Viewpoint Diversity:

A Common Sense Guide

WASHINGTECH

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Founded in 2014, the ***Washington Center for Technology Policy Inclusion*** *is a 501(c)(3) nonpartisan, nonprofit organization whose mission is to foster an inclusive dialogue in media and technology policymaking.*

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EXECUTIVE SUMMARY

None of us has to go very far to start looking for any piece of information ever created. We do not even have to get out of bed. Presuming one has adequate access to the internet, all one needs is a web browser.

But, even in a democracy, this freedom has limits. Between the decision to locate information, and finally obtaining it, public and private policies play immense roles in the ultimate conclusions we draw from what we discover.

This is especially true when we have political questions:

We encounter answers based, first, on the kind of information a government decides a society may consume. Chinese officials expressly limit dissent. In the United States, rule number one is literally free expression.

But in both countries, force, imposed with violence, legislation, and property investments, has always determined the political impact of dissenting viewpoints. In China, one example was Tiananmen Square.

In America, among other unspeakable acts, violent mobs burned down abolitionist and minority-owned newspapers, enabling other newspaper owners to acquire great wealth, reinvesting it to keep up with technology, and, the entire time, using their outlets to engender sympathy within the electorate. Voters elect lawmakers who play defense, with clever legislation, appointing Federal Communications Commissioners, who take all of the speech they allow and effectively divide it into separate envelopes labeled "*Entities*," "*Eligible Entities???,*" and "*Individuals*."

Were it not for the Commission enacting foreign media ownership rules affording more speech protection to white immigrants with existing wealth, than to Americans trying to build it, Rupert Murdoch would have no empire here. According to Nielsen, during a recent week, Fox News, the flagship outlet of the colossus Murdoch founded, News Corporation, occupied 7 of the top ten programs on cable network channels. All 7 featured the viewpoints of two people: Sean Hannity and Tucker Carlson.[2]

Benjamin Franklin, owner and publisher of the Philadelphia Gazette, would be astonished. Franklin experienced censorship firsthand when the postmaster, publisher of a competing newspaper, banned the Gazette from delivery. Franklin inherited this power when the British Crown appointed him as joint postmaster general in America. However, of Franklin's first actions, as he developed what ultimately became the United States Postal Service, was to abolish this practice. He sacrificed one of his key powers to foster free expression without regulators getting in the way.[3]

Joseph Siffred Duplessis, Benjamin Franklin, 17 Jan 1706 -17 April 1790 in NAT'L PORTRAIT GALLERY, SMITHSONIAN INSTITUTION; gift of the Morris and Gwendolyn Cafritz Foundation, https://npg.si.edu/object/npg_NPG.87.43 (last visited Dec 10, 2020).

Today, we enjoy access to more media outlets from which to choose distributing more content than we have time for. Each participates in one of several markets: radio, television, digital, film, and others. Collectively, these markets comprise our media ecosystem. The ecosystem is a marketplace of ideas in which a finite, although numerous, number of platforms distributing a finite number of viewpoints. Individuals express them — not revenue. But, as this paper will show, **Americans have regulated no speech more heavily than the viewpoints of minorities and women.**

"We permit free expression because we need the resources of the whole group to get us the ideas we need." - Louis Menand

HISTORICAL CONTEXT

The Commission makes an ostensibly anodyne, yet completely unsubstantiated, assertion that the record does not contain sufficient evidence showing broadcast station ownership by minorities and women leads to "viewpoint diversity."[4] But this defies common sense.

American history teems with government actors, media outlet managers, and media-incited mobs restricting, in gut-wrenching fashion, media outlets publishing counter narratives to prevailing attitudes about minorities, while advocating freedom of the press for themselves.[5] Each of these instances occurs when too many sympathetic whites advocate against the subjugation of minorities that white supremacist ideology requires, and; when there exists a proliferation, of minority-owned media outlets in a market, publishing diverse viewpoints, by minority contributors opposing America's race-conscious caste system,[6] precisely because the overwhelming majority of white-owned and operated outlets do not.[7]

The Commission further suggests that counting how many majority-minority owned stations exist in a market somehow undermines its "*touchstone*"[8] goal of viewpoint diversity. This sad conclusion reveals more about the absence of diverse viewpoints, to which many otherwise educated Commissioners have been exposed, than it does their declared disposition in favor free expression.

In fact, were it not for Juan González and Joseph Torres, both Latino-American men, their acclaimed book, i.e. their outlet, News for All the People, the Epic Story of Race in American Media — a catalogue of incidents establishing the frailty of the Commission's thesis — might otherwise been lost to history, along with their viewpoints.[9]

The Religious Values of Sympathetic Whites

Obviously, a majority minority or woman-owned media outlet can choose to publish whatever viewpoints it wants. But it was not until 1828 when Cherokee schoolteacher Elias Boudinot published the inaugural issue of the first Native American newspaper in history.[10]

So, during the colonial era, there were exactly zero Native American newspapers, much less any espousing the most widely-disseminated viewpoint — that they were inferior, sub-human, threatening, and violent cannibals inherently unworthy of property interests in North American land. Exclusively white-owned and staffed newspapers, with wide circulations in major cities, filled the void.

In their view, Native Americans were "*Barbarous Indians*," "*miserable savages*," and "*Sculking Indians*," who "*lurked about*," "*kidnapping white children*".[11] These newspapers further urged settlers to "*kill all male Indians over the age of twelve and capture women and children over the age of 12 for rewards*."[12]

But Benjamin Franklin was "*one of the few colonial editors who challenged the dominant narrative of Indian savagery*."[13] In one article, Franklin sympathetically described a mob of whites who had murdered "*'20 Innocent Indians who were living in peace among the Quakers*."

Indeed, while the complete absence of racial and ethnic diversity among the owners of America's colonial-era newspapers makes it impossible for one to do more than assume they would have, by and large, countered how most white colonial newspapers depicted them, one type of diversity did foster antagonistic viewpoints: religious diversity.

> *"As Franklin noted: 'The universal Concern of the neighboring White [Moravian and Quaker] People on Hearing of this Event, and the Lamentations of the younger Indians, when they returned and saw the Desolation, and the butchered half-burnt Bodies of their murdered Parents, and other Relations, cannot be well expressed.'"*[14]

The Anti-Slavery Society

"*[T]he source*" John Jay Chapman wrote in 1921 — referring to the prominent abolitionist and suffragist publisher of the widely-read anti-slavery newspaper, The Liberator — of William Lloyd Garrison's "*power*" was "***the Bible … It was with this fire that he started his conflagration.***"[15]

But in September, 1835, James Watson Webb, the anti-Black owner of "*the largest and most powerful newspaper in the country*"[16] — the Courier and New York-Morning Enquirer — urged citizens of Utica, New York to attack an October 21st meeting of Garrison's Anti-Slavery society. Other state newspapers, including the Albany Argus, the Utica Whig, and the Utica Observer, joined in promoting the assault. "*Webb urged that the convention be 'put down' either by the laws of New York, or by the 'law of Judge Lynch.'*"[17] Many of Utica's citizens obliged:

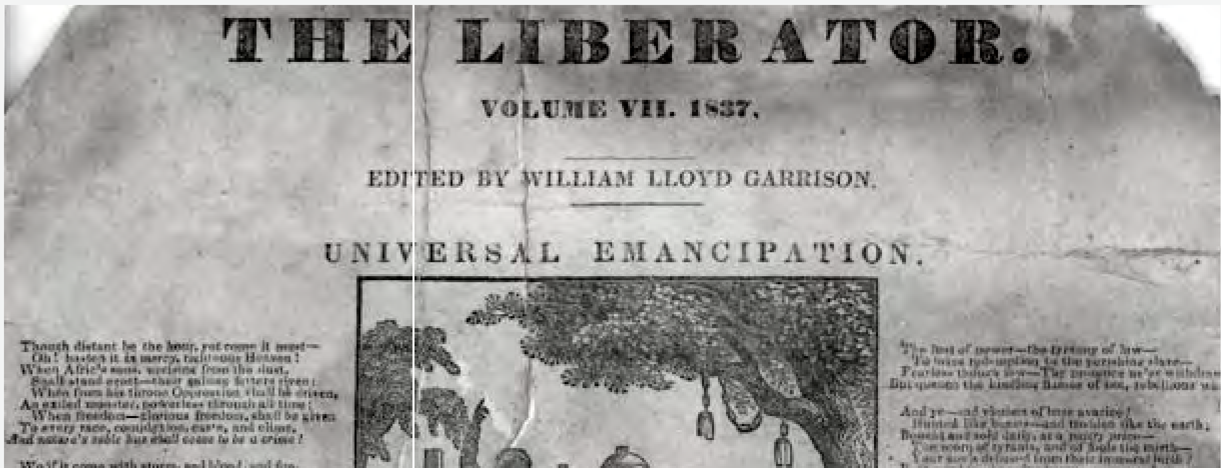
> *"The morning of the convention, a mob stormed the church where the abolitionists had gathered … seized the podium, tore up antislavery literature, ripped the clothes off one delegate, and shouted down all other speakers, forcing the abolitionists to flee. That night, the mob ransacked the office of the Oneida Standard and Democrat, one of the few newspapers in town that had argued for allowing the convention to go forward."*[18]

The same day in Boston, English abolitionist George Thomas was scheduled, on Garrison's invitation, to address women abolitionists. But Commercial Gazette publisher James Homer, not knowing Thomas had canceled, worked with local merchants to distribute flyers he had printed offering "*a $100 reward to anyone who first laid 'violent hands on Thompson, so that he may be brought to the tar kettle before dark.'*"[19] Shortly thereafter, "*a hostile crowd*," threatening to lynch Garrison instead, "*assembled on Washington Street, broke into the women's meeting, then beat and chased Garrison from the building.*"[20] Boston Mayor Theodore Lyman jailed Garrison for the night — his only escape from the attempted murder.[21]

Then, in an atmosphere in which antagonistic viewpoints had no way of reaching Utica's readers, *The Boston Atlas*, the *Patriot*, and the *Commercial Advertiser* wrote that the "*protest*" had been merely "*a meeting of gentlemen of property and standing from all parts of the city*" to prevent Garrison from "*disturbing the peace,*" **a piece that further reinforced the popular presumption that slavery was a more lawful endeavor than abolition.**[22]

One-hundred and eighty two years later, in 2017, the same thing happened when white supremacists gathered in Charlottesville, Virginia, for a '**Unite the Right Rally**,' in protest against the city's proposed removal of a statue of Confederate General Robert E. Lee. Self-defined white supremacist James Alex Fields Jr. used the opportunity to intentionally ram his car into a crowd of counter-protesters, injuring 19 and killing one — Heather Heyer — a lower middle class, 20-year-old white woman who had joined a crowd chanting, "*Black lives matter*." President Donald Trump used his massive reach to refer to all of the protesters, including the white supremacists, as "*very fine people*."[23]

Thus, co-conspirators in Utica and Boston successfully executed their plan to commit three burglaries, several aggravated assaults, and at least one attempted murder, to suppress the Anti-Slavery Society's viewpoint. Gonzaléz and Torres point to many more examples, too numerous to list here, of whites incited to violence by much larger newspapers. They murdered religious, abolitionist whites, such as Elijah Lovejoy, burned their newspapers to the ground, and terrorized Black people they feared might step out of line, all to ensure abolitionist viewpoints never gained a toe-hold in the community.[cite]


THE LIBERATOR.

VOLUME VII. 1837.

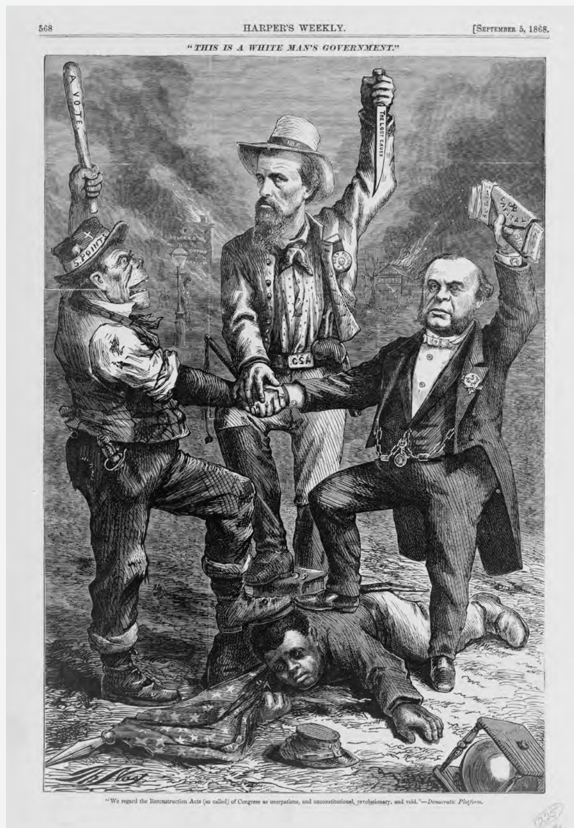
EDITED BY WILLIAM LLOYD GARRISON.

UNIVERSAL EMANCIPATION.

William Lloyd Garrison's 'The Liberator'

A Propensity to Destroy Minority-owned Outlets

Throughout American history, minority-owned newspapers, of which, during brief periods there were many, still remained "*virtually invisible*" to the majority of Americans "*generation after generation.*"[24] But they posed enough of a threat to a white supremacist establishment using its resources to silence their viewpoints.



A page from Harper's Weekly (1868)
(Source: Library of Congress)

La Patria

On October 1st 1847 in New Orleans, Latino editors Eusebio Juan Gómez and Victoriano Alemán published the first edition of *La Patria*, America's first Spanish-language daily newspaper. At first, they attempted to establish a "*cross-border identity*" between the United States and Mexico,[25] and, since Gómez and Alemán were pro-slavery, convince Anglo Americans of their comparative humanity.

However, in 1846, when the Mexican-American War broke out, the paper countered the main narrative of English-language newspapers, such as the *Picayune*, the *Delta*, the *Crescent*, the *Commercial Times*, and the *Bulletin*, heralding the virtuosity of America's role in the war. Much larger newspapers nationwide condemned *La Patria* as being anti-American, accusing Gómez and Alemán of "*stealing*" from secret military documents information they had actually obtained from public records. Following this coverage, Alemán was "*severely beaten*" by *Crescent* editor William Walker, ensuring *La Patria* remained otherwise pro-American.[26]

Four years later, after Gómez and Alemán had changed the name of the newspaper and published views critical of the United States' engagement in Cuba, a mob demolished the newspaper's assets, physically attacked Aléman in front of his family, attacked the Spanish consulate in New Orleans, and looted Hispanic businesses. Their newspaper "*had been silenced for good.*"[27]

Ida B. Wells

When word reached the Memphis Board of Education that Ida B. Wells, one of its teachers, had also been writing anti-Jim Crow articles, in Washington, D.C.'s *Evening Star*, under a pen name, and had become co-owner and editor of the Memphis-based *The Free Speech and Headlight*, they fired her. But then, after picking up on a story in the *Cleveland Gazette* about the wrongful conviction of William Offet, a black man, for raping a married white woman who, years later, confessed that Offet had not raped her, and that she and Offet had been engaged in a consensual affair, Wells satirized the conviction in Free Speech in a way Memphis newspaper *The Daily Commercial* found offensive to "*the wonderful patience of Southern Whites*." Another Memphis newspaper, the *Evening Scimitar*, called for white Memphis residents to "tie the wretch who utters such calumnies to a stake to be "publicly branded in the forehead with a hot iron" and mutilated.[28] A White mob then destroyed *The Free Speech* and creditors sold its remaining assets.

Anti-Chinese Virulence

"*They are a worse class to have among us than the Negro*," the San Francisco Daily Alta Californian roared, referring to Chinese people. In 1853, the devastating Taiping Rebellion raged in China. It was a civil war that ultimately claimed tens of millions.[29] Many fled. Some came to California, to which thousands of Chinese immigrants, seeking Gold Rush fortunes, had arrived before them, where they faced a hostile, native-born white populace, incited by the press. They were virulent, consumed by hatred against immigrants — from China, Mexico, the Pacific Islands, and Europe — and, of course, Black and Native Americans, discovering gold to which they felt entitled.[30]

The courts also became outlets, releasing viewpoints to further embolden angry whites. When California Supreme Court Justice Hugh C. Murray ruled that Chinese people were "*a race of people whom nature has marked inferior*," etc. some whites concluded this gave them license to torture Chinese miners with physical acts of violence, extortion, and forced expulsion from the fields.[31]

By 1858, large, nationally-distributed newspapers, like the New York Tribune and Harper's Weekly, called the Chinese "uncivilized" and described them as "*half-horse [and] half- stevedore.*"[32] The only outlets providing counter narratives were written in Chinese or run by paternalistic Americans purporting to civilize the Chinese. Nevertheless, none of these outlets stemmed the tide of the anti-Chinese sentiment and violence major newspapers had engendered and incited.

By 1882, the prevailing, unchallenged, anti-Chinese narrative became so pervasive, Congress passed the Chinese Exclusion Act[33] — a wholesale prohibition of Chinese immigration into the United States, which began the suppression of Asian immigration and, thus, their perspectives, in favor of a white, Protestant narrative.

So, in 1885, further inspired, a white mob in Rock Springs, Wyoming:

"[F]urious at increased competition for jobs from local Chinese surrounded the large Chinatown neighborhood there, ordered its residents to leave within an hour, then began setting fire to their shacks and shooting down the fleeing victims. When the smoke cleared, twenty-eight Chinese lay dead, fifteen had been wounded, dozens were missing, and some 100 houses had been destroyed."[34]

Broadcast Media and the Internet

Congress established the Federal Radio Commission (FRC) with the Radio Act of 1927. It was the first time Congress required those seeking a broadcast license to prove they would operate their stations to further "*the public interest, convenience or necessity.*"[35]

The Communications Act of 1934 replaced the FRC with the Commission and expanded the new agency's mandate, defining the Act's purpose "*as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion national origin, or sex [emphasis added], a rapid, efficient, Nationwide, and world-wide wire and radio communication service*[36]*…*"

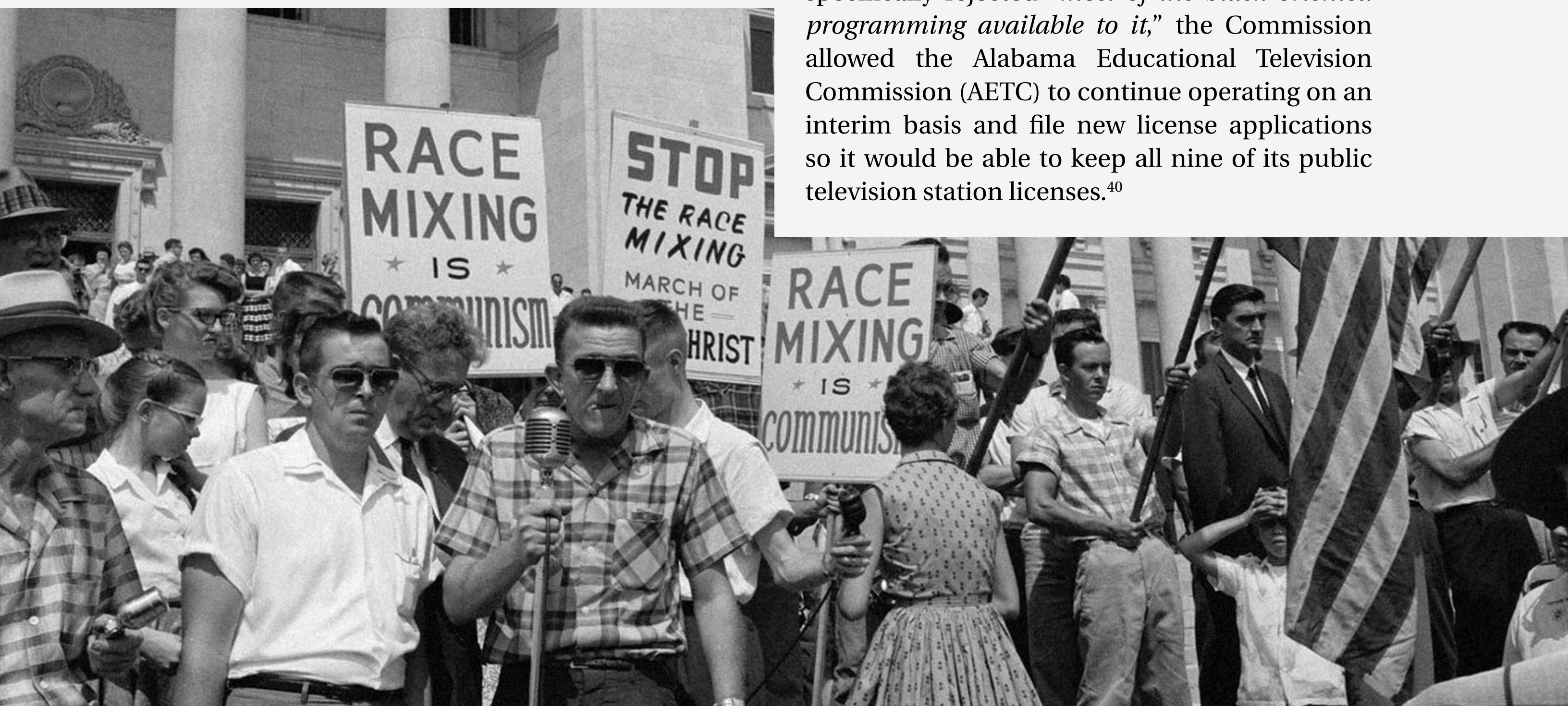
But the Commission paid scant attention to this mandate and, two decades later, even defied the Supreme Court's 1954 Brown v. Board of Education striking down race-based segregation as unconstitutional.[37]

Notable examples of the Commission's recalcitrance include:

In 1955, the Commission granted Shreveport Television Company a permit to construct a television station. The Commission based its decision on the fact that one of the company's owners, Don George, would have "*full charge of the day-to-day operations of the station.*" The Commission thought George had "*a good record of local residence and civic activity.*" But as González and Torres note, when it arrived at this conclusion, the Commission dismissed the fact that George operated segregated movie theaters in Shreveport because, after all, he was "*only abiding by the Jim Crow laws of Louisiana.*"[38]

In 1965, the Commission infamously renewed the license of Jackson, Mississippi's WLBT-TV, an NBC affiliate, despite complaints it not only urged citizens to maintain segregation, but deliberately pre-empted Thurgood Marshall while NBC's other affiliates broadcasted his viewpoint.[39]

In 1975, even after finding the Alabama Educational Television Commission (AETC) specifically rejected "*most of the black oriented programming available to it,*" the Commission allowed the Alabama Educational Television Commission (AETC) to continue operating on an interim basis and file new license applications so it would be able to keep all nine of its public television station licenses.[40]



The Kerner Commission

Since the colonial era, people of color have enjoyed virtually no respite from a blistering policy environment designed to keep non-white viewpoints out of the public discourse. However, in response to the "*Long, hot summer of 1967*," a series of riots in American cities stemming largely from confrontations between citizens and the police, the Lyndon B. Johnson Administration formed an 11-member National Advisory Commission on Civil Disorders with Illinois Governor Otto Kerner, a Democrat, serving as Chair.[41]

Now charged with excavating America's founding values, with just two African American members, both men — U.S. Senator Edward W. Brooke and Roy Wilkins, Executive Director of the NAACP — the Kerner Commission attempted to identify and fix the underlying factors causing "*recent major disturbances in our cities.*"[42]

The Kerner Commission was to become a voice of America's buried egalitarian soul. But aligning these purported values to ameliorate events on the surface proved futile: The Kerner Commission released its final report on February 27th,1968. But fewer than two months later, James Earl Ray assassinated Martin Luther King Jr., on April 4th, igniting another series of riots on the streets.

Despite its failure to stem today's, still-ongoing, deterioration of America's racial discourse, the Kerner Commission report symbolizes an open door. Among the conditions it found to have sparked the events of the summer of 1967 was that, leading up to them, media reporting on the plight of the poor had been scarce. This underreporting yielded a lack of viewpoint diversity, the Kerner Commission report concluded, ensuring sympathy would never activate public outcry against injustice.[43]

At first, policymakers took this observation to heart:

1969

The Commission passes its first set of Equal Employment Opportunity Rules, prohibiting licensees from discriminating on the basis of race or sex.

Also in 1969, In Office of Communication of the United Church of Christ v. Commission, the D.C. Circuit Court of Appeals vacates the Commission's renewal of WLBT-TV's license and finds the Commission's administrative conduct in the WLBT-TV proceeding was "*beyond repair.*"[44]

1971

The Commission passes ascertainment requirements, requiring broadcast licensees to determine the needs of their community via one-on-one contact with members of the community, and to develop programming in response to those needs.[45]

1974

In *TV 9, Inc. v. Commission*, the DC Circuit Court of Appeals held that when reviewing applications for broadcast licenses, the Commission must accord merit to the "ownership and participation" of racial minority stockholders.[46]

1975

The nation's first black-owned television station, WGPR-TV, signs on in Detroit.[47]

1977

The United States Commission on Civil Rights releases Window Dressing on the Set, finding broadcasters fabricated their compliance with EEO and anti-discrimination rules.[48]

1978

The Commission establishes its tax certificate policy which allows owners of failing stations to sell those stations to minority owners at a discounted rate, and defer the capital gains tax.[49]

1979

Dorothy Brunson becomes the first African-American woman to own a radio station — WEBB AM/FM — in Baltimore, MD.[50]

1982

The Commission begins granting preferences for companies vesting shareholder control in minorities.[51]

1990

Dorothy Brunson becomes the first African-American woman to own a TV station — WGTW-TV — in Burlington, NJ.[52]

In Metro Broadcasting, Inc. v. Commission, the Supreme Court holds the Commission's interest in enhancing diversity is an "important governmental interest" and that the Commission's minority preferences are "substantially related" to that interest.[53]

But these victories were short-lived. In April, 1995 Congress repealed the tax certificate program.[54] Then, in July, the Supreme Court overturned its *Metro Broadcasting* ruling. In *Adarand Constructors, Inc. v. Peña*, it adopted the "*strict scrutiny*" standard for laws containing racial classifications, holding they must be "*narrowly tailored*" to address a "*compelling*" state purpose.[55] This ruling was the death-knell for laws containing explicit racial language to address unequal outcomes because, on first glance, it required the Commission to produce only "race neutral" interventions subject to the most exacting scrutiny courts would apply.

Then, Congress passed the Telecommunications Act of 1996 (the "*Act*").[56] The Act contains a controversial provision, Section 202(h), requiring the Federal Communications Commission (Commission) to review its media ownership rules every 4 years — changed [when/how] from the original version of this provision to review the rules every two years — to determine which ones it should keep, modify, or eliminate, to fulfill its public interest mandate:

"(h) **FURTHER COMMISSION REVIEW-** The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.")[57]

The Act paved the way for consolidation in the media industry.

Many lawmakers failed to perceive Section 202(h) of the Act for what it was: an engraved invitation for media conglomerates to lobby for weaker rules in service to a political element seeking to establish a massive echo chamber.[58] In fact, Cable World reporter Alicia Mundy found that it was none other than two News Corp lobbyists who had crafted and lobbied Congress to enact Section 202(h).

Five years later, the Supreme Court further defined strict scrutiny. In its Grutter v. Bollinger (2003) decision, a divided court upheld The University of Michigan Law School's admission program under which it considers an applicant's race among other "*individualized factors*," but not as the sole factor.[59] Writing for the majority, Justice Sandra Day O'Connor wrote that the law school's goal of achieving a "*critical mass*" of minority students was a "*tailored use*."

But the Commission ignores *Grutter to apply Adarand* with breathtaking force.

1996 - PRESENT: THE COMMISSION GETS STUCK

No Movement on Diverse Station Ownership

The Commission seemed to read the post-1996 legal and regulatory environment to absolve it of all responsibility for developing innovative minority and women-owned station ownership proposals. During the nearly quarter-century following Adarand and the enactment of the *1996 Ac*t, the Commission has engaged only in a series of reluctant proceedings and, what ought to have been, predictable litigation. Today, the racial and ethnic demographics of radio and television station owners in the United States nowhere reflects the proportion of minorities in the population, even in the most densely-populated areas to which generations of millions of people of color have immigrated, been native, or imported and in which multitudes of their descendants have remained.

In at least two major markets, there is no evidence of viewpoint diversity resulting from twenty-five years of media consolidation.

For example, in the Washington, DC Metropolitan Area, Nielsen ranks just 2 independently-owned radio stations within the top 10 — American University's WAMU-FM and Howard University's WHUR-FM — the latter of which is held by what is perhaps the most well-known among the nation's 102 Historically Black Colleges and Universities ("HBCUs")[60]. But only WHUR-FM specifically targets the 45 percent of Washington, DC residents who self-identify as Black or African American[61].

In the New York City Metropolitan Area, Nielsen ranks zero (0) independently-owned radio stations within the Top 20 and zero (0) among the Top 46[62] specifically targeting over 1.3 million Asian New Yorkers.[63]

The comparison on the national level barely needs repeating

The Commission collects statistics via Form 323 and 323-E. Station owners submit them to the Commission to provide a "*snapshot*" estimate of the rate at which minorities and women own a share of the **total 11,529** commercial and noncommercial broadcast stations in the U.S.

There is no viewpoint diversity.

In 2018, women comprised **58.2 percent** of the civilian labor force over age 16[64] but, in 2017,[65] owned a "*discernible interest*" in just:

5.3 percent
of 1,368 full power commercial TV stations (down from 7.4 percent of 1,385 such stations in 2015).[66]

5.8 percent
of 330 Class A television stations (down from 9.3 percent of 396 such stations in 2015).[67]

7.4 percent
of 1,025 low power (LPTV) stations (down from 11% of 1,137 LPTV stations in 2015).[68]

9.3 percent
of 3,407 commercial AM radio stations (up from 8.9% of 3,509 such stations in 2015).[69]

7.2 percent
of 5,399 commercial FM radio stations (down from 8.1% of 5,492 such stations in 2015).[70]

Further, of the **total 11,529 commercial broadcast stations** (which we evaluate as a whole for the sake of simplicity), those who in 2018 self-identified as:

American Indian & Alaska Native[71]

1.5%
1.2%
0.9%
0.6%
0.3%
0.0%

.003%
1.3%

Stations with Majority of Voting Interest (31 Stations)
Occupancy of US Population

Native Hawaiian & Other Pacific Islander[72]

0.5%
0.4%
0.3%
0.2%
0.1%
0.0%

.0006%
0.2%

Stations with Majority of Voting Interest (7 Stations)
Occupancy of US Population

Black or African American[73]

15%
12%
9%
6%
3%
0%

0.02%
13.4%

Stations with Majority of Voting Interest (239 Stations)
Occupancy of US Population

Hispanic or Latino[74]

20%
15%
10%
5%
0%

0.06%
18.5%

Stations with Majority of Voting Interest (668 Stations)
Occupancy of US Population

Asian[75]

8%
6%
4%
2%
0%

0.01%
5.9%

Stations with Majority of Voting Interest (136 Stations)
Occupancy of US Population

Two or More Races[76]

3.0%
2.5%
2.0%
1.5%
1.0%
0.5%
0.0%

.0003%
2.8%

Stations with Majority of Voting Interest (3 Stations)
Occupancy of US Population

Net Neutrality

But with the rise of the internet, and widespread optimism for the opportunities an absence of "*gatekeepers*" seemed to create for individuals, interest in the cause of improving television and radio ownership diversity, never a core political issue in the first place, declined even more. Streaming, social media, podcasting, and e-commerce upended the entire ecosystem. Traditional broadcasters began lobbying for relaxed restrictions, now arguing that they are no longer necessary when viewed in light of external competition evolving on these "*edges*" of the Commission's authority.

Thus, "*network neutrality,*" the concept that Internet Service Providers ("*ISPs*") should provide its subscribers with unfettered access to all content, without regard for their source, became the new media diversity cause for many policymakers. In 2015, after years of intense debate, failed legislation, litigation, and a series of proceedings and inquiries, the Commission, under then-Chairman Tom Wheeler, issued its Open Internet Order.[77] ("*Order*") The Commission assumed jurisdiction over ISPs, requiring them to meet certain standards the Commission found would ensure the continued free flow of traffic over the networks.

It was short-lived. The Court of Appeals for the District of Columbia Circuit upheld the Order.[78] But, in April, 2017, newly-appointed Commission Chairman Ajit Pai repealed it over the objections of the vast majority of some 20 million commenters.[79] The DC Circuit Court upheld the repeal.

In addition, during the course of the Trump Administration, leading platforms owing their existence to the Internet, such as Google, Facebook, Twitter, and Amazon, came under intense, bi-partisan scrutiny following evidence of Russian interference in the 2016 U.S. Presidential Election,[80] data privacy and security weaknesses,[81] and allegations that social media companies harbored an "anti-conservative bias."[82]

Section 230 of the Communications Decency Act

"*No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutional protected…*"47 U.S.C. s220 (2020)[83]

"Get the facts about mail-in ballots" - Twitter, May 26, 2020 (flagging President Donald J. Trump's tweet the same day stating *"There is **NO WAY (ZERO!)** that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone….."*)[84]

"As a Nation, we must foster and protect diverse viewpoints [emphasis added] in today's digital communications environment where all Americans can and should have a voice. … [W]ithin 60 days of the date of this order, the Secretary of Commerce (Secretary), in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC 22 expeditiously propose regulations to clarify [Section 230]"
- The White House, May 28, 2020[85]

Until Congress enacted Section 230 of the Communications Decency Act in 1996 ("*Section 230*") to encourage innovation on the then-fledgling internet, some entrepreneurs were reluctant to build internet platforms out of fear they could be sued for content posted by their users. But while Section 230 provides social media companies with some liability protection, it does not shield them from "*copyright violations, or certain types of criminal acts.*"[86] Further, users posting illegal content may still be held liable.

But on March 10th, 2020 the Centers for Disease Control recommended that election officials encourage mail-in voting to prevent the spread of COVID-19 at polling stations.[87] Then, in accordance with this federal directive, on May 8th, California Governor Gavin Newsom issued an Executive Order directing election officials to provide mail-in ballots to every registered voter in California.[88] Next, after an 18-day cooling-off period, Trump made the unsubstantiated claim via Twitter that mailing ballots to Californians would lead to "*voter fraud.*"[89] However, according to Heritage Foundation data available prior to the President's tweet, over the previous 20 years, "*vote fraud*" occurred in approximately 0.00006 percent of total votes cast across all 50 states.[90] So Twitter attached a disclaimer to the president's tweet stating "*get the facts about mail-in voting*" and directing users to more information for context.[91]

Furious, after the approximately 2 days it would have taken his legal team to draft it, on May 28 President Trump issued an unnumbered Executive Order directing the Commerce Secretary, under the auspices of the National Telecommunications and Information Administration (NTIA), to file a petition before independent Federal Communications Commission — an otherwise independent, federal agency — requesting that it investigate social media companies to ensure they were not interpreting Section 230(c)(A) of the Communications Decency Act[cite] as "blanket immunity" from liability for censoring conservative viewpoints.[92]

NTIA filed the petition and the matter is now pending before the Commission.[93] Then, one week after then-Republican Commissioner Michael O'Rielly — whose renomination to the Commission was pending before the Senate — delivered remarks appearing to criticize the president's executive order, the White House withdrew O'Rielly's nomination.[94] Further, the president went so far as to threaten to veto a $1 trillion defense spending bill if Congress did not repeal Section 230.[95]

Despite what many modern observers perceive to be outrageous conduct, this is part of a centuries-long pattern in American history — as we have seen. In this case, however, the short passage of time between when Twitter flagged Mr. Trump's tweet, making the baseless claim that mail-in balloting would lead to voter fraud, and when he issued the Section 230 Executive Order, establishes that the president had the mens rea to prevent more people from voting — another age-old tactic that suffrage opponents have repeatedly used to inspire brutality against those whom they have persuaded their confederates to believe are predisposed to act in a deficient, suspicious, or, in this case, fraudulent way that should preclude categorizing them as individuals who should have any agency in the democratic process.

He was incensed that Twitter would dare interfere with the tactic that has endured for so long.

'*VIEWPOINT DIVERSITY*' TAKES CENTER-STAGE

"In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves [emphasis added] the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

"Viewpoint diversity is a paramount objective of this Commission because the free flow of ideas undergirds and sustains our system of government." - Federal Communications Commission, 2002 Biennial Review Report and Order and Notice of Proposed Rulemaking[96] (2003).

"We address the concerns raised by the court in Prometheus II and find that reinstating the revenue-based entity standard and the related regulatory policies will serve our broader goal of diversity of ownership, and thus viewpoint diversity [emphasis added], by facilitating small business and new entrant participation in the broadcast industry." - Federal Communications Commission, 2010 *Quadrennial Review Report and Order*[97] *(2010).*

"Previously, the Commission has described several types of diversity, focusing on viewpoint diversity as the relevant touchstone for purposes of the structural media ownership rules." - Federal Communications Commission, 2018 Quadrennial Review Report and Order[98] (2018).

Consistent with the Act's quadrennial review requirement, on July 2, 2003, under the direction of former Chairman Michael Powell, the Commission released a Report and Order and Notice of Proposed Rulemaking ("2003 R&O") regarding its media ownership rules. This policy statement defined "five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity."[99]

The Commission eliminated source diversity as a broadcast ownership policy goal.[100] It also defined program diversity as "a" policy goal but only as "*an input to the retail product offered by competing delivery systems.*"[101] And "*Outlet diversity*"—which "*simply means that, in a given market, there are multiple independently-owned firms*" — the Commission found — is only a "*means through which we seek to achieve our goal of viewpoint diversity*" and not "*an end in itself.*"[102]

Then, the Commission found minority and female ownership diversity to be "an" important Commission objective, but subordinate to outlet diversity.

Finally, the Commission found viewpoint diversity to be "*a paramount objective of this Commission.*"[103] However, it did not define viewpoint diversity as the paramount objective.

The Commission interprets its aim as being to provide minorities and women only with "*greater opportunities [emphasis added]*" to enter the mass media industry."[104] It releases itself from responsibility for producing results, as we can see in the Commission's recent Form 323 reports.[105] Then it uses this lack of results to say that its record is inadequate to prove a link between race and gender diversity and viewpoint diversity.

Therefore, the 2003 R&O set the stage for the Commission to start defining viewpoint diversity as a compelling interest — the interference with which, under Adarand, would have to withstand strict scrutiny — making it even more difficult to consider race and gender in its decisions.

This process began in 2016, when the Tom Wheeler Commission "*tentatively*" concluded, in the context of "*Eligible Entities*" discussed in the next section, that courts would likely find viewpoint diversity to be a compelling governmental interest[106], but not race or gender, since, according to the Commission, the Supreme Court has found "*race-based action*" as compelling only in the context of higher education admissions or remedying past discrimination.[107]

But nowhere in the law does it say that the complexity of an agency's domain expertise absolves it from common sense.

So, in reaching its conclusion regarding Eligible Entities, we shall see that the Commission decided that it did not consider the Grutter v. Bollinger test — of applying race as a single factor in a holistic, individualized approach but not the sole factor — as good enough. For the Commission's spectrum licensing process is much more complicated than university admissions.[108]

It could not be so bothered. Yet, all the Commission had to do was apply race and gender as single factors in its analysis.

Instead, over the course of nearly 25 years, when it comes to their broadcast ownership policies, it fails to find a race-neutral alternative. The record shows that, during nearly a century since the federal government commenced to regulate the mass media, it has failed to fulfill what is now the Commission's self-defined, "paramount" public interest mandate — via policies that go, as far as possible, toward ensuring all Americans have access to adequate broadcast facilities[109] — viewpoint diversity.

THE COMMISSION'S HIDDEN WEALTH PREFERENCE

The Supreme Court now considers the Third Circuit Court of Appeals' 2019 decision ("Prometheus IV") to strike down the Commission's most recent iteration of its media ownership rule changes.[110] The lower court's decision is the fourth time since 2004 that the Commission has reviewed the Commission's station ownership rule changes and found either that it failed to adequately consider minorities and women or took too long to reach its conclusions. The previous cases before the lower court became known as "Prometheus I,"[111] "Prometheus II,"[112] and "Prometheus III."[113] In Prometheus IV, the Third Circuit vacated all of the FCC's media ownership-related rule makings since Prometheus III, which is the period discussed here.

Eligible Entities

In the 2016 R&O[114] discussed previously, the Wheeler Commission voted to retain its media ownership rules but chose to reinstate a revenuebased definition for what the Commission would consider "Eligible Entities" entitled to certain preferences the FCC purports would encourage broadcast station ownership by minorities and women.[115]

To define Eligible Entities, the Commission had been faced with a choice: It could either carve out a proposed, race-conscious "Overcoming Disadvantages Preference," based on the Small Business Administration's (SBA) "small and disadvantaged business" (SDB) definition, which applies an individualized assessment model to each applicant, and which considers race just one of several factors, rather than the main factor, as the Court instructed in Grutter v. Bollinger. Or, it could have adopted the SBA's race-neutral, revenue-based definition of "small business," which, at the time, the SBA defined as those meeting a maximum size standard of 1,500 employees and $38.5 million for radio stations, television broadcast, and cable and other subscription programming.[116]

With the exception of the "1,500 employees" element, which it excluded from its Eligible Entities definition, the Commission chose the latter — not only ignoring suggestions the Third Circuit had made in Prometheus I, to replace the revenue-based Eligible Entities standard with the SDB definition, and the those of subject matter experts, including the Multicultural Media, Telecom and Internet Council (MMTC) and Office of Communications of the United Church of Christ (UCC) (which has been suing the Commission for its licensing policies since 1966 and, arguably, has more subject-matter expertise than anyone else),[117] who believed the revenue-based definition would fail to promote minority and female ownership of broadcast stations[118] — but also ensuring large station owners with more than 1,500 employees could compete for Eligible Entity status.

This is because the Commission harbored another, hidden, bias for rejecting the SBA's SDB model for defining eligible entities as ODPs: The SDB model grants a preference for individuals rather than established entities." This ideological preference ultimately made its way into the commission's Business Incubator program[119] ("Incubator Order").

The Commission's characterization of the SBA's SDB standard as race conscious, and therefore presumably vulnerable to a strict scrutiny analysis, is misleading. It excludes the further provision in the SDB model that 'other individuals can qualify if they show by a 'preponderance of the evidence' that they are disadvantaged.'

"*Qualifications for the [SDB] program are similar to those for the 8(a) Business Development Program. A small business must be at least 51% owned and controlled by a socially and economically disadvantaged individual or individuals. African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Asian Americans, and Native Americans are presumed to qualify. Other individuals can qualify if they show by a 'preponderance of the evidence' that they are disadvantaged.*"[120]

Thus, the Commission conveniently, and egregiously, ignored an important regulatory precedent, from an agency to which it otherwise defers — the SBA — in which the SBA employed a constitutionally-permissible standard to allow for the individualized assessment of each applicant with race as one aspect to a holistic approach.

'Individuals' Need Not Apply

To reinforce this standard, and grant a preference for applicants with "*substantial*" existing capital, the Incubator Order established rules for "*entities eligible for incubation*".[121] In establishing the standards, the Commission conceded the record reflected that "*individuals [emphasis added] seeking to purchase their first or second broadcast station are the ones that often face the most challenging financial hurdles.*"[122]

However, that is the last mention of "*individuals*" as the intended beneficiaries of the Incubator Order.

Rather off-handedly, the Commission dismisses the idea of giving individualized attention to each Eligible Entity. That is fine. But it never defines how it would give individualized attention to individuals, which it is bound to do under the 1996 Act, which, in part, defines a person the Commission may permit to "own, operate, or control, or have a cognizable interest in, radio broadcast stations[123] …" as an "individual."[124]

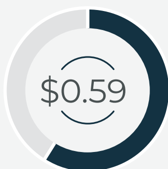
Upon close inspection, the Commission's selection criteria for the incubator program do not reflect a preference for "*individuals*" at all. They only define "*entities,*" which the Commission insists must be able to "*provide or guarantee a substantial share of the financing needed to acquire the incubated full-service AM or FM station and operate it effectively.*"[125]

The Commission refuses to apply the SBA's SDB definition because its stated aim is the opposite of what it is actually doing. It is using a revenuebased definition to define Eligible Entities, and qualified incubator participants, to enable existing wealth, as a stand-in for racial and genderbased discrimination, against individuals.

The Wealth Gap

The evidence at the Commission's disposal simply cannot be ignored. Yet the Commission failed even to consider it. In September, 2020 the US Federal Reserve reported a median wealth of $188,200 for White families compared to $24,100 for Black families and $36,100 for Hispanic families, and somewhere below White families but above Black and Hispanic families for Asian, American Indian, Alaska Native, Native Hawaiian, Pacific Islander, other race, and respondents reporting more than one race, combined.[126] In February, Brookings found the typical white family has a net worth of $171,000 compared to $17,150 for Black families.[127]

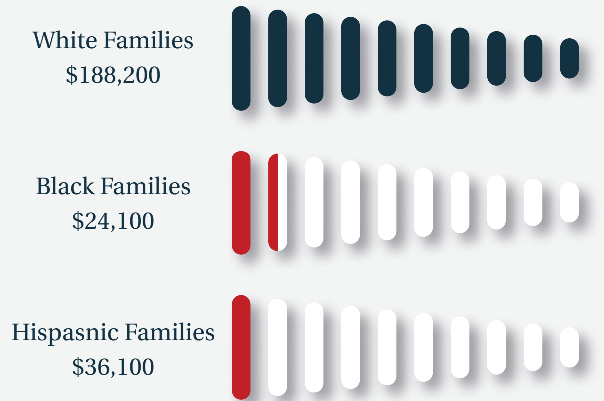
Congress concurs, citing the Brookings study, but finds the situation for Black families relative to white families is much worse, with Black households earning just 59 cents on the dollar, gaps increasing with education, and Black Americans having shorter life expectancies of nearly four years.[128]



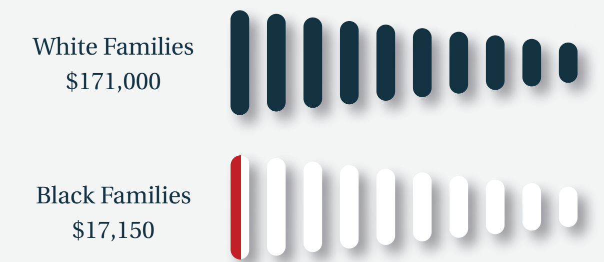
Black households earn 59 cents on the dollar.

By some calculations, women own just 32 cents on the dollar compared to men.[129]

Family Median Wealth



Family Net Worth



With these race-neutral standards, the Commission effectively requires minorities and women to meet a higher threshold than someone with existing wealth. Still, it somehow concludes that relaxing the media ownership rules, and using a revenue-based definition for Eligible Entities, promotes viewpoint diversity. This is the real over-regulation the Commission refuses to address.

The Commission Smothers Damning Evidence

Importantly, the Commission has failed to produce any meaningful evidence showing a nexus between the revenue-based Eligible Entity standard and viewpoint diversity. However, it went out of its way to accept study findings written and peer-reviewed, ironically, by a racially and gender homogenous handful of individuals who purport there is no nexus between viewpoint diversity and the racial, ethnic, and gender diversity of those with at least a cognizable interest media outlets[130].

At the same time, it turned its white gaze onto the findings of Santa Clara University School of Law Professor Catherine Sandoval — a Hispanic woman of color — claiming that her 38-page paper supported by the Social Sciences Research Council (SSRC) did not establish a strong-enough nexus between minority commercial radio ownership and viewpoint diversity, it only established program diversity, even though Professor Sandoval pointed to some 30 years of robust supporting data.[131]

According to Professor Sandoval, nearly 75 percent of minority-owned stations broadcast minority-oriented programming. Jumping at the opportunity to shoehorn Professor Sandoval's study into its own definition of program diversity it defined in 2003[132], which it never properly noticed to the public[133], it marginalized a set of completely valid findings.

During "the analysis [of more than 11,000 records from the Federal Communications Commission's Consolidated Database System]," Professor Sandoval found:

"*many problems with the FCC's methods for collecting and reporting broadcaster information [that] create barriers to analysis, particularly for longitudinal studies or efforts to analyze trends within or between large groups of broadcasters. The FCC databases are so cumbersome that the Commission itself does not rely on the agency's databases for rulemaking, turning instead to private sources that put that same data in a format more conducive to analysis.*[134] *This practice conflicts with the FCC's duties under the Administrative Procedures Act (APA) and the Data Quality Act (DQA) to ensure that rulemaking is based on reasoned and discernable analysis.*"[135]

True to form, what the Commission found most objectionable was Professor Sandoval's viewpoint. Her findings threaten the Commission's foundationless effort to establish viewpoint diversity as a compelling governmental interest that is entirely separate from racial and genderbased considerations.

The Commission Sets the Rules Ablaze

In 2017, following public resistance to the revenue-based eligible entities definition, the Commission granted a rehearing.[136] Following the notice and comment period, the Commission issued an order that again rejected the SBA-based ODP model and:

> *"made sweeping changes to the ownership rules. It eliminated altogether the newspaper/broadcast and television/radio cross-ownership rules. It modified the local television ownership rule, rescinding the so-called 'eight voices' test but retaining the rule against mergers between two of the top four stations in a given market—albeit now subject to a discretionary waiver provision. And it announced the Commission's intention to adopt an incubator program, although it left the formal implementation of that program to a subsequent order."*[137]

Now, it hopes the Supreme Court will give it the rubber stamp.

THE COMMISSION OBSTRUCTS EMPLOYMENT DATA COLLECTION

In addition to suppressing the viewpoints of minorities and women through over-regulation of their abilities to gain entry into the broadcasting industry as station owners, the Commission obstructs enforcement of its Equal Employment Opportunity (EEO) rules for broadcasting[138] and Multi- Channel Video Programming Distributors (MVPDs)[139] (like Comcast, Cox, Spectrum, and other firms commonly referred to as "cable companies") further encouraging noncompliance and, thus, the suppression of viewpoint diversity in the media workforce.

The Leadership Conference on Civil & Human Rights noted, in 2019, that the Commission has rebuffed the 1996 Act[140] for 20 years, failing to collect television station employment diversity statistics since 2000.[141] In 2019, the Trump-era Commission eliminated a rule requiring broadcasters to submit EEO data midway through each eight-year licensing cycle.[142] In 2017, it issued a declaratory ruling overturning its previous rule stating that online-only job posts did not meet a requirement that job posts be widelydistributed.[143] So, now, it is easier for broadcast stations to recruit by word of mouth exclusively, as long as they post the job on the internet to create the appearance of compliance. Further, the Commission is currently considering further changes to the EEO rules, with many broadcasterscalling for their complete elimination.[144]

Unfortunately, since the Commission has not enforced its EEO commitments, it is not in a position to report radio and television diversity statistics. Instead, the public must rely on external sources.

Broadcast & Digital-Only Newsrooms

In one bright spot, the Radio Television Digital News Association (RTDN) reports in 2020 that, overall, the percentages of people of color in radio and television newsrooms has generally increased for the "third year in a row.[145]" Still, in senior management, people of color remain underrepresented comprising just 8 percent of Radio News Directors, 6.3 percent of radio General Managers, 7.1 percent of General Managers across all television stations, 17.4 percent of Television News Directors, and 7.1 percent of Television General Managers.[146]

Further, just 19 percent of Television General Managers, 36.8 percent of of TV News Directors, 23.6 percent of Radio General Managers, and 28.8 percent of Radio News Directors, are women. Also, women of color in radio and TV outnumber men of color. However, white men outnumber white women.[147]

As for online-only newsrooms, ASNE reports that 21.9 percent of the salaried workforces of the platforms it surveyed were people of color in 2018, while 50 percent were women.

Newspapers

Newspapers lack viewpoint diversity reflecting the overall population. The US Census reported in 2018 that 17 percent of newsroom staff at legacy newspapers are racial and ethnic minorities.[148] Just 13 percent are in leadership positions.[149]

Public Media Data/Controversies

Public media outlets face unique challenges with staffers taking to Twitter to protest their stations' lack of racial and gender diversity. The employees of American University's WAMU. 88.5FM took to Twitter to call-out a high minority turnover rate and disproportionately white management team.[150] The most popular public radio station in the country, WNYC, faced a revolt in July, 2020 for appointing a white woman, Audrey Copper, who had no previous radio experience, lived ion California, and hailed from Kansas.[151] PBS, on the other hand, reports that 55% of its staff are female, and 40 percent are people of color. However, it does not break down its not break down its statistics for each category or report on racial and gender diversity among its leadership.[152]

Scripted Programming

Finally, UCLA reports that, while racial and gender diversity has improved in front of the camera — with people of color comprising 35 percent of "lead roles in scripted cable shows" and women in 44.8 percent of such roles — women hold just 32 percent of studio chair and and CEO jobs, with minorities comprising just 8 percent.[153]

Outside of a few bright spots, one would be hard-pressed to conclude the media ecosystem is viewpoint diverse.

POLICY RECOMMENDATIONS

The Commission should assess business incubator applicants based on whether they fall below a median, capital-based threshold, not the SBA's revenue-based small business definition.

The SBA's small business definition as those with revenues falling below $38.5 million annually, is not sufficiently malleable for the FCC's business incubator program. Given its finding that *access to capita*l is the primary barrier facing new entrants, not just existing revenue, the FCC should develop a pool of potential incubator candidates::

1) whose available capital falls below the median amount of capital a new entrant needs to effectively compete, in a given local market, for X number of years;
2) all of the existing, non-revenue, sources of capital to which an incubator applicant has access, plus;
3) if the applicant is a business, its annual revenue.

This more inclusive approach would capture individuals who have yet to form revenue-generating entities. Given the co-dependency between wealth and race, the overall effects of an access to capital-based definition is a more race-neutral alternative than the solely revenue-based standard.

The FCC should be required to provide evidence to support its unsubstantiated prediction that its revenue-based Eligible Entities definition fosters viewpoint diversity, not just that it doesn't harm minority and gender diversity, since it has defined viewpoint diversity as its paramount objective.

When it comes to its quadrennial assessments, the FCC has applied a double standard favoring applicants with existing wealth. It has accepted limited, empirical data, from non-diverse sources, to maintain its conclusion that it lacks the evidence base strict scrutiny requires to conclude that minority and female station ownership would promote viewpoint diversity. Accordingly, the Commission has opened the door to consider empirical data in determining its Eligible Entities definition.

However, the FCC never disclosed what empirical evidence it considered in finding that its revenue-based definition would promote viewpoint diversity, to a greater degree than it would perpetuate the availability of existing wealth as a proxy for race and ethnicity, since the existing wealth of white households far exceeds that of minority households.

Nevertheless, irrespective of whether its Eligible Entities definition disproportionately excludes people of color, the FCC has stated its paramount objective as fostering viewpoint diversity. The record defies this asserted aim. The record shows that the FCC required zero evidence to conclude its revenuebased Eligible Entities definition fosters viewpoint diversity. Yet, at the same time, it concluded that using race, ethnicity, or gender-based factors among its Eligible Entity criteria requires some vague empirical link to viewpoint diversity that is distinguishable from the Sandoval study linking ownership and minority and gender-diverse programming.

Congress should overhaul its telecommunications and media policy framework to codify a protected class-inclusive definition of viewpoint diversity as the Commission's ultimate public interest obligation.

The time has come for Congress to re-visit the Communications Act. The Section 202(h) provision, allowing the FCC to eliminate rules it no longer deems necessary to serve the public interest is, vague. Congress should designate viewpoint diversity as the Commission's public interest benchmark. Further, Congress should define viewpoint diversity to encompass the protected class status of persons as factors within a holistic analysis, not as a separate, colorblind standard.

In order to exemplify its commitment to viewpoint diversity as its ultimate end, the Commission should be required to provide the public with regular reports on its own staff diversity above the GS-12 level.

The Commission's own diversity data is opaque. The Commission should regularly provide the public with reasonable access to its own diversity data, including data on influential policymakers above the GS-12 level. This would serve only to enhance the Commission's paramount objective of viewpoint diversity by providing the public with some sense of the demographics of those who write the nation's media ownership rules.

Congress should overhaul the Public Broadcasting Act.

Enacted in 1967, the Public Broadcasting Act falls short in several respects. First, it should establish viewpoint diversity as its aim with an inclusive definition that includes the protected class status of individuals. Second, Congress should write an inclusive definition of which individuals it considers "*eminent*" and qualified to join the Board of the Corporation for Public Broadcasting (CPB). Third, Congress should also establish an Advisory Commission of citizen commissioners to advise the board. Finally, Congress should further require CPB to regularly collect and report on the diversity statistics of its grantees.

The White House should release a new Kerner Commissionstyle report every 4 years

Protests throughout 2020, following the death of Mr. George Floyd, reached a level unparalleled in American history and, certainly, since the 1967 riots. Congress should pass legislation requiring the president to release a Kerner Commission-style report every 4 years, that expands on the original 1968 report, and provides policymakers with meaningful and longitudinal data.

Congress should preclude the Commission from changing its EEO Rules.

The Commission has neither the expertise, nor the diversity among Commission policymakers, that give them the diverse viewpoints and perspectives it needs to change its EEO rules via the administrative process. Therefore, Congress should eliminate the Commission's ability to change its EEO rules.

Congress should establish better Commission oversight.

Congress should provide better oversight of the Commission. Its data and rulemakings are often opaque and, despite recent reforms to its database, not accessible enough for all Americans to easily consume. For example, the Commission's two-decade failure to fulfill its statutory obligation to collect data reflecting EEO trends throughout the industries it regulates, is due to a lack of accountability. Further, its status as an independent agency allows the Commission to pass undetected, enabling Commissioners to pass rules that meet their own, personal and political ends.

CONCLUSION

The president's executive order broadly mischaracterizing "*viewpoint diversity*" as a standalone form of diversity, rather than as the ultimate aim of combining racial, ethnic, gender, and socioeconomic factors, in a holistic way, is an artful attempt to over-regulate minorities' and women's viewpoints. The Trump Administration's effort to use Section 230 of the Communications Decency Act to tamp down on social media companies' purported "*anti-conservative bias*" is just one example of this fashion. It evinces the underlying, political animus inherent in efforts, by the ostensibly independent Commission, to obtain judicial consent to its unprecedented suggestion that viewpoint diversity is a separate and distinct form of diversity entitled to its own, totally colorblind set of rules.

Thus, nearly eighteen years following the 2003 R&O, and amidst heated, national debates about hate speech, content moderation, and social justice, this otherwise humdrum document has taken on renewed vitality. Soon, we will have an opinion on the constitutionality of Third Circuit's decision to strike down the Commission's recent orders because they 1) eliminated several important media ownership rules; 2) reinstated its revenue-based "*eligible entities*" definition, dand; 3) imported this definition into the standards it later established to admit applicants to a proposed broadcast business incubator.

The Supreme Court may issue new guidelines on viewpoint diversity in this case. Given the national dialogue, especially among conservatives, to favor viewpoint diversity, as a way to counteract a perceived "*anti-conservative bias*" in traditional and social media, over racial, ethnic, and gender diversity, the Court's opinion in this matter could have wide-ranging implications. In a best case scenario, the Court could not only define viewpoint diversity as a compelling governmental interest, but require the Commission to pursue racial, ethnic, and gender-based classifications, not as ends in themselves, but as factors in a "*holistic approach*" [cite Grutter] towards viewpoint diversity.

In a worst case scenario, the Court could define viewpoint diversity as a separate, colorblind, compelling governmental interest to which Grutter does not apply.

Irrespective of the Supreme Court's decision. Attempts to assert viewpoint diversity as a defense against dissenting perspectives will continue. Therefore, **it is urgent for advocates and policymakers to consider viewpoint diversity as the touchstone guiding their legislative, judicial, and administrative goals, rather than pursuing racial, ethnic, and gender diversity as ends in themselves.** Without civic participation to counter the prevailing justification to silence minorities and women, there is a substantial risk that viewpoint diversity will become legally defined as a separate and distinct governmental interest that does not consider race, ethnicity, and gender at all. Historical opponents will have successfully appropriated the notion of viewpoint diversity, to further suppress racial, ethnic, and gender-diverse perspectives, as their forebears have done since the colonial era.

Endnotes

1 Joseph Shepherd Miller, Esq. is Founder, President and CEO of the Washington Center for Technology Policy Inclusion – d/b/a WashingTECH. WashingTECH's mission is to foster an inclusive narrative aboutechnology's impact on how think, work, and live. Learn more at www.washingtech.org.
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