CREATING A DIVERSITY OF VOICES: LOCAL EXPRESS
THROUGH A LOW POWER RADIO SERVICE

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I. INTRODUCTION

"Where there is even a pretense of democracy, communications are at its heart"1

The broadcast industry in America has had a long tradition of encouraging many voices from many locations. The tradition of diversity of viewpoints at the core of democracy is threatened by the reforms of the Telecommunications Act of 1996 ("1996 Act").2 Since the passage of the 1996 Act, the American system of broadcasting, characterized by stations distributed across America, each the voice of its own hometown has been relegated to a tangled web of mass corporate ownership. Nowhere is this tangle of interests more apparent than in the local community’s battle to gain access to the airwaves through low power broadcasting.

Since its beginning, radio has been the quintessential local communications service.3 It is at the center of local communities perhaps more than any other medium. Over ninety-five percent of Americans listen to radio on a daily basis, which averages to nearly twenty hours per week.4 Although radio remains a pervasive means of communication, the passage of the 1996 Act has dramatically reshaped the radio industry by ushering in an unprecedented number of corporate consolidations.5 Large publicly-traded corporations are acquiring a great number of radio stations at an alarming rate.6 Over the past two years, more than one-third of all radio stations have consolidated into larger companies as a result of the 1996 Act’s deregulation of ownership restrictions.7 The negative impact of the streamlining of broadcast ownership regulations has affected even the smallest markets across the country and as a result, there are less diverse viewpoints carried over the airwaves.8

Since the beginning of broadcasting in the United States, the Federal Communications Commission ("FCC" or "Commission") restrained the number of broadcast stations that one party may own, both locally and nationally.9 The Commission’s restrictions were an effort to emphasize di-

3 See generally Thomas G. Krattenmaker and Lucas A. Powe, Jr., REGULATING BROADCAST PROGRAMMING (1994) (discussing the early history of radio); Id. at pp. 5-32 [hereinafter Krattenmaker & Powe].
4 See FCC Chairman William E. Kennard, Address at the National Association of Broadcasters Radio Convention (October 16, 1998) [hereinafter Kennard Address at NAB Convention].
6 See generally Mike Harrington, A-B-C, See You Real Soon: Broadcast Media Mergers And Ensuring A "Diversity Of Voices," 38 B.C.L. REV. 497, 538 (1997) (noting that any attempt to ensure a diversity of voices should not be in the form of more regulation, instead, Congress must emphasize the importance it places on the broadcast industry maintaining a marketplace of ideas).
7 See Jill Howard, Congress Errs in Deregulation Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diver-
versity of ownership of radio stations as part of its' congressional mandate to regulate radio in the public interest.\(^10\) Despite this mandate, the 1996 Act has allowed the FCC to downplay its duty to serve the public interest in local broadcasting. The principle of diversity of ownership in broadcast media has slipped in the rush to deregulate the industry in the name of competition. The increasing centralization of ownership of radio stations has had two detrimental effects: less localism and diminished diversity.

The concentration of ownership has decreased the number of locally owned radio stations,\(^11\) thereby limiting the number of diverse outlets.\(^12\) Deregulation has not only had the effect of concentration of ownership, it-curiously has also had

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\(^11\) See In re 1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry, 13 FCC Rcd. 11276, paras. 18-19 (1998) (documenting an increase in the number of radio stations from 10,222 to 10,475, a total of 2.5% increase). The rapid mergers of some of the top radio station owners has resulted in a decrease in the number of owners of commercial radio stations by 11.7%, from 5,105 to 4,507. See id. The Commission also noted a downward trend in the number of local radio stations in small Metro markets from 12 to 11, totaling approximately a decrease of one owner per market. See id. In addition, the smallest radio Metro markets (markets 101-265), have declined from 9 to 8 owners. See id.

\(^12\) See id. at para. 6 (stating that diversity is divided into three sections: viewpoint, outlet and source). Viewpoint diversity includes material presented by the media that covers a wide array of diverse and antagonistic opinions and interpretations. See id. Outlet diversity represents numerous delivery services such as newspapers and the Internet, which prepare and present programs directly to national and local audiences. See id. Lastly, source diversity includes the promotion of a variety of management, such as producers and owners. See id.

\(^13\) See Jim Cullen, Pirate Radio Fights for Free Speech, The Progressive Populist (April 1998) (defining radio pirates as unlicensed broadcasters that include community talk shows, city council meetings and militia rants) [hereinafter Cullen].

\(^14\) See, e.g., Alexander Cockburn and Jeffrey St. Clair, Theirs To Steal, Ours To Win, Battle For The Soundwaves, Counterpunch Vol. 6, No. 6 (Mar. 16-31, 1999) (claiming that 99.99 percent of the public does not have access to the public airwaves as a result of the 1996 Act). In addition, radio pirates have emerged in resistance to the corporate mergers that have occurred at high rates. See id. See also Cullen supra note 15.

\(^15\) See supra note 5 at A1 (noting that since the passage of the 1996 Act, more than a quarter of the country's 10,000 radio stations have acquired new owners).


\(^17\) See Low Power Radio Service NPRM supra note 16 at paras. 22-33 (proposing a 1000-Watt primary service, subject to the majority of the service rules. It would operate at a maximum radius of 1000 watts). The 100-watt class would be designed to provide affordable service to communities of moderate size. See id. at para. 30. The LP100 service would allow stations to operate at a maximum of 100 watts and 30 meters (98 feet). See id at 30.

\(^18\) See Cullen, supra note 13 (explaining that the word "microradio," meaning micro-power broadcasting, was coined by Mbanas Kantako of the Black Liberation Radio in Springfield, Illinois).

\(^19\) See Low Power Radio Service NPRM supra note 16, at paras. 10-14. The 1-10 watt secondary "microradio" service would permit an individual or small number of people with limited financial resources to provide service to a very small community. See id. at para. 34. The Commission received over 13,000 inquiries in 1998 from various private organizations, who were interested in starting a new low power radio station ("LPFM"). See id at para 11. The Commission notes that the level of interest in creating a new LPFM indicates the need for a microradio service that would establish an outlet for new voices and serve the needs of small communities. See id. at paras. 10-14.
sult of the 1996 Act. Part III of this Comment discusses the need for a low power radio service in light of the Commission’s Notice of Proposed Rulemaking. Part IV analyzes the need for the Commission to return to its original mandate of promoting diversity of ownership and localism. Finally, Part V concludes that the creation of a low power radio service would serve the needs of small communities and provide clear-cut opportunities for minorities to secure ownership in the radio industry.

II. THE DEVELOPMENT OF RADIO REGULATION

A. An Explosion of Interest: The Radio Act of 1927

Guglielmo Marconi20 introduced radio to the western world in 1895.21 Radio did not become a phenomenon of widespread interest, however, until 1912 when hundreds of pioneers began broadcasting in America.22 The surge of interest in radio prompted Congress to pass the Radio Act of 1912,23 requiring all broadcasters to obtain a license.24 It was under the Radio Act of 1912 that noncommercial radio25 developed, and by the 1920s, noncommercial radio stations had surpassed the number of commercial stations by a ratio of at least two-to-one.26

Shortly thereafter, the explosion of interest in noncommercial stations in particular, prompted Congress to pass the Radio Act of 1927,27 thereby creating the Federal Radio Commission (“FRC”), the precursor of today’s FCC. The purpose of the FRC was to allocate frequencies among applicants in consideration of the “the public interest, convenience, and necessity.”28

The FRC provided noncommercial stations less radio time than commercial stations and also limited broadcast radio licenses to three-month terms.29 Between 1927 and 1934, noncommercial radio nearly disappeared, averaging merely 2 percent of all airtime by 1934.30

B. Regulation for the Public Interest: The Federal Communications Act of 1934

1. The FCC’s New Mandate

The Communications Act of 1934,31 which established the FCC, charged the Commission with regulating all interstate radio and wire communications and the issuance of licenses to broadcasters who promised to serve the public interest.32 The basis of the FCC’s authority lies in its man-

20 Guglielmo Marconi was the founder of the Marconi Company. He created the “wireless telegraph”, to transmit and receive messages from the airwaves. See Krattenmaker & Powe, supra note 3, at 5-6 (1995).
21 See Ruggiero supra note 1, at 25 (by 1907, people became interested in technology generally, and by 1912, many pioneers began to establish their own broadcast facilities).
22 See id.
23 See Krattenmaker & Powe, supra note 3, at 6 (stating that by 1912, ship-to-shore communication encountered significant interference, thereby prompting the Navy to demand regulation of the airwaves).
24 See id. (noting that the United States were signatories to the first international radio treaty negotiated in 1912, and as such was obligated to conform to treaty regulations to further wireless conformity and compatibility). See id. In response to these developments, Congress passed the Radio Act of 1912 which required broadcasters to obtain licenses and forbade the operation of radio equipment without a license, but did not set aside frequencies for private broadcast. See id.
25 See id. at 6 (explaining that under the Radio Act of 1912, the government was authorized to determine which communications were more important than others). See id. The government developed several “categories” of broadcasting including a commercial for profit category for which there was a direct charge imposed on the user, and a non-commercial category. See id. at 8. The noncommercial category was designed primarily for amateurs and was for not-for-profit purposes. See id.
26 See Ruggiero supra, note 1, at 25.
28 It was the Radio Act of 1927 that first introduced the phrase “public interest” to the broadcast industry. See Krasnow, supra note 10, at 610. There is no explanation of the origins of the phrase “public interest” in the legislative history of the 1927 act. See id. However, it was reported that a young attorney, detailed to the Senate from the Interstate Commerce Commission (“ICC”), suggested to the drafters of the Radio Act the words “public interest, convenience and necessity”, the standard used by the ICC. See id. The legislative history of this phrase has been the focus of immense scholarly debate in the field of broadcasting. See id. For a broad discussion of FCC and court rulings stemming from the public interest standard, see generally, Krattenmaker & Powe, supra note 3, at 143-74.
29 See Ruggiero supra note 1 at 25.
30 See id. at 26.
32 Section 151 of the Communications Act states in part: “For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States...nationwide, and world-wide wire and radio communication service with adequate facilities...” 47 U.S.C. § 151 (1994 & Supp. II 1997).
date to provide for the "public convenience, interest, or necessity." The passage of the Communications Act of 1934 thus provided the Commission with a sweeping grant of regulatory authority. The public interest standard is a vague mandate, long recognized by the courts as the basis for the theory that diversification of mass media ownership serves the public interest because it promotes the diversity of programs and viewpoints. The foundation of the Commission's authority as a public trustee therefore, lies in its mandate to provide for the "public convenience, interest, or necessity." Acting on this mandate, the Commission consistently maintained that diversification of mass media ownership serves the public interest by promoting diversity of programming and viewpoints. Indeed, such broad exposure to ideas is essential to the maintenance of a vibrant democracy.

By 1940, the Commission launched its broadcast ownership control efforts by prohibiting a licensee in the same broadcast service from obtaining additional licenses in the same market. The first quantifiable limit placed a cap on the number of FM radio outlets under national common ownership to six stations. The Supreme Court's conclusion in Associated Press v. U.S., that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," influenced the Commission, in 1946, to create a de facto limit of up to seven nationally owned AM and FM radio stations. The amended multiple-ownership rules were called upon to serve two objectives: (1) to foster maximum competition in broadcasting; and (2) to promote diversification of programming sources and viewpoints.

C. Promoting Competition & Diversity

"If our democratic society is to function, nothing can be more important than ensuring that there is a free flow of information from as many divergent sources as possible." Although the "rule of seven" remained the status quo for more than three decades, by 1984, the FCC took a turn towards total deregulation. The FCC was convinced that the goals of diversity and competition could no longer be recognized through ownership caps, and in 1990 ordered a complete repeal of its national ownership ceilings. The Commission decided that the public interest was better served by repealing the seven station rule.

In response to the industry's frustration to the FCC's deregulation efforts, the Commission decided that the proposed abandonment of the ownership caps was not necessary to achieve its goals. Instead, the Commission ruled that a single entity was permitted to own up to twelve AM and twelve FM stations nationally.

The Commission's strict policies against duopo-
lies\textsuperscript{50} gave way to economic considerations resulting in a relaxation of the national radio caps.\textsuperscript{51} Specifically, the rapid growth in the number of radio stations and non-radio outlets increased competition in the radio industry, thereby causing financial difficulties for certain broadcasters.\textsuperscript{52} By 1992, the FCC adopted a new duopoly rule, to allow broadcasters to have the potential to develop and thrive in a competitive environment, thus encouraging ownership diversity and competition.\textsuperscript{53}

In 1994, noting the increase in competition provided by a multitude of non-radio sources, the FCC increased the national radio ownership caps to twenty AM and twenty FM stations.\textsuperscript{54}

III. FREE AT LAST, FREE AT LAST?
DEREGULATION OF OWNERSHIP
RESTRICTIONS IN THE INTEREST OF
COMPETITION RESULT IN AN
INCREASE IN THE CONCENTRATION
OF OWNERSHIP

A. Ownership Limits After The 1996 Act

The 1996 Act struck an unintended blow to local broadcast diversity. The Act commanded the Commission to eradicate all ownership limitations on the number of radio stations any one party may own on the national level.\textsuperscript{55} Congress reasoned that such a drastic measure was not short sighted because the goals of radio ownership regulation had been achieved.\textsuperscript{56} In concluding that the radio industry had achieved adequate levels of competition and diversity, Congress cited the existence of 11,000 radio stations nationwide, with an average of twenty-five radio stations in each market.\textsuperscript{57} However, Congress failed to sufficiently consider the impact this measure would have on minority and local ownership.

B. Local Restrictions on Ownership

In addition to the removal of national ownership caps in radio, Congress altered ownership restrictions at the local level. In particular, Section 202(b) of the 1996 Act\textsuperscript{58} now permits common ownership of radio stations as follows: (1) a party may own, operate, or control up to eight commercial radio stations, not to exceed five in the same service (AM or FM) in radio markets with forty-five or more commercial radio stations; (2) an owner may own, operate, or control up to seven commercial radio stations, not to exceed four in the same service, if the party is in a market of between thirty and forty-four commercial radio stations; (3) in markets between fifteen and twenty-nine commercial radio stations a party may own, operate, or control up to six commercial radio stations, not exceeding four in the same service; and (4) in markets with less than fourteen commercial radio stations, a party may own, operate, or control at the most five such stations, not to exceed three of which are in the same service, with the exception that a party may not own, operate, or control more than fifty percent of the stations in

\textsuperscript{50} See 1970 First Report and Order, supra note 42, at 5. (stating that the Commission's duopoly rules were designed early in the 1970's for the purpose of restricting concentration of broadcast media control, and were structured to proscribe common ownership, operation, or control of more than one broadcast station in the same area, regardless of the type of broadcast service). See id.

\textsuperscript{51} See 1992 Report and Order supra, note 51, at para. 23 (modifying the Commission's ownership rules by relaxing its cap from 12 AM and FM stations to 30 AM and FM stations and limiting a single owner to one-half of one percent of the total number of licensed stations).

\textsuperscript{52} See id. at para 2.

\textsuperscript{53} See In Re Revision of Radio Rules and Policies, Notice of Proposed Rule Making, 6 FCC Rcd. 3275, para. 3 (1991) (explaining that it was necessary to balance diversity with the need to foster economic growth in order to provide vigorous competition).

\textsuperscript{54} In re Revision of Radio Rules, Second Memorandum and Opinion Order, 9 FCC Rcd. 7185, para. 1 (1994) (minority owners were permitted to own up to 25 stations in each service. See id. at para. 5. Further, non-minority broadcasters could exceed the national limits by up to five, but only if such excess were non-controlling interests in minority or small business controlled AM or FM stations. See id.

\textsuperscript{55} See The 1996 Act, 47 U.S.C. § 151 et seq.

\textsuperscript{56} See 1984 Report and Order, supra note 45 at 61. The Commission concluded in 1984 that group owners do not impose monolithic viewpoints on local media outlet, and further that the public has available to it an abundance of other media outlets including over 10,000 broadcast stations, and 12,000 newspapers and periodicals, thereby offsetting any threats concentrated ownership may have on encouraging diversity of voices and the "public interest" mandate. See id.

\textsuperscript{57} See Jill Howard, Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violations of Equal Protection, 5 Commlaw Conspectus 269, 275 (1997) (explaining that Congress justified the deregulation of the telecommunications industry by reaching a consensus that the broadcast environment indicates that limitations on broadcast ownership are not needed, and further that radio station owners need the deregulation so that they may be in a position to compete in the marketplace).

\textsuperscript{58} 202(b) of the 1996 Act requires the Commission to modify 47 C.F.R. 73.3555 to eliminate ownership limits. The Commission has done so. See 47 C.F.R. 73.3555(a)(1)(1).
C. Ownership Consolidation Begins

Congressional relaxation of ownership limits has resulted in less competition, and consequently, less diversity in the broadcasting marketplace. The effect of the 1996 Act is that the concept of the “public interest” is now secondary to other (i.e. corporate) interests. Congress’ attempt to promote competition has unfortunately triggered a destructive chain of events culminating in an increased concentration of ownership. For example, during the first month of the 1996 Act’s existence, over $2 billion in radio station sales were concluded; an unprecedented volume.

March and April of 1996 were an even stronger indication of the consolidation trend. Most notably, Infinity, the second largest radio group, merged with the even larger Westinghouse/CBS, creating the largest acquisition in radio history. The Westinghouse/CBS merger resulted in the combined company owning fifty FM stations and thirty-three AM stations throughout sixteen markets with sixty-nine of its eighty-three stations and thirty-three AM stations throughout sixteen markets with sixty-nine of its eighty-three stations.

The result has been a “squeeze out” of local, independently owned radio stations by large corporations. A new trend has emerged is the explosion of “radio pirates.” Radio pirates, seeking their own slice of the broadcast spectrum, have responded to the concentration of radio stations in the hands of large corporations by operating small unlicensed radio stations. Although the FCC has consistently enforced its policies and shut down pirate operations, this new trend suggests that local groups are fighting to gain control of their share of the public radio spectrum, however small. This pattern seems to indicate that many Americans are dissatisfied with the broadcast programming and media in its current form. Furthermore, it underscores the unforeseen desire of many small communities to maintain local control of the airwaves and have access to a wide variety of programming through a diversity of media outlets.

D. The Act’s Impact on Minority Ownership

Consolidation has made it increasingly difficult for small operators and proprietors to enter into the radio industry. Its impact has been most prominent on minority broadcasters. Less than three percent of radio stations are minority-owned, and that number is steadily declining. The trend in minority ownership is clearly counter to the industry as a whole. Minority owned broadcast outlets have rapidly become remote islands in an ocean of corporate broadcasters.

In 1994 and 1995, the percentage of minority ownership of broadcast stations was dramatically higher than it is today. The on-going merger mania has served only to create barriers for mi-

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59 See The 1996 Act supra, note 56.
62 See Geraldine Fabrikant, CBS Accepts Bid By Westinghouse; $5.4 Billion Deal, N.Y. TIMES, Aug. 2, 1996, at A1 (stating that the deal would create 15 television stations and 39 radio stations, allowing direct access to over one third of the nation’s households). See id. See also Albert R. Kerr, Westinghouse Corp.; CBS Purchase Completed in $5.4 Billion Agreement, WALL ST. J., Nov. 27, 1996, at B3.
64 See Chuck Taylor, Westinghouse, Infinity Merger Fuels Consolidation Concerns, BILLBOARD, Jul. 6, 1996.
65 See id.
66 See Cullen, supra note 13.
67 See Ruggiero, supra note 1, at 27.
69 See id. Between 1993 and 1995, the broadcast industry acquired 508 new stations. See id. However, during this same period, minorities gained only 15 new stations. See id.
70 See id.
Minorities struggling to compete in the broadcast industry. Minority broadcasters, generally with limited capital and resources, are finding it increasingly difficult to compete in a rapidly consolidating industry, where, for example, large conglomerates, such as CBS and Chancellor Media, have increased their holdings, causing station prices to increase substantially. In a recent study conducted by the National Telecommunications and Information Administration, minority owners attributed the lack of sufficient access to capital as the primary deterrent to increased minority ownership. Because of this, potential minority broadcasters are effectively prevented from serving their communities. The benefits of local perspectives and minority viewpoints on important issues are lost to the media conglomerates. The consolidation of ownership resulting from the 1996 Act has produced a decline in diversity of ownership and localism, thus threatening the ideals of a society enriched by disparate voices.

IV. THE PENDULUM OF CHANGE: TIME TO SWING BACK TO DIVERSITY OF OWNERSHIP & LOCALISM

A. The FCC’s NPRM on the Creation of Low Power Radio Service

1. Is Low Power Broadcasting the Solution?

In response to over 13,000 inquiries in the past year from individuals and groups expressing an interest in starting a low power radio station, the FCC, on February 3, 1999, issued a Notice of Proposed Rule Making, [hereinafter Low Power Radio Service NPRM] seeking comment on the creation of a low power radio service. The Commission indicated that some of its major goals in creating low power radio stations would include: (1) providing new opportunities for community-oriented radio broadcasting; and, (2) establishing more avenues for new radio broadcast ownership in an effort to promote additional diversity in radio voices and programming, without jeopardizing the integrity of the spectrum. The Commission further asserted the need to create a low power radio service that would provide a low-cost means of serving urban communities and neighborhoods.

The Low Power Radio Service NPRM proposed new services designed to meet a variety of local needs and capabilities, from broad community based coverage to smaller neighborhood areas. Specifically, the Commission’s proposal includes a service with primary frequency usage status to operate at a maximum effective radiated power (“ERP”) of 1000 watts and an antenna height of 60 meters, thus covering a service area of approximately 8.8 mile radius. It also proposed a secondary service to operate at up to 100 watts and 30 meters, with a service radius of up to 3.5 miles. Additionally, the Commission sought comment on whether these microradio stations should be limited to noncommercial entities and whether educational institutions are the best potential low power FM licensees.

The FCC’s efforts to establish and seek comments concerning the creation of a low power radio service, serves as some indication that it is mindful of the dramatic impact the 1996 Act has had on the radio industry. The fact that the Act does not have a clear foundation for widespread ownership in the industry, as evidenced by the alarming number of mergers, is indicative of the need for the Commission to reassess its current broadcast regulations. Furthermore, the creation

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71 See id. Since the enactment of the 1996 Act, minority owners reportedly have experienced heightened competition for nationally syndicated programming and have further noted more difficulty in securing advertisers. See id. In addition, minority owners noted that their businesses were negatively affected by media concentration since the passage of the 1996 Act; therefore, larger, majority owned companies have greater market power, giving group owners even greater control and power over advertising revenues and programming. See id.

72 See id.

73 See id. at para 1.

74 See Low Power Radio Service NPRM, supra note 16.

75 See id. at para 1.

76 See id.

77 See id.

78 See id. at paras. 23-24.

79 See id. at paras. 30-32.

80 See Low Power Radio Service NPRM, at paras. 34-37.

81 See id. at paras. 68-70.

82 See Kennard Address at NAB, supra note 4; See also Tristani Address before TBA, supra note 7 (expressing concern by the Chairman and the Commissioner, respectively, over the rapid number of mergers since the passage of the 1996 Act, and its negative impact on minority ownership and diversity of voices).

83 See supra notes 61-69 and accompanying text.
of a low power radio service would certainly be consistent with the spirit of the Communications Act of 1934 and the legislature's intent to promote the public interest and to maintain the FCC's duty to promote diversity of media voices.

B. Diversity of Ownership Equals a Diversity of Voices: The Need for LPFM Service

The plethora of media outlets that are available to the public today, exclusive of radio, provides a marketplace of ideas, of sorts. However, these multifarious outlets do not serve as a substitute for the need of radio to be a diverse outlet for the public discourse, particularly on the local level.

The establishment of a microstation radio broadcasting service would not only provide additional outlets of broadcast information, services, and entertainment, but it would also serve to promote diversity of ownership in the media. Ownership diversity will be achieved by establishing three disincentives to corporate control. Microstations would be limited to one per owner. The licensee would have to ensure that the service would be local and the licensee would have to maintain local programming. The creation of a new low power FM broadcast service would facilitate the needs of small cities or neighborhoods urban areas and would generate sufficient revenue to operate as niche facilities. In addition, the creation of microradio stations would provide much needed opportunities for individual citizens and small community groups to operate low power radio stations, thereby allowing for direct citizen involvement in broadcasting.85

Low power radio service would solve the radio piracy problem that has grown as a result of consolidation.86 Radio pirates, or "micro-broadcasters," would no longer feel squeezed out of the market place. An affordable low power service would provide radio pirates a low-cost avenue in which they would not have to compete with incumbent broadcasters for the opportunity to serve their communities.87 The creation of a LPFM service would substitute a legal means for unlicensed micro-broadcasters to participate in the airwaves.

Lastly, microradio stations would cause a significant increase in minority ownership by significantly lowering the barriers to entry into the radio industry. The ranks of minority broadcasters would increase because of the existence of more affordable opportunities for ownership and a larger pool of potential radio facilities available for licensing.88

C. The FCC Still Has a Mandate Under the 1934 & 1996 Acts to Promote Diversity of Media

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, continues to support a public policy of promoting diversity in the media through its broad mandate to regulate in the public interest convenience and necessity. Although the Communications Act of 1934 does not specifically identify diversity as a

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84 See In Re Proposal for Creation of Low Power FM Broadcast Service, Petition for Rulemaking, (Submitted by J. Rodger Skinner, Jr.) RM-9242 (Feb. 20, 1998) (proposing the creation of three classes of LPFM service: a "primary service" class, a "secondary service" station as well as "special events" stations) [hereinafter Skinner Petition]. See id. at para. 7. Under the Skinner Petition, the primary service would have effective radiate power levels from at least 50 watts and a maximum power level of 3 kilowatts, with a minimum antenna height of 328 feet (100 meters). See id. at para. 23. The "secondary service" would be for those owners that prefer to conform to a more structured form of broadcasting; the requirements would include a minimum power of 1 watt and maximum power of 50 watts with maximum antenna height of 328 feet (100 meters). See id. at para. 25. Finally, the "special event" stations would be available for those interested in broadcasting information about local events that occur over a period of time not to exceed ten days. See id. at para. 27. These LPFM "special event" stations would have a maximum power limit of 20 watts and a maximum antenna height of 100 feet. See id.

85 See Petition for a Microstation Radio Broadcasting Service, (submitted by Nickolaus Leggett et. al.) RM-9208 (July 17, 1997) (proposing the assignment of one AM broadcast and one FM broadcast channel to microstation owners) [hereinafter Leggett Petition]. Under the plan in the Leggett Petition, each owner would be assigned to a specific geographic location or cell, thereby preventing any interference between the microstations. See id. For purposes of promoting diversity, a licensee, would only be able to purchase stations located no more than 50 miles from each other. See id. at para. 1.4.

86 See supra notes 68-69 and accompanying text.

87 See Alexander Cockburn and Jeffrey St. Clair, Theirs To Steal, Ours To Win: Battle For The Soundwaves, COUNTERPUNCH, Vol. 6 No.6, 6 (March 16-31, 1999). For a brief discussion on the technical advantages and disadvantages of LPFM, see generally Carl Marcucci, Examining LPFM: the technical pros and cons, ENGINEERED FOR PROFIT, at 7 (March 15, 1999).

88 See The Skinner Petition, supra note 86, at para. 12 (suggesting that by placing media ownership restrictions on applicants, i.e. the entity or individual must prove residence within 50-miles of the proposed station's antenna site, only local owners will be able to compete for licenses, thus lowering economic barrier entries, and assuring significant minority ownership).
goal of the Act, sections 151, 303 and 309 indicate strong Congressional intent for the maintenance of diversity by the Commission.

The stated purpose of the Act is detailed in Section 151. It is in this section that Congress has given the Commission the authority to enforce the provisions of the Act, which, when taken together with the previously noted sections, is indicative of the FCC’s right to maintain and advance the principles of diversity in broadcasting.

In the same vein, Section 309 directs the Commission to grant applications with the public interest in mind. This section describes generally the process for obtaining a broadcast license. It emphasizes that, in granting licenses, the Commission should do so in a manner that will promote diversity in media communications. In terms of promoting diversity in the broadcast industry, this section of the Communications Act is the most significant to the Commission’s efforts to ensure diversity in the airwaves. At the very least, this section gives the FCC leeway to develop rules that will grant preferences to applicants where the granting of those licenses would result in an increase in diversification of media ownership.

A low power FM service would promote diversity of ownership, particularly on the local end. It would ensure that small communities and individual owners receive their fair share of the market, while promoting the FCC’s interest in the diversification of the radio industry.

Despite deregulation of broadcasting by the 1996 Act, the Commission has not completely abandoned the maintenance of diversity of media voices. For example, section 257(a) directs the FCC to conduct proceedings for the purpose of identifying and eliminating market entry barriers. This section is specifically aimed at entrepreneurs, minorities and other small business owners who may otherwise experience difficulties in entering the broadcast field. Congress mandated these proceedings to assist the Commission in its efforts to promote the goals of the 1996 Act.

The FCC continues to have a statutory mandate to promote and maintain diverse viewpoints in broadcasting. The creation of low power radio stations clearly would be consistent with the Commission’s mandate to encourage diversity. Because a LPFM service can be created to serve small communities, be locally owned, and air local programming, it would naturally result in diverse viewpoints and diversity in ownership. In addition, it would provide desperately needed outlets for individuals and small organizations to participate in the industry without encumbering full power radio stations, and without spectrum interference problems.

Incumbent broadcasters wishing to preserve the status quo have argued that the existing radio stations are already serving the myriad of needs and interests of local communities. They contend that the public is better served when radio stations are consolidated because broadcasters can combine AM and FM stations operations in one facility, and the accompanying cost savings will allow

See id. at § 257(b) (1994 & Supp. II 1997).

See Low Power Radio Service NPRM supra note 16, at para. 15-21 (proposing minimum distance separation between LPFM stations as the best practical means of preventing interference between low power radio and full power FM stations). It would require co-channel (or same channel) and 1st adjacent channel protections, but the Commission did not believe that 3rd adjacent channel and possibly 2nd adjacent channel protection would not be necessary in view of the low power levels and other factors. See id.

See, e.g., Low Power Radio Service NPRM supra note 17, at para. 9. See also Elizabeth A. Rathburn, A Crusader Against Microradio, BROADCASTING AND CABLE, March 15, 1999 at 85 (explaining that large broadcasters believe that microradio is not the best path to increasing diversity in the industry). Rather, large broadcasters believe that mergers allow the radio business to be much more efficient) See id.
more varied programming from the station group than one independent station could offer to the community.\textsuperscript{103} What these arguments fail to recognize is that there is a need for individual and small group ownership in the industry. Diversity does not necessarily emerge from creating stations that provide various “formats” to the community. On the contrary, diversity results from decentralized ownership and diverse local programming addressed to the specific needs of a small community. The incumbent broadcasters have not recognized the benefits of low power stations that will cater to the narrow and specific interests of small communities and neighborhoods.

Further, the argument that microradio will harm full power broadcasters has long been discounted.\textsuperscript{104} Indeed, the FCC has repeatedly rejected the contention that the radio frequency spectrum should be artificially underutilized to protect incumbent users.\textsuperscript{105} Despite fears of major broadcasters,\textsuperscript{106} there are proposed technical solutions that could resolve the interference concerns.\textsuperscript{107} The ability to create ownership diversity in radio outweighs any minimal amount of interference that might result from the creation of a low power radio service. The benefits of a low power service, such as promoting local expression and diverse outlets for small niche markets, far transcend any potential burdens on large broadcasters. Microradio has the potential to spawn diversity of ownership in media, which could spark a rebirth of local radio through the divergence of viewpoints on the air.

D. The 1st Amendment Mandates Diversity of Viewpoints and Ownership

The judiciary has a similar desire to support the promotion and maintenance of diversity of voices in broadcasting. In 1945, the Supreme Court held in \textit{Associated Press v. United States}\textsuperscript{108} that a district court correctly granted summary judgment to enjoin members of a press association from acting in restraint of trade.\textsuperscript{109} The Supreme Court upheld the district court’s finding that the bylaws of the Associated Press constituted a restraint on trade because they stifled competition in the newspaper publishing industry.\textsuperscript{110} The Court found that the First Amendment called for the “widest possible dissemination of information from diverse and antagonistic sources.”\textsuperscript{111}

In \textit{Red Lion v. FCC},\textsuperscript{112} the Court also emphasized the goals of the First Amendment and the protection of the distribution of ideas.\textsuperscript{113} Specifically, the Court declared that, “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”\textsuperscript{114}

The Court asserted that no licensee has a First Amendment right to a broadcast license, nor the right to monopolize a frequency to the exclusion of other licensees.\textsuperscript{115} By stating that, “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, rather than to countenance monopolization of that market,”\textsuperscript{116} the Supreme Court implied that the First Amendment requires the maintenance and promotion of diversity in broadcasting.\textsuperscript{117}

In 1990, the Supreme Court again articulated a public policy of maintaining diversity in broadcast

\textsuperscript{103} See id. at 85.
\textsuperscript{105} See, e.g., \textit{In re Commercial FM Broadcast Assignments}, 94 F.C.C. 2d 152, 158 (1983) (noting that a “basic objective” of the Commission has been to provide “outlets for local expression addressing each community’s needs and interests”). See also Television Channel Allotments (VHF Drop-ins) Notice of Proposed Rulemaking, 45 Fed. Reg. 72902 (1980) at paras. 9 & 12, (explaining that “any potential loss experienced [by incumbents] will be more than offset by the benefits of such a policy, it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable”).
\textsuperscript{107} See \textit{Skinner Petition}, supra note 86, at paras. 28-35.
\textsuperscript{108} 326 U.S. 1 (1945).
\textsuperscript{109} Id. at 5.
\textsuperscript{110} Id. at 11-12.
\textsuperscript{111} Id. at 20.
\textsuperscript{112} 395 U.S. 367 (1969).
\textsuperscript{113} Id. at 390-92.
\textsuperscript{114} See \textit{Red Lion}, 395 U.S. at 389.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 390.
\textsuperscript{117} In \textit{Red Lion}, the petitioner, Fred Cook, sought free airtime to counter-attack an opponent. Id. at 371-2. The FCC and the United States Court of Appeals for the District of Columbia, both agreed that Cook was entitled to the free air-
ownership. In *Metro Broadcasting, Inc., v. FCC*, the Court held that the FCC’s policies in favor of promoting minority interests were a valid means of exercising the FCC’s authority. In *Metro Broadcasting*, the Court reasoned that the policies promoting program diversity were an important governmental goal that could stand up to constitutional challenges. The court noted that safeguarding the public’s right to receive diverse radio programming has always been an integral component of the FCC’s mission under the Communications Act of 1934.

Five years later, the Supreme Court essentially overruled its analysis in *Metro*. In *Adarand Constructors, Inc., v. Pena*, the Supreme Court concluded that all minority preferences, including those involving “benign classification,” must be analyzed under a “strict scrutiny” standard. In *Adarand*, the Supreme Court reviewed a minority preference program under the auspices of the Small Business Administration (“SBA”). *Adarand* involved a minority contractor certified by the SBA as meeting specific racial and economic factors that qualified them for special preferences. Adarand Constructors, a non-minority owned business, lost a U.S. Department of Transportation bid to construct a highway project, despite qualifying for the work and submitting the lowest bid. The Supreme Court concluded under the new test that all race-conscious measures must be narrowly tailored to meet a compelling governmental interest.

Three years later, in *Lutheran Church v. FCC* the United States Court of Appeals for the District of Columbia Circuit applied the Supreme Court’s *Adarand*-based “strict scrutiny” test to strike down the FCC’s EEO program for licensing radio and television stations. In this case, the Lutheran Church Missouri Synod appealed the FCC’s finding that it had violated the EEO regulations through the use of the Church’s religious hiring preferences and as well as for its inadequate minority recruiting. The court reasoned that the FCC’s EEO regulations were not narrowly tailored and did not meet a compelling governmental interest.

Although the Court in *Adarand* and *Lutheran Church* has backed away from public policy arguments for promoting diversity in the broadcast industry, nothing in the holdings of these cases precludes the FCC from promoting diversity of ownership. Indeed, although both cases overturned the analysis that the Court first upheld in *Metro Broadcasting*, that diversity could serve as a constitutional compelling governmental interest, by no means should the FCC abandon its efforts to ensure diverse viewpoints and the economic opportunity of minorities and small groups. There is still room for the FCC to operate.

The Court in *Adarand*, for example, overturned *Metro Broadcasting* only “to the extent it is inconsistent with [its] holding.” In other words, if the Court in *Metro Broadcasting* had applied a strict scrutiny standard, the Commission’s minority preference policies would still be good law. From this point, it should be noted that although the Court in *Metro Broadcasting* did not expand the issue of diversity, the Court did comment that “at the very least,” diversity of viewpoint is an important governmental interest. The Commission is therefore not averse to promoting diversity of ownership alone as a compelling government interest. In addition, ownership diversity promotes the strong government interest of remedying past discrimination in the broadcast industry. Furthermore, the Court in *Lutheran Church* limited its holding to employment practices, not ownership. Therefore, although diversity of content, according to the Court, is not a compelling interest, di-

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119 Id. at 552.
120 Id. at 554-55.
121 Id. at 565.
123 Id. at 227.
124 Id. at 205.
125 Id. at 204.
126 Id. at 235.
128 Id. at 556.
129 Id. at 354.
130 *Adarand*, 515 U.S. at 258.
131 Id. at 227.
132 See *Metro Broadcasting*, 497 U.S. 547, 567-68 (stating that, “the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission’s minority ownership policies”).
university of ownership could very well be a compelling interest for the government to promote.

A low power radio service would provide the FCC with the opportunity to remedy past discrimination in broadcast ownership, while promoting diversity of viewpoints on the airwaves. A LPFM service is a means to provide a much needed outlet for local expression and opportunities for small groups and minorities to enter the radio industry and be heard.

These major Court decisions do not foreclose the FCC from promoting policies favoring program diversity. Indeed, the FCC is still empowered to promote diversity in the broadcast industry and has a compelling interest in doing so through the creation of a low power radio service.

E. Localism: The Bedrock of the Broadcast System

The principle of localism has helped to guide the Commission in promulgating regulations for many years. Indeed, the FCC's predominant, although not exclusive method for shaping content and viewpoint diversity through broadcast licensing was its localism policy. As far back as 1955, the Court recognized that the "distribution of a second license to a community in order to secure local competition for originating and broadcasting programs of local interest [fell] within the [Commission's] allowable area of discretion" to make "a fair, efficient, and equitable distribution of radio service" among different localities.

Broadcasting is a unique medium of communications to local neighborhoods. Localism, which stems from the licensee concept, has been a means by which the broadcast field has developed into a universal service designed to address the specific needs and concerns of local communities. With the consolidation of ownership resulting from the passage of the 1996 Act and its deregulation of ownership rules, the effect has been to squeeze out many local voices in the radio industry. Further, more consolidation means an increase in the number of absentee owners of broadcast stations. Absentee owners are less likely to know the community they serve, and thus are more likely to rely on stereotypes when making programming decisions. Accordingly, the "new barons of radio convert their stations from local presence's into cash cows for instant milking, their values ballooned for trading to the next buyer." Thus the consolidation process, which has resulted in decreased localism, is a consequence that is difficult even for large group owners to challenge, particularly when they admit outright that, "[i]t's commodity trading to us. We don't know [our] community. We're short term players."

The demise of localism through the consolidation crunch threatens the expression of local voices and makes it unbearably difficult for small groups and individual owners to survive in the industry. The creation of a low power radio service could clearly revive the nearly dead spirit of localism by creating expressive opportunities and reducing market entry barriers.

V. CONCLUSION

In a democracy, the people must have access to diverse opinions about public affairs and information that directly affect their communities and families. Concentration of ownership in the hands of a few jeopardizes the entire concept of a diverse and informative media that lies at the foundation of a healthy democracy.

The FCC's Low Power Radio Service NPRM is a means to offset the negative effects of the 1996 Act on local ownership and diversity in the radio industry. Additionally, the elimination of the

139 Id. at 362.
139 See supra note 7.
141 Id.
Commission's EEO regulations through past court decisions is even more reason to rectify the status of minorities in the media through the use of LPFM service. Microradio will enable the FCC to realize the ideals of a media operating in the public interest through the reemergence of local ownership and the rich diversity of programming that can flow from a media in the hands of the many.