
THE FEDERAL COMMUNICATIONS COMMISSION AND ITS DEREGULATION OF MEDIA: ENCOURAGING INNOVATION OR INHIBITING DEMOCRACY?

ABSTRACT

Every text we send, Netflix show we binge, football game we watch on cable programming, or radio news report we listen to is monitored, either directly or indirectly, by the Federal Communications Commission (FCC). During the twentieth century, the FCC started to relax its regulatory standards, and this deregulatory trend has continued into the twenty-first century. Currently, U.S. media is owned by only a handful of companies, controlling the majority of what Americans read, watch, or listen to. This Note explores the regulatory role of the FCC, its deregulatory trend, and the ramifications of that deregulation. Lastly, this Note discusses alternatives to the current FCC regulatory method and recommends a regulatory solution to discourage continued media consolidation.

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I. INTRODUCTION

During 2017, much of the United States was up in arms, fearing that the Internet as we knew it would change with the Federal Communications Commission's (FCC) repeal of net neutrality regulations.¹ John Oliver, a comedic journalist, warned the FCC was destroying the Internet's level playing field with the repeal of net neutrality rules, favoring Internet service providers and leaving the U.S. public vulnerable in its right to access all

1. *See infra* Part V.

information on the Internet.² Oliver encouraged all users of the Internet—including every YouTube celebrity, Yelp reviewer, Internet time-waster, and those who took the time to congratulate Beyoncé on her pregnancy—to voice their opposition to the repeal of net neutrality by submitting a comment to the FCC.³ Oliver and his team went as far as creating their own link, goFCCyourself.com, to streamline the commenting process for their viewers.⁴

At the same time, the U.S. public heard from representatives of cable companies, reassuring the public that the repeal of net neutrality would not change the public's Internet use.⁵ A Comcast company blog promised it “will not block, throttle, or discriminate against [legal] content.”⁶ A video created by Verizon showed its general counsel explaining that it is not Verizon's goal to kill net neutrality, but instead Verizon aimed to place net neutrality rules “on a different legal footing,” limiting the FCC's “unbounded jurisdiction over [Verizon's] business” to control how Verizon provides services, interacts with customers, and prices its services.⁷

Despite Americans' views on the net neutrality issue, the FCC was in the limelight for much of 2017 with its various deregulatory actions, which placed the FCC, its commissioners, and its regulations on the radar of many U.S. citizens.⁸ This extra attention on the FCC is appropriate since every text we send, Netflix show we binge, football game we watch on cable programming, or radio news report we listen to is regulated, either directly or indirectly, by the FCC.⁹

2. Last Week Tonight with John Oliver, *Net Neutrality II*, YOUTUBE (May 7, 2017), <https://www.youtube.com/watch?v=92vuuZt7wak>.

3. *Id.*

4. *Id.*

5. See David L. Cohen, *FCC Takes Next Steps on Open Internet*, COMCAST (Nov. 21, 2017), <https://corporate.comcast.com/comcast-voices/fcc-takes-next-steps-on-open-internet> [<https://perma.cc/R56Z-484Y>]; David Young, *Where We Stand on Net Neutrality*, VERIZON (Apr. 28, 2017), <https://www.verizon.com/about/news/where-we-stand-net-neutrality> [<https://perma.cc/DX4J-4WB9>].

6. Cohen, *supra* note 5.

7. Young, *supra* note 5.

8. See *infra* Part V.

9. See Fed. Comm'ns Comm'n, *About the FCC: The FCC's Mission*, FCC, <https://www.fcc.gov/about/overview> [<https://perma.cc/N7J7-6Z9S>] [hereinafter Fed. Comm'ns Comm'n, *About the FCC*].

This Note explores the FCC and its role in media, specifically its deregulation of media, both in the past and in current society. Part II provides an overview of the FCC, its mission, and how it fulfills its stated goals. Next, Part III discusses the FCC's trend of deregulation through the twentieth century and early twenty-first century. Part IV explores the arguments and rationales of both proponents and opponents of FCC deregulation. Then, Part V examines current deregulation, and Part VI proposes possible improvements to FCC regulations. In Part VII, a specific approach to improving FCC regulations is recommended, calling for the FCC to make substantial modifications in how it regulates corporate and independent media ownership and how it reconciles and assesses its current and future regulations with its stated goals of promoting diversity, competition, and localism.¹⁰

II. FEDERAL COMMUNICATIONS COMMISSION AND ITS REGULATORY ROLE

The FCC's mission is to regulate "interstate and international communications by radio, television, wire, satellite, and cable in all 50 states An independent U.S. government agency overseen by Congress, the Commission is the federal agency responsible for implementing and enforcing America's communications law and regulations."¹¹ According to the FCC, the agency fulfills its mission by fostering competition in the communications industry and by developing an appropriate regulatory framework.¹² The FCC strives to encourage domestic and international broadcasting by monitoring regulation so that new technologies can help promote both diversity and localism in the communications industry; ultimately, the FCC claims to defend the United States' communication infrastructure.¹³

The FCC is directed by five commissioners appointed by the President and confirmed by the Senate.¹⁴ The President selects one commissioner as a

10. See Fed. Commc'ns Comm'n, *What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> [<https://perma.cc/EQC2-5952>] [hereinafter Fed. Commc'ns Comm'n, *What We Do*].

11. Fed. Commc'ns Comm'n, *About the FCC*, *supra* note 9.

12. See Fed. Commc'ns Comm'n, *What We Do*, *supra* note 10.

13. See *id.*

14. *Id.*; 47 C.F.R. § 0.1 (2018).

chairman, and each commissioner serves a five-year term.¹⁵ To ensure viewpoint diversity and accountability, only three commissioners can be from the same political party, and none of the commissioners may have a “financial interest in any commission-related business.”¹⁶ The current commissioners are Ajit Pai (chairman), Geoffrey Starks, Michael O’Rielly, Brendan Carr, and Jessica Rosenworcel.¹⁷

Most FCC rules are adopted through a “notice and comment” rulemaking process.¹⁸ Under this process, the FCC gives notice to the public of a proposed rule or modification, explaining the needs, authorities, and reasons for the proposed rule changes.¹⁹ After notice is given, the public has 30 days to file comments with the FCC regarding the rule proposal.²⁰ The FCC also allows *ex parte* presentations, both oral and written, to the agency’s decisionmakers.²¹ After the comment period closes, the FCC reviews and analyzes the public comments and then decides either to proceed with the proposed rulemaking as a final rule, modify its proposal, or abandon the proposal.²² Under the Congressional Review Act, the FCC must submit its final rules to Congress to receive approval or be overturned;²³ as part of Congress’s agency oversight, Congress may hold hearings, issue reports, or adopt legislation pertaining to the final rule.²⁴

15. 47 C.F.R. §§ 0.1, 0.3; Fed. Commc’ns Comm’n, *What We Do*, *supra* note 10.

16. Fed. Commc’ns Comm’n, *What We Do*, *supra* note 10.

17. Fed. Commc’ns Comm’n, *Leadership*, FCC, <https://www.fcc.gov/about/leadership> [<https://perma.cc/TZ9B-PWET>]. Currently, the FCC is controlled by Republicans Ajit Pai, Michael O’Rielly, and Brendan Carr; the Democrats on the Commission are Geoffrey Starks and Jessica Rosenworcel. James Doubek, *Trump Picks Republican Lawyer for FCC Commissioner Seat*, NPR (June 29, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/29/534828696/trump-picks-republican-lawyer-for-fcc-commissioner-seat> [<https://perma.cc/SV3L-6TCJ>].

18. Fed. Commc’ns Comm’n, *Rulemaking Process*, FCC, <https://www.fcc.gov/about-fcc/rulemaking-process> [<https://perma.cc/FPD8-8NFU>] [hereinafter Fed. Commc’ns Comm’n, *Rulemaking Process*].

19. *Id.*; 47 C.F.R. § 1.412.

20. *See* 47 C.F.R. § 1.415; Fed. Commc’ns Comm’n, *Rulemaking Process*, *supra* note 18.

21. *See* 47 C.F.R. § 1.1200; Fed. Commc’ns Comm’n, *Rulemaking Process*, *supra* note 18.

22. *See* 47 C.F.R. § 1.425; Fed. Commc’ns Comm’n, *Rulemaking Process*, *supra* note 18.

23. 5 U.S.C. § 801 (2018).

24. Fed. Commc’ns Comm’n, *Rulemaking Process*, *supra* note 18.

III. FCC REGULATION TO DEREGULATION

In 1934, Congress enacted the Communications Act, establishing the FCC for the purpose of regulating “interstate and foreign commerce in relation to the communications industry as to make sure the FCC regulated all communications to promote the general public interest.”²⁵ Shortly after in 1940, the FCC established restrictions over corporate ownership with two main objectives: to provide the public with “diverse and antagonistic viewpoints” and “to promote market competition in order to ensure the efficient use of resources.”²⁶ These restrictions limited the number of television and radio stations that a single entity could own nationwide.²⁷ However, the FCC’s objective changed over the next few decades, and in 1996, Congress passed the Telecommunications Act, repealing existing ownership regulations and increasing the number of stations that one entity could own.²⁸

This deregulatory trend surfaced in the judiciary as well. In *Time Warner Entertainment Co. v. FCC*, the court overturned an FCC rule regarding cable-system ownership.²⁹ Under the rule, cable systems were not allowed to reach more than 30 percent of potential subscribers nationwide.³⁰ The court acknowledged such a rule encourages viewpoint diversity but stated the FCC could not arbitrarily set an ownership limit without an adequate justification.³¹ As one commentator notes, “The *Time Warner Entertainment* case clarified to the FCC that its media ownership rules would need to be carefully justified on the basis of actual market evidence rather than anecdote or theory.”³²

25. Christa Corrine McLintock, Comment, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 590 (2004); see generally 47 U.S.C. § 151 (1934) (current version at 47 U.S.C. § 151 (2018)).

26. McLintock, *supra* note 25, at 590.

27. See *id.* at 590–91.

28. *Id.* at 591; see generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

29. *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001).

30. *Id.* at 1129.

31. See *id.* at 1136.

32. Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 377 (2006).

In *Fox Television Stations, Inc. v. FCC*, the court once again found that the FCC was not adequately justifying either the ownership limit it was placing upon national television stations or its prohibition of cable and broadcasting cross-ownership.³³ The FCC needed to provide record evidence that these rules were necessary to help promote diversity.³⁴ The court said the FCC could make regulations in the interest of viewpoint diversity, even if they are harmful to promoting competition.³⁵ However, these regulations needed to be based upon actual and convincing evidence, not just theory: “[A] regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.”³⁶

Furthermore, this trend continued in *Sinclair Broadcast Group v. FCC*.³⁷ In this case, the court declared the FCC was arbitrarily and capriciously retaining ownership limits over local broadcast stations.³⁸ Like the rationale in *Time Warner Entertainment* and *Fox Television*, the court said the FCC had to prove that its regulations were necessary for viewpoint diversity.³⁹ The FCC’s wide discretion did not free it from the obligation of clearly justifying its rules.⁴⁰

These judicial opinions set the stage for further deregulation in 2003 when the FCC reviewed the 1996 Telecommunications Act and considerably changed the ownership rules in three distinct areas.⁴¹ First, the FCC modified the ownership rule for national television networks.⁴² The original regulation prohibited broadcasting networks from owning additional networks unless the combined network owned “less than [35] percent of the national television audience.”⁴³ Under the new regulation adopted in 2003, a network is permitted to own multiple stations as long as the company does not own “more than [45] percent of the total national viewing audience.”⁴⁴ Second,

33. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002).

34. See *id.* at 1043.

35. See *id.*

36. *Id.* at 1050.

37. *Sinclair Broad. Grp. v. FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002).

38. *Id.* at 169.

39. See *id.*

40. *Id.* at 162.

41. McLintock, *supra* note 25, at 592; Shelanski, *supra* note 32, at 375.

42. McLintock, *supra* note 25, at 592.

43. *Id.*

44. *Id.*

the FCC's changes affected cross-ownership rules.⁴⁵ The new regulation removed the prohibition of a media corporation owning a television station and a newspaper in the same city and allowed this ownership as long as there are nine or more television stations in the city.⁴⁶ Finally, the FCC changed the local-ownership rule, allowing a media company to own up to three television stations in a market with eighteen or more stations.⁴⁷ Additionally, a media company "may own two television stations in a market with seventeen or fewer stations, as long as only one of the company's stations is among the top four in ratings."⁴⁸

These changes indicated that the FCC was deregulating the media industry, and with this deregulation, regulation over consolidation often fell to antitrust enforcement.⁴⁹ The practical effect of the FCC's deregulation was media consolidation, arguably resulting in "too much power in too few hands."⁵⁰ This consolidation can pose a threat to the marketplace of ideas, undermining both democracy and the First Amendment.⁵¹ Furthermore, FCC deregulation contradicts the objectives to foster a competitive market and to provide diverse viewpoints in the general interest of the public: "[T]he FCC has now adopted the most radical view of media consolidation any democracy has ever supported, where the FCC seems exclusively driven by a non-interventionist ideology and by a desire to protect business interests with little regard for the interest of the public."⁵²

IV. PROPONENTS AND OPPONENTS OF DEREGULATION

Proponents of the FCC deregulation in 2003 believe the deregulation best serves the public interest by "fostering a market that does the best possible job of satisfying consumers' programming preferences."⁵³ The media company's liberty in appealing to consumer preferences creates a more competitive market and arguably a more efficient set of regulations.⁵⁴

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See id.*; Shelanski, *supra* note 32, at 375.

50. McLintock, *supra* note 25, at 594.

51. *See id.*

52. *Id.*

53. Shelanski, *supra* note 32, at 383.

54. *See id.*

A commentator notes that the 2003 deregulation was an “overdue step toward replacement of rigid structural regulations that restrict public benefits with more adaptable and case-specific antitrust standards.”⁵⁵

Opponents of the deregulation view its effect on the public interest differently. According to opponents of deregulation, the public interest is best served when there is a diverse, high quality, and politically informative market.⁵⁶ Opponents do not believe that satisfying consumer demand or preferences is as important as diversifying the market.⁵⁷ Rather, the goal of FCC regulation should be to provide market access for producers of diverse content.⁵⁸

V. CURRENT DEREGULATION

Proponents of deregulation support it because it supposedly creates a more efficient and creative media market.⁵⁹ However, there is evidence showing deregulation is actually frustrating the goals of the FCC to fulfill its mission and resulting in a noncompetitive market.⁶⁰ The media market after deregulation has higher prices, increased demands, and fewer media corporations—the opposite of a competitive and efficient marketplace.⁶¹ The existence of larger media corporations “does not serve to promote any of the [FCC’s] governing goals, especially diversity or competition.”⁶²

For example, after the deregulation in 1996, 2003, and 2011, around 90 percent of the United States’ media landscape (television stations, newspapers, and radio) was owned by only 6 corporations, meaning they controlled the vast majority of what Americans read, watched, or listened to.⁶³ This was consolidated from 50 companies in 1983.⁶⁴ Also, before FCC

55. *Id.* at 382–83.

56. *See id.* at 383.

57. *See id.*

58. *See id.*

59. *See id.*

60. *See* McLintock, *supra* note 25, at 596–98; *see infra* notes 60–64 and accompanying text.

61. *See id.*; *see infra* notes 60–64 and accompanying text.

62. McLintock, *supra* note 25, at 596.

63. Ashley Lutz, *These 6 Corporations Control 90% of the Media in America*, BUS. INSIDER (June 14, 2012), <http://www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6> [https://perma.cc/RR6P-GYAF]. These six corporations include GE, NewsCorp, Disney, Viacom, Time Warner, and CBS. *Id.*

64. *Id.*

deregulation in 1996, companies could not own 40 or more radio stations.⁶⁵ Currently, iHeart Media owns 1,240 radio stations.⁶⁶ In newspapers, Gannett Company currently owns more than 1,000 newspapers and 600 print periodicals.⁶⁷ This level of media consolidation results in less viewpoint diversity and less competition in the media market.

Furthermore, the media companies' goal of maximizing profits conflicts with responsible journalism.⁶⁸ In turn, when responsible journalism is compromised, the democratic process, which is reliant upon unbiased and trustworthy news sources, is threatened.⁶⁹ With deregulation, mainstream media cozies up with the powers it should be monitoring: "Absent such regulation, the mass media will continue to abuse their political and cultural power and maintain continued concentration until the public is left without viewpoint diversity, which is ultimately harmful for democratic participation."⁷⁰ Increased consolidation of the media industry correlates with decreased viewpoint diversity.⁷¹

For example, in 2017, Sinclair Broadcast Group, the largest owner of local television stations in the nation, bid to acquire Tribune Media for \$3.9 billion.⁷² At the time, Sinclair owned 173 television stations; after the merger, Sinclair would have owned more than 215 stations, reaching 72 percent of U.S. households.⁷³ This household exposure would be more than the

65. Michael Corcoran, *Twenty Years of Media Consolidation Has Not Been Good for Our Democracy*, MOYERS (Mar. 30, 2016), <http://billmoyers.com/story/twenty-years-of-media-consolidation-has-not-been-good-for-our-democracy/> [<https://perma.cc/U6GY-ZHBK>].

66. *Id.*

67. *Id.*

68. McLintock, *supra* note 25, at 596–97.

69. *See id.* at 597.

70. *Id.* at 598.

71. *Id.* at 597.

72. Cecilia Kang, Eric Lipton & Sydney Ember, *How a Conservative TV Giant Is Ridding Itself of Regulation*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/politics/how-a-conservative-tv-giant-is-ridding-itself-of-regulation.html?mcubz=0>.

73. Sydney Ember, *Sinclair Requires TV Stations to Air Segments That Tilt to the Right*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/business/media/sinclair-broadcast-komo-conservative-media.html>; Tom Kludt, *Sinclair-Tribune: The Other Major Media Merger in Limbo*, CNN (Nov. 10, 2017), <http://money.cnn.com/2017/11/10/media/sinclair-tribune-merger/index.html> [<https://perma.cc/P6J9-ATBG>].

federally mandated limit of 39 percent.⁷⁴ However, this limit no longer posed a serious threat to the merger because of the FCC's vote to loosen ownership-cap rules in April 2017.⁷⁵ These looser ownership rules allowed Sinclair to attempt to manipulate its ownership of broadcast stations in order to comply with the ownership rules:

And what happened was they said that in part of the arrangements in selling off certain stations, Sinclair was doing possibly what they called sham agreements where they were trying to sell off some of their stations to people or companies that were so closely aligned with Sinclair that it wasn't really a true independent sale. That is what the FCC said they wanted to investigate.⁷⁶

Luckily, because of these questionable actions on the part of Sinclair, the FCC did finally vote in disapproval of the merger in August 2018 and referred the case to an administrative law judge: "And what that means is it's going to go through a hearing, which usually means these deals die because it takes so long that companies aren't willing to wait for that to go through."⁷⁷ At that point Tribune decided to pull out of the deal.⁷⁸ In this instance, the FCC properly regulated Sinclair; however, this Note still discusses this instance because it is a prime example of the abuse and manipulations that large media corporations can commit. Additionally, the FCC's prior loosening of the ownership rules allowed such a merger to potentially occur, and such a merger would have had arguably harmful ramifications, as discussed below, for our media landscape.

The potential Sinclair-Tribune merger and the high percentage of Sinclair's reach to U.S. households was concerning because Sinclair was requiring each of its local stations to air certain video segments produced by the company each day.⁷⁹ These segments usually supported partisan

74. Mike Snider, *FCC Extends Sinclair-Tribune Merger Comment Period Until Nov. 2*, USA TODAY (Oct. 18, 2017), <https://www.usatoday.com/story/money/business/2017/10/18/fcc-extends-sinclair-tribune-merger-comment-period-until-nov-2/778295001/> [<https://perma.cc/9CLK-QYTB>].

75. *Id.*

76. *Tribune Media Pulls Out of \$3.9 Billion Sinclair Merger*, NPR (Aug. 9, 2018), <https://www.npr.org/2018/08/09/637054078/tribune-media-pulls-out-of-3-9-billion-sinclair-merger> [<https://perma.cc/E382-GREB>].

77. *Id.*

78. *Id.*

79. Ember, *supra* note 73.

viewpoints.⁸⁰ Proponents of the merger argued FCC deregulation was long overdue to get rid of the antiquated ownership cap that did not reflect the current market conditions.⁸¹ Proponents claimed that easing the ownership rules would help level the “playing field and benefit millions of Americans who rely on broadcast stations for news and entertainment by allowing the companies to invest in new equipment and technology.”⁸² Opponents of this merger, and the deregulation that made it possible, claimed it would undermine the FCC’s mission to protect diversity, competition, and local control of media by potentially providing Sinclair an “unparalleled national platform” to increase the broadcasting of its own political views.⁸³ Market innovation and honoring consumer preference can occur without supporting media consolidation.⁸⁴

An even more controversial issue involving the FCC occurred in December 2017 when it voted 3–2 to repeal net neutrality rules established in 2015 during the Obama Administration.⁸⁵ The three Republican commissioners voted in support of the repeal, while the two Democrat commissioners voted against the repeal.⁸⁶ These net neutrality rules regulated Internet service providers (ISPs) by prohibiting them from blocking websites or charging more for certain content.⁸⁷ Net neutrality regulations are often referred to as “common carrier” rules, and as common carriers, ISPs are not only prohibited from blocking data but also from slowing or manipulating the data in any way, except for legitimate management purposes such as easing congestion or blocking spam.⁸⁸ Net neutrality regulations may have been formally established in 2015, but

80. *Id.* These segments have included terrorism-alert updates, a story recommending viewers not vote for Hillary Clinton in the 2016 presidential election because the Democratic Party was historically proslavery, and accusations of other media outlets publishing fake news. *Id.*

81. Kang, Lipton & Ember, *supra* note 72.

82. *Id.*

83. *Id.*

84. *See id.*

85. Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html> [hereinafter Kang, *Net Neutrality Rules*].

86. *Id.*

87. *Id.*

88. *See What Is Net Neutrality*, ACLU, <https://www.aclu.org/issues/free-speech/internet-speech/what-net-neutrality> [<https://perma.cc/H494-WSBU>].

common carriage has been applied for centuries to protect societal utilities such as public road systems, railroads, and telegraph and telephone networks.⁸⁹

Theoretically, market competition could prevent ISPs from blocking or manipulating data; however, data can be slowed or distorted in subtle ways that are not easily detected.⁹⁰ Furthermore, most consumers only have access to a few ISPs, if not only one, placing them in a vulnerable position with little power to protect themselves.⁹¹ If consumers only have access to one ISP in their geographical location, then consumers either must tolerate potential ISP data manipulation or choose to forego Internet service altogether.⁹²

This ISP abuse did occur before the FCC enacted the net neutrality rules in 2015.⁹³ For example, in 2007, AT&T was responsible for streaming a Pearl Jam concert.⁹⁴ During the concert, Pearl Jam's lead singer, Eddie Vedder, sang, "George Bush, leave this world alone," and, "George Bush, find yourself another home."⁹⁵ When Vedder sang these phrases, AT&T shut off the sound on its broadcast, censoring the performance and denying consumers the exclusive coverage of the concert that AT&T had promised to provide.⁹⁶

Also during 2007, Verizon Wireless cut off access to a text-messaging program that a pro-abortion-rights group had been using to communicate among themselves.⁹⁷ Verizon justified its conduct by claiming it would not provide service programs to any group "that seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of our users."⁹⁸ Verizon later reversed its decision and

89. *Id.*

90. *See id.*

91. *See id.* The vast majority of Americans only have access to one or two ISPs. *Id.*

92. *See id.*

93. *Id.*

94. *Id.*; Michelle Roberts, *AT&T Censors Pearl Jam, Then Says Oops*, NBC NEWS (Aug. 9, 2007), http://www.nbcnews.com/id/20201788/ns/technology_and_science-internet/t/att-censors-pearl-jam-then-says-oops/#.WqlxPajwZPY [https://perma.cc/LDN8-5JHF].

95. Roberts, *supra* note 94; *What Is Net Neutrality*, *supra* note 88.

96. *See What Is Net Neutrality*, *supra* note 88.

97. *Id.*; Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES (Sept. 27, 2007), <http://www.nytimes.com/2007/09/27/us/27verizon.html>.

98. *What Is Net Neutrality*, *supra* note 88.

decided to provide service to the group after receiving public disapproval.⁹⁹ Another example occurred in Canada in 2005; Telus, a Canadian telecommunications company, was engaged in a labor dispute with an organized union.¹⁰⁰ During this dispute, the ISP blocked its subscribers from accessing the union's website.¹⁰¹ These examples of ISP data manipulation or blockage serve as real concerns of what ISPs can do, and have done, without FCC net neutrality regulations.

FCC chairman, Ajit Pai, claimed the repeal would aid consumers by promoting competition: "Broadband providers will have more incentive to build networks, especially to underserved areas."¹⁰² Another FCC commissioner, Mike O'Rielly, stated opponents' arguments against the repeal are "guilt by imagination" and "baseless fear-mongering."¹⁰³ Furthermore, he said, "I'm simply not persuaded that heavy-handed rules are needed to protect from hypothetical harm."¹⁰⁴ Also, the FCC published an announcement on its website:

[T]he Commission reversed the FCC's 2015 heavy-handed, utility-style regulation of broadband Internet access service, which imposed substantial costs on the entire internet ecosystem. In place of that heavy-handed framework, the FCC returned to the traditional light-touch framework that was in place until 2015. . . . In particular, the FCC's action today has restored the jurisdiction of the Federal Trade Commission to act when broadband providers engage in anticompetitive, unfair, or deceptive acts or practices. The framework adopted by the Commission will protect consumers at far less cost to investment than the prior rigid and wide-ranging utility rules. And

99. *Id.*; Liptak, *supra* note 97.

100. *Telus Cuts Subscriber Access to Pro-Union Website*, CBC NEWS (July 24, 2005), <http://www.cbc.ca/news/canada/telus-cuts-subscriber-access-to-pro-union-website-1.531166> [<https://perma.cc/GQE9-GDMZ>]; *What Is Net Neutrality*, *supra* note 88.

101. *Telus Cuts Subscriber Access to Pro-Union Website*, *supra* note 100; *What Is Net Neutrality*, *supra* note 88.

102. Kang, *Net Neutrality Rules*, *supra* note 85.

103. Alina Selyukh, *FCC Repeals 'Net Neutrality' Rules for Internet Providers*, NPR (Dec. 14, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/14/570526390/fcc-repeals-net-neutrality-rules-for-internet-providers> [<https://perma.cc/9AXX-UZT7>].

104. *Id.*

restoring a favorable climate for network investment is key to closing the digital divide, spurring competition and innovation that benefits consumers.¹⁰⁵

The repeal of net neutrality rules became effective on June 11, 2018.¹⁰⁶ In response to the repeal, attorneys general from 22 states filed a protective petition for review against the FCC in the U.S. Court of Appeals for the District of Columbia.¹⁰⁷ The court heard oral arguments on February 1, 2019, regarding whether the FCC's repeal of the net neutrality rules was in accordance with its public mission.¹⁰⁸ The court's ruling is currently pending.¹⁰⁹ Additionally, 29 "states have introduced net neutrality legislation in the 2019 legislative session,"¹¹⁰ and there is pro-net-neutrality federal legislation as well—Save the Internet Act of 2019.¹¹¹ The bill passed the House 232–190 on April 10, 2019.¹¹² At the time this Note was written, the

105. Fed. Commc'ns Comm'n, *Restoring Internet Freedom*, FCC, <https://www.fcc.gov/restoring-internet-freedom> [<https://perma.cc/UHZ3-448A>].

106. Heather Morton, *Net Neutrality Legislation in States*, NAT'L CONF. ST. LEGISLATORS (Jan. 23, 2019), <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx> [<https://perma.cc/T5TQ-UF26>].

107. Cecilia Kang, *Net Neutrality Repeal at Stake as Key Court Case Starts*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/technology/net-neutrality-repeal-case.html> [hereinafter Kang, *Key Court Case*].

108. *Id.*; Brian Fung, *Net Neutrality: Federal Judges Had Tough Questions for the FCC*, WASH. POST (Feb. 1, 2019), https://www.washingtonpost.com/technology/2019/01/31/this-wasnt-how-internet-was-meant-be-net-neutrality-advocates-prepare-face-fcc-court/?noredirect=on&utm_term=.f791d51560e4; Matthew S. Schwartz, *Net Neutrality Goes Back to Court*, NPR (Feb. 1, 2019), <https://www.npr.org/2019/02/01/690609162/net-neutrality-goes-back-to-court> [<https://perma.cc/DS3W-VV3S>].

109. See Krista Cox, *Oral Arguments in Mozilla v. FCC*, ARL POL'Y NOTES (Feb. 11, 2019) <https://policynotes.arl.org/?p=1773> [<https://perma.cc/L94W-GP8W>].

110. Heather Morton, *Net Neutrality 2019 Legislation*, NAT'L CONF. ST. LEGISLATORS (May 6, 2019), <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-2019-legislation.aspx> [<https://perma.cc/Z4TU-2MYE>].

111. Save the Internet Act of 2019, H.R. 1644, 116th Cong.; James K. Willcox, *Net Neutrality Battles Heat up in Congress and Beyond*, CONSUMER REPS. (Apr. 10, 2019), <https://www.consumerreports.org/net-neutrality/the-battle-for-net-neutrality-continues/> [<https://perma.cc/8KY2-KBUW>].

112. *H.R. 1644 – Save the Internet Act of 2019*, CONGRESS.GOV <https://www.congress.gov/bill/116th-congress/house-bill/1644/actions> [<https://perma.cc/382R-JFHF>].

bill was pending in the Senate.¹¹³ However, it has a poor outlook in the Senate.¹¹⁴ U.S. Senate Republican Leader Mitch McConnell declared the bill “dead on arrival in the Senate,” and President Donald Trump has made it clear he will veto the bill if it reaches his desk.¹¹⁵ The White House released a statement “strongly oppos[ing]” a bill that would “return to the heavy-handed regulatory approach of the previous administration.”¹¹⁶

While legal and legislative challenges to the repeal of net neutrality are pending, the debate regarding the advantages and disadvantages of the repeal continues. ISPs, such as Comcast and AT&T, have echoed the FCC’s mentality in support of the repeal and assured consumers the Internet will continue to function as it always has by promising they do not plan to slow, prioritize, or block any content.¹¹⁷ The ISPs claim they understand that data manipulation would frustrate their consumers, driving them to another ISP.¹¹⁸ Comcast went as far to assure customers by saying they “will continue to enjoy all of the benefits of an open Internet today, tomorrow, and in the future. Period.”¹¹⁹

However, opponents of the repeal argue that there are important market, consumer-protection, and freedom-of-speech concerns in addition to the potential data-manipulation examples discussed above.¹²⁰ If the FCC no longer regulates ISP discretion of what content ISPs provide services for, ISPs may only provide services for businesses that can pay for it—costs that would likely be passed on to consumers.¹²¹ One analyst commented:

You and I and everyone else who uses the Internet for personal use will see some changes in pricing models For most of us, I expect we

113. *Id.*

114. See David Shepardson, *U.S. Senate Republican Leader Calls Net Neutrality Bill ‘Dead on Arrival’*, REUTERS (Apr. 9, 2019), <https://www.reuters.com/article/us-usa-internet/senate-republican-leader-calls-net-neutrality-bill-dead-on-arrival-idUSKCN1RL2HE> [<https://perma.cc/J4BU-X3CV>].

115. *Id.*

116. *Id.*

117. See Kang, *Net Neutrality Rules*, *supra* note 85.

118. See *What Is Net Neutrality*, *supra* note 88.

119. Seth Fiegerman, *Trump’s FCC Votes to Repeal Net Neutrality*, CNN (Dec. 14, 2017), <http://money.cnn.com/2017/12/14/technology/fcc-net-neutrality-vote/index.html> [<https://perma.cc/5QSK-VPZ3>].

120. See Kang, *Net Neutrality Rules*, *supra* note 85.

121. *Id.*

will pay more. Service bundles (e.g., social media package, streaming video package) will likely be bolted on to basic transport for things like web surfing and email.¹²²

Mignon Clyburn, an FCC commissioner who voted against the repeal, stated, “When the current 2015 net neutrality rules are laid to waste, we may be left with no single authority with the power to protect consumers.”¹²³

Opponents of the repeal are not only worried about protecting consumers but also small businesses and start-ups.¹²⁴ As mentioned before, ISPs could start charging websites to reach consumers; this potential charge may be too much for small businesses and start-ups to afford, harming the “next generation of online services” or the existing little guy.¹²⁵ Clyburn also said, “I have heard from innovators, worried that we are standing up a ‘mother-may-I’ regime, where the broadband provider becomes arbiter of acceptable online business models.”¹²⁶ Supporters of the repeal may argue it will promote competition, but as Michael Beckerman, president of the Internet Association Trade Group, says, “Let’s remember why we have these rules in the first place . . . There is little competition in the broadband service market.”¹²⁷

This prioritization of ISP freedom could also suppress certain political voices that do not have the funds to pay for ISP services.¹²⁸ An ISP could choose not to provide service to certain content sources because the ISP disagrees with the content or the source conflicts with another client to whom it already provides services.¹²⁹ This potential prioritization would likely result in less speech on the Internet, hindering viewpoint diversity—a supposed goal of the FCC.¹³⁰ As the American Civil Liberties Union states,

122. Brian Fung, *The FCC Just Voted to Repeal Its Net Neutrality Rules, in a Sweeping Act of Deregulation*, WASH. POST (Dec. 14, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation/?utm_term=.a384dfc7635b.

123. Selyukh, *supra* note 103.

124. *See id.*

125. Fiegerman, *supra* note 119; *see* Kang, *Net Neutrality Rules*, *supra* note 85.

126. Selyukh, *supra* note 103.

127. Kang, *Net Neutrality Rules*, *supra* note 85.

128. *Id.*

129. *See id.*

130. *See id.*; *What Is Net Neutrality*, *supra* note 88.

“[F]reedom of expression isn’t worth much if the forums where people actually makes use of it are not themselves free.”¹³¹

The arguments posed by the proponents and opponents in both examples of current FCC deregulation—the Sinclair–Tribune merger and the repeal of net neutrality—can be boiled down to the opposing viewpoints that were discussed in Part IV of this Note.¹³² Those in support of FCC deregulation value competition, believing that the public interest lies in innovation and meeting consumer preferences.¹³³ However, on the other hand, those against FCC deregulation want to protect viewpoint diversity and provide market access to many different content providers, bolstering free speech—considered to be the cornerstone of democracy.¹³⁴

131. *What Is Net Neutrality*, *supra* note 88.

132. *See supra* Part IV. Meanwhile, there is an additional viewpoint in support of the repeal of net neutrality—not necessarily in support of the ISPs but in support of less government interference. Josh Steimle, *Am I the Only Techie Against Net Neutrality?*, FORBES (May 14, 2014), <https://www.forbes.com/sites/joshsteimle/2014/05/14/am-i-the-only-techie-against-net-neutrality/#2406679d70d5> [<https://perma.cc/F5SW-PHBN>]. Advocates under this viewpoint acknowledge that ISPs have too much power but argues so does the government. *Id.* One commentator notes:

But if monopolies are bad, why should we trust the U.S. government, the largest, most powerful monopoly in the world? . . .

The U.S. government has shown time after time that it is ineffective at managing much of anything. This is by design. The Founders intentionally created a government that was slow, inefficient, and plagued by gridlock, because they knew the greatest danger to individual freedom came from a government that could move quickly—too quickly for the people to react in time to protect themselves. If we value our freedom, we need government to be slow. But if government is slow, we shouldn’t rely on it to provide us with products and services we want in a timely manner at a high level of quality.

Id. The repeal of net neutrality rules results in less government regulation, creating a freer market for true competition. *Id.* If this competition occurs, then ISPs who abuse the repeal of net neutrality and manipulate data will not exist because consumers will go elsewhere, or ISPs will be replaced by another provider offering a better service. *See id.* The commentator also notes, “If we want to break up the large telecoms through increased competition we need to eliminate regulations that act as barriers to entry in the space, rather than create more of them.” *Id.*

133. *See supra* Part IV.

134. *See supra* Part IV.

VI. PROPOSALS TO IMPROVE FCC REGULATION

There are varied approaches to remedying FCC deregulation. One approach suggests modifying how antitrust law is applied to the media industry.¹³⁵ Currently, “[g]eneral antitrust law will have difficulty vindicating both sets of public interest objectives that implicitly underlie the FCC’s ownership rules.”¹³⁶ Because of this, Congress should develop new approaches for media regulation, starting by focusing on improving how antitrust laws are applied to the media industry.¹³⁷ Rolling back current regulations and replacing those rules with a tailored antitrust regime would both decrease the costs of “rigid, ineffective rules” and “would cause no immediate negative effects.”¹³⁸ This approach does not necessarily advocate for eliminating the FCC as a whole but rather radical changes in how the FCC monitors media ownership and in the regulatory scheme that is applied.¹³⁹ As one commentator suggests, “The FCC and Congress should therefore supplement their decision-making processes with regard to media ownership rules with a discussion of the future of mass media policy and of how antitrust agencies and the FCC can best achieve its objectives.”¹⁴⁰

Another recommended approach retains the current regulations with substantial modifications.¹⁴¹ Under this approach, the Telecommunications Act of 1996 would be amended to eliminate biannual reviews of ownership regulations since these reviews have just been a pretense for protecting public interest while really protecting media ownership.¹⁴² Furthermore, any future amendments to the Act should incorporate and should be considered within the context of the stated goals of the FCC—diversity, competition, and localism:¹⁴³ “[W]hen the [FCC] is dedicated to pursuing its stated goals of diversity, localism and competition, the less chance there is that one person or corporation can dominate mass communication, advancing a unified set of social, economic and political views.”¹⁴⁴ Part of that dedication includes consistently monitoring media ownership, which requires the FCC

135. See Shelanski, *supra* note 32, at 419–21.

136. *Id.* at 420.

137. *Id.*

138. *Id.* at 421.

139. *See id.*

140. *Id.*

141. See McLintock, *supra* note 25, at 614.

142. *Id.* at 614–16.

143. *Id.* at 616.

144. *Id.*

not to provide exceptions to any media companies.¹⁴⁵ This fairness would help ensure dedication to its mission, equity to all media corporations, and no favoritism or impropriety.¹⁴⁶

While no exceptions should be made, there should also be separate rules to regulate independent and corporate media ownership.¹⁴⁷ Traditionally, there is more power behind corporate media ownership, which requires stricter regulations to prevent monopolization of the industry:

Market concentration in the form of a monopoly, duopoly or oligopoly negatively impacts society because these companies can use their control in their given market to charge a lower price than the competitive rate of return and then once they have effectively eliminated their competition, they charge a much higher price.¹⁴⁸

Less stringent standards and FCC support for independent media ownership, as opposed to corporate media ownership, would most likely result in increased independent ownership.¹⁴⁹ In turn, additional independent ownership would produce more diverse sources:

While diversification has important economic implications in general, in the telecommunications industries, the importance of diversification goes beyond mere concerns about sound economics and actually involves concerns about the effect on a well-functioning democracy and personal autonomy. When the FCC regulates the media industry, such diversification of control through maintaining diversity of ownership, in turn fosters diversity of viewpoints and promotes diverse expression, which is an essential aspect of essential First Amendment principles. Diversity of expression is also an essential aspect of a well-functioning democracy because the exposure to eclectic ideas allows the citizenry to make informed choices in politics and also gives them the knowledge they need to challenge the ill-informed decisions made by its representatives.¹⁵⁰

145. *See id.* at 617.

146. *See id.*

147. *See id.* at 616.

148. *Id.* at 617.

149. *See id.*

150. *Id.* at 617–18.

The focus on preventing media concentration and promoting independent ownership is a cornerstone of achieving the FCC's goals of diversity, localism, and competition.¹⁵¹

VII. RECOMMENDED APPROACH

Viewpoint diversity in media is essential to ensure the U.S. public is exposed to a multitude of ideas.¹⁵² This exposure allows citizens to consider their own beliefs, compare and contrast their own rationale with the rationale of others, and ultimately decide what viewpoint best expresses their personal ideas and beliefs.¹⁵³ This consideration of beliefs then often manifests itself in the political process through advocacy of certain political opinions and voting for public representatives—democracy at work.¹⁵⁴ In the interest of viewpoint diversity, this Note recommends separate ownership regulations for corporate media owners and independent owners.¹⁵⁵

Increasing Congress's role in media regulation would make regulation even more of a partisan process than it already is.¹⁵⁶ Whatever party controls Congress will have more power over media regulation, giving that party the opportunity to promote its own interests rather than promoting diversity, localism, and competition.¹⁵⁷ The FCC is already required to have at least two commissioners that do not share the same political affiliations of the other commissioners.¹⁵⁸ Further entangling Congress with media regulation would likely undo the bipartisan effort that this requirement is trying to instill in the FCC.¹⁵⁹

The recommended approach of separate ownership rules for corporate and independent ownership, with less stringent regulations for independent ownership, would likely promote localism and result in more media providers.¹⁶⁰ It is also likely that the more media providers there are, the

151. *See id.*

152. *See id.* at 616.

153. *See id.*

154. *See id.* at 618.

155. *See supra* Part VI.

156. *See* Steimle, *supra* note 132.

157. *See id.*

158. *See* Fed. Commc'ns Comm'n, *What We Do*, *supra* note 10.

159. *See id.*

160. *See* McLintock, *supra* note 25, at 621–23.

more viewpoints that will be posed to the U.S. public.¹⁶¹ U.S. citizens should not have to trust the few corporations that control 90 percent of media to provide them with a spectrum of fair and unbiased viewpoints.¹⁶² Too much trust is being placed in corporations whose main goal is to maximize profits.¹⁶³ Also, this Note's recommended approach calls for the FCC to rededicate itself to its three stated goals of diversity, localism, and competition, rather than the FCC's current trend in partisan action and its favoritism of competition at the cost of diversity and localism.¹⁶⁴

Even though courts supported the FCC's deregulatory trend, courts do understand and value viewpoint diversity in the media.¹⁶⁵ In *FCC v. National Citizens Committee for Broadcasting*, the Court stated, "[T]he Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."¹⁶⁶ The court in *Fox Television Stations* agreed that diversity of viewpoints relates to diversity in ownership.¹⁶⁷ Justice Potter Stewart, in his dissent in *Branzburg v. Hayes*, stated:

As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.¹⁶⁸

VIII. CONCLUSION

With decades of FCC deregulation resulting in media consolidation, the United States is in need of an FCC that values diversity and localism as much as it values market competition and innovation.¹⁶⁹ Competition and innovation can coexist with diversity and localism, but there must be room

161. *See id.* at 621–22.

162. *See Lutz, supra* note 63.

163. *Id.*

164. *See McLintock, supra* note 25, at 614–16.

165. *See FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978).

166. *Id.*

167. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047 (D.C. Cir. 2002).

168. *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972).

169. *See McLintock, supra* note 25, at 595.

for all of the FCC's stated goals. However, these goals can only be met if the FCC considers all of these goals when assessing its current and future regulatory actions.¹⁷⁰ Therefore, the best solution to honor diversity, localism, and competition is for the FCC to have separate ownership rules for independent and corporate media owners with less stringent rules for independent owners.¹⁷¹ Otherwise, U.S. citizens will be forced to continue to trust in a corporate-dominated media market to provide the fair coverage and viewpoints that they use to form their own political opinions.¹⁷² As an advocate for this recommended approach notes: "Without these proposed regulations, freedom of press and ultimately overall democratic participation will likely continue to decline in such a corporate dominated media market."¹⁷³

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170. *See id.* at 616.

171. *See id.* at 615–18.

172. *See id.* at 583.

173. *Id.* at 623.

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