because they cannot afford to compete.[231] The public bears the cost, as concert-goers saw ticket prices for the top 100 touring acts rise 70 percent from 1996 to 2001.[232] Furthermore, industry insiders tell of advertising pricing policies that undermine competing stations, payment deals that skirt anti-payola laws, purchases of stations across the Mexican border to bypass limits on domestic ownership, and strong-arming artists to perform with Clear Channel's concert production division.[233]

Clear Channel took on tremendous debt in order to grow into a powerful entity and is a publicly owned corporation that must fulfill its duties to its shareholders.[234] Thus, the company is motivated to make artists tour as much as possible and fill as many venues as possible.[235] Clear Channel's ownership consolidation allows the company to take advantage of artists, who need radio airplay to gain new fans and maintain old ones.[236] Artists fear that they may not get their songs played on Clear Channel radio stations if they decide not to "play ball" with Clear Channel the concert promoter.[237] Meanwhile, fledgling and second-tier talents suffer from lack of exposure in terms of venue and airplay.[238]

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[230] *See* Bragg, *supra* note 228.

[231] *Id.*

[232] *See* Hotakainen & Bream, *supra* note 226 (pointing out that ticket prices have gone from $25.61 to $43.86).

[233] Jennifer Lee, *U.S. Radio Giant Faces Competition Inquiry*, INT'L HERALD TRIB., Feb. 1, 2003, at Finance 11 (citing Congressional testimony).

[234] *See* Dezell, *supra* note 227.

[235] *Id.* (noting that "[i]t competes ruthlessly to do that").

[236] *See* Tim Feran, *Fear of Clear: Competitors Worry Radio Industry Giant's New Clout Will Leave Them Out*, COLUMBUS DISPATCH (Ohio), Dec. 16, 2001, at 1E (comparing competitors and Clear Channel to David and Goliath).

[237] Hotakainen & Brown, *supra* note 226.

[238] Dezell, *supra* note 227.

B. Diminishing Diversity: The Homogenization of Radio

Far from regulating ownership in the name of diversity,[239] the deregulation of ownership standards is intended to promote programming diversity as competitive stations seek out specific niche markets to gain the greatest audience share.[240] Proponents of deregulation contend that consolidation has resulted in more diversity and newer formats.[241] Critics charge that consolidation has led to a homogenization in the music played on the radio.[242] There are more formats, but the significance of formats as a measure of diversity is uncertain.[243]

Deregulation advocates point to radio consolidation and the corresponding increase in number of formats as proof that relaxed ownership restrictions result in increased programming diversity.[244] According to research conducted by Bear, Stearns & Co., the number of core formats has risen seven percent since 1996.[245] Additionally, Spanish language formats have increased by over eighty percent in the last decade.[246]

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[239] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978) (upholding regulations governing the permissibility of common ownership of a radio or television broadcast station and a daily newspaper located in the same community based on the FCC's policy of promoting diversification of mass media).

[240] *See* Bates & Chambers, *supra* note 6, at 24.

[241] *See* Berry & Waldfogel, *supra* note 181, at 1018 (noting that "increases in concentration appear to reduce the incentive to add stations and to increase variety, both absolutely and conditional on the number of stations").

[242] *See* Ortner, *supra* note 23, at 172 (arguing that consolidation has "effectively homogenized the programming heard across the country and stifled the diversity of voices emanating from the airwaves").

[243] Due to significant overlapping of songs, more formats may not necessarily mean more diversity. *See infra* notes 247–64 and accompanying text.

[244] *Hearings*, *supra* note 157 (testimony of Mays).

[245] Bear, Stearns & Co., *Format Diversity: More from Less?* 2 (Nov. 4, 2002) (maintaining that the rapid consolidation of radio following the Telecommunications Act of 1996 has created more diversity in programming), *available at* http://www.nab.org/FormatDiversity (last visited Nov. 21, 2003).

[246] *Hearings*, *supra* note 157 (testimony of Edward Fritts). Fritts is the president and chief executive officer of the National Association of Broadcasters. *Id.*

Many argue, however, that formats are a poor measure of diversity.[247] Sub-classifications are misleading, considering that a number of different classifications can mean virtually the same thing.[248] In addition to the adult contemporary format, for example, there are hot adult contemporary, rock adult contemporary, urban adult contemporary, mix adult contemporary, soft adult contemporary, light adult contemporary, and others.[249] Playlists, rather than formats, are more accurate evaluators of programming diversity.[250]

The Future of Music Coalition report of November 18, 2002 analyzed playlists and found substantial overlap between formats.[251] In the most extreme case, there was a seventy-six percent overlap as thirty-eight of the top fifty songs on two charts were identical.[252] This trend reveals a homogenization in the music played on the radio.[253] As conglomerates purchase more local and independent radio stations, playlists contract and become uniform.[254]

Large owners blame perceived homogenization on the record labels' practice of promoting a small amount of new artists each year.[255] What the public hears is often what the record industry promotes the most.[256] Furthermore, record companies fail to take the risks necessary to sign, produce, and promote new artists.[257]

Record companies respond that they would be willing to promote more artists if not deterred by the high costs of payola.[258] The practice of pay for play not only pushes out smaller labels and

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[247] *See* FUTURE OF MUSIC COALITION, *supra* note 192, at 41 (charging that some stations change the name of their format for marketing purposes, while leaving the playlist unchanged).
[248] *See id.* at 44.
[249] *Id.* at 49.
[250] *See id.* at 44.
[251] *Id.* at 44–48.
[252] *Id.* at 49. For the week ending August 2, 2002, the CHR/Rhythmic and Urban formats shared thirty-eight songs out of top fifty most played. *Id.*
[253] *See Hearings*, *supra* note 157 (testimony of Henley).
[254] *See id.*
[255] Gilbert, *supra* note 166.
[256] *Id.*
[257] *See Hearings*, *supra* note 157 (testimony of Mays).
[258] *See* Leeds, *supra* note 213.

independent artists,[259] but also restricts the amount of new artists on which large record companies take a chance.[260] As a result, there exists a homogenization of music on the airwaves.[261]

Despite Steiner's theory that increased ownership concentration on the local level would lead to a subsequent increase in formats in order to reach more listeners, there is little evidence that deregulation has led companies to seek out specific niche markets.[262] Detractors complain of a reduction of classical and jazz formats from the airwaves.[263] Those listeners, apparently not sufficiently served by radio, have turned to the Internet, as three of the eleven most-visited commercial music Web sites consist of classical or jazz formats.[264]

Although a firm owning multiple stations seems to have an incentive not to allow the individual stations to compete with each other, this does not necessarily result in more diverse formats in an effort to reach more listeners.[265] A firm owning multiple stations can prevent excessive intra-firm competition simply by closing some stations.[266] Furthermore, a firm interested in reaching more listeners than any other station in the market does not have to program formats that appeal to each group.[267] Instead, the firm

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[259] *See id.*

[260] *See Hearings*, *supra* note 157 (testimony of Henley).

[261] *See id.*

[262] Steiner, *supra* note 144, at 210.

[263] JOINT STATEMENT, *supra* note 191, at 4 (calling for the FCC to investigate the consolidation of radio ownership and the reduction of classical, jazz, bluegrass, and other formats from the airwaves).

[264] *See* Press Release, Arbitron, MUSICMATCH Is Top Non-Commercial Internet Broadcast Network in July According to Arbitron Internet Broadcast Ratings (Aug. 19, 2003), *available at* http://www.arbitron.com/home/content.stm (last visited Nov. 21, 2003). In January 2003, five of the top ten were classical or jazz. Press Release, Arbitron, Three Classical Stations Rank Within the Top Ten Channels According to Arbitron's Measure Cast Ratings (Jan. 23, 2003), *available at* http://www.arbitron.com/newsroom/archive/WCR01_23_03.htm (last visited Nov. 21, 2003).

[265] Berry & Waldfogel, *supra* note 181, at 1022 (arguing that monopolistic firms act to pre-empt entry of new firms into the marketplace by crowding a particular format with only mildly diverse programming).

[266] *Id.* at 1011 ("If this can be done in a way that does not attract entry, then variety is reduced.").

[267] *Id.* at 1012.

could program formats in ways that crowd the most popular format, in order to deter new stations from entering the market.[268] Thus, the incentive to control the entire market coupled with the incentive to keep competitors out of the market results in formats that are "differentiated, but not by too much."[269] A market where monopolistic firms program in order to deter new competitors and control the entire market illustrates a market that is non-competitive and not sufficiently diverse to reach the niche listeners.

C. Localism Sacrificed for Efficiency

In a Policy Statement on Comparative Broadcast Hearings adopted in 1965, the FCC said, "local residence complements the statutory scheme and [FCC] allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations."[270] As deregulation of radio has turned into consolidation of radio, however, many local stations are far away from their parent company management.[271] A station's news and public service programming reflects the character of the local communities,[272] and radio consolidation has sacrificed that character in many communities.

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[268] *Id.* Recalling the examples, *supra* notes 146–47, if there is a monopoly, where the only two stations in a market are owned by the same entity, and eighty percent of the audience wants to listen to a country music format and twenty percent wants to listen to a classical music format, the entity could crowd the country music format in order to deter new stations from entering the market by closing any holes in the format space. Thus, one station would have a country music format appealing to fans of Garth Brooks and Tim McGraw and the other station would have a country music format appealing to fans of Hank Williams and Johnny Cash, in order to reach and retain the most possible listeners of the largest format in the market. As a result, no station would reach the niche market of classical music listeners, and the two remaining formats would consist of extreme overlap and little diversity.

[269] *Id.*

[270] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

[271] Clear Channel is headquartered in San Antonio, Texas and owns approximately 1,225 stations nationwide. ClearChannel, *Company Profile*, *at* http://www.clearchannel.com/company.php (last visited Nov. 21, 2003).

[272] Knoll, *supra* note 164 (reporting that many radio listeners are finding themselves with fewer sources of local news as news staffs are consolidated).

Successful localism demands comprehensive newscasts and plentiful public affairs programming.[273] The FCC has noted that it is important "in a free society to prevent a concentration of control of the sources of news and opinion."[274] But as radio station ownership consolidates so that a single owner may control up to eight stations in the largest markets, news staffs are being combined.[275] As a result, many listeners find themselves with fewer sources of local news.[276] In many communities, the local radio newscast has been abandoned in favor of someone reading news and weather from the nationwide Associated Press.[277] As one commentator put it, "There is hardly anything more juxtaposed to localism than mass produced news."[278]

Conversely, large conglomerates have the resources to support growing news departments.[279] Many smaller radio stations are unable to maintain the costs of news departments.[280] Stations that are not taking advantage of the efficiencies of economy of scale may end up off the air, altogether depriving communities of the local service.[281]

Large conglomerates, which have more capital to reinvest in local radio stations and markets than smaller owners, take advantage of economies of scope to create new and innovative products for radio.[282] For example, Clear Channel has used its resources to create a $10,000 digital automation system called "Prophet," which has revolutionized radio.[283] The software allows

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[273] Howard, *supra* note 119, at 280 (arguing that absentee owners are motivated by money and uninterested in preserving localism).

[274] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

[275] *See* Knoll, *supra* note 164 ("In a number of large to medium-sized markets around the country, a single owner may control from three to five stations.").

[276] *Id.*

[277] Howard, *supra* note 119, at 280.

[278] *Id.*

[279] *Hearings*, *supra* note 157 (testimony of Fritts) (stating that "the 1996 Telecommunications Act enabled radio to better serve local audiences across the country as well as strengthening the industry economically").

[280] *See* Knoll, *supra* note 164.

[281] *Hearings*, *supra* note 157 (testimony of Fritts).

[282] *See* Randy Dotinga, *'Good Mornin' (Your Town Here)'*, Wired News, *at* http://www.wired.com/news/business/0,1367,54037,00.html (Aug. 6, 2002).

[283] *Id.*

disc jockeys to voice track their shows.[284] They spend a few minutes recording introductions and other sound bites, and a computer merges those sounds with songs, promotional spots, sound effects, and commercials to create the show.[285]

Voice-tracking creates tighter operations.[286] The biggest benefit of voice-tracking, according to proponents, is that it brings big-city disc jockey talent to smaller markets that otherwise would not be able to afford it.[287] Programming recorded in Los Angeles is exported to smaller markets throughout the nation as a series of taped moments that are spliced together to sound as if the disc jockeys were broadcasting locally.[288] Producers edit segments to create the appearance of disc jockeys taking live requests and calls from listeners, even recording half of a conversation with which a live, local disc jockey can interact.[289] There are some drawbacks, such as when Florida's attorney general fined Clear Channel $80,000 for misleading listeners into thinking that a national contest was local, partly since the company dubbed a local disc jockey's voice into an interview with a winner.[290]

Although voice-tracking techniques and syndication may give small market listeners otherwise unattainable disc jockeys and morning shows, many argue that "the local part of local radio" suffers.[291] If the show is taped, a listener cannot call a favorite disc

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[284] *Id.*

[285] *Id.* "Thanks to advances in audio technology and pioneering work by Clear Channel Communications, an epidemic of digital fakery has struck the radio industry. Only the listeners are live and local at many radio stations, and Clear Channel is gambling that nobody will notice. Or care." *Id.*

[286] *Id.*

[287] *See* Leeds, *supra* note 15. For example, listeners in small markets can hear Rick Dees joking about their local news or Sean Valentine promoting local concerts. *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.* Another disadvantage of running a station on autopilot is slow response time. *See* Dotinga, *supra* note 282. For example, on September 11, 2001, it took four hours for a group of automated Clear Channel stations in Harrisonburg, Virginia to stop playing music and start broadcasting news. *See id.* Apparently, the employees "couldn't figure out how to do anything because they had so few people in that building." *Id.*

[291] Polly Higgins & Oscar Abeyta, *Tuscon Radio Making Waves: Corporate Radio Roves In*, TUCSON CITIZEN, May 3, 2002, at 1A (commenting that "your favorite morning team with whom you take that cup of coffee or drive to work may not be as close as you think").

jockey and make a request.[292] Also, local appearances are at a minimum, if at all.[293] Moreover, the technological efficiencies have severely affected the institution of nighttime disc jockeys.[294] In San Diego, the nation's seventeenth-largest market, only two local after-midnight hosts remain.[295]

Moreover, some worry that "formats will serve the most profitable demographics only and that syndicated programming will become a cost-saving mainstay, prompting a decline in localization."[296] There is no doubt that consolidation has resulted in innovative technology aimed at streamlining operations, and that syndication can bring otherwise unattainable popular programs to small communities. For listeners who value news and talent with local relevance, however, deregulation of ownership restrictions has not served their interests.

D. Private Interests Versus Public Interests

Consolidation of radio ownership allows conglomerates to benefit from economies of scale.[297] The private economic interests of radio owners, however, should be subordinate to the public interest of promoting competition, diversity, and localism in the marketplace.[298] Thus, benefits to private interests should not be gained at the expense of the public interest.

Large-scale radio owners benefit from operational efficiencies, such as sharing management, production, and programming personnel.[299] Additionally, advertising, promotions, and technical

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[292] *Id.*

[293] *Id.*

[294] *Id.* Many stations record evening and overnight shifts, allowing voice-tracking to cut and paste voices with songs. *Id.*

[295] Dotinga, *supra* note 282.

[296] Howard, *supra* note 119, at 280 (quoting Chuck Taylor, *Westinghouse, Infinity Merger Fuels Consolidation Concerns*, BILLBOARD, July 6, 1996).

[297] As a firm grows larger, it can consolidate its resources to operate more efficiently than smaller firms. *See supra* notes 153–58 and accompanying text.

[298] The licensee is merely a fiduciary for the public. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); *see also supra* notes 85–89 and accompanying text.

[299] Ekelund, *supra* note 118, at 158.

facilities can be combined to decrease operational costs.[300] Proponents of deregulation argue that these efficiencies resulting from consolidation are passed on to the consumer.[301]

According to Lowry Mays, the chairman and chief financial officer of Clear Channel, in testimony before the Senate Committee on Commerce, Science, and Transportation, Clear Channel takes advantage of economy of scale throughout the country, reinvesting savings into stations, improving technical facilities, and increasing the quality of local programming.[302] In Syracuse, New York, Clear Channel saves nearly $200,000 per year by operating its stations as a unit instead of standalone properties.[303] It has reinvested those savings in the local stations, upgrading a transmitter, installing new studio equipment, and increasing local news programming.[304]

The efficiencies found in an economy of scale are in stark contrast to the state of radio in the early 1990s, when sixty percent of stations were losing money.[305] Competition from cable and broadcast television helped to send AM station profits plummeting fifty percent in 1989 and 1990, while FM station profits fell thirty-three percent.[306] With consolidation and streamlining of operations, stations have become more profitable.[307]

On November 18, 2002, however, the Future of Music Coalition released a report that, among other things, purported to dispel claims that consolidation is necessary for economic viability of the radio industry.[308] The report used "power ratio" as a type of profitability measure, dividing a station's revenue share by its

[300] *Id.*
[301] *Hearings*, *supra* note 157 (testimony of Mays).
[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] *Hearings*, *supra* note 157 (testimony of Fritts).
[306] *Hearings*, *supra* note 157 (testimony of Mays).
[307] *See* Higgins & Abeyta, *supra* note 291 ("But some people worry that too much power is being put in too few hands, and that radio listeners' needs are being put behind the needs of corporate profits.").
[308] FUTURE OF MUSIC COALITION, *supra* note 192. The study maintains that the rapid consolidation of radio following the Telecommunications Act of 1996 has resulted in a loss of localism, less competition, fewer viewpoints, and less diversity in radio programming. *Id.*

audience share.[309] The formula revealed little relationship between the amount of stations owned and the power ratio.[310] Parent companies owning fewer than 50 stations perform similarly to those owning more than 100, according to the report.[311] The authors of the report note that the data ideal for analysis—radio companies' internal financial and operations data—is not publicly available.[312]

Whether or not consolidation has led to economic efficiencies, many argue that the FCC must weigh any potential efficiencies against the fundamental need to promote the public interest.[313] Accordingly, regardless of the theoretical validity of economic arguments, the policy goals themselves—of ensuring competition, diversity, and localism in the marketplace—are worth pursuing through regulation.[314] After all, they argue, the Communications Act of 1934 created a fiduciary relationship between the licensed radio stations and the public.[315] As the Court in *Red Lion Broadcasting* stated, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[316]

Consolidation may lead to economic benefits through the efficiencies of economies of scale and scope. The efficiency theory, however, seems to place the private interests of broadcasters above the public interest. Economic efficiency that benefits the station owners is a valid goal, as long as it is not at the expense of the public interest. The rights of the listeners trump the rights of the broadcasters.

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[309] *Id.* at 30.
[310] *Id.* at 31.
[311] *Id.*
[312] *Id.* at 30.
[313] *See* Letter from Mike DeWine & Herb Kohl, U.S. Senators, Subcommittee on Antitrust, Business Rights and Competition, to Michael Powell, Chairman, FCC (Jan. 28, 2003) (voicing concern about any significant relaxation in media ownership rules the FCC might be considering), *available at* http://www.democraticmedia.org/issues/-mediaownership/dewine_kohl.doc (last visited Nov. 21, 2003).
[314] *See* Bates & Chambers, *supra* note 6, at 21.
[315] *See* Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 389 (1969) (upholding regulations requiring radio stations to provide time for a response to a personal attack).
[316] *Id.* at 390.

IV. OWNERSHIP REGULATIONS ARE NEEDED TO REVIVE COMPETITION, DIVERSITY, AND LOCALISM

Congress deregulated the radio industry with the Telecommunications Act of 1996 to encourage "diversity of media voices, vigorous economic competition" and to promote "the public interest, convenience, and necessity."[317] Today, as the radio industry contends with monopolistic behavior, decreased diversity, and indifference toward localism, it becomes clear that deregulating ownership restrictions failed to achieve the goals stated in the Telecommunications Act of 1996.[318] The current marketplace does not provide a sufficient level of competition to protect and advance the goals of competition, diversity, and localism in the market.

The driving force behind deregulation of ownership restrictions is the marketplace theory, which speculates that competition compels radio firms to create diverse programming in order to reach and serve various listening groups.[319] The fundamental assumption underlying the marketplace theory is the existence of sufficient competition in the market.[320] Unfortunately, this assumption cannot be applied to the current radio marketplace, where excessive ownership consolidation has created an anti-competitive environment.[321] Insufficient competition sabotages the marketplace theory and its promise of increased diversity and localism.

The radio marketplace is highly concentrated, with the two largest radio entities reaching over 160 million listeners and pulling in over 45 percent of nationwide advertising revenue.[322] This immense size and influence facilitates anti-competitive behavior, as radio stations pressure record labels and artists to pay for airtime and exposure.[323] Although pay-for-play existed before

[317] Telecommunications Act of 1996, Pub. L. No. 104-104, § 257, 110 Stat. 56, 77 (1996) (amending 47 U.S.C. § 151 (1934)).
[318] *See supra* notes 165–296 and accompanying text.
[319] *See supra* notes 121–49 and accompanying text.
[320] *See supra* note 134 and accompanying text.
[321] *See supra* notes 180–97 and accompanying text.
[322] *See supra* notes 192–97 and accompanying text.
[323] *See supra* notes 198–223 and accompanying text.

deregulation, recent massive consolidation has raised prices for payoffs and reduced alternative options.[324] Consequently, small record labels and new and independent artists are squeezed out, reducing the potential diversity of the airwaves.[325]

The largest radio owner—and frequent target of deregulation critics—is Clear Channel, with over 1,200 stations nationwide.[326] Clear Channel enjoys a 27 percent listener share of 103.4 million listeners, while netting 27.5 percent of the nationwide advertising revenue.[327] Clear Channel is just as influential in related markets, maintaining the status as the nation's largest live entertainment company and the biggest outdoor advertising company.[328] Along with Clear Channel's size comes the incentive to use its clout to raise revenue.[329] Accordingly, industry insiders charge the conglomerate with numerous monopolistic abuses, from driving smaller companies out of business to strong-arming artists to perform with the company's promotional arm.[330]

In addition to nationwide radio consolidation that has led to anti-competitive behavior, the radio marketplace has seen a decrease in programming diversity and a forfeiture of localism. Playlists and news are streamlined, formats overlap, and small market stations lose their local identity.[331] Moreover, due to lack of competition in the marketplace, stations are not seeking out specific niche markets to gain the greatest audience share.[332] Rather, there is a reduction of classical and jazz formats causing those listeners to turn to the Internet.[333]

Despite adversely affecting competition, diversity, and localism, consolidation has led to valuable operational efficiencies.[334] Streamlining many departments, voice-tracking,

[324] *See supra* notes 258–61 and accompanying text.
[325] *See supra* notes 208–23 and accompanying text.
[326] *See supra* note 189 and accompanying text.
[327] *See supra* notes 192–94 and accompanying text.
[328] *See supra* notes 225–29 and accompanying text.
[329] *See supra* notes 234–35 and accompanying text.
[330] *See supra* notes 231–33 and accompanying text.
[331] *See supra* Part III.B.
[332] *See supra* notes 262–69 and accompanying text.
[333] *See supra* notes 263–64 and accompanying text.
[334] *See supra* Part II.B.

and syndication save money and bring smaller markets talent they may otherwise miss.[335] Furthermore, large radio entities have more financial capital to reinvest in local stations and markets than small owners.[336] Clearly, the public interests of promoting competition, diversity, and localism outweigh any benefits of cost-cutting efficiencies.[337] The benefits of consolidation, however, cannot be ignored.

Deregulation is not wrong. Many smaller stations were losing money, and many smaller news departments were in danger of being eliminated when the Telecommunications Act of 1996 opened the doors for large-scale consolidation.[338] Operational efficiencies can benefit both owners and listeners.[339] The marketplace theory is not wrong. In a marketplace of sufficient competition, the public will choose what is in the public interest by voting with their radio dials.[340]

The damage to the radio marketplace occurred because Congress excessively deregulated, spoiling the opportunity to create a marketplace of sufficient competition. Changing the nationwide ownership cap from forty stations to unlimited was reckless. The marketplace theory never had a chance to work, as a few corporations with sufficient capital began to rapidly consolidate and left the competition in their wake.[341] The resulting marketplace is devoid of sufficient competition and fails to promote diversity and localism.

To infuse sufficient competition into the marketplace, Congress and the FCC must consider implementing regulations limiting ownership. Congress and the FCC must reevaluate ownership regulations within the marketplace, balancing the public interests of promoting competition, diversity, and localism with consolidation efficiencies. There is a middle ground, where the marketplace can benefit from efficiencies associated with

[335] *See supra* notes 283–90 and accompanying text.
[336] *See supra* notes 279–82 and accompanying text.
[337] *See supra* notes 313–16 and accompanying text.
[338] *See supra* notes 305–07 and accompanying text.
[339] *See supra* Part II.B.
[340] *See supra* Part II.A.
[341] *See id.*

consolidation, without sacrificing competition, diversity, and localism. Congress and the FCC must determine whether a national ownership limit would create competition sufficient to give the marketplace theory a chance to work, resulting in increased diversity and a renewed commitment to localism.

CONCLUSION

Clear Channel and other radio conglomerates may not be as evil as they are often portrayed,[342] but they certainly make deregulation look bad. The massive consolidation of radio has stifled competition, decreased programming diversity, and hurt localism in many markets. The Telecommunications Act of 1996 intended to promote competition through deregulation, but it overreached by completely eliminating the national ownership cap. New ownership restrictions are required to create sufficient competition in the radio marketplace and promote the public interest.

[342] "The evil intentions attributed to Clear Channel are not true at all," declared Randy Michaels, former chief executive officer of Clear Channel radio operations. Randy Dotinga, *Murky Water for Clear Channel*, Wired News, *at* http://www.wired.com-/news/business/0,1367,54038,00.html (Aug. 7, 2002).