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FCC minority broadcast ownership policies-- a critical race theory analysis of judicial assumptions in court decisions : the convergence of race and law

Kadesha DeFrance Washington
University of Tennessee

To the Graduate Council:

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Benjamin Bates, Major Professor

We have read this dissertation and recommend its acceptance:

Accepted for the Council:

Carolyn R. Hodges

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

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FCC MINORITY BROADCAST OWNERSHIP POLICIES— A CRITICAL RACE THEORY ANALYSIS OF JUDICIAL ASSUMPTIONS IN COURT DECISIONS: THE CONVERGENCE OF RACE AND LAW

A Dissertation
Presented for the
Doctor of Philosophy
Degree

The University of Tennessee, Knoxville

Kadesha DeFrance Washington

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DEDICATION

This dissertation is dedicated to my family:

Ms. Vivian Robinson (Mommy)

Ms. Saundra L. Robinson (Auntie)

Mrs. Lillian D. Robinson (Ma)

Mr. William H. Cook (Pops)

and

Mr. Michael John (Uncle)

who have provided unconditional love and support

throughout all of my educational endeavors.

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ABSTRACT

This dissertation used critical race theory as a basis to probe legal and regulatory transitions in the area of minority ownership and their implications for marketplace diversity and public interest. Through the examination of judicial decisions involving minority broadcast ownership this dissertation analyzed the expressed or implied assumptions of the judiciary in reaching those decisions, provided a critical analysis of those assumptions, discussed the implications and results of those assumptions on minority broadcast ownership, and suggested approaches to promote diversity and minority ownership in a deregulated media environment.

Both primary and secondary authorities were integral to this research. Overall, analysis took place in three parts. First, there was a collection of United States district court, appellate court, and Supreme Court cases in the area of minority ownership and minority ownership policies promoted by the FCC. Second, analysis of cases consisted of reviewing majority and dissenting opinions. Placing majority and dissenting opinions in the framework of critical race theory, the study continued with determining the judicial rationales and arguments.

The FCC expressed concern that historically, minority groups have been underrepresented. While moderately helpful, minority broadcast ownership policies (such as distress sales and tax certificates) were superseded by major court decisions and the deregulatory movement towards the "economic" marketplace of ideas. Not surprisingly, the period since the Telecommunications

Act of 1996 has seen a decline in minority ownership and arguably in marketplace diversity.

Deregulation has left the decisions of service and programming to the economic forces operating within the broadcast industry. With the increasing relaxation of government regulations, broadcasters have discretion in how they serve the public's interests. From the early 1990s until the present, the FCC minority preferences have been challenged and severely restricted. The trend towards deregulating the broadcast industry has coincided with the increased hostility toward and lack of support for minority ownership preferences.

Legally and socially, the concept of race was initially defined in terms of group rights, as seen in *TV 9* and *Garrett* decisions. With the remnants of segregation embedded in society, race was seen as a label. However, as economic and social changes took place, there was a backlash. Minority ownership policies were perceived as forms of "reverse discrimination" against the white majority. Discrimination against groups began to be attributed to individual actions in isolated, specific contexts. The courts shifted in their interpretation of FCC rationales for minority ownership policies and deferred to administrative agencies (FCC) and congressional action, as they recognized Congress' power to promote the interest of society.

However, the United States Court of Appeals for the District of Columbia began to change its approach to minority ownership polices. In *National Black Media Coalition,* the courts allowed the industry's focus on technological advancements to prevail over citizen concerns. With the coming of new

technologies such as personal communication services (PCS), high-definition television (HDTV), and direct broadcast satellite (DBS), the FCC was looking to advance pro-industry, deregulatory policies. Congress soon followed the FCC's stance as comparative hearings were replaced with competitive bidding. The courts, without questioning what impact these changes may have on minorities, upheld the deregulation of the industry.

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CHAPTER I: INTRODUCTION

The marketplace of ideas language coined by Justice Oliver Wendell Holmes Jr., in World War I sedition cases continued to cast a shadow over thought and language into the latter years of the 20th century and beyond. The marketplace of ideas is a commonly held expression, which has been found in policy statements by the Federal Communications Commission [FCC] as a manifestation of a desire to promote diversity in broadcast ownership and programming. The FCC expressed concern that historically, minority groups have been underrepresented. Recognizing this as an issue, the FCC instituted a series of minority preferences in the 1960s/1970s. While moderately helpful, these policies were superseded by major court decisions and the deregulatory movement towards the "economic" marketplace of ideas, a belief that unbridled competition would mean good results for society. Not surprisingly, the period since the Telecommunications Act of 1996 has seen a decline in minority ownership and arguably in marketplace diversity.

While some argue that the marketplace of ideas and the economic marketplace are one and the same,[1] the ability of these concepts to work together is questionable.[2]

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[1] Mark Fowler and Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. R. 207 (1982) Fowler and Brenner assert that the free market (removed of regulation) would allow the rights of the viewers to be heard and attended to.

[2] Kurt A. Wimmer, *The Future of Minority Advocacy before the FCC: Using Marketplace Rhetoric to Urge Policy Change*, 41 FED. COM. L.J. 133, (1989) [Hereinafter Minority Advocacy]. The author stated that deregulation has limited the citizens ability to be heard noting the removal of the fairness doctrine, ascertainment requirements, and the limited appeals through public participation (license challenges, etc.); *See also* Wilfrid Rumble, *The FCC's Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 SAN FRANCISCO

Former FCC chairman Newton Minow declared, "I reject this ideological view that the marketplace will regulate itself and that the television marketplace will give us perfection."[3] Deregulation has left the decisions of service and programming to the economic forces operating within the broadcast industry.[4] With the increasing relaxation of government regulations, broadcasters have discretion in how they serve the public's interests.[5]

Quoting former governor of Florida and past president of the National Association of Broadcasters, LeRoy Collins, Minow said public interest in broadcasting,

> "...must have a soul and a conscience, a burning desire to excel, as well as to sell; the urge to build the character, citizenship and intellectual stature of people..."[6]

However, there remains great ambiguity about what exactly constitutes "public interest." Rather than trying to clarify the concept, broadcaster- friendly regulators resolved to let industry forces and economic bottom-line considerations define what the public interest should be. It is arguable that by removing FCC and government restrictions, broadcasters will be inclined to pursue those ideas. But as Don R. LeDuc has argued, broadcasters often sacrifice freedom of expression in order to secure economic concessions or

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LAW REVIEW 793 (1994); Vincent Mosco, *The Mythology of Telecommunications Deregulation*, 40 JOURNAL OF COMMUNICATIONS 36 (1990).

[3] Newton Minow, *How Vast The Wasteland Now? Thirtieth Anniversary of "The Vast Wasteland" 12* (Gannett Foundation Media Center, 1991).

[4] Bill F. Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 NORTH CAROLINA LAW REVIEW 1057 at 1104 (1982).

[5] Jon T. Powell and Wally Gair, *Public Interest and the Business of Broadcasting* 39 (1988).

[6] *Supra* note 3 at 23.

advantages.[7] For example, many stations opt to forego investing monies into news and public affairs programming, which are traditionally considered the heart of public interest obligations.[8]

Previous judicial and government involvement promoted minority preferences and viewpoints in the media. From the mid-1960s until 1989, the FCC and Congress have enacted various policies to help minorities gain a foothold in the industry.[9] While these policies have helped minorities make small strides in ownership, they failed to substantially increase the number of minority owners and have not been without their critics. From the early 1990s until the present, the FCC minority preferences have been challenged and severely restricted.[10] The trend towards deregulating the broadcast industry has coincided with the increased hostility toward and lack of support for minority ownership preferences.

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[7] Dwight L. Teeter, Jr. & Don R. LeDuc, *Law of Mass Communications* 453 (8th ed. 1995).

[8] *See,* Public Service Responsibility of Broadcast Licensees, FCC Mimeograph No. 81575, March 1946. The 'Blue Book' is a 1946 document that outlined the public service responsibilities of broadcast licensees. Though never officially enforced by the FCC, the Blue Book provided a thorough and well-reasoned guideline. In order for broadcasters to fully serve the public's interest, four major issues were deemed important: 1) elimination of excessive advertising, 2) carriage of programs devoted to public service, such as news, 3) coverage of live, local programming, and 4) carriage of sustaining programming, which meant programs that were paid for by the station as opposed to sponsorships. *See also,* Michael McKean and Vernon Stone, *Deregulation and Competition: Explaining the Absence of Local Broadcast News Operation*, 69 JOURNALISM QUARTERLY 713 (1992); Benjamin Bates and L. Todd Chambers, *The Economic Value of Radio News: Testing Assumptions of Deregulation*, Paper presented at 43rd Annual ICA conference, Washington, D.C. May 1993.

[9] Distress sale, minority tax certificates and incubator programs. *See*, In *Office of Communications v. FCC*, 123 U.S. APP. D.C. 328 (1966) (citizens had standing to dispute a station's programming in regards to minorities). *Winter Park Communications, Inc. v. Federal Communications Commission*, 873 F.2d 347 (1989). Rehearing En Banc denied June 21, 1989) (minority enhancements in license hearings were upheld); *Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547 (1990) (held the FCC's policies of minority preferences in license hearings and the distress sale were constitutionally valid).

[10] *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985) (the FCC's extension of minority enhancements to women was unconstitutional.) In 1995, *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (the FCC's sex-preference policy violated the Fifth Amendment.) In 1995, the minority tax certificate program was abolished.

PURPOSE OF STUDY

The purpose of this study was to explore the concept of race in minority ownership policies through the analysis of court decisions. This dissertation uses critical race theory as a basis to probe legal and regulatory transitions in the area of minority ownership and their implications for marketplace diversity and public interest. Through the examination of judicial decisions involving minority broadcast ownership this dissertation: 1) analyzed the expressed or implied assumptions of the judiciary in reaching those decisions, 2) provided a critical analysis of those assumptions, 3) discussed the implications and results of those assumptions on minority broadcast ownership, and 4) suggested approaches to promote diversity and minority ownership in a deregulated media environment.

THEORETICAL FRAMEWORK

Critical legal studies are characterized by a central message that laws exist to legitimate the current maldistribution of wealth and power.[11] Initially, critical legal studies attracted minority legal scholars because of its fundamental belief that change is needed to create a just society.[12] Critical legal studies (CLS) challenged dominant legal discourse but did not acknowledge the minority voice, which led many to believe CLS' analysis of the law was incomplete.[13]

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[11] Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations* in *Critical Race Theory: Key Writings that Formed The Movement* 64 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., 1995).
[12] *Id.* At 64-65.
[13] Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law* in *Critical Race Theory: Key Writings that Formed The Movement* 107-108 (Kimberlé Creshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., 1995) [Hereinafter Race and reform].

Inspired by the failures of CLS to include the minority voice, critical race theory emerged in 1980 with its first official conference held in 1989.[14] Critical race theorists seek to identify values and norms that are hidden in the law through the combination of various philosophies (e.g., Marxism and Black Nationalism), disciplines (e.g. sociology, feminist studies) and techniques (e.g. narratives).

Critical race theory is eclectic, as it draws from various sources of doctrines, methods, and styles.[15] However there are some basic tenets most critical race theorists hold to be true.[16] First, racism is normal in our society and is in fact part of our history and laws. Second, because race is so firmly entrenched in our society it is difficult to believe that our legal system is "color blind." Third, laws ought to be understood and interpreted with an eye on the history and context in which they were initially created. Fourth, the experiences of people of color make them effective in analyzing the law, especially the areas on non-discrimination. [17]

Critical race theory contends that since there is no singular voice within the law, cultural and racial uniqueness should be reflected.[18] There is no clear, dominant interpretation of the law because such thinking leaves out marginalized

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[14] Richard Delgado, *Introduction* in *Critical Race Theory: The Cutting Edge* xiv (Richard Delgado ed., 1995) [Hereinafter Introduction].
[15] John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World* in *Critical Race Theory: The Key Writings that Formed The Movement* 315-328 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas eds., 1995).
[16] Introduction, *supra* note 14 at xiv- xv.
[17] *Id.*
[18] Robert J. Arajuo, *Race Relations and Conflict in the United States: Critical Race Theory: Contributions to and Problems for Race Relations*, 32 GONZ. L. REV. 537 (1996/1997).

perspectives. Race is not a fixed term; it is fluid and complex.[19] Race neutrality, within the legal system, creates an illusion that race (and racism) is no longer a major contributor to the condition of the black underclass.[20]

Mainstream legal discourse is generally without perspective because it is exclusive of conflicting views, values and experiences.[21] This exclusion hinders the progress of minority groups since majority opinions are viewed as impediments to racial equality.[22] Opponents feel critical race theorists over-analyze the differences between races and dismiss the similarities.[23] Yet critical race theorists conclude that to truly achieve equality, whites, people of color, courts, etc. need to acknowledge that our society and our laws are race conscious.[24]

Additionally, critical race theorists advocate pluralism and promote multiculturalism over a unified knowledge and cultural tradition. By advancing pluralism, critical race theory discards a singular, assumption-driven meaning of law.[25] Critical race theorists support the removal of the "color-blindness" ideology that permeates current policy, and decision-making processes that govern American law.[26] They contend that affirmative action, as a social policy tool and a

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[19] Calmore, *supra* note 15 at 318.
[20] Race and reform, *supra* note 13 at 112.
[21] Calmore, *supra* note 15 at 325.
[22] Carlos Nan, *Adding Salt to the Wound: Affirmative Action and CRT*, 12 LAW & INEQ. J. 553 (1994).
[23] *See generally,* Race and reform, *supra* note 13.
[24] *Id. See also,* Calmore, supra note 15.
[25] See, Robert L. Hayman, *Race and Reason: The Assault on Critical Race Theory and the Truth About Inequality*, 16 NAT'L BLACK L. J. 1 (1998/1999); Nancy Levit, *Critical Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795 (1999).
[26] *Id.*

matter of law, is slow to bring about progress and is relatively ineffective.[27] Critical race theorists argue that advances made through affirmative action have been cyclical, with small steps forward and disproportionately large leaps backwards.

This cyclical movement may be what legal scholar Derrick Bell refers to as the "interest-convergence" theory.[28] Bell's theory advances the idea that when the interest of blacks (and presumably other minorities as well) in achieving racial equity "converges" with the interest and comfort level of the white majority, is when progress is made. If there is no convergence, racial equity becomes stagnant or possibly reversed.[29]

For example, while the initial goals and beliefs behind affirmative action programs had some effects, by the late 1970s, those who were privileged (i.e., white majority) began to see a tightening job market.[30] As employment opportunities began to dwindle, resentment grew toward polices that seemed to provide an "unfair advantage" to others.[31] The white majority insisted that affirmative action achieved its goals and was no longer needed to correct any injustices. Affirmative-action policies were attacked as a form of "reverse discrimination".[32]

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[27] Nan, *supra* note 22.
[28] Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. R. 518 (1980).
[29] *Id.*
[30] Nan, *supra* note 22 at 556.
[31] *Id.* at 556.
[32] *Id.*

The resentment towards affirmative action policies continues. A 1990 California poll taken by the San Francisco Chronicle and KRON-TV revealed fifty-five percent of white males were in support of ending affirmative action, while thirty-one percent of women were in favor of keeping the policy.[33] In addition, sixty-one percent of white males stated affirmative action had gone too far. Similar sentiments were expressed in a report from the Commission on African-American Affairs, located in the state of Washington.[34] The report examined affirmative action policies that governed hiring within state government. Findings of the report include statistics on the percentage and number of hires under affirmative action policies. In 1994, sixty-two minority women, thirty-seven white women, and thirty-five veterans were noted as new employees that would not have been interviewed for their jobs had it not been for affirmative action.[35] That year, the state of Washington hired over three thousand new workers.

Similarly in 1993, one hundred and sixty-seven whites and one hundred and fifty-three minorities were hired as a direct result of affirmative action programs. That year, the state hired close to thirty-five hundred new workers.[36] A study conducted in 2000 by the University of Michigan found racial prejudice as the main factor as to why whites continue to oppose affirmative action.[37] The study, which interviewed over one thousand adults in the Detroit area, concluded

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[33] Yumi Wilson, *Perceptions: Minority Women's Views Opposite of White Men's,* THE SAN FRANCISCO CHRONICLE, June 10, 1995 at A8.
[34] Kerry Murakami, *Affirmative Action Helps Whites Too, Says Report—Policy Doesn't Affect Most State Workers,* THE SEATTLE TIMES, July 27, 1995 at B1.
[35] *Id.*
[36] *Id.*
[37] Jeannie Baumann, *U. Michigan Study: Prejudice Fuels Opinion*, U-Wire, February 16, 2000.

whites that opposed affirmative action also showed little empathy or high regard for blacks. In addition, whites that identified with racist statements (such as blacks have gotten more than they deserve) were also more likely to oppose affirmative action.[38]

Despite some evidence that might dispel the myth of reverse discrimination and the efforts of critical race theorists to include minority viewpoints in matters of social and legal discussion, critics of critical race theory call it oppositional scholarship because it challenges whiteness, white dominance, and white experiences.[39] Other critics say the use of narratives breed "subjectivity" and encourage irrational decisions.[40] For some, narratives have no place in law, especially in constitutional issues.[41] They contend that case law does not turn on personal stories of tragedy because those are private issues, whereas the law is a public issue.[42]

The notion of race-neutral laws creates what Crenshaw called "an illusion that racism is no longer the primary factor responsible for the position of the black underclass."[43] Race-neutral laws and 'color-blind' interpretations justify a social, economic, and political system of law that is advantageous to whites.[44] Gotanda noted how current Supreme Court decisions have formalized race by

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[38] *Id.*
[39] Calmore, *supra* note 15 at 318.
[40] Hayman, *supra* note 25; Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503 (1997).
[41] Litowitz, *supra* note 40.
[42] *Id.*
[43] Race and reform, *supra,* note 13 at 117.
[44] Neil Gotanda, *A Critique Of "Our Constitution is Color-Blind"* in *Critical Race Theory: Key Writings that Formed The Movement* 261-262 (Kimberlé Creshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., 1995) [Hereinafter Colorblind].

constructing categories of identity.[45] Race becomes an individual attribute (as opposed to a group attribute) and is unrelated to any cultural or societal context. Race becomes unconnected to present or past realities of oppression.[46] Consequently, racial discrimination is seen as an isolated phenomenon. This impedes the nation's ability to address correlations between minority groups and racism because race-neutral laws view social problems as independent.[47]

What makes the survival of race-based programs such as affirmative action more difficult is the judiciary's use of the standard of strict scrutiny.[48] On matters related to constitutional law, strict scrutiny is applied to suspect classifications, such as race, in the analysis of equal protection and to fundamental rights such as due process.[49] Creation of statutes or polices based on suspect classifications must establish a compelling interest that justifies the need for law. This standard of review makes it more difficult to defend the creation of minority ownership policies, especially in a deregulated marketplace.

RESEARCH QUESTIONS

This raises a fundamental research question: How has the legal and social concept of race factored into minority broadcast ownership policies and decisions? In order to fully address this question, it is useful to subdivide it into the following specific research questions:

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[45] *Id.* at 264.
[46] *Id.* at 265.
[47] *Id.* at 260.
[48] *Id.* at 266-267.
[49] BLACK'S LAW DICTIONARY (Bryan A. Garner, ed., 1996).

1) In what ways have the courts viewed the issue of race and diversity in broadcast ownership?

2) Is there a difference in the rationales used among the various courts (e.g., Supreme Court versus Courts of Appeal) in deciding minority ownership cases?

As questions continue to arise about the role and value of marketplace diversity and the validity of the deregulatory movement, this study can advance future debate on minority ownership issues.

OUTLINE OF STUDY

Chapter I, "Introduction," provides a general introduction to the research topic. In addition, this chapter outlines the foundation for the entire dissertation. The major problems-- minority broadcast ownership, race, and deregulation-- are presented.

Chapter I explains how these problems are closely related to the marketplace of ideas concept and how judicial interpretations have come to shape the current status of minority ownership. The purpose of this research, along with the research questions is presented.

Chapter II, "Literature Review," lays a historical and theoretical foundation for the study. It begins by discussing the assumptions underlying the marketplace of ideas philosophy. The chapter then traces communication and legal scholarship in the areas of minority ownership, employment, and racial preferences. The Telecommunications Act of 1996 is discussed, as well as its

effects on media consolidation and minority ownership. In-depth review of communications scholarship focuses on stereotypes, media portrayals, programming, and ownership issues. The theoretical framework is explained in detail.

Chapter III, "Methods," delineates the research design and methodology. Delimitations of the dissertation also are clarified.

Chapter IV," Legislative Histories," summarizes congressional and administrative agency discussions on minority ownership and broadcast race preference policies. Particular attention is given to the broadcast comparative hearing policy and minority tax certificate policy.

Chapter V, "Federal Court Cases," discusses minority ownership cases from the district courts, court of appeals, and the Supreme Court of the United States.

Chapter VI, "Analysis and Assumptions," provides a full investigation of the judicial assumptions in each decision. More importantly, placed within the framework of critical race theory, the analysis seeks to answer the major research question: how have the legal and social concepts of race factored into minority ownership policies? The other research questions are answered through this chapter's exploration of judicial decisions.

Chapter VII, "Conclusion," summarizes the results. In addition, there are suggestions for the future development of minority ownership policies and ideas for future research.

CHAPTER II: LITERATURE REVIEW

Freedom of speech, and presumably the freedom to receive speech, is the backbone of modern mass mediated communications. The concept of freedom of speech initially grew out of classical liberalism and libertarian principles. As it was argued in the *Four Theories of the Press,* libertarian principles have helped to shape the social and political structures that currently exist within mass media.[50]

Under liberalism, the function of society is to advance the interest of individual members. The state (government) exists as a means of providing people with various ways to realize their own potential as members of society. Individuals are considered seekers of truth. In order to gain knowledge and truth, people must be able to communicate in an open market.[51] That means all people must be allowed to speak. Within this concept of liberalism, the mass media function to inform, entertain and assist society with the discovery of truth. This discovery of truth comes through the media's ability to present all viewpoints.

Liberalism developed during the Enlightenment Period of the seventeenth and eighteenth centuries.[52] The eighteenth century saw the "transfer of the press from authoritarian to libertarian principles."[53] Libertarian principles flourished through the writings of philosophers such as John Milton, John Locke, and John

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[50] Fred S. Siebert, et. al, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of What the Press Should Be and Do* 39 (1963). Applied mainly to print media, the "marketplace of ideas" has been stretched over the years to include broadcast media. Any communications system that is free of control is said to promote the exchange of information in a democratic society. It would follow that broadcasting is to adhere to the spirit of the marketplace of ideas; it should expose people to a variety of messages.

[51] *Id.*

[52] *Id.* at 43.

[53] *Id.* at 44.

Stuart Mill. Born in 1608, John Milton wrote *Areopagitica*,[54] in1644. *Areopagitica* was Milton' s argument against the licensing of books, viewing such action as a form of censorship. Claiming that mankind was inherently good at heart, Milton believed liberty, freedom, and open debate permitted society to know truth. Milton also believed that in order for truth to be known and discovered man would have to ultimately encounter untruths. The often-quoted sentence, "Let her falsehood grapple; who ever knew Truth put to worse in a free and open encounter?" is a testament to Milton's support of free speech.[55] His "self-righting" principle stated that when truth and falsehood collided, truth would always emerge. Since truth (as a concept) is very strong, it will prevail with or without government involvement.

John Locke, born in 1632, is known as the father of empiricism, which is the heart of scientific method. Locke stated knowledge was gained from the inside and was the result of individual efforts. And while Locke stated everyone has a property interest in his or her own person,[56] when society sought to establish government individuals divested themselves of their right to their own personage. The right of property no longer lay with individuals, but with the government.

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[54] Sir R.C. Jebb, *Milton- Areopagitica* (1969).
[55] *Id.* at 58.
[56] *John Locke's Two Treatises of Government: New Interpretations* 182-183 (Edward J. Harpham, ed. 1992).

Born in 1806, John Stuart Mill is often called the founding father of liberalism.[57] His essay, *On Liberty*,[58] drew a sharp focus to the threat of individual freedom by society.[59] Mill thought that humankind should be free to follow any pleasures that brought happiness, but such pursuits should not interfere with the freedom of others. While Mill said the greatest threat to freedom was society and public opinion, he declared that all views ought to be presented for free expression to work properly. Suppression of any kind worked against mankind.[60] In fact, Mill asserted that silencing of expression robbed the human race.[61] Diversity of opinions, according to Milton, was advantageous and would always be so until mankind entered a stage of "intellectual advancement."[62]

Justice Oliver Wendell Holmes Jr., in a dissenting opinion in *Abrams vs. U.S.*,[63] borrowed from the writings of Milton and Mill to articulate his vision of free speech and the First Amendment. The marketplace of ideas, according to Holmes, should be free of government regulation. However, there were times when Justice Holmes advocated government restraint of speech. In *Schenk v. US*,[64] Justice Holmes wrote free speech and press were protected so long as what was said did not constitute a "clear and present danger."[65]

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[57] J. Herbert Altschull, *From Milton to McLuhan: The Ideas Behind American Journalism* 161-162 (1990).
[58] John S. Mill, *On Liberty* (1869).
[59] Altschull, *supra* note 57 at 168.
[60] *Id.*
[61] *The Classics: John Stuart Mill's On Liberty* 20-21 (John Gary, ed. 1991).
[62] *Id.* at 51.
[63] *Abrams vs. United States*, 250 U.S. 616 (1919).
[64] *Schenck v. United States,* 249 U.S. 47 (1919).
[65] Altschull, *supra* note 57 at 121.

However Fred Siebert, a former dean of Communications at Michigan State University, observed that Alexander Meiklejohn was critical of Holmes' viewpoint.[66] Meiklejohn, a twentieth-century philosopher and educator, was particularly suspicious of Holmes' clear and present danger test because the test was inconsistent with libertarian principles.[67] Discussion by the public, in Meiklejohn's view, should be free from government intervention at all times, just as discussion by members of the legislature are free from government intervention.[68]

While Locke certainly held true to his assertion that man was able to self-govern and control his property (meaning control his or her self without interference), he did note that when governments were created people traded those rights away. Milton and Mill both argued against state intrusion on social debates (although liberalism does acknowledge that government involvement exists from time to time). Holmes also declared that a functioning marketplace allowed diverse ideas to compete with each other, with the best ideas winning out. This "marketplace theory" has been a motivation for deregulating the communications industry.[69]

MARKETPLACE DIVERSITY ASSUMPTIONS

The marketplace of ideas theory is based on assumptions about society, some of which can be described as incomplete or faulty. Marketplace of ideas

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[66] Siebert, *supra* note 50 at 59.
[67] *Id.*
[68] *Id.*
[69] Robert B. Horowitz, *The Irony of Regulatory Reform* 260 (1989).

theory and its liberal philosophical tenets consider people to be rational in thought and continual seekers of truth. However, it cannot be expected that reason will be exclusively used to comprehend reality. People create and discover reality; thus, it is always changing. Many things can influence an individual's perceptions of reality, from drugs to religious values. People are not always rational, often using emotion or illogical information to make decisions. Advertising is one example of how emotional and illogical appeals to human senses can help guide people towards a perceived understanding or truth. In other instances, people believe they are receiving the truth in its entirety and are less inclined to seek additional sources of information.[70]

It is also assumed the marketplace allows everyone a chance to be heard. However, in reality not everyone has access. Average citizens do not own a broadcast outlet. Becoming a broadcast owner takes a huge investment of time and capital. As a result, not every individual will have the opportunity to become a radio or television owner. However, individual citizens have tried to access the media marketplace in other ways. Advocacy groups, interest groups and community groups have tried to access broadcast stations on issues including politics, religion, and minority representation. For example, in the late 1960s,

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[70] John Wright III, *Deregulation and Public Perceptions of TV: Longtudinal Study,* 41 COMMUNICATION STUDIES, 266 (1990). Focused on public perception of news and programming before and after deregulation. Surveys conducted over 4 year period showed people believed news and quality were sufficient and did not feel as though they were less informed since deregulation.

citizen groups began to enter into agreements with stations about employment and programming issues.[71]

These agreements between citizen groups and broadcast stations continued well into the 1970s, but started to decline by the 1980s. Krasnow offered several reasons for the decline in agreements, such as fewer petitions, denial of petitions that were presented, better negotiation between citizens and broadcasters, and reduced financial support from the private sector, which left those groups with fewer resources to challenge stations.[72]

Access to media ownership is occasionally granted through appeals to the station owners or the FCC. However, the ability for citizens to appeal has been curtailed by recent rulings.[73] There are fewer chances for renewal hearings as the Telecommunications Act of 1996[74] eliminated the comparative process for license renewals and replaced it with a new two-step renewal procedure. This new process calls for automatic license renewal unless the license holder fails to meet any of the following requirements: 1) service in the public interest, convenience, and necessity, 2) no serious violations by the licensee of this Act or Commission rules and regulations, and 3) no violations that would suggest an ongoing pattern of abuse.

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[71] Erwin G. Krasnow, et. al, *The Politics of Broadcast Regulation* 56 (1982). Authors noted examples in Texas and Los Angeles where citizen groups withdrew petitions to deny station license in return for agreements that changed employment policies or programming.
[72] *Id.* at 56- 57.
[73] Minority Advocacy, *supra* note 2. *See also* Ithiel de Sola Pool, *Technologies of Freedom* 130- 131 (1983).
[74] 47 U.S.C. § 307 (c).

THE NEED FOR MINORITY BROADCAST OWNERSHIP

For minority groups, portrayals are very important in how they view themselves and their place in society.[75] TV news media often illustrate minority groups, black Americans in particular, as poor and on welfare. The media images associated with black Americans tend to reinforce such beliefs.[76] Whites, whom often lack close contact and exposure to minority groups, depend on media and cultural images for understanding such groups.[77]

Media develop stereotypes as a shorthand method to communicate with society about a variety of issues. While some stereotypes may be positive, in many instances they are negative. Research indicates stereotypical images in the media reinforce racist attitudes.[78] Stereotyping associates certain values, characteristics, or expected behaviors with particular communities. As Kennedy stated, the media and the images they present about race are often the source from which others learn about people of color.[79]

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[75] See, C Taylor, J.Y. Lee, B.B. Stern, 1995. *Portrayals of African, Hispanic, and Asian Americans in Magazine Advertising*, 38 AMERICAN BEHAVIORAL SCIENCE 608 (1995); Jannette Dates & Edward Pease, *Warping The World: Media's Mangled Image of Race*, 8 MEDIA STUDIES JOURNAL 88 (1995); Paula Matabane & Bishette Merritt, *African Americans on Television: Twenty-five Years after Kerner*, 7 HOWARD JOURNAL OF COMMUNICATION 329 (1996); Gloria Abnernathy-Lear, *African-Americans' Criticisms Concerning African American Representation on Daytime Serials*, 71 JOURNALISM QUARTERLY 830 (1994).

[76] Robert M. Entman & Andrew Rojecki, *The Black Image in the White Mind: Media and Race in America* 8-9 (2000).

[77] *Id.* at 43.

[78] Neil Vidmar & Milton Rokeach, *Archie Bunker's Bigotry: A Study in Selective Perception and Exposure,* JOURNAL OF COMMUNICATION 36 (1974). The authors studied the effects of "All in The Family," a 1971 TV comedy. The high prejudice viewers admired Archie over Mike, feeling that at the end of each episode Archie won. Since there was no relationship between frequency of television watched and degree of prejudice, the authors concluded that high prejudice persons watched "All in The Family" more than low prejudiced persons.

[79] Deseriee Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*," 32 *ARIZ ST. L.J.* 622 (1999).

Some communications scholars contend that broadcasters, in order to enhance profits, are willing to relinquish their duty in promoting free speech and public interest.[80] Since deregulation, none of the industry's actions reveals a commitment to providing or upholding public interest or free speech values.[81] And since free speech and diversity of voices were never explicitly a main policy goal, they may never truly materialize within the deregulated environment.

In the current deregulated environment, the marketplace of ideas has been redefined in terms of economic incentives.[82] Reliance on economic incentives to bring about marketplace diversity favors those who already have access, which is based on one's ability to compete on an economic, business level. Minority groups are struggling to gain media ownership opportunities within the increasingly economically oriented industry.[83]

EARLY MINORITY INVOLVEMENT IN BROADCASTING

Minority ownership of broadcast properties is a relatively uncommon phenomenon. However, minority involvement in the broadcast industry can be traced back to early 1920s. Throughout that period and until World War II, jazz music and its culture was idolized on radio. Barlow traced the history of black contributions to the broadcast industry and stated that while blacks and their

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[80] Teeter, *supra* note 7.
[81] *Id.*
[82] Rumble, *supra* note 2; Kathryn Schmeltzer, *Clearing The Air: Deregulation of the Broadcast Industry*, 29 FB NEWS & JOURNAL 398 (1982) [hereinafter Schmeltzer].
[83] Kofi A. Ofori, *When Being No. 1 Is Not Enough: The Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations* (January 13, 1999) <http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/#tableofcontents> [hereinafter Civil Rights Forum].

music were desired and imitated-- they were not allowed to perform on radio or at public venues.[84] This exclusion transferred over into radio programming with shows such as "*Amos n' Andy.*" Public outcry against the show's stereotypical portrayals of blacks mounted in 1931. Despite 740,000 signatures on a nationwide petition and National Association for the Advancement of Colored People [NAACP] criticism, the Federal Radio Commission (the early predecessor to the FCC) could not cancel the show.[85] Although a call to end the show garnered support within the black community,[86] the Federal Radio Act forbid the FRC from interfering with communications or signals transmitted over broadcast airwaves.[87]

Blatant discrimination against black actors and actresses in radio continued well into the 1940s. Even with a few black-hosted radio programs, most of the programming failed. Many of the shows were created by whites for the general white audience and usually were stereotypical.[88] Ownership of Negro radio was usually by whites. The percentage of ownership by blacks was small because many prospective minority owners could not find the money to finance a purchase of a station or find experienced broadcasters to work at the stations. Furthermore, major companies (mostly white-owned) would not advertise on minority-owned or formatted stations for fear of alienating their white

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[84] William Barlow, *Voice Over: The Making of Black Radio* 13-35 (1999).
[85] *Id.*
[86] While support for ending the show grew largely from the middle-class blacks, not all blacks endorsed the removal of the show. *See generally*, Melvin Patrick Ely, *The Adventures of Amos 'n' Andy: A Social History of an American Phenomenon* (1991); Thomas Cripps, *Amos 'n' Andy and the Debate over American Racial Integration* in *American History, American Television* (1983).
[87] § 47 U.S.C. 326.
[88] Barlow, *supra* note 84 at 26-28 (1999).

customers.[89] For many white advertisers believed equating their product and/or image with minority groups, particularly blacks would have negative economic consequences.[90]

In addition, some southern communities pressured radio networks not to carry black-hosted programs, as they felt uncomfortable with the idea of a "Negro" on the air.[91] Stole examined the attempts of network television to address the problem of representation, specifically looking at the actions of National Broadcasting Company [NBC] and the Nat King Cole Show. NBC sought to 'stay in touch' with the minority community and hosted several round table discussions on ways to improve the status of minorities. They were careful never to push integration, so as not to alienate sponsors. According to Stole, NBC had gone through great lengths at the time to cultivate a "good public relations campaign" with the black community. Afraid to lose its competitive edge, NBC swept Nat King Cole away from Columbia Broadcasting System [CBS] and gave him his own show.

However, NBC did very little to ensure the success of the "Nat King Cole Show." Low production budgets, sparse pay for the workers, and no advertising contributed to the show's ultimate failure. Sponsorships for the show were low,

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[89] *Id.* at 183.
[90] Kennedy, *supra* note 81 at 648.
[91] *Id. See also* Richard S. Kahlenberg, *Negro Radio*, 26 *THE NEGRO HISTORY BULLETIN* 127 (1966) [hereinafter Negro Radio]. The author indicated that mixed management was common, such as Negro stations being white owned and black operated or white owned and white operated with mixed announcing staffs; Niger L. Stole, *Nat King Cole and the Politics of Race and Broadcasting in the 1950's*, 1 *THE COMMUNICATION REVIEW* 349 (1996). Stole examined minority TV employment in the 1950's and highlighted the attempts of network television to address the problem of racial representation, specifically looking at the actions of National Broadcasting Company [NBC] and the Nat King Cole Show.

even after NBC drastically reduced its advertising rates. Co-ops were obtained, but only in the Northern states.[92] The fear of the Southern audience withdrawing from a particular sponsor was enough to keep many from advertising on the show. Minority involvement in the broadcast industry was obviously limited during this time. Blacks either played very small, stereotypical roles or they were simply excluded from the industry altogether.

Even though minorities had purchased broadcast radio properties as early as 1949, black broadcast ownership would not become widespread until the 1960s.[93] Yet the idea of programming stations with a black music format began much sooner. Between the period of 1949 and 1956, four hundred stations nationwide carried some form of black-oriented programming or were completely black formatted.[94] By 1970, there were sixteen black owned and black formatted stations. That number grew to over two hundred stations nationwide by 1986.[95]

The future growth of minority ownership was expected to be hampered by potential problems, including lack of available licenses and more importantly, difficulties in obtaining financing.[96] Financiers considered minority broadcast ownership to be "high-risk" ventures.[97] Although the problems of ownership may

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[92] Co-ops, shorthand for cooperative advertising, are joint efforts between a retailer and a manufacturer/supplier to share the cost of advertisements. In the case of broadcasting, co-ops allow manufacturers to share the cost of making a commercial ad with a radio or television station. See, Ed Shane, *Selling Electronic Media* (1999).
[93] Barlow, supra note 84 at 246-247.
[94] *Id.* at 245-257.
[95] Negro Radio, *supra* note 93.
[96] Bernard Rubin, "*See Us, Hear Us, Know Me*," in *Small Voices and Great Triumphs: Minorities and the Media* 3-46 (Bernard Rubin, ed., 1980).
[97] *Id.* Many of the owners did not have a great deal of broadcasting experience. Moreover, for those who did, financiers considered investing in broadcast properties to be risky, as such properties were licensed and controlled by government authorities.

be acute for minorities, broadcast media in general is considered to be a risky investment venture.[98] Corn-Revere noted the poor economic performance of the broadcast industry in the early 1990s, as more than half of the radio stations on the air had lost money. Yet a 1978 FCC task force report declared the lack of minority participation would result in society being "deprived and unaware of minority viewpoints and concerns."[99] At the time of the task force, minorities owned less than one percent of the 8,500 commercial broadcast outlets. While the figures improved slightly, minority ownership is still low. As of 1998, minorities owned less than eight percent of the over 12,000 commercial AM and FM radio stations in the United States.[100] Table 1 presents minority broadcast ownership from 1993 until 1998.

MINORITY BROADCAST OWNERSHIP POLICIES

Noting the paucity of minority owners, several programs were designed to promote ownership. The distress sale policy allowed broadcasters in danger of losing their license to sell their station(s) to minorities for up to 75% of the fair market value.[101] In spite of such a seemingly profitable and easy to use policy, it has been relatively ineffective. Because of the lack of FCC commitment, there were few opportunities to use the policy. The small number of renewal hearings held by the FCC, in conjunction with the eight-year license term periods adopted

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[98] *See*, Alison Alexander, James Owers, & Rob Craveth, *Media Economics: Theory and Practice* 74 (1993).
[99] Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (May 17, 1978) [Hereinafter 1978 report].
[100] National Telecommunication and Information Administration, *Minority Broadcast Ownership in the United States*, (October 27, 1998) <http://www.ntia.doc.gov/opadhome/minown98/>
[101] Alan Stavitsky, *The Rise and Fall of the Distress Sale*, 36 JOURNAL OF BROADCASTING AND ELECTRONIC MEDIA 249 (1992).

Table 1: Ownership of Minority vs. Non-Minority Broadcast Stations*

	1993	1994	1995	1996-1997	1998	1999-2000
AM RADIO						
INDUSTRY	4,590	4,929	4,906	4,814	4,724	**11,865
BLACK	120	111	109	101	100	**211
HISPANIC	63	76	72	80	84	**187
ASIAN	0	1	2	1	4	**23
NATIVES	2	2	2	2	1	**5
FM RADIO						
INDUSTRY	4,920	5,044	5,285	5,468	5,591	
BLACK	80	80	86	64	68	
HISPANIC	23	35	34	31	46	
ASIAN	2	3	3	2	1	
NATIVES	3	3	4	3	1	
TELEVISION						
INDUSTRY	1,151	1,155	1,221	1,193	1,209	1,265
BLACK	20	22	28	28	26	20
HISPANIC	8	9	9	9	6	2
ASIAN	1	1	1	1	0	1
NATIVES	0	0	0	0	0	0

*Figures from the National Telecommunications and Information Administration reports *Minority Broadcast Ownership in the United States* (1998); *Changes, Challenges and Charting New Courses: Minority Broadcast Ownership in the United States* (2000).
**These are aggregate numbers, representing both AM and FM ownership as ownership of broadcast radio by frequency band and race was not provided.

in the 1996 Telecommunications Act, meant the chance for a station coming up for revocation is slim.

Starting in 1965, enhancement credit in comparative hearings was a method used to provide ownership opportunities. "Integration of ownership and management" focused on broadcast station owners and their day-to-day involvement with the operation and management of their stations. Minority and gender preferences were both seen as aspects of "integration of ownership and management." During competitive licensing hearings, "integration of ownership and management" was given quantitative credit and weighed along with the other licensing criteria.[102] This was very important because comparative hearings decided who would construct a new station in cases where more than one person or firm wanted to do so. However, in 1993 the United States Court of Appeals (DC) prohibited the FCC from using integration credit in comparative hearings.[103]

Probably the most well noted and most controversial of all the minority preference programs was the minority tax certificate. Created in 1978, the minority tax certificate encouraged sales of broadcast properties to minorities. The policy originated from a section of the Internal Revenue Service tax code-section 1071. The tax certificate provided favorable tax treatment to sellers by deferring taxable gain from the sale of their station(s), provided the buyer was a

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[102] Kenneth C. Creech, *The Licensing Process* in *Electronic Media Law and Regulation* 100- 111 (2nd ed. 1996). The other criteria used in this licensing process were diversification of control, proposed programming, full-time participation by owner(s), past broadcast record, efficient use of frequency, character, and other issues presented by applicants.
[103] *Bechtel v. FCC*, 10 F.3D 875 (1993).

minority.[104] There were several approaches to the tax certificate policy as well as some revisions over its 17-year history.[105] But by 1995, minorities owned three hundred and sixty stations. Many of those purchases used the tax certificate to attract initial investors.[106] Three hundred and thirty tax certificates had been issued with two hundred and sixty of those for radio transactions, forty for television transactions, and thirty for cable television transactions.[107] In general, the tax certificate policy had granted 507 certificates prior to its repeal in 1995.[108]

The proposed sale of Viacom's cable systems to a minority-led communications group in 1995 through a tax certificate would have allowed Viacom to defer $600 million dollars in taxes. That prompted Congress to eliminate the tax certificate policy.[109] Many believed the repeal of the policy was racially motivated because Viacom utilized other tax-free provisions to sell its properties to a non-minority entity.[110] And while this exchange of cable stations between Viacom and a minority owned company was blocked, in November

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[104] Kofi Ofori & Mark Llyod, *The Value of the Tax Certificate*, 51 FEDERAL COMMUNICATIONS LAW JOURNAL 693, 702- 703 [Ofori and Llyod].
[105] *Id.* The tax certificate could be used in three distinct ways: 1) the seller did not have to pay tax on any gains from the sale provided the proceeds were used to purchase replacement property, 2) the gains from the sale could be used to reduce the seller's basis in other depreciable property, or 3) use half of the gains towards purchase of new property and the other half towards the reduction in depreciable property. In 1982, the policy was amended to grant investors deferment on gains from sale of purchased stock in a minority owned broadcast property/ company.
[106] Erwin Krasnow, *A Case for Minority Tax Certificates*, BROADCASTING AND CABLE, December 15, 1997 at 80.
[107] *Id.*
[108] 95-319 SPR, CRS Report for Congress, *The Viacom Transaction and Beyond* (March 2, 1995).
[109] *Id.*
[110] Krasnow, *supra* note 106; *See also* Erwin Krasnow and Lisa M. Fowlkes, *FCC Minority Tax Certificate Program: A Proposal for Life After Death*, 51 FEDERAL COMMUNICATION L.J. 665 at 673 (1999).

2000, Viacom purchased the largest black-owned cable channel- Black Entertainment Television.[111]

However, the minority tax certificate idea has begun to resurface. As recently as 1998, Congress looked toward re-instating the program.[112] Mandatory holding periods, limiting the number of times a certificate could be used, screening of participants, and caps on the amounts deferrable are all new ways in which the policy is being adjusted.[113] Although various mechanisms to prevent abuses were explored in 2000, former FCC Chairman William Kennard, while FCC General Counsel, offered many of the same suggestions in 1995. In testimony before the United States Senate, Kennard presented alternative methods of tightening the policy.[114] Specifically, Kennard discussed extending holding periods for licensees, limiting the number of certificates that could be used, and limiting the dollar amount of the deferral. However, the suggestion made did not include specific numbers or figures as the FCC was still blocked from making any changes to existing broadcast policy under the appropriation riders.

BROADCAST EMPLOYMENT OPPORTUNITIES

Prior to the creation of specific minority ownership policies, employment was viewed as a way to include minorities in the broadcast industry. In July 1969,

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[111] Geraldine Fabrikant, *BET Holdings to be bought by Viacom for $2.34 billion,* (November 7, 2000), <http://www.nytimes.com/2000/business/04viac.html>

[112] Paige Albiniak & Bill McConnell, *Minority Initiatives Advance*, BROADCASTING AND CABLE, August 2, 1999 at 7.

[113] Erwin Krasnow, *Tax Certificate: New and Improved,* BROADCASTING AND CABLE, June 28, 1999 at 14.

[114] *FCC's Tax Certificate Program*, hearing before the Senate Finance Committee, 104th Congress (1995). (Testimony of William Kennard, FCC General Counsel at 9-10).

the FCC adopted rules that prohibited discrimination based on race, color, religion, or origin. Those rules also required that equal opportunity in employment be given to all qualified persons. License holders had to develop a program of specific practices that would assure equal opportunity.[115]

The FCC began requiring licensees to file annual reports, including written equal employment policies and data, to insure minorities were given full consideration.[116] The FCC eventually created a model EEO program. The policy said, "An affirmative action plan is a set of specific and result-oriented procedures which broadcasters must follow to assure that minorities and women are given equal and full protection."[117] Today, all formalized EEO requirements in broadcasting have been removed, as they were ruled invalid in *Lutheran Church-Missouri Synod v. FCC.*[118]

The FCC argued that two church-related stations in Missouri were not vigorous in their minority recruitment efforts. Those stations were fined as they failed to comply with the FCC's EEO rules and regulations. Although the FCC used a rational basis test when they applied their EEO guidelines,[119] the Court of Appeals (DC) disagreed, stating that after the decision in *Adarand v. Pena,*[120] the

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[115] Federal Communications Commission, *Statement on Policy of Minority Ownership of Broadcast Facilities,* 68 FCC 2D 979 [hereinafter Statement on Policy of Minority Ownership].
[116] *Id.*
[117] *Non-Discrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 FCC2d 358 (1975).
[118] *Lutheran Church-Missouri Synod v. FCC,* 141 F.3d 344 (1998).
[119] Black's, supra, note 49. In constitutional law, when a court uses a rational basis test it will uphold a law valid under the equal protection clause only if it has a conceivable relationship to a legitimate government objective.
[120] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

FCC should have been using a standard of strict scrutiny.[121] The Supreme Court ruled that affirmative action efforts that used racial classifications in awarding contracts were to abide by strict scrutiny standards. The ruling affected all federal, state, and local government agencies.

After weighing the policy under "strict scrutiny" guidelines established in *Adarand*, the D.C. Court of Appeals decided the Commission's EEO policy had no compelling interest. According to the court, the FCC failed to produce evidence that non-programming positions that employed minorities affected the outcome of overall programming diversity.

The FCC had asked the Court of Appeals not to pass any ruling on the Missouri-Synod case. [122] Nevertheless, the case went forward. The National Association of Black Journalists argued the removal of the EEO policies "raised questions about access to the airwaves by African-Americans and other peoples of color."[123] The EEO policy did help bolster minority employment in the industry from 9% to almost 20% over a 25-year period.[124] Insiders speculated whether the removal of the EEO policies meant the end of the industry's ability to enforce affirmative action policies in general.[125]

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[121] *FCC diversity plan loses on* appeal, ABA JOURNAL, July 1998 at 36.
[122] Chris McConnell, *FCC asks court to stay out of EEO* case, BROADCASTING AND CABLE, March 9, 1998 at 12.The FCC informed that court they would send the case back to the FCC, the Commission planned to reverse its earlier finding in the case and remove the reporting of employment portions of the policy.
[123] Kelvin Childs, *Black Journalists Blast Ruling*, EDITOR AND PUBLISHER, April 25, 1998 at 35.
[124] Alicia Mundy, *An unappealing decision*, MEDIAWEEK, June 1, 1998 at 18.
[125] *Id.*

DEREGULATING THE BROADCASTING INDUSTRY

The Reagan (and later Bush) presidencies marked what many believed were the beginnings of widespread deregulation across many industries, including communications.[126] In particular, President Reagan supported the relaxation of restrictions in many private sectors in order to boost the economic health of society and private industry.[127] Reagan's administration's rhetoric invoked a desire to cut taxes, remove government from people's lives, balance the budget, and increase military spending.[128] While President Reagan drastically removed or limited spending for social programs such as food stamps, and subsidized housing,[129] spending for the military increased. The cutting of social programs coupled with the increase of military spending, according to University of Nebraska Professor Ann Mari May, was detrimental to women and minorities.[130] Women tended to be less supportive of President Reagan's initiatives, as they favored less spending on military issues and more on social services.[131]

Besides the shifts in spending, President Reagan vowed to remove government control of businesses. This was achieved through the removal or relaxation of government regulations that supervised the conduct of

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[126] Horowitz, *supra* note 69 at 244-247.
[127] *Id.* at 209
[128] Lauren Tarshis, *The Legacy of Reaganomics,* SCHOLASTIC UPDATE, March 6, 1992 at 10.
[129] *Id.*
[130] Ann Mari May, *Women, economics, and the concept of the market: A second look at Reaganomics,* 27 JOURNAL OF ECONOMIC ISSUES 471 (1993).
[131] *Id.*

businesses.[132] However, the plan to de-regulate many industries had mixed results.[133] The airline industry began to experience massive buyouts, which resulted in less competition and inflated prices passed on to consumers.[134] The savings and loan disaster in the mid 1980s was another example of how less government control harmed society.[135]

Horowitz wrote that during the mid 1980s, the broadcasting industry adopted the economic marketplace theory and used it as the basis for deregulation.[136] According to William Ray, former chief of the FCC's Complaints and Compliances division, under the leadership of FCC Chairman Mark Fowler and later Chairman Dennis Patrick, the FCC "... sought to nullify the entire concept of the broadcaster as a public trustee."[137] Ray wrote that those chairmen began to deregulate the industry from policies and issues they believed hampered the broadcasters, such as the anti-trafficking rule (which made way for the early attempts at mergers and consolidations).[138] It was said by Chairman Fowler that competition would correct any deficiencies in programming.

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[132] Tarshis, *supra* note 128.
[133] *Id.* at 14.
[134] *Id.* at 14-15.
[135] Tarshis, *supra* note 128. The industry was wrought with mismanagement, fraud, and corruption. Many taxpayers lost their life savings as those institutions that were members of the savings and loan industry went under. The author stated that Congress estimated taxpayers would have to spend over $550 million dollars to fix the problem.
[136] Horowitz, *supra* note 69 at 244-246; Pool, *supra* note 73.
[137] William B. Ray, *FCC: The Ups and Downs of Radio-TV Regulation* 163 (1990).
[138] This FCC policy forbade station owners from selling their license within a three-year period of purchase. Ray, *supra note* 137 argues that once this policy was abolished, stations were bought and sold at rapid pace, often times with no regard for the employees' an/or programming of various stations.

When the Telecommunications Act of 1996 was passed, it further relaxed nationwide and local ownership limits.[139] For radio, old FCC rules did not permit ownership of more than 20 FM or 20 AM stations nationwide. As of the 1996 Act, there is no limit on radio ownership nationwide. Yet, there are local market limitations. In markets with 45 or more commercial radio stations, an entity can own up to 8 stations. In markets with 30-44 commercial radio stations, ownership is capped at 7 stations. Markets with 15-29 commercial stations, ownership is held to 6 stations. Lastly, in markets with 14 or fewer commercial radio stations, an entity can own up to 5 stations, however one entity may not own, operate, or control more than 50% of the stations in the market. All of these changes prompted many companies to purchase radio and television stations at a rapid pace. Large media outfits began merging with and buying out other broadcasters.[140]

As suggested by McChesney, radio station ownership had undergone major transformations that resulted in four large companies controlling one-third of all the industry's revenues.[141] Mergers and acquisitions generated huge amounts of cash flow, which was used to finance future purchases. For minority owners, the ability to convince banks, venture capitalists, or potential investors to

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[139] Under the former FCC rules, a single entity could not own more than 12 television stations nationwide or television stations reaching more than 25% of the nation's television households. The 1996 Act eliminated the 12-station limit and increased the maximum permissible audience reach to 35% nationwide.
[140] Paul Farhi, *For Radio Stations, Does Big Mean Bland?* THE WASHINGTON POST, July 1, 1996, at F5. Author notes that between May and July of 1996, companies such as Evergreen and CBS/Westinghouse made aggressive moves to purchase radio properties that not only gave those companies sizable control of local markets, but also built their nationwide assets.
[141] Robert W. McChesney, *Rich Media, Poor Democracy: Communications Politics in Dubious Times* 18 (1999) [Hereinafter Rich Media, Poor Democracy].

provide more cash for expansion became harder.[142] Current stations had to be used as collateral for financing deals. Any attempt to buy more stations came at the risk of potentially losing the currently owned stations through hostile takeovers.[143]

On the other hand, the inability to compete for advertising against large group owned stations could also squeeze a minority owner out of the broadcasting business. In 1997, a Birmingham-based minority broadcast company sold its radio properties to industry giant Cox Radio.[144] (According to Columbia Journalism Review's website, Cox Radio owned stations in the following places: Los Angeles (4), Atlanta (4), Tampa (4), Miami (2), Orlando (7), San Antonio (8), Louisville (3), Birmingham (7), Dayton (5), Tulsa (5), Syracuse (5), and Bridgeport (1).)[145] The Birmingham minority radio group cited competition from several local stations that were black formatted but white owned. The competing stations were part of larger media conglomerates. That allowed those stations to offer better advertising rates through combination sales across stations.

Radio and television have seen increased concentration of ownership that has resulted in less competition.[146] The total number of television group owners

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[142] See, Geraldine Fabrikant, *Slow Gains by Minority Broadcasters*, NEW YORK TIMES, May 31, 1994 at D1; Bill McConnell, *Few and Far Between*, BROADCASTING AND CABLE, October 5, 1998 at 28 [hereinafter Few and Far].
[143] Few and Far, *supra*, note 142 at 30.
[144] Paula M. White, *Black-Owned Radio Stations Tuning Out,* BLACK ENTERPRISE, September 1997 at 20.
[145] http://www.cjr.org/owners/index.asp, accessed June 26,2000.
[146] *See*, Farhl, *supra* note 147; Neil Hickey, *So Big: The Telecommunications Act at One Year,* 35 COLUMBIA JOURNALISM REVIEW 26 (1997); Ofori and Llyod, *supra* note 106.

decreased between 1995 and 1997. [147] The mergers between broadcasting groups, usually smaller ones being acquired by larger ones, seemed to be the major cause of overall group ownership decline.[148] These consolidations and mergers are believed to have been detrimental to listener choices in programming.[149] Since there are fewer owners, the ability of those owners to dictate advertising rates has negatively impacted other competitors.

Effects of Media Consolidation

There are also social effects and impacts of consolidation. The media appear more interested in pleasing corporate owners and advertisers than informing and providing a voice for the public. Citing the Telecommunications Act and the resulting trend towards consolidation, McChesney referred to examples such as the Disney and 20/20 fiasco[150] as inevitable outcomes. In 1998, ABC's news program "20/20" refused to air an investigative report on Disney theme parks and employment practices, which include inadequate screening for pedophiles. Disney owns ABC.

Aptly put by McChesney, "the media...exists as it does because powerful interests have constructed it so that citizens will not be involved in the key policy decisions...."[151] This certainly raises the issues of how a media system controlled by private ownership can work to promote public interest and divergent views.

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[147] Herbert H. Howard, The *1996 Telecommunications Act and TV Station Ownership: One Year Later*, 11 THE JOURNAL OF MEDIA ECONOMICS 26 (1998).
[148] *Id.*
[149] Bruce E. Drushel, *The Telecommunications Act of 1996 and Radio Market Structure*, 11 THE JOURNAL OF MEDIA ECONOMICS 16 (1998).
[150] *Id.*
[151] Rich Media, Poor Democracy, *supra* note 141 at 15.

Furthermore, it is noted that the content of the press is often related to those who finance the press.[152] And relationships, such as that between the tobacco industry and the media, point to a longstanding, systemic influence on media content.[153] Media scholar Ben Bagdikian also noted the potential danger of corporate influences and interlocking directorates when he said,

> "It is dangerous enough that in a democracy fifty corporate chiefs have so much power over the national consciousness and that this power can be exercised in ways that serve other interests."[154]

McChesney acknowledged that an oligopolistic structure exists in the media industry.[155] Oligopolies are characterized by market conditions in which there are few sellers and the action of any single seller can affect price and have a sizeable impact on other competitors. Many media companies are also worldwide and have become what are known as transnational companies. These companies are interwoven as many hold stocks in each other's businesses.[156] Their boards of directors have what McChesney called 'direct links'— two or more people serving on different executive boards of media firms and Fortune 1000 companies.[157] Similar to Bagdikian's concept of interlocking directorates, McChesney's 'direct links' are not only interwoven with one another, but with the larger corporate community.

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[152] Pamela J. Shoemaker & Stephen D. Reese, *Mediating the Message: Theories of Influence on Mass Media Content* 162 (1991).
[153] *Id.*
[154] Ben H. Bagdikian, *The Media Monopoly* 20 (1983).
[155] Robert McChesney, *Big Media Game Has Fewer and Fewer Players*, THE PROGRESSIVE, November 1, 1999 at 20 [hereinafter Big media].
[156] Robert McChesney, *It's a Small World of Big Conglomerates*, THE NATION, November 29, 1999 at 11 [hereinafter Small world].
[157] Rich Media, Poor Democracy, *supra* note 141 at 29.

Media giants also tend to participate in "equity joint ventures."[158] In these ventures, two or more companies assume ownership of certain media projects. The financial risk is spread around, so no one company takes an unusually hard hit. The advertising revenue is also shared, thereby reducing competition among the companies for advertising dollars.[159] This tendency to share what McChesney called "interlocking relationships" is dangerous because most corporations support a very conservative, mainstream agenda. Shoemaker and Reese suggested that financial institutions could end up controlling the basic decisions in media corporations or large media institutions may become dependent on the resources controlled by financial institutions. [160]

There is general concern that the blitz of mergers and consolidations poses a threat to diversity of voices. When huge media companies own multiple stations in a market, the ability for smaller, minority owned stations to obtain necessary revenue is greatly diminished. More minority owners may sell their properties as their capacity to buy more stations and attract advertising dollars has decreased.[161] It is argued that consolidation, particularly in radio, allows an owner to focus on one type of musical format and buy up the competition, effectively dominating huge chunks of the broadcast markets' offerings.[162] That is not to say that all owners will follow that course of action. However, consolidation has the potential to leave listeners with fewer musical choices.

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[158] *Id.* at 28
[159] *Id.*
[160] Shoemaker, *supra* note 152 at 175.
[161] Few and Far, *supra*, note 147 at 30.
[162] Eric Boehlert, *Radio Land Rush,* ROLLING STONE, October 17, 1996 at 40.

Impacts on Minority Ownership

Advertising Discrimination

For years, minority owners have complained of discriminatory practices in broadcast sales and advertising. These practices, usually seen in agencies, tend to view minority consumers as unimportant.[163] As such, the agencies do not push "advertising buys" on minority-owned stations. And while in some markets minority owned media are the leaders, their revenue streams do not match their rankings.[164] Across radio formats (such as black, urban, Spanish, ethnic, and general) in the top 200 markets, white-owned stations earned more revenue than minority-owned stations.[165] On average the revenue stream for white- owned radio stations is approximately $3.5 million dollars per year, while black- owned stations take in $2.6 million dollars per year regardless of format.[166]

Stations that are minority programmed are often unable to earn revenue comparable to "general" formatted stations. This can be attributed to many factors including media consolidation, group ownership, non-urban dictates and minority discounts, along with subtle race discrimination. In a study conducted by Kofi Ofori (director of research at the Civil Rights Forum on Communications Policy) and commissioned by the FCC, non-urban dictates were identified as the practice of barring the placement of advertising on Spanish or urban formatted

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[163] Civil Rights Forum, *supra* note 83 at 23.
[164] Mira Schwirtz, *Ratings Racism: When NO. 1 is Not,* MEDIA WEEK, June 22, 1998 at 14.
[165] Civil Rights Forum, *supra* note 83.
[166] *Id.*

radio stations.[167] Minority discounts is the system of buying time on urban and Spanish formatted stations at rates far less than would be paid to general formatted stations of a comparable size in a comparable market.[168] Non-urban dictates and discounts usually take place at the advertising agency level, although individual businesses often discriminate and refuse to place ads on Spanish and urban formatted stations as well. Because of these reduced rates and/or outright refusal of ad placements, minority owned stations tend to earn less advertising revenue than non-minority broadcasters.[169]

Financial Barriers

Several published reports from the National Telecommunications and Information Administration (NTIA) concluded that deregulation, consolidation, and discrimination were contributors to the declining number of minority owned media.[170] Elevated prices for stations and lack of advertising dollars were just a few of the effects. Some have predicted broadcast station prices at 20x cash flow.[171] For example, it can cost as much as $20 million dollars to enter the FM side of radio in any of the larger broadcast markets.[172] Ragan Henry, founder of the black owned US Radio Inc., sold his stations to Clear Channel Communications for $140 million dollars.[173] He said that his financial investors

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[167] *Id.* at 25.
[168] *Id.* at 26.
[169] *Id.*
[170] See, *supra* note 87; National Telecommunications and Information Administration, *Minority Broadcast Ownership in the United States,* (October 27, 1998) <http://www.ntia.doc.gov/opadhome/minown98/>.
[171] Ofori and Llyod, *supra* note 106.
[172] Boehlert, *supra* note 162.
[173] Andrea Adelson, *Minority Voice Fading For Broadcast Owners,* N.Y. TIMES, May 19, 1997, at D9.

were reluctant to provide him with more money to buy expensive stations. Without the tax certificate and the lack of available equity financing, Mr. Henry encountered hurdles he felt he could not overcome. (Clear Channel, the company that bought out Mr. Henry came under fire in 1999 when on-air personalities at one of their Ohio market stations, made racially offensive statements.[174] As a result, the station apologized and instituted proposals to bring about racial diversity in hopes of reaching out to the community.)

Financial and technical barriers exist in markets and among competitors, regardless of race. In the case of broadcast markets, there are few available frequencies left to apply for. [175] In order for a broadcaster to gain entrance, an existing station must be acquired. As previously discussed, prices for radio stations have dramatically increased.[176] Notwithstanding the daily financial expenditures in broadcast operations, such as payroll and programming, new entrants must also worry about the effects of rapid consolidation.

McChesney observed that about eight conglomerates control much of the world's media.[177] And locally, it is typical for three to four media companies to control almost all of a market's radio stations. Robert Johnson, former owner and president of Black Entertainment Television (a cable channel that programs to

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Combined they owned 35 stations. Ragan Henry indicated that he would have preferred to hold on to those stations. The deregulating of the industry has sent station prices soaring and as Henry noted stations are now being valued at 15x cash flow, as compared to the figure of 8x cash flow just a few years ago.

[174] *Toledo Radio Stations Pledge to be More Sensitive to Minority Issues*, Associated Press Newswire, March 24, 2000.

[175] Alan B. Albarran, *Radio Industry*, in *Media Economics: Understanding Markets, Industries, and Concepts* (1st ed. 1996).

[176] *Id.*

[177] Rich Media, Poor Democracy, *supra* note 141. McChesney referred to the eight major conglomerates that have a heavy hand in media and broadcast communications worldwide: Disney, Time Warner (which merged in 2000 with AOL), Viacom, Seagram, Bertelsmann, General Electric, and AT & T.

African-Americans) perceived large conglomerates would eventually control broadcast media, effectively pushing out the smaller voices.[178] Johnson also stated that media consolidation blocks out agendas and concerns that are not important to those in control.[179] Media consolidation is a threat to minority broadcast ownership and a contributor to the elimination of local programming.[180] Various black-owned broadcasting groups have sold their properties to bigger companies.[181] However, it is a general belief that large media operations have more resources to effectively compete in the media market, thus race may not always be considered the sole factor. Nevertheless, other minority broadcast owners are expected to follow suit as their ability to survive has dwindled.[182] If minority owners cannot acquire other stations, obtain strong advertising revenue, and manage the daily finances of a station, then their chances of survival are slim.

EQUAL OPPORTUNITY AND EQUAL PROTECTION

Anti-discrimination law and its legislative foundation can be found in Title VII of the 1964 Civil Rights Act.[183] This provision of the 1964 Act prohibits discrimination based on sex, color, gender, or national origin. This provision also

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[178] Robert Johnson, *The First Amendment Speech You've Never Heard Before,* BROADCASTING & CABLE, May 19, 1997, at 22-23. However, Robert Johnson recently sold BET to multi-media giant, Viacom, for $2.34 million dollars. *See,* Geraldine Fabrikant, *BET Holdings to Be Bought by Viacom for $2.34 Billion,* New York Times on the Web, November 4, 2000 <http://www.nytimes.com/2000/11/04/business/04VIAC.html>.
[179] *Id.*
[180] Adelson, *supra* note 173.
[181] *Id.* (US Radio sold its 25 station in 1996 for $140 million to Clear Channel Communications). *See also,* White, *supra* note 151.
[182] Adelson, *supra,* note 173.
[183] Pub. L. 88-352 (1964) amended several sections of Title VII.

created the Equal Employment Opportunity Commission [EEOC], which is charged with upholding the law proscribed through Title VII.

According to Carter Wilson, a University of Toledo professor, during its initial years the EEOC was ineffective because it suffered from limited resources, limited statutory authority, and operated under a politically conservative framework.[184] This meant the Commission operated on a case-by-case basis, viewing discrimination as an individual problem as opposed to a systemic problem.[185] Of the 100,000 employment discrimination complaints received at the EEOC during its first seven years in existence, only 41,000 were investigated and only 2,460 were successfully resolved. A key factor in the seemingly weak enforcement of Title VII complaints was that the EEOC lacked the power to bring lawsuits against firms. The EEOC had to turn many cases over to the Justice Department for further investigation and/or prosecution.

In the 1970s, anti-discrimination policies became more effective. Wilson described how the EEOC and the courts began to view anti-discrimination policies in a more expansive framework. Institutional forms of discrimination were being recognized.[186] The EEOC moved to implement an industry-wide approach in dealing with discrimination, no longer using a case-by-case approach.[187] Affirmative action plans had begun to be used to remedy discrimination. Most

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[184] Carter A. Wilson, *Racism: From Slavery to Advanced Capitalism* 190 (1996).
[185] *Id.*
[186] *Id.* at 191.
[187] *Id.* at 192.

importantly, the EEOC had the newfound power to initiate lawsuits against firms that discriminated.

Equal opportunity is crucial for all people, but especially for those who have been historically denied privileges. Congressional Digest described equal opportunity in several ways.[188] Affirmative action, as defined by the U.S. Commission on Civil Rights, includes any measure adopted to correct or compensate for past/present discrimination or prevention of future recurring discrimination. Affirmative action has two elements: a voluntary and a mandated effort to ensure minorities and women are given equal opportunity in education, employment and other areas.[189] Equality of opportunity is the idea that all people should be able to equally compete, perform and succeed on their merits without being discriminated against because of their race, sex or other characteristics.

As a goal of affirmative action, equality of results is not as simple. Those who oppose affirmative action say a system seeking equal results is designed to give people an advantage based on their membership in a protected group. Supporters argue that the lack of minority participation is indicative of the lack of opportunity. Members of marginalized or minority groups do not start at the same level as society at large, so trying to root out discrimination case by case is ineffective.

Affirmative action programs use a classification structure and are designed to correct a tangible, evident problem. In order to classify groups for

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[188] Affirmative Action, Retribution or Equal Opportunity?, 75 CONGRESSIONAL DIGEST 162- 164 (1996).
[189] *Id.*

special treatment, the goals of affirmative action programs should be narrowly defined and target a government interest. Providing protection for a class of people (defined by race) is a violation of the Constitution, unless it can be proven that such classification identifies and corrects past injustice. In the case of broadcast minority preferences, distress policies and tax certificates were seen as ways to overcome prior discrimination.

These policies did not use specific, past instances of discrimination as their explicit purpose. As a result, many of the legal arguments against these minority ownership policies have cited equal protection clause violations. The equal protection clause regulates the government's ability to classify people for obtaining benefits or administering punishments. The equal protection clause provides for similar treatment of all people in like circumstances. Nevertheless, minority ownership preferences and policies were created to foster the concepts of diversity and to increase the presence of minority groups in broadcast media.

While minority preferences initially passed judicial muster as serving a substantial government interest,[190] opponents have continued to argue that such policies infringed on the constitutional rights of others and failed to present a logical connection to programming.[191] Schement & Singleton studied the relationship between minority ownership and minority programming and concluded Spanish-owned stations fared no better or worse than white owned

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[190] As seen through Congress's actions in the 1980s to stop FCC revocation of minority preferences.
[191] Howard Kleiman, *Content Diversity and the FCC's Minority And Gender Licensing Policies*, 35 JOURNAL OF BROADCASTING AND ELECTRONIC MEDIA, 411 at 421 (1991).

stations in terms of minority programming. [192] A subsequent study found no significant relationship between race, ownership and quantity of programming.[193] Other studies reinforced this tenuous connection between race, programming,[194] and ownership.[195] Even without a clear empirical connection between minority ownership and programming, inclusion of minorities in media ownership was said to promote a more open, accepting and reflective society.[196]

Besides the belief that minority ownership would help in the promotion of a more reflective society, Gauger's analysis concluded that race based preferences did not unnecessarily abridge the rights of adversely affected parties.[197] Other scholarship indicated "tangible" benefits to minority ownership, such as better programming.[198] In 1988, the Congressional Research Service found some correlation between minority ownership and programming.[199] Of the stations that were not owned by minorities, only twenty percent provided

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[192] Jorge Reina Schement and Loy A. Singleton, *The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio*, 31, JOURNAL OF COMMUNICATION, 78- 83 (1981).
[193] Loy A. Singleton, *FCC Minority Ownership Policy and Non-Entertainment Programming in Black-Oriented Radio Stations*, 25 JOURNAL OF BROADCASTING, 195-201 (1981). (Black owners did not provide significantly more or less programming than non-black owners).
[194] Stuart Surlin, *Black Oriented Radio: Programming to a Perceived Audience,* 16 JOURNAL OF BROADCASTING, 288- 298 (1972) (Black oriented radio devoted less time to news and public affairs programming).
[195] James Jeeter, A Comparative Analysis of Black-owned Black-oriented radio stations and White-owned Black-oriented radio stations (1981) (Ph.D. Dissertation, University of Wisconsin-Madison). Study found no significant difference in public affairs programming and content between black-owned, black oriented stations and white-owned, black oriented stations. However, results showed there were significant differences in playlists and musical selection between the two types of ownership.
[196] 1978 report, *supra* note 99.
[197] Timothy Gauger, *The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcast Licenses,* 83 NW. U.L. REV. 665 (1989).
[198] Paul M. Gold, The Federal Communications Commission's Minority Ownership Policy: Public Interest Assumptions as it is Applied to Nonentertainment Program Content of Black-Oriented Commercial Radio Stations on the U.S. Mainland (1983) (Thesis, University of North Carolina, Chapel Hill) (study concluded that a greater percentage of black owned stations expended over 4% of their total news times to locally oriented news.)
[199] Kleiman, *supra* note 191 at 424.

programming for minorities. However, of the minority owned stations, sixty-five percent provided programming for minorities.[200]

The need for minority ownership also was reflected in studies that linked minority ownership to better employment opportunities for minorities.[201] Nevertheless, Stone found minorities working in broadcast news were not employed in positions that led to managerial opportunities.[202] This was especially true for minority males, as they were concentrated in low paying jobs such as cameramen and photographers. Women, however, were seen more often in reporting and anchoring positions.[203] Profiles of television and radio news directors found women (mostly white women) were making rapid advancements in news management, although minority advancement was minimal, a one percent increase over a four-year period.[204] In addition, a ten-year study showed the total broadcast industry workforce had increased by thirty five percent but minority employment had decreased, particularly for black males.[205]

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[200] *Id.*
[201] David Honig, Proceedings from the 10th annual telecommunications Policy Research Conference: *Relationships between EEO, Program Service and Minority Ownership* (1982). (Stations with black oriented programming hired twice as many blacks as did the control group stations -those not black formatted. In addition, black owners generally hired blacks at higher rates.) *See also* Gold, *supra* note 198. (Results from the study showed a significantly greater percentage of black owned stations hired black general managers and reported that over 75% of the stations staff was black.)
[202] Vernon A. Stone, *Pipelines and Dead Ends: Jobs Held by Minorities and Women in Broadcast News*, 15 MASS COMM REVIEW 10(1988).
[203] *Id.*
[204] Vernon A. Stone, *Changing Profiles of News Directors of Radio and Television Stations*, 1972- 1986. 64 JOURNALISM QUARTERLY 745 (1987).
[205] Vernon A. Stone, *Trends in the Status of Minorities and Women in Broadcast News*, 65 JOURNALISM QUARTERLY 288 (1988).

OWNERSHIP POLICIES AND THE FCC

Perhaps the lack of minority involvement in broadcast ownership and the ineffectiveness of minority broadcast policies was due to weak enforcement of FCC policies.[206] For example, the Commission initiated an ascertainment requirement policy in 1960. Broadcasters were required to go into the community and speak with various leaders and groups to determine the type of people who lived there, the kinds of concerns and interests those people had, and how they [broadcasters] could meet those concerns. The FCC designated certain institutions that broadcasters should seek out and interview about community concerns.[207] When the ascertainment requirements were undermined and eventually eliminated in 1981, it became more difficult for citizen groups to question station efforts to serve underrepresented members of the community.[208] Challenging station licenses was another way in which citizen groups sought to voice their concerns. Hundreds of citizen complaints were lodged over an eight-year period, yet the FCC failed to hold any hearings,[209] and over a ten-year period, the FCC had one hundred and twenty renewal challenges but only granted three hearings.[210]

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[206] The history of FCC involvement in minority broadcast policy decisions has contrasted with court interpretation of such policies. However, much of the conversation in this area is now moot. Much of the legal foundation for race-based policies was overturned in 1995 with *Adarand v. Pena* 515 U.S. 200 (1995).
[207] Horowitz, *supra* note 69 at 248-249. *See generally*, Orville Walker, Jr. and William Rudelius, *Ascertaining Programming Needs of "voiceless" Community Groups*, 20 Journal of Broadcasting Media 89 (1976).
[208] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971); *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418 (1976). *See also* David Honig, *The FCC and its Fluctuating Commitment to Minority Ownership of Broadcasting Facilities*, 27 HOWARD LAW JOURNAL 859 (1984).
[209] *Id.*
[210] G.G. Leatherman, *Employment Discrimination in Television Broadcasting: A Study of FCC and EEOC*

Additional research suggested a history of racism at the FCC in its early years might have affected minority ownership and participation in the industry. The WLBT-TV[211] case is the often referenced as evidence of FCC denial of community groups' grievances in relation to programming.[212] Citizens and advocacy groups in Jackson, Mississippi, petitioned the FCC to deny WLBT's license renewal application. The formal petition stated, among other things, that WLBT failed to serve the black population of Jackson, the programming was unfair and discriminatory against blacks, and their treatment of racial and integrationist issues was unfair and inadequate. Although the petitioners had gathered evidence to support their case, the FCC granted a one-year conditional renewal to the station, provided WLBT improved its programming. Instead of fully investigating the claims of the petitioners, the FCC declared the petitioners did not have standing.[213] Petitioners appealed the case to the D.C. Court in 1966. The Court remanded the case back to the FCC for further consideration. The Commission held formal hearings on the renewal of WLBT's license and subsequently renewed the license. Upon a second appeal to the D.C. Court in 1969, WLBT's license was removed. [214] As then judge-- and later Chief Justice Warren Burger-- stated in the opinion it was imperative that,

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Concurrent Jurisdictions, 2 HASTINGS COMM. & ENT. L.J. 125 (1979/1980).

[211] *Office Of Communication Of The United Church Of Christ, v. Federal Communications Commission*, 359 F.2d 994 (1966).

[212] Steven Douglass Classen, *Standing on Unstable Ground: A Reexamination of the WLBT-TV Case*, 11 CRITICAL STUDIES IN MASS COMMUNICATIONS 73 (1994); Mary Tabor, *Encouraging "Those Who Would Speak Out With a Fresh Voice" Through the FCC's Minority Ownership Policies*, 76 IOWA L. REV. 612 (1991).

[213] *Id.; See also*, Steven Douglass Classen, Broadcast Law and Segregation: A Social History of the WLBT-TV case (1993) (Ph.D. Dissertation, University of Wisconsin, Madison).

[214] *Id.*

> "the holders of broadcasting licenses be responsive to the needs of the audience without which the broadcaster could not now exist."[215]

Some have argued that the failure of minority preferences in broadcasting rested with FCC construction of minority ownership policies,[216] while others concluded preference policies were subjects of great support or opposition as they hinged upon court interpretation of constitutional law.[217] According to Anastos, other explanations for failure of minority ownership policies claimed people who were not in need of the policies used loopholes to take advantage.[218] And while loopholes are bound to exist with any policy, Hart stated the policies themselves were of extreme value and importance.[219]

BROADCAST REGULATION AND DEREGULATION

Deregulation has had a profound impact on minority participation in the broadcast industry. Deregulation was predicted as being potentially contrary to minority interests, as it would allow the commercial market to determine allocation of media properties.[220] As such, the highest bidder would be able to

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[215] *Supra* note 211 at 1002.
[216] Milan Meeske, *Black Ownership of Broadcast Stations: An FCC Licensing Problem*, 20 JOURNAL OF BROADCASTING, 261-271 (1973). Meeske indicated that the concept of "weight" in comparative hearings was problematic and lacked true definition. Furthermore, the exact roles of minorities that would enable them to receive the "weight" were a fuzzy concept. Lastly, Meeske wondered if minority preferences should even exist at all. If they were so problematic was that not an indication that perhaps they were not working.
[217] Kleiman, *supra*, note 191.
[218] Arthur J. Anastos, *The Fallacy of a Single Minority Broadcast Voice: The Legacy of Metro Broadcasting, Inc. v. FCC*, 15 COMMUNICATIONS AND THE LAW 3 (1993).
[219] Thomas A Hart, Jr., *The Case for Minority Ownership,* 2 GANNETT CENTER JOURNAL 54 (1988). The author suggested a case-by-case approach with regards to minority ownership, thus solving the problems of 'shams' and 'fronts'.
[220] Kurt Wimmer, *An Interdisciplinary Look at Minorities and the Media: Implications for Deregulation*. Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication, Memphis, TN (1985, August); Kurt Wimmer, *Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform,* 8 HASTINGS COMM. & ENT. L.J. 329- 480 (1985/1986). [Hereinafter Broadcast Reform].

purchase broadcast properties. Socioeconomic factors would preclude the existence of minority advocacy and a market failure would exist for minority programming.[221] Economic changes influenced shifts in political power. Those changes contributed to high concentrations of wealth in the upper class.[222] As conservative forces grew strong, civil rights forces weakened. This shift in power allowed the corporate sector to become more politically active,[223] as McChesney stated companies such as Time Warner and Disney "have their own lobbying machines."[224]

Private ownership of capital sources (such as those in the broadcasting and communications industry) indicates that investments and policies tend to profit and help accumulate wealth, not to satisfy human (listeners or viewers) needs.[225] A deregulated broadcast environment, according to Schmeltzer, would provide little incentive for broadcasters to serve minorities,[226] would reduce competition and diversity,[227] and would only serve advertisers and profit appeals.[228] Yet broadcasters are licensed to serve in the "public interest, convenience, and necessity" as evidenced by that phrase's inclusion in the 1996

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[221] Broadcast Reform, *supra* note 220, at 333, 340, 353.
[222] Wilson, *supra* note 184 at 241.
[223] *Id.*
[224] Rich Media, Poor Democracy, *supra* note 141 at 64.
[225] Wilson, *supra* note 184 at 212.
[226] Kathryn Schmeltzer, *supra* note 82.
[227] Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violations of Equal Protection*, 5 COMMLAW CONSPECTUS 269 (1997).
[228] Rumble, *supra,* note 2.

Telecommunications Act.[229] As guardians of the public airwaves, that implies a certain responsibility to the public regarding programming.

The FCC historically used several rationales for regulating in the public interest. One was the "scarcity" argument.[230] There was limited channel availability, so not every citizen would be able to broadcast. Licensing was created as a way to ensure that diverse ideas were being introduced into society. However, "scarcity" in the technical sense no longer has the same meaning as it once held, especially with the emergence of additional programming sources like cable, independent stations, digital broadcast satellites, etc.

Some studies have theorized that as the number of channels increase, more minority and diverse programming will be provided.[231] Although there are multitudes of programming outlets, some have noted minority access or participation is still relatively low.[232] According to Minow, enlarged choice may not be enough to satisfy the public interest, as some viewers will be excluded.[233] Choices, such as cable television, come with a huge price that many people will

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[229] Section 307(c) (47 U.S.C. 307(c)) was amended to read as follows: Upon application therefore, a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby. Consistent with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action

[230] *See generally,* Horowitz, *supra* note 69; Pool, *supra* note 73.

[231] Steven S. Wildman and Theomary Karamanis, *The Economics of Minority Programming*, The Aspen Institute (June 11, 2000) <http://www.aspeninst.org/c&s/diversity_papers96_wildman.asp>. The authors referred back to Peter Steiner's 1952 model, which studied the programming decisions of an ad-supported broadcasting industry with relatively few channels. Steiner was the first to state that programming provided by advertiser-supported broadcasters is likely to be biased toward the types of programs preferred by the majority of viewers and away from those that would appeal to viewers with non-mainstream tastes.

[232] Broadcast Reform, *supra* note 220 at 346- 349.

[233] *Supra* note 3 at 11.

be unable to afford.[234] And despite the growth of pay-per-view services in the last twenty years, television still has the most significance for addressing minority programming as approximately one-third of television homes in the United States rely on commercial television as their sole means of broadcast programming.[235]

Another rationale used for regulating in the public interest was diversity of programming and information. Long standing as a basic tenet of broadcast regulation law, diversity of programming has its root in a 1943 Supreme Court case.[236] The FCC's decision to provide for minority representation was designed to foster "unrestricted flow of ideas and equal opportunities for all."[237] To that end, the FCC implemented rules that offered equal opportunities in all licensees and permittees.[238]

Overall, the value of encouraging a wide range of voices and opinions has been asserted as a fundamental principle of the First Amendment and has been used by regulators and courts to sustain broadcasting polices. Yet, broadcasters have not presented a wider range of programming nor diversity within programming. A 1981 study indicated blacks were shown less frequently than in previous years, black females were invisible, but whites of both sexes had increased their representation in major roles.[239] A 1989 survey conducted by the

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[234] *Id.*
[235] Wildman, *supra* note 231.
[236] *Associated Press v. United States*, 326 U.S. 1 (1945).
[237] 1978 Report, *supra,* note 99.
[238] Statement on Policy of Minority Ownership, *supra* note 115.
[239] John F. Seggar, Jeffrey K. Hafen, & Helena Hannonen-Gladden, *Television Portrayals of Minorities and Women in Drama and Comedy Drama 1971- 1980*, 25 *JOURNAL OF BROADCASTING* 277 (1981). Authors conducted content analysis of television dramas and comedy programs. And although specific shows were examined at the exclusion of other show types, the authors contend their results were in agreement with

Center for Media and Public Affairs showed that minorities were rarely seen as anchors and reporters on network evening newscasts. [240] The survey found no blacks, no Asians, and only two Latinos-- Juan Vasquez on CBS and John Quinones on ABC. Ziegler and White's study, which investigated network news and the role of sex and race on newscasts, found most correspondents were white and male and the representation of women and minorities changed very little on television, even though the number of minorities in the population continued to increase.[241]

Other studies have examined the effects of programming formats on portrayals of minority groups. For reality based shows such as "Cops," research showed white characters were likely to be depicted as law enforcement, while perpetrators and criminal suspects were overwhelming black and Hispanic characters.[242] As part of President William Clinton's initiative on race dialogue, a 1998 study conducted by communications scholar Robert Entman investigated the issue of race and stereotypes.[243] The study found high visibility of blacks, but in stereotypical roles. Additionally, the study noted the invisibility of other minorities who are not black. Other research has studied portrayals of other

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prior research studies. Their results in this study contrasted sharply with the researchers early findings in 1977. That study showed an increase in portrayals for whites and blacks and other groups (whom were defined as Orientals, Mexicans, Natives, etc.) and females. *See* John F. Seggar, *Television's Portrayals of Minorities and Women, 1971-1975*, 21 JOURNAL OF BROADCASTING 435 (1977).

[240] *Dissecting Network News: Study Finds Men Dominate, With More Women Anchors Than Reporters and Few Minorities*, BROADCASTING, February 26, 1990 at 40.

[241] Dhyana Ziegler and Alisa White, *Women and Minorities on Network Television News: An Examination of Correspondents and Newsmakers*, 34 JOURNAL OF BROADCASTING AND ELECTRONIC MEDIA 215-223 (1990).

[242] Mary Beth Oliver, *Portrayals of Crime, Race, and Aggression in "Reality-based" Police Shows: A Content Analysis*, 38 JOURNAL OF BROADCASTING AND ELECTRONIC MEDIA 179 (1994).

[243] *Mass Media and Reconciliation* (September 1, 2000) <http://raceand media.com/chp.asp>. The study included an examination of print media, Hollywood films, and network news analysis.

minority groups, such as Asian Americans, finding evidence of over-representation of such portrayals as compared to actual population figures.[244]

Overwhelmingly, black portrayals were seen more on black programs while white characters were seen more on white programs.[245] Black characters on black programs were more stereotypical, exhibited more personal problems, and had lower social status. In contrast, black characters on integrated shows displayed greater social values, exhibited community problems, and had higher social status.[246] Interviews with writers, producers, and talent agents in Los Angeles revealed that what the average person thought someone in a particular role should look like was an important factor in making casting decisions.[247] A producer stated:

> "By a damn sight, you would be far more likely to accept a white or Chicano policeman in Beverly Hills than a black policeman ...Why should I start arguments in a living room or a den between husband and wife? I mean, why make a point out of something that's not a point?"[248]

When blacks did appear in programming, their roles were usually unrealistic compared to the actual world.[249] The 'televised' labor market did not

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[244] Charles R. Taylor and Barbara B. Stern, *Asian Americans: TV Advertising and the "Model-minority" Stereotype,* 26 JOURNAL OF ADVERTISING 47 (1997).
[245] Pamela T. Reid, *Racial Stereotyping on Television: A Comparison of the Behavior of Both Black and White Television Characters*, 64 JOURNAL OF APPLIED PSYCHOLOGY 465 (1979).
[246] Cherry A. McGee-Banks, *A Content Analysis of the Treatment of Black Americans on Television*, SOCIAL EDUCATION 336 (1977).
[247] Joseph Turow, *Casting for Television Parts: The Anatomy of Social Typing*, JOURNAL OF COMMUNICATION 18 (1978).
[248] *Id.* For example carpenters were usually male and telephone operators were usually female. Although it can be disputed that either sex can actually be in either one of these professions, the casters emphasized most people had certain expectations in terms of occupational roles. Ironically, most casters admitted they had no idea what most people thought. Others stated that whatever they believed would be good enough for the masses.
[249] John F. Seggar & Penny Wheeler, *World of Work on TV: Ethnic and Sex Representation in Television*

resemble the actual labor market except for farm workers and managerial depictions.[250] Portrayals of various racial and ethnic groups were not comparable with their numbers in the population. In some cases, there seemed to be over-representation of minorities in the televised "labor market." Most occupational portrayals of blacks were as law enforcement officers or entertainers, with under-representation of less prestigious occupations.[251]

Programming affects how minorities view themselves. There is a strong relationship between race and perceptions of black television characters. Blacks tend to relate to black characters on television.[252] In addition, programming can connect people to positive and negative images about themselves and members of other groups. For example, "All in The Family" had high enjoyment from both high and low prejudice viewers. However, high prejudice persons watched "All in The Family" more than low prejudiced persons. These viewers admired Archie (antagonist) over Mike (protagonist) and believed Archie made better sense.[253]

The public's ability to be informed on a variety of issues, through programming or other ways, has continued to be a strong goal of regulators. However, the way to accomplish this task is no longer through the accountability of broadcasters to the public. Deregulation centers broadcaster accountability in

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Drama, 17JOURNAL OF BROADCASTING 201 (1973).

[250] *Id. See also,* J.R. Dominick, *The Portrayal of Women in Prime Time: 1953-1977,* 5 *SEX ROLES* 405 (1979). Women also had a problem with real labor vs. televised labor; Herbert C. Northcott, John F. Seggar, & James L. Hinton, *Trends in TV Portrayal of Blacks and Women*, 52 JOURNALISM QUARTERLY 741 (1975). Examined television occupational depiction of blacks and whites as an indicator of stereotypes and/or tokenism. Blacks were basically relegated to backgrounds.

[251] Church Roberts, *The Portrayal of Blacks on Network Television*, 15 JOURNAL OF BROADCASTING 45 (1971).

[252] Jannette Dates, *Racial Attitudes and Adolescent Perceptions of Black Television Characters*, 24 JOURNAL OF BROADCASTING 549 (1989).

[253] Vidmar & Rokeach, *supra* note 78.

the marketplace. In spite of that, evidence shows that minority groups are less able to afford access to new media (such as cable, satellite, etc.) and continue to view traditional media as their way to receive information and programming.[254] As the market is left to dictate programming choices, the industry's ability to serve minority interests and tastes dwindles.[255] Wimmer's discussion of minority issues in broadcasting noted that in 1983, the large networks devoted less than 30 seconds per day to minority programming interests.[256]

The NAACP president, Kweisi Mfume, criticized the broadcast networks for lack of diversity within their programs.[257] While newer networks such as Warner Brothers' WB Network and Rupert Murdoch's Fox Network have attempted to provide some minority programming, the traditional three networks (ABC, CBS, and NBC) are still far behind. None of the twenty-six shows scheduled for the fall 1999-television season had a minority person in a prominent role.[258] Another contributing factor is that only fifty-five of the eight hundred and thirty-nine writers who work on television dramas and comedies are black. The majority of those black writers work for the WB or United Paramount's network-- UPN.[259]

USA Today had the same opinion of the fall 1999 TV season. In a featured cover story, the fall line-up of shows was described as being unreflective

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[254] Broadcast Reform, *supra,* note 220 at 339.
[255] Broadcast Reform, *supra* note 220 at 353.
[256] See *Id.* at note 50.
[257] *Id.*
[258] Richard Breyer, *Color TV*, 15 THE WORLD AND I 84, March 2000.
[259] *Id.*

of American society.[260] Not only were the story lines and accompanying casts focused on young, urban, and beautiful characters, but those characters and the storylines were white-oriented.[261]

CRITICAL RACE THEORY

Critical race theory is composed of many theoretical strands, some of which are connected to the dissertation topic. The "constitution is color blind" and the interest-convergence theory are theoretical strands that can help explain the failure of minority ownership polices. They can help show why the policies have been unsuccessful to this point. In addition, these legal theories provide insight into what can be done to craft and implement minority ownership policies in a more effective manner.

The Constitution is Color-Blind

Kimberlé Crenshaw, a well-known critical race theorist, remarked that the Reagan administration symbolized the emergence of hostility towards civil rights and affirmative action policies.[262] The Reagan and Bush administrations sought to restore a conservative standard in civil rights laws.[263] There was an active campaign against affirmative action, as both administrations promoted race-neutral policies that insisted upon proof of discrimination. Furthermore, President Reagan's administration saw the EEOC returning to a case-by-case approach

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[260] Robert Bianco, *According to TV, Everyone is White, Sex-crazed, Beautiful, and Young-- Just Like in Reality? Right?*, USA TODAY, Friday, August 6, 1999. Section E, 1-2.
[261] *Id.*
[262] Race and reform, *supra* note 13.
[263] Wilson, *supra* note 184 at 197.

that was indicative of the Commission's conservative approach prior to the 1970s.[264] This new hostility towards affirmative action was transformed into a formalistic, "color blind" view of civil rights, although the move towards deregulation began prior to the Reagan and Bush presidencies. However, this "color blind" view of civil rights and the Constitution called for the removal of affirmative action and other preference based policies. Color-blind rhetoric was transformed in the broadcasting industry through broadcast deregulation. The removal of broadcast policies such as ascertainment, anti-trafficking, and license challenges were ways to relax industry and remove the voice of marginalized persons.

While the Supreme Court has held racial subordination of any group as an isolated phenomenon, Gotanda contended this viewpoint hinders society's ability to address the connection between minorities and racism.[265] The "color blind" theory limited available remedies only to "actual victims" of discrimination; meaning only those people who could prove a visible injury of some kind.[266]

Freeman argued that anti-discrimination law was embedded in the "perpetrator" viewpoint.[267] In this viewpoint, racial discrimination is viewed as a series of actions inflicted upon a victim by a specific perpetrator. Racial discrimination is simply the misguided actions of a few individuals, not a social

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[264] *Id.*
[265] Colorblind, *supra* note 44.
[266] Race and reform, *supra* note 13.
[267] Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine* in *Critical Race Theory: Key Writings that Formed The Movement* 30 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., 1995).

phenomenon. Remedies become case specific as their objective is neutralizing the inappropriate conduct of the perpetrator.[268] The overall focus is on the specific action rather than the overall existence of the victim and the racial subordination.[269]

Affirmative action, as an equalizer, looks to redistribute power, resources, and wealth.[270] Harris argued that affirmative action, "dismantles the actual and expected privilege that has attended white skin.".[271] The origin of inherent property rights in whiteness is deeply rooted in race discrimination and slavery.[272] White identity and being white were sources of protection from being enslaved. Blacks were imported into the United States as tools of labor and were labeled as property.[273] This resulted in the legalization of slavery which allowed blacks to be sold, used as collateral, transferred, or used sources of currency – all characteristics of property.[274] This institutional system was codified in the United States Constitution through the Representation Clause where blacks were classified as 3/5 of all other persons.[275] Race was critical as being white was equated with freedom.[276]

Historical and social contexts, such as slavery and the original intent of the Constitution's framers, are a part of the "victim" perspective of affirmative action.

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[268] *Id.* at 36-37.
[269] *Id.*
[270] Cheryl L. Harris, *Whiteness as Property* in *Critical Race Theory: Key Writings that Formed The Movement* 289 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., 1995).
[271] *Id.* at 288.
[272] *Id.* at 277.
[273] *Id.* at 279.
[274] *Id.*
[275] *Id.* at 278.
[276] *Id.* at 279.

From this perspective, racial discrimination consists of existing social conditions (e.g. housing, money, employment), as well as the mental state associated with those conditions. Freeman argued that when race discrimination is viewed holistically and when the steps to remove the discrimination are systematic, only then can racial balance and equity be achieved.[277] Similar to this perspective is what Crenshaw called the expansive view of anti-discrimination law.[278] The expansive view characterizes equality as a result and it tries to identify real consequences for racial groups.

Minority ownership and preferences share concepts akin to the "victim" viewpoint. Reflecting on barriers such as lack of capital, lack of viable properties, and bias in advertising, supporters refer to the systematic nature in which minorities have been excluded from ownership.

To counter, opponents claimed such policies served to "stereotype" minorities with a single voice.[279] While not all minorities think the same way, critical race theorist Patricia Williams contended equating minority ownership policies and preferences with a stereotype of the single voice is inaccurate.[280] There exist culturally and historically shared experiences within each minority group and society as a whole. What minority ownership policies seek to

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[277] Freeman, *supra* note 269.
[278] Race and reform, *supra* note 13.
[279] Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times* in *Critical Race Theory: Key Writings that Formed The Movement* (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., 1995).
[280] *Id.*

accomplish is a more reflective media, accommodating other interpretations, images, and views- not typecasting all minorities with one, monolithic voice.

The Interest-Convergence Theory

Discrimination can be described as a collection of behaviors, beliefs, and customs embedded in our society. According to legal scholar and critical race theorist Derrick Bell, it is the inability of whites to recognize and accept the fact that discrimination still exists that hinders overall efforts to achieve racial balance.[281] Whites are not willing to accept accountability for the problems that exist nor do they deem any level of personal sacrifice necessary to right systematic or societal wrongs. The evidence that whites are still unable to accept the deep-rooted effects of racism is evident in the continued debate over affirmative action and preferential programs.[282]

Bell contends that racial equality will only happen when that equality merges and is in alignment with the interest of the white majority.[283] The need to remain superior hinders whites from understanding the need to allow racial minorities to exert their social and political muscle. This convergence of interest undermines the efforts to eradicate discrimination by focusing the spotlight on preserving the socio-economic status of upper class whites. The theory asserts that whites will only allow social and economic progress of racial minorities insofar as it does not encroach on what whites feel they are naturally entitled.

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[281] Bell, *supra* note 28.
[282] *Id.*
[283] *Id.*

What motivates the resistance to racial equality is the perception (belief) by whites that any gains by minority groups will threaten the white majority's sense of entitlement to preferential treatment and superiority over minority groups.[284]

To wonder why whites would feel the need to hinder the removal of racial barriers is difficult. However, one cannot dismiss various efforts by the white majority to limit progress of racial minorities, under the guise of public interest, race-neutrality, and other concerns. The repeal of the minority tax certificate was placed in such a context. In order to provide a health care provision for small business owners, the tax certificate needed to be removed. The program was removed based on a deal to a minority led cable group and the wish to supply a health care policy for small business owners. Interests that were very different and an instance where a policy aimed at rectifying inequalities in ownership were dismissed for a "greater societal good."

While the federal courts now assess 14th Amendment violations under the strict scrutiny standard of review, Bell argued there may be more to this blanket approach to equal protection and constitutional guarantees.[285] Remedies that are achieved under strict scrutiny review may be an external expression of subconscious judicial need to protect the status of upper and middle class whites.[286] As such, the meaning of the policy and its subsequent remedy (which should be justice for the disadvantaged and racial balance) is never achieved.

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[284] Derrick A. Bell, Jr., *Property Rights in Whiteness- Their Legacy, Their Economic Costs* in *Critical Race Theory: The Cutting Edge* (Richard Delgado, ed.).
[285] *Id.* at 81.
[286] *Id.*

Even if one disagrees with the idea of a judicial subconscious playing a role in remedying discrimination, viewing racial discrimination and discriminatory actions under a standard of strict review might pose as a legal obstruction to achieving racial balance. Discriminatory actions must now be linked to intentional conflict of some kind and remedies are targeted at punishing specific entities.[287] It is often difficult to distinguish from intentional and unintentional acts. Furthermore, a requirement of intentional conflict can diminish the importance of social and historical factors that contributes to racial inequality- factors that cannot be easily identified, but are embedded in our society.

For broadcast ownership, minorities have faced the same challenges for years. Many of those challenges are direct results of overt and subtle bias, such as advertising discrimination. The minority ownership policies were cognizant of the long social and even industry discrimination towards minority participation. However, the acceptance of the colorblind theory by the courts has diminished the importance of understanding such information.

Race does matter because it reveals something about the person and links to a larger, cultural identity. It is a filter through which all people see the world and themselves. Many whites think minorities are obsessed with race and fail to understand why race is so important. However, communications scholarship has found race to be important to self-awareness, self-esteem and socialization.

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[287] Colorblind, *supra* note 44 at 262-266.

CHAPTER III: METHODS

According to Wren and Wren, researching the law is often necessary to learn the consequences of a specific set of facts.[288] For this reason, legal research was selected as the method of investigation. While an understanding of the set of facts that underlie a case or statute is important, legal research can help make clear the roles that social and political processes play in shaping our laws. Legal research can serve largely adversarial goals. However, Gillmor & Dennis[289] stated that legal research could also accomplish several things:

> Clarifying the law through the examination of case precedents or procedures.
>
> Advocating reformation of old laws and creation of new ones.
>
> Giving clear understanding of how the law operates for people and within society.

Gillmor and Dennis described a variety of ways to conduct legal research.[290] *Traditional* legal research focuses on the exhaustive analysis of legal materials related to a specific area of law, for example, analysis aimed at finding rules of law from statutes, administrative agency decisions, executive orders or court decisions. *Empirical legal research and behavioral* legal research use methodologies found in social sciences as they recognize the complexities

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[288] Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual* 29 (2 ed. 1986).
[289] Donald M. Gillmor & Everette E. Dennis, *Legal Research in Mass Communications Research* in *Research Methods in Mass Communication* 334 (Guido H. Stempel III & Bruce H. Westley, eds., 1989).
[290] *Id.* at 340- 344.

and circumstances of the law. *Context*, as a tool of legal research, calls for the understanding of legal issues that may have origins in areas unrelated to the phenomenon being studied. It remains important to know that legal research is often done to support a particular position. Only a small percentage of legal research is conducted just for the sake of knowing.

Several factors distinguish legal research from traditional scientific research. Social scientific research seeks to emphasize general aspects of a phenomenon. While social science research looks for connection between various phenomenon, empirically based testing is customarily used to make those connections. Legal research is concerned with the uniqueness of a case and often uses reasoning by analogy— case B is like case A. S*tare decisis* refers to the principle of precedent. This principle requires the adherence to rulings in similarly patterned cases by following the principles that prior courts and judges have established.[291] Although precedents may be distinguished (saying case B is really not like case A) or overruled, courts are reluctant to do so unless it is apparent that the former rule would be clearly unjust in present circumstances.

Legal research also differs from social scientific research because it does not deal with probabilities or uncertainties, and is heavily oriented towards the past. In social scientific research, *theory* is composed of related, abstract statements that are empirically linked and explain a human behavior or condition. The concept of *theory* has a different purpose when used in legal research.

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[291] Christina Kuntz et al, *Legal Research* 137 (4th ed. 1996).

Theory in law focuses on explaining the rationale or explaining the specifics on which an action is claimed to exist or not exist.

Despite the differences among social scientific forms of communications research, legal research is one of the oldest areas of communication research. Legal research lends itself to a variety of other fields of study, including history, economics and philosophy. [292] Legal research has begun to incorporate elements of social science research. Although this kind of application is relatively new, what exists proves to be potentially useful to making sense of the law. [293] Gillmor and Dennis note that scholars are moving away from the dogmatic, intrinsic aspects of law. Many are exploring the extrinsic factors that can influence the courts and the law, such as politics, elections,[294] and in the case of this dissertation, race.

RESEARCH DESIGN

Legal research methods were used to conduct this study. Overall, legal analysis took place in three parts. First, there was identification of a collection of United States district court, appellate court, and Supreme Court cases in the area of minority ownership and minority ownership policies promoted by the FCC. Second, analysis of cases consisted of reviewing majority and dissenting opinions. Third, placing majority and dissenting opinions in the framework of

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[292] *Id.* at 333.
[293] *Id.* at 345.
[294] *Id.* at 346.

critical race theory, the study continued with determining the judicial rationale and arguments.

Legal research relies heavily on existing documents and materials, which also adds a historical dimension to the study as well. The materials used in legal research are generally differentiated in terms of primary and secondary authority. Primary authority is described as anything that constitutes the law.[295] Local, state and federal legislation, judicial case law, administrative regulations and decisions, legislative histories, as well as rules of procedure are all sources of primary authority.[296] Using primary authority provides not only a firm legal basis for any argument, but also shows where such arguments have taken place in the law.

Secondary authority is information and resources that are created by individuals and non-governmental bodies to attempt to interpret or explain primary authority.[297] Secondary authority includes treatises, restatements, periodicals, journals (academic and law), newspapers, encyclopedias, pamphlets, Internet, microforms, and other such materials.[298] Usage of secondary authority is important for many reasons. First, such sources can lead to the discovery of primary authority. Next, secondary authority provides specialized analysis or a distinct viewpoint of a specific argument.[299]

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[295] *Id.* at 4.
[296] *Id.* at 5.
[297] *Id.* at 6.
[298] *Id.* at 6.
[299] *Id.* at 44.

Both primary and secondary authorities were integral to this research. Primary authority was located through *Lexis-Nexis Universe* and *West Law* databases. The key research phrases used in the databases searches were: 1) ownership, 2) broadcast ownership, 3) radio, 4) television, 5) broadcast policies, 6) broadcast preferences, 7) communications policies, 8) minorities, 9) black, 10) Afro-American, 11) distress sales, 12) comparative hearings, 13) racial preferences, and 14) minority tax certificates. These research phrases were used in together in a variety of search patterns.

To locate secondary authority materials, *Lexis-Nexis Universe* and *LegalTrac* were used to find law review articles. Academic and industry sources were identified using *ProQuest*, *CommAbstracts*, *Dissertation Abstracts*, *Dow Jones Interactive* and *Uncover* databases.

The citation style used for this dissertation is, *A Uniform System of Citation: The BlueBook*, sixteenth edition. This citation is the standard form used in legal research and writing.

DELIMITATIONS

While this dissertation covers an expansive period of judicial decisions and government regulations, there are some acknowledged limitations of this study. The author has delimited the types of persons involved, the types of cases used for analysis, and the subject matter of the cases, in order to focus on a narrower issue.

Race versus Gender Issues

According to the FCC, a minority individual is defined as an American Indian, Black (not of Hispanic origin), American Eskimo, Hispanic, Aleut, or Asiatic American.[300] Although the courts or the government have rarely recognized such a connection, women disadvantaged by workforce discrimination might very well fit the description of a minority.[301] Socially, a minority person can be defined as anyone that is not of the majority. In the United States, the majority culture is described as being white and Eurocentric.

While it is conceivable to examine all cases involving these designated minorities, the 2000 Census reported that of the 281 million people in the United States, African Americans constituted 34 million or 12% of the population. American Indian, Eskimo, and Aleut populations stood at 2.4 million, Asian population stood at 10 million, and Pacific Islanders were estimated to be close to 400,000 people. Lastly, Hispanic population estimates were 35 million people.[302]

Even though Hispanics are now considered the largest minority, there are several reasons why this study focuses on African-Americans as the population group for analysis. First, population estimates and figures identify African-Americans as a very large group of people, trailing Hispanics only slightly. Second, the analysis of cases involving other minority groups would have yielded

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[300] 1978 Report, *supra* note 99; Statement on Policy of Minority Ownership, *supra* note 115.
[301] *Supra* note 8.
[302] *See,* Census 2000 Brief Series, *Overview of Race and Hispanic Origin* (March 12, 2001) <http://www.census.gov/population/www/cen2000/briefs.html.

relatively few cases for analysis. As ownership figures revealed in Chapter II, African-Americans tend to comprise the bulk of minority owners. Also, many of the FCC policies regarding minority ownership grew from concerns voiced by African-American individuals and groups. As a result, this study concentrated on cases involving African-Americans.

There is an acknowledgment that some cases may involve African-American women as well. That is an inherent outcome when deciding to narrow cases by racial identification as opposed to gender identification. For purposes of this study, black (African American) individuals and groups were the only minority group used for analysis.

Judicial versus Administrative Cases

Statutes passed by Congress create federal administrative agencies. The Federal Communications Commission is an example of what is called an independent federal agency, meaning it was positioned by Congress to sit outside the three branches of federal government. This "independence" is guaranteed to some extent by the statute requiring no more than three of the five FCC commissioners can be from the same political party. This independence, however, is illusory because as is commonly observed, there often does not seem to be major doctrinal differences between the two major political parties. For example, in the late 1990s, FCC Chairman William Kennard wanted to draw back from some of the deregulatory efforts within the industry, specifically

ownership concentration, Congress (through pressure from the NAB) announced it might hold hearings to investigate the role of the FCC.[303]

Since its inception in 1934, the FCC has been more of an advocate for broadcast licensees than a regulator. McChesney argued that the "FCC notion of regulation owes more to its support of the commercial interest than to its being the public watchdog."[304] The power to remove broadcast licenses was rarely exercised and then usually for technical reasons (such as bad engineering or straying from the assigned frequency). Even though it has been widely held that licenses were renewed as a basic formality, former FCC Chairman Minow remarked that there was nothing inherently permanent about a broadcast license.[305] Broadcasters are now seen as "de facto owners,"[306] as any challenges to license holders because of inadequate service to the public are very difficult to prove. McChesney noted that in 1998, the FCC failed to remove a license from a Denver television station, despite evidence that showed no local public affairs coverage and excessive coverage of violence in the news.[307]

Nevertheless, the legal function remains-- independent agencies such as the FCC are supposed to be insulated from political shifts or influences. Regardless of whether the FCC is sufficiently independent to insure that broadcasters live up to their obligations to serve the "public interest,

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[303] Rich Media, Poor Democracy, *supra* note 141 at 69.
[304] *Id.* at 69.
[305] Minow, *supra* note 3 at 28.
[306] *Id.*
[307] Rich Media, Poor Democracy, *supra* note 141 at 69.

convenience, or necessity," the FCC creates regulations, which are rules that govern the areas they enforce.

Federal agency decisions constitute administrative law. Administrative law, on a federal level, has the force of law. Rules, regulations, and decisions from the FCC govern telecommunications throughout the country. However, decisions from federal agencies are subject to review from the federal court system. In the case of the FCC, any administrative decisions made can be appealed to the D.C. Court of Appeals and the Supreme Court.

Several reasons preclude the use of FCC administrative decisions in this study. First, the author seeks to understand the assumptions and arguments used in judicial proceedings. Second, the judiciary makes what is called "common law"- law that applies throughout the United States. More importantly, it is such law that can overturn an administrative decision or rule an administrative decision as unconstitutional. So while examining FCC decisions may have added another dimension to this research, it is not necessary to the primary focus of this study.

Ownership versus Employment Issues

Employment of minorities may be an entrance into minority ownership. Nevertheless, most of the FCC employment rules and policies are based on the EEOC guidelines and standards. The procedures and issues that are involved in employment cases are different from procedures and issues in ownership cases. Employment cases might involve such issues as sex, age, or religious

discrimination. In order to keep the scope of the study narrowly focused on minority ownership policies and regulations, employment cases were excluded from analysis.

There were several limitations to this study that may have impacted the outcome of this research. First, the texts for analysis were limited to federal court cases, specifically district court and Supreme Court cases. While a search of district court cases yielded no usable results, an inclusion of FCC decisions may have provided an added dimension to this research. The addition of FCC rulings and adjudications on the issues of minority ownership policies could show other arguments that the agency considered which may have impacted the policies. In addition, the rationales of the FCC's minority ownership policies could have been weighed against their actions in other agency decisions. However, the focus of this study was on judicial decisions and rationales used in their decision making processes.

Another limitation of this policy was the focus on minority ownership policies. While the study's topic was the reason why the cases were selected, focusing on three distinct policies limited the number of potential cases. By including perennial issues such as "sham" organizations, multiple ownership rules, equal employment opportunities, and comparative license renewal hearings, the impacts of other industry policies on minority participation could have been examined.

CHAPTER IV: LEGISLATIVE HISTORIES

In January of 1978, the National Telecommunications and Information Administration (NTIA) submitted a petition to the FCC calling for an official policy statement on minority broadcast ownership.[308] Established in 1978 by Reorganization Plan Number 1 (1977) and implemented with Executive order 12046,[309] the NTIA was created by President Jimmy Carter to shift telecommunications policy and advisory functions away from the White House for fear of undue Presidential influence.[310] The Executive Order made the Secretary of Commerce the President's principal adviser on telecommunications policy. The NTIA became the research unit for the United States government, formulating policies to support the growth of telecommunications.[311] The NTIA wanted the FCC to create a general policy in support of minority ownership and specific polices that would: 1) create minority oriented changes to the comparative hearing process, 2) create minority oriented changes in license assignment policies, and 3) change standards of financial qualifications for new facilities applicants.[312]

While the NTIA had proposed specific items for implementation, the FCC was already working on several of its own. By May of the same year, the FCC formed the policies of granting tax certificates and distress sales to minority

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[308] *Petition for Issuance of Policy Statement or Notice of Inquiry*, 69 F.C.C. 2d 1591 (1978).
[309] http://www.ntia.doc.gov/opadhome/history.html
[310] Krasnow, et. al, *supra* note 71.
[311] T. Barton Carter, Marc A. Franklin, & Jay B. Wright, *The First Amendment and the Fifth Estate: Regulation of Electronic Mass Media* (4th ed., 1996).
[312] *Id.*

applicants. The rationale for the newly created policies was to increase ownership by minorities and to "enhance the diversity of control of a limited resource." Diversification was seen as a public interest goal, one that the FCC wanted to promote. And while they noted that these two policies alone were not a total solution to the problem, the FCC believed these policies would be a start.

Minority tax certificates, distress sales, and later on comparative hearings would remain the primary ways that the FCC fostered minority ownership. What follows is a discussion of how those policies have legislatively evolved over time.

MINORITY TAX CERTIFICATES

The FCC had been granting minority tax certificates since 1978. The policy was effective in promoting minority ownership, thus it went relatively unchanged for several years. These certificates provided a reduction in capital gains taxes to owners of broadcast stations who sold their stations to minority-owned firms. In 1982, the FCC issued a policy statement that reflected some modifications to the policy.[313] The FCC limited the usage of tax certificates to situations that would only fulfill new or current FCC policy. That translated to the barring of sales that involved detailed inquiry or required heightened evaluation of the merits of the sales.

In 1986, the FCC chose to review the minority tax certificate policy along with other minority-preference policies.[314] However, Congress attached an

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[313] *Policy Statement on Issuance of Tax Certificates*, 92 F.C.C. 2d. 170 (1982).
[314] *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C.R. 1315 (1986).

appropriation rider to the FCC's fiscal budget which prohibited the spending of monies to repeal, change, examine, or continue any examination of policies or procedures that dealt with comparative licensing, distress sales, or tax certificates.[315]

The minority tax certificate policy would again come under scrutiny in 1995. Viacom Inc., one of the world's largest entertainment and media companies,[316] announced that it was selling its cable systems to a minority-owned company on January 20, 1995. A minority tax certificate was being used to complete the deal. There were many estimates on how much money Viacom would defer from the sale. A Congressional Research Service Report for Congress placed the figures anywhere from $440 million to $640 million dollars.[317]

It is important to note that linked together with the discussion of the minority tax certificate was the government's plan to restore and codify a tax deduction for self-employed people who paid certain portions of their health premiums. In order to pay for the reinstatement of the tax deduction (revenue reducer), the government had to find ways to fund it (revenue raisers).[318] One of the ways to raise the revenue was the repeal of the tax certificate policy. It had been estimated that by repealing the policy, federal revenue would increase by

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[315] Pub. L. No. 100-202 (1987).
[316] *See* http://www.viacom.com/merger/
[317] Angele A. Gilroy, *The Viacom Transaction and Beyond: the Federal Communications Commission Tax Certificate Program*, 95-319 SPR.
[318] 95-IB95032. *Congressional Research Service*. Jack Taylor, Aril 18, 1995.

$1.3 million over a five-year period.[319] While other measures were discussed,[320] the tax certificate was intensely focused on.

A bill that originated in the House of Representatives in February 1995, H.R. 831, called for the end of the tax certificate. The bill was also applied retroactively to January 17, 1995.[321] That had serious implications for the Viacom deal. In a Senate hearing, Viacom's Vice Executive President and General Counsel Phillippe Dauman said:

> "If I were unable to go through with this transaction we will have to explore other possibilities. We had wished to re-configure our assets... That was the reason we explored the sale of our cable system to Mr. Washington. But we will not be able to go through with this sale if the Section 1071 program is retroactively repealed."[322]

Both the House[323] and Senate[324] held public hearings on the minority tax certificate program. Debate continued over the following months with the House and Senate agreeing to the bill's passage. On April 11, 1995, House Bill 831, which repealed the minority tax certificate and permanently extended the tax deduction for health insurance costs of the self-employed, was signed into public law.[325]

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[319] *Id.* at 3.
[320] Modification of involuntary conversion rules and restrictions on earned income tax credits for low-income workers.
[321] H.R. 831.
[322] *FCC'S Tax Certificate Program*, hearing before the Senate Committee on Finance, 104th Cong. 69 (1995).
[323] *Id.*
[324] *FCC Minority Tax Certificate*, hearing before the Subcom. on Oversight of the House Committee on Ways and Means, 104th Cong. (1995).
[325] Pub. L. No. 104-7 (April 11, 1995).

BROADCAST DISTRESS SALES

When the broadcast distress sale policy was adopted in 1978, the policy sought to increase minority ownership. Station owners who were in danger of losing a license could transfer the license at a "distressed" price (usually no more than 75% of fair market value) to a minority owner. The minority ownership interest in the property had to be more than fifty-percent or compose a controlling interest.

Only forty broadcast licenses had been transferred using the broadcast distress sale policy from 1978 until 1995.[326] So the FCC posted a notice of inquiry to examine ways to expand the policy.[327] Specifically, the FCC wanted to adopt two changes to the policy that would: 1) limit the distress price of the station to no more than 50% of the fair market value, and 2) allow distress sales prior to the beginning of revocation or renewal hearings.[328]

However, the ruling in *Shurberg v. FCC* ended the Commission's attempts to expand the policy.[329] In *Shurberg*, the D.C. Court of Appeals ruled the policy unconstitutional because it deprived Shurberg of his equal protection rights. Furthermore, the program was not narrowly tailored to remedy past discrimination and the policy was not designed to promote programming diversity.[330] A rehearing en banc was denied. Consequently, the FCC

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[326] FCC Minority Tax Certificate, *supra* note 336 at 51 (Testimony of William Kennard).
[327] *Distress Sale Policy for Broadcast Licensees*, 50 F.R. 42047 (1985).
[328] *Id.*
[329] *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902 (1989). Rehearing En Banc denied June 16, 1989.
[330] *Id.*

terminated the original notice of inquiry begun in 1985 and the policy was subsequently terminated.[331]

COMPARATIVE LICENSE HEARINGS

The FCC has used comparative hearings for the awarding of radio and television licenses for many years. However in 1965, the Commission announced a set of guidelines and preferences to be followed in future comparative hearings. [332] In a comparative hearing, each applicant presents evidence and reasons as to why it should be awarded the license being sought by multiple applicants. However, the comparative hearing process did not initially have provisions that *specifically* focused on race. The main goals of the comparative policy were: 1) to provide the best service to the public and 2) to provide a maximum diffusion of control of mass media. According to the Commission, good service originated from a broadcaster's ability to serve his or her primary audience needs and be aware of other specialized needs or interests. Diversification of control was needed in a free society, especially in a system where the government must limit access to, and control of, broadcast licenses.

However, diversification of control in the 1965 policy statement did not speak of granting preferences based on racial orientation. In fact, most of the issues under the diversification criterion dealt with management. The Commission favored full-time owners, as it believed hands-on participation would lead to greater knowledge of the community. Experience within the industry, local

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[331] *Distress Sale Policy of Broadcast Licensees*, 5 F.C.C.R. 397 (1990).
[332] *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

residence, participation in community activities, and types of signal coverage were other types of factors under the diversification criterion.

Granting Minority Preference in Comparative Hearings

The granting of racial and gender preferences were born out of the decisions in two D.C. Circuit cases. In *TV 9*,[333] several applicants filed for the license of a Florida TV station. The station was awarded to a company called Mid-Florida. Appellants contested the FCC's award of the station to Mid-Florida. Specifically, a minority owned company called Comint claimed no credit was given in the proceedings to its ownership structure. Two of the principals in Comint Corporation were African-American. In addition, one of the African-American principals was designated a vice president and was to spend at least two days a week at the TV station. Both African-American principals had lived in the community for more than 20 years, and had been involved in various community activities.

The D.C. Court of Appeals reasoned that the level of participation by the two African-American principals would be high. However, the FCC did not grant credit to Comint. The FCC ruled that the Communications Act was color-blind and unless Comint could show that the participation of the two minority principals would provide a level of superior service than Mid-South, Comint could not succeed on minority ownership merit. Black ownership could not be an

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[333] *TV 9, Inc. v. FCC*, 495 F.2d 929 (1973).

independent comparative factor. Instead, black ownership must be shown to produce a public interest benefit.

The D.C. Circuit Court found the FCC's decision to be inadequate. While the Commission granted some credit to Comint for management participation, the court stated that was not the same kind of credit that could have been attributed to the broader community representation of the two principals. The credit being sought by Comint was consistent with the comparative hearings criterion of "diversification of ownership of mass media." Moreover, the court argued that the FCC wavered on its own standards of qualifications, as the FCC sought an assurance of superior community service from Comint, but did not seek such assurance on the issues of local residence, participation or integration of management with ownership.

In *Garrett v. FCC*,[334] the D.C. Court of Appeals ruled that the FCC did not provide credit for black ownership and operation of a radio station in Alabama. In addition, the Court contended that the FCC did not remain faithful to prior precedents it had set with other cases with similar circumstances. The proposals of Garrett and the other applicant were combined into a comparative hearing at the request of an administrative law judge, since the targeted changes of both stations would have impacted service to the Huntsville, Alabama area. The appellant, Leroy Garrett, had filed an application with the FCC seeking to construct additional facilities that would change his station's (WEUP) status from

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[334] *Garrett v. FCC*, 513 F.2d 1056 (1975).

daytime-only to unlimited broadcasting. The Commission denied his application because Garrett was unable to comply with rules regarding minimum city coverage. The competing applicant also fell short on coverage requirements, but the application was granted. The FCC and an administrative law judge believed that the competing applicant's lack of coverage was better justified.

The competing applicant's proposed changes would have encompassed 92.4% of the population and 89.4% of the area of the city of Warner Robins, Georgia which is about 200 miles away from Huntsville. In contrast, the administrative law judge stated Garrett's proposal would have included only 73.4% of Huntsville's total population and 49% of its total area. However, Garrett's proposed changes would have provided service to more than 12,000 people without AM service and would have attracted over 100,000 more people through the nighttime service. The FCC considered the competing applicant's transmitter site as providing optimum coverage of the city and a waiver of the coverage rules was granted. Neither the Review Board nor the FCC considered Garrett's proposal impressive enough to grant a waiver.

The Court of Appeals called the judgment of the Review Board "grievously incorrect." Citing its motivations in the *TV 9* decision, the Court held that in situations where minority ownership is inclined to increase or produce diversity, merit should be awarded in those situations. The Court insisted that reasonable expectation of the diversity is necessary as a basis for credit, however an advance demonstration of diversity was not needed.

Revamping Minority Preference in Comparative Hearings

In 1992, the Commission wanted to fully reexamine the comparative hearing policy.[335] Although the Commission had previously tried to create new procedures that would speed up the comparative process,[336] attempts were deferred due to several petitions for reconsideration.[337] In order to revamp the 1965 policy, the FCC sought comments on modifications to several criteria: 1) integration of ownership and management, 2) proposed program service, 3) past broadcast record, and 4) use of auxiliary power.[338] The FCC also wanted additional comments on its proposal for a new, point-based system of evaluating competing applicants.

After a deadline extension,[339] the FCC issued another Notice of Proposed Rule Making for consideration of an amendment to the comparative hearing policy. The Amendment suggested that successful applicants own their stations for a minimum of three years before transferring ownership.[340] As the comment period for the notice was extended,[341] the United States Court of Appeals for the

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[335] *In The Matter Of Reexamination Of The Policy Statement On Comparative Broadcast Hearings*, 7 F.C.C.R, 2664. (1992). (Proposed April 10, 1992).
[336] *Comparative Hearing Process for New Broadcast Applicants*, 56 FR 787 (1991) (Commission wanted to encourage settlements, eliminate intermediate review, limit oral arguments, and implement other time saving mechanisms).
[337] *Amendment Of Section 73.3525 Of The Commission's Rules Regarding Settlement Agreements Among Applicants For Construction And Proposals To Reform The Commission's Comparative Hearing Process To Expedite The Resolution Of Cases*, 6 F.C.C.R. 5703 (1991).
[338] *Id.*
[339] *Reexamination Of The Policy Statement On Comparative Broadcast Hearings*, 7 F.C.C.R. 3192 (1992) (placing NAACP comments into a new docket on "finder's preferences, thereby extending comment period by a week).
[340] *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 8 F.C.C.R. 5475 (1993) (further notice proposed August 12, 1993). (FNPRM sought to extend the holding period for successful comparative hearing applicants to three years).
[341] *Reexamination Of The Policy Statement On Comparative Broadcast Hearings*, 8 F.C.C.R. 6676 (1993) (granting extension to Media Access Project to file comments on the three year holding period amendment).

District of Columbia reviewed the case of *Bechtel v. FCC*.[342] This case was to become a crucial moment in the ongoing FCC discussions about comparative hearings.

Demise of Minority Preference and Comparative Hearings

In deciding between or among mutually exclusive applicants who wanted to build and operate a new broadcasting station, the FCC generally favored applicants who promised to participate consistently in the station's management. In *Bechtel v. FCC* [*Bechtel I*],[343] an application was denied due to the lack of integration of management. Because there was no proposal to integrate ownership and management of the new station, an administrative law judge rejected several competing applications, including Bechtel's. On an appeal by Bechtel, the D.C. Court of Appeals ruled the Commission had to demonstrate why integration of ownership was in the public interest. The Court further instructed the FCC to respond to Bechtel's challenges and consider the application in light of those challenges.

As the Court was deciding the *Bechtel I* case, the FCC ceased comparative hearings, halted the intake of new applications, and stopped judgment on any outstanding mutually exclusive proposals.[344] Upon remand in *Bechtel I*, the FCC failed to show why integration was still in the public interest. Soon afterwards, Bechtel again took the case to the D.C. Court of Appeals

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[342] *Bechtel v. FCC*, 957 F.2d 873 (1992).
[343] *Id.*
[344] *FCC Freezes Comparative Proceedings*, 9 F.C.C.R. 1055 (1994).

[*Bechtel II*].[345] This time the court decided that integration of ownership was a subjective and unreliable criterion and was deemed unlawful.[346] The Court ordered the FCC to hold new proceedings to consider Bechtel's application without the integration preference.

The FCC decided not to appeal the *Bechtel II* decision and subsequently lifted some of the restrictions placed during the comparative hearing freeze.[347] A second further notice of proposed rule making was issued.[348] This time, the FCC was looking for comments and suggestions that would help fine tune the policy in light of the final decision in *Bechtel II*.[349] But before any results could be seen from the FCC's proposed rule making on comparative hearings, an act of Congress would dramatically alter the future of comparative hearings altogether.

Competitive Bidding Replaces Comparative Hearings

The Telecommunications Act of 1996 was enacted on February 8, 1996.[350] Section 309(j) of the Telecommunications Act reads as follows:

> (j) Use of competitive bidding.
> (1) General authority. If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding

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[345] 10 F.3d 875 (1993).
[346] *Id.*
[347] *Modification Of FCC Comparative Proceedings Freeze Policy*, 9 F.C.C.R. 6689 (1994). (Commission resumes processing applications for new broadcast media stations, applications for upgrades to previously owned stations, and the issuance of cut-off lists. They continued to suspend processing of applications that were mutually exclusive).
[348] *Reexamination Of The Policy Statement On Comparative Broadcast Hearings*, 9 F.C.C.R 2821 (1994) (second FNPRM proposed June 22, 1994).
[349] *FCC Waives Limitations On Payments To Dismissing Applicants In Universal Settlements Of Cases Subject To Comparative Proceedings Freeze Policy*, 10 F.C.C.R. 12182 (1995).
[350] 47 U.S.C. § 307.

> that meets the requirements of this subsection.
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> (5) Bidder and licensee qualification. No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) and sections 308(b) and 310 [47 USCS §§ 308(b) and 310]. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) for the resolution of any substantial and material issues of fact concerning qualifications.
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> (11) Termination. The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2007.

The 1997 Balanced Budget Act further expanded the Commission's authority under section 309(j) of the Telecommunications Act of 1996 to resolve all mutually exclusive license applicants by competitive bidding procedures.[351] In November of that same year, the FCC proposed license auction procedures.[352] Almost a year after the Balanced Budget Act allowed the FCC to resolve competing applications through competitive bidding, the Commission adopted general bidding procedures to select among mutually exclusive broadcast license applications.[353]

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[351] The FCC can stipulate methods by which a reasonable reserve price is required to obtain any license or permit being assigned pursuant to the competitive bidding. This freedom can have potential impacts on women, small businesses, and minorities who may not be unsuccessful in meeting that reserve price.

[352] *Implementation Of Section 309(J) Of The Communications Act, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 12 F.C.C.R. 22363 (1997).

[353] *Implementation Of Section 309(J) Of The Communications Act, Reexamination Of The Policy Statement On Comparative Broadcast Hearings, Proposals To Reform The Commission's Comparative Hearing Process To Expedite The Resolution Of Cases*, 13 F.C.C.R. 15920 (1998).

Advancing Minority Ownership

Although policies were created to enhance minority ownership, there continued to be a real problem incorporating minorities into broadcast ownership. To address the problem, the FCC formed the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications.[354] The FCC discussed its continual efforts in the area of minority broadcast ownership and included recommendations from the Advisory Committee.[355] Based upon several of those recommendations, the FCC adopted new procedures which included: 1) authorized tax certificates and distress sales to limited partnerships when a minority general partner owned at least twenty percent of the property, 2) allowed tax certificates to divesting shareholders only when that divestiture further promoted minority ownership, and 3) delegated authority to conducted distress sale transactions to the Mass Media Bureau for quicker expedition.[356]

In addition to the policy statement, the Commission also issued a notice of proposed rule making to investigate the expansion of seller-creditor rights.[357] The FCC acknowledged that some sellers and creditors might take a security interest in a station's assets or stock in the corporate license and that such transfers could be further promoted if sellers had greater protection. That protection, the FCC proposed, might come in the form of a reversionary interest, a future

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[354] *Commission Policy Regarding The Advancement Of Minority Ownership In Broadcasting*, 92 F.C.C. 2d 849 (1982) (proposed December 13,1982).
[355] *Id.*
[356] *Id.* at 849-851, 856.
[357] *Id.* at 859-860.

interest in a broadcast property when the property is not completely disposed of, yet assigned or granted to, another party.

Supporters of expanding seller-creditor rights felt the physical assets of a station represent a small portion of the station's actual value and if sellers have to place a high reliance on those assets that places their capital at greater risk.[358] And although supporters of the expansion of seller-creditor rights indicated such expansion would stimulate minority acquisition, the FCC did not agree. [359]

The FCC, along with various comments from minority and community-based groups, noted there have never been any property rights in a broadcast license. As such, licenses could not be subject to reversionary interest. The Commission also expressed concern expressed by commissioners that the proposed policy would hinder the progress of minority owners. Their independence as broadcasters would be threatened as control over their broadcast facility might be compromised. Noting the above arguments, the FCC terminated the proceeding into the expansion of seller-creditor rights. [360]

REEXAMINING OWNERSHIP POLICIES

By the middle of the 1980s, the broadcasting industry had changed. The industry was beginning to undergo deregulation. The Supreme Court had begun to review many affirmative action cases with more scrutiny.[361] Its review of such cases had bearing on the FCC's race preferential programs. So the Commission

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[358] *Id.*
[359] *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting,* 99 F.C.C. 2d 1249 (1985) (proceeding terminated).
[360] *Id.*
[361] *See generally, Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

issued a notice of inquiry to reexamine the comparative licensing process, the distress sale policy, and the minority tax certificate program.[362]

The inquiry was designed to examine the constitutionality of the programs against the "strict scrutiny" standard of review. Additionally, the inquiry solicited comments and evidence as to the connection between minority/gender ownership and programming. The FCC noted in its inquiry the provisions Congress had made in the Communications Act of 1982.[363] Section 309 of the Communications Act of 1982 codified the lottery licensing provision, which authorized a minority preference plan. Notwithstanding Congress' attempts to promote and protect minority ownership, the FCC solicited comments on how to reconcile the government's attempts to promote minority ownership with the judiciary's strict review of such policies.

Besides seeking comments on the legal arguments surrounding these policies, the FCC postponed consideration of all distress sales and comparative hearings where the diversification criterion was being claimed. However, President Reagan signed into law a joint resolution from the House of Representatives on December 22, 1987.[364] This resolution, which authorized monies for the fiscal year 1988, attached an appropriation rider to the FCC's fiscal allocations. The rider prohibited the FCC from spending any of the monies to repeal, change, examine, or continue any examination of policies or

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[362] *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C.R. 1315 (1986).
[363] *Id.*
[364] Pub. L. No. 100-202 (1987).

procedures that dealt with comparative licensing, distress sales, or tax certificates. That law effectively terminated the FCC's efforts to re-examine those policies and the FCC issued an order stating their discontinuation of their proceedings in January of 1988.[365] To ensure the FCC did not attempt to change these policies in the future, the same rider was attached to every fiscal budget until 1994.[366] Congress intended, through its actions, to keep minority ownership policies intact.

Nearly eight years later, the FCC would finally get the opportunity to re-examine the minority ownership policies. In a 1995 notice of proposed rule making, the Commission wanted to look at alternative legal remedies for providing entry for minority ownership.[367] The Commission wanted remarks on its exploratory proposals for an incubator program (to provide minority and female broadcast owners with small interest loans and other services from large broadcast groups), on FCC's revision to the broadcast ownership form to include information on race and gender, and on ways to expand the tax certificate program to encourage more sales to minorities.[368]

After an order for extending the comment period was granted,[369] the Commission issued a report and order in 1998.[370] One of the results from the

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[365] *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, F.C.C.R. 766 (1988).
[366] See, Pub. L. No. 100-459 (1988); Pub. L. No. 101- 162 (1989); Pub. L. No. 101-515 (1990); Pub. L. No. 102- 140 (1991); Pub. L. No 102-395 (1992); Pub. L. No. 103-121 (1993); Pub. L. No. 103-317 (1994).
[367] *Policies And Rules Regarding Minority And Female Ownership Of Mass Media Facilities*, 10 F.C.C.R. 2788 (1995) (proposed January 12, 1995).
[368] *Id.* at 2790-2792.
[369] *Review Of The Commission's Regulations Governing Television Broadcasting, Television Satellite Stations, Minority And Female Ownership Of Mass Media, Facilities, Attribution Of Broadcast interests,*

report was the modification of the annual ownership form to require information on race and gender of the license holder(s), excluding those ownership structures that are not required to file such forms (e.g. sole owners and partnerships).[371] Petitions were filed shortly after the adoption of the revisions to the annual ownership form. Petitioners, the National Association of Broadcasters [NAB], stated the new form would create more paperwork and would be an undue burden. In addition, the NAB stated that the NTIA already collected such information and the FCC's efforts would be redundant.

The FCC, in addressing the comments, declined to remove the new revisions.[372] Although it acknowledged that the NTIA collected similar information, the Commission noted the NTIA's collection of such data was not altogether complete. Also, the NTIA reports did not distinguish owners on the basis of gender, as the FCC annual report form would. Last, the FCC's collection of data was premised on legal, statutory authority, since the Commission provides licenses to broadcasters.

SUMMARY

The legislative histories of minority ownership policies serve as a backdrop to legal discourse and analysis. While the histories may show some

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Investment In The Broadcast Industry, Cross-Interest Policy, 10 F.C.C.R. 12277 (1995).

[370] *1998 Biennial Regulatory Review -- Streamlining Of Mass Media Applications, Rules, And Processes, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 13 F.C.C.R. 23056 (1998).

[371] *Id.*

[372] *1998 Biennial Regulatory Review -- Streamlining Of Mass Media Applications, Rules, And Processes, Policies And Rules Regarding Minority And Female Ownership Of Mass Media Facilities*, 14 F.C.C.C.R. 17525 (1999).

inconsistencies, they do show long-standing discussion, usage, and support of minority ownership policies by the FCC and Congress. The policy that had the steadiest support, with the least challenge, was the minority tax certificate. However that policy, along with broadcast distress sales, was eventually repealed. The only policy left standing was comparative hearings, which underwent a transformation with the 1996 Telecommunications Act.

The legislative histories of these policies are used during judicial decisions about minority ownership. While circuit judges and Supreme Court justices would eventually dispute the meaning and weight of legislative histories on case law, the histories do provide a good sense of the rationale behind the policies.

CHAPTER V: FEDERAL COURT DECISIONS

As described in Chapter III, WestLaw and Lexis-Nexis databases were used to gather court cases concerning minority ownership policy. A thorough search using the terms outlined in Chapter III yielded twenty-five cases. Seventeen cases were eliminated, as the questions posed in the cases did not turn on the specific issue of minority ownership or any of the minority ownership policies.[373]

Eight cases were classified as texts for analysis. Of those eight, only one was decided at the Supreme Court level. The other seven cases were decided in the D.C. Circuit Court. The cases span the period from 1973 through 1990. What follows next is an overview of each case, which includes posture, questions before the court, and the decision. Chapter VI provides a full analysis of court rationales in each case and discusses those rationales in light of social and political contexts.

TV 9, INC. V. FCC (1973)[374]

In 1965, Mid-Florida TV, *TV 9* Inc., and other applicants[375] were competing for a permit to operate a TV station in Orlando, Florida. While the

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[373] For example, one case dealt with minority preferences in personal communication services (PCS) auctions; another case dealt with FCC multiple ownership rules, with impacts on minority ownership as a secondary result. Other cases discussed changes in the board of director's, legal representation, denial of licenses, "sham" organizations, or other topics that were not a direct result from the question of minority ownership preferences or policies.

[374] 495 F.2d 929 (D.C. Cir. 1973).

[375] The other applicants were Orange Nine, Central Nine Corp., Howard A. Weiss, Florida Heartland, Comint Corp., and Florida 9 Broadcasting Co.

FCC denied the applications of several applicants, it allowed Mid-Florida interim authority of the television channel. Comint (a minority- owned company) and Consolidated Nine[376] applied for interim authority of the channel, but their applications were denied. Both parties appealed to the D.C. Circuit Court. The court vacated the grant of interim authority to Mid-Florida and remanded the case back to the FCC. The Commission then granted interim authority to Consolidated Nine in 1969.

A comparative hearing ensued among *TV 9*, Inc., Comint, Central Nine, Florida Heartland, and Mid-Florida. In 1972, the Commission awarded Mid-Florida's application for a new TV station to operate in Orlando. The award went to Mid-Florida based on what the FCC called the "best practicable service" through its superior integration of ownership with management and their good past broadcast record. The case was then brought as another appeal to the D.C. Circuit Court.

The question presented in this case was whether merit for black participation and black ownership should be awarded during the comparative hearing process? The court answered by stating only when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, should merit be awarded. The holding in this case was significant in that it stated when minorities proposed to be instrumental in local management and ownership of stations, merit should be awarded during the comparative hearing process.

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[376] Consolidated Nine was composed of three of the initial applicants: Central Nine, TV 9, and Florida Heartland). Consolidation Nine was formed for the express purpose of trying to gain interim authority of the channel.

GARRETT V. FCC (1975)[377]

Appellant (Garrett) was denied an application seeking to construct facilities that would change his station from daytime only to unlimited broadcasting. Garrett's station, WEUP, located in Huntsville, Alabama, was also in competition with the application of WRBN, Warner Robbins, Georgia, to upgrade facilities. The FCC consolidated the two applications and assigned them for comparative hearings. The FCC determined that WEUP's proposed change of service would not meet coverage rules and was therefore denied. WRBN's proposed changes, although falling short on the coverage requirements, were enough to justify the rule waiver. Garrett appealed the decision to the D.C. Circuit Court.

This case presented several questions. First, did the Commission, in denying Garrett the application, give proper weight to the black ownership and operation of Garrett's station? In addition, were the rulings on station coverage in error? The Court of Appeals ruled the Commission erred when it denied Garrett's application and in its application of the waiver provision. The court cited prior federal cases where it held that administrative bodies cannot act in an arbitrary

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[377] 513 F.2d 1056 (D.C. Cir 1975).

[378] The D.C. Circuit Court noted that prior FCC cases should have been used as precedent for the coverage issue. In *Great Southern Broadcasting Company*, 7 F.C.C.2d 701 (1968), the Commission allowed an AM station to be built in a small, unincorporated community in Tennessee. As the community had merged with a larger city, the Commission stated the new municipality was large, covered rural and urban areas. As such, the FCC continued to acknowledge the former town and city before the merger took place. In *KDEF*, 30 F.C.C. 635 (1961), a daytime only station in New Mexico was authorized to broadcast without limit even though the coverage did not conform to minimum filed intensity rules. The coverage extended to fewer than 70% of the city limits within Albuquerque. Because a large part of the underserved areas were in fact under populated, the Commission decided that it would have been too harsh to require an applicant to require service to vacant areas near the city.

manner and cannot treat similar situations differently.[378] Although it was stated that the cases were different, there was no adequate explanation as to why the two applications were so different as to warrant different treatment.

It was also noted that WEUP, as a solely black-owned and operated facility, was primarily black-staffed and was one of a few such stations nationwide at the time. Huntsville, the city of service, had a considerable black population that WEUP claimed to serve. The black ownership and operation of WEUP did not receive any qualitative credit during the proceedings. The court, as it referred to its supplemental opinion in the *TV 9* case, wrote that in light of *TV 9* the FCC erred in its decision not to grant merit to Garrett.[379] In that supplemental opinion, merit was defined as recognition by the FCC that a particular applicant has positive qualities that may (but do not always) result in a preference. The thrust of *TV 9* was relevant to this case, which the FCC did not acknowledge. The Court remanded the case back to the FCC to re-examine the applicability of coverage rules and its waiver rules in light of past precedents and *TV 9*.

This case was significant in that the court not only affirmed its earlier holding in *TV 9*, but also extended merit for minority ownership and participation in comparative hearings to other situations.

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[379] 495 F.2d 929 at 941.

STEREO BROADCASTERS, INC. V. FCC (1981)[380]

Stereo Broadcasters, located in Garden City, New York, was selling its properties through a distress sale to Domino Broadcasting Company (a minority entity). Stereo Broadcasting opted to pursue the sale, despite the fact that its application for renewal had progressed to an unfavorable decision by an administrative law judge.

As noted in the D.C. Circuit opinion, the original policy on station transfers was limited to license holders who had been designated for a revocation hearing or whose renewal application had been assigned to a hearing.[381] The distress sale policy was allowed in cases where the licensee had moved into the initial decision stage of application or renewal.[382] The minority distress sale policy had three major components: promotion of minority ownership, deterrence, and administrative economy.[383] The two concepts in question are the deterrence and administrative economy. Stereo claimed that substantial financial gains could still take place if the sale between Domino and Stereo was allowed to go through. Citing the costs of appealing a negative decision and subsequent costs of holding comparative hearings to fill the vacancy if Stereo was disqualified, it would provide better administrative economy to allow Stereo to consummate the

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[380] *Stereo Broadcasters Inc, v. Federal Communications Commission*, 652 F.2d 1026 (D.C. Cir. 1981).
[381] *Id.* at 1027.
[382] *Id.* at 1027- 1028. As stated in the opinion of the court, the FCC had initially limited the distress sale to cases in which hearings had not yet begun. This eliminate potential abuses by a rogue licensee who would go through a hearing, seeing what evidence could be presented against him, then decide to sell to a minority in order to gain some kind of monetary value out of a licensee that would well be denied. However, the Commission broadened the policy to cases that were in transition, meaning the case had gone to a hearing but no ruling had been issued.
[383] *Id.* at 1029. Minority ownership was not in question because it was clearly established that a black minority controlled Domino Broadcasting Company.

sale. As for deterrence, Stereo argued that it was unreasonable to discriminate among licensees in the hearing process until a final determination of the questions had been reached.

Despite Stereo's arguments, the FCC did not allow the distress sale. Stereo Broadcasters claimed the FCC's application of the various factors of the distress sale policy (as it pertained to their case) was arbitrary and capricious and an abuse of the FCC's discretion. They appealed the decision to the D.C. Circuit Court.

Was the FCC's application of the various factors of the minority distress sale policy arbitrary, capricious, and an abuse of the FCC's discretion? The court held that the FCC, in using its agency discretion, did not act in an arbitrary or capricious manner. The FCC did not take well to a license holder, already considered unfit to retain a license, seeking to gain profit from a station that he/she was no longer deemed to have a right to operate. This case showed that the structure of the distress sale policy and the administration of the policy were upheld by the court.

WEST MICHIGAN BROADCASTING V. FCC (1984)[384]

Waters Broadcasting (a minority entity) and West Michigan Broadcasting filed mutually exclusive applications for construction permits to build a new FM radio station in Hart, Michigan. An administrative law judge granted the license to Waters because of the credits received for being black owned, for local

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[384] *West Michigan Broadcasting v. Federal Communications Commission*, 735 F.2d 601 (D.C. Cir. 1984).

residence, and for civic activities.[385] Upon appeal to the FCC's Review Board, the decision was reversed. Waters then appealed to the full Commission, which reversed and granted Waters the license.

West Michigan appealed to the D.C. Circuit Court. Its challenge was against the FCC's use of the minority enhancements in comparative hearings, as well as the enhancement given to Waters for local residency and community involvement. Because the community to be served had a sparse black population, West Michigan argued the FCC was wrong to grant any minority enhancements.

In this case, the court had to decide if the FCC usage of minority enhancements in comparative hearings was a violation of equal protection and a violation of specific comparative hearing criteria. The court ruled that the FCC's use of the minority enhancement did not violate any administrative, statutory, or constitutional (equal protection) laws. The court referred to the holding in *TV 9* and stated that the ruling in *TV 9* supported the FCC's granting of the license to Waters. The FCC sought to provide minority ownership regardless of the size of or existence of a minority population in the community of license.

Prior Supreme Court cases *Bakke*[386] and *Fullilove*[387] were cited as precedents that established FCC minority enhancements would not violate equal

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[385] *Id.* at 602.
[386] 438 U.S. 265. This was a highly charged case, as noted by the opinions of the court. Writing the court's opinion was Justice Powell in which Justices White, Brennan, Marshall, and Blackmun joined in part and dissented in part. In addition, Justices White, Marshall, and Blackmun filed separate opinions. Justice Stevens filed an opinion concurring in the judgment in part and dissenting in part. Justices Burger, Stewart, and Rehnquist joined in Steven's dissent.
[387] *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The Supreme Court sustained the constitutionality of a

protection. In order to understand the applicability of these cases to FCC minority preferences, the Supreme Court's decision in both of cases must be explained. In *Bakke*, the Supreme Court struck down a university admission policy that set aside a fixed percentage for minority students in a state medical school's entering class. Justice Powell's opinion rejected the idea that race classifications could be used to assure a diverse student body.[388]

The majority opinion also rejected race classifications as a remedy for past discrimination. The university had not made a final conclusion that discrimination did in fact exist or such discrimination warranted special classification and admission for minority groups. Yet, the opinion did recognize that the university had a compelling interest to promote a diverse educational experience. To that end, the court suggested that had the preference been a part of a multi-factor decision process, it might have passed judicial review.[389] However, race alone could not be the basis for special classification.

Writing for the Court, Chief Justice Burger stated in *Fullilove* that while programs that used race classifications need to be closely examined, when "benign" race classifications were used--adopted by an administrative agency at the direction of congressional action--the courts were bound to defer to Congress.[390] As such, the majority did not apply strict scrutiny review to the

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government sponsored minority preference for a set aside provision authorizing funding in public works construction.

[388] 438 U.S. 265 at 307.

[389] 438 U.S. 265 at 317.

[390] 448 U.S. 448 at 502- 507. Congress is charged by Section 5 of the 14th Amendment to look after and ensure the general welfare of society. The Court held that even if the measures were not necessarily remedial, they could be allowed under the Constitution so long as the preference served an important

questioned racial preference. In light of the decisions and rationales used in *Bakke* and *Fullilove*, the D.C. Circuit Court ruled the FCC policy of granting enhancements was constitutionally valid.

In contrast to *Bakke,* the FCC did not set up quotas the number of licenses to be given to minorities. The enhancement was part of a multi-factor approach. Second, in agreement with *Fullilove,* congressional action had shown recognition of the underrepresentation of minorities in mass media ownership. That underrepresentation was attributed to past racial and ethnic discrimination. This case further solidified the use of FCC minority ownership preference policies as constitutionally valid and serving as a compelling government objective.

NATIONAL BLACK MEDIA COALITION V. FCC (1987)[391]

The FCC observed that daytime AM stations were providing good service to their communities despite their technical limitations. So the Commission issued an order allowing such stations to expand their operating hours as far as the station could technically handle.[392] However, in 1981 the NTIA petitioned for rulemaking proceedings that would give daytimers preference in comparative hearings for new FM facilities.[393] While the FCC deferred decision on that issue, it pursued other avenues to increase the number of commercial FM stations. As it issued a notice of proposed rule making, the FCC sought comment on whether to grant special consideration for daytimers over other competing applicants for new

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governmental objective.
[391] 822 F.2d 277 (1987).
[392] *Id.* at 278.
[393] *Id.*

FM stations in the same community.[394] As the rules stood, competing applicants for a FM station could "win" through the diversification of mass media property preference over daytime stations.

The National Black Media Coalition submitted comments that opposed granting special consideration to daytime AM stations. Instead, the Coalition wanted the FCC to reduce the demerits it assigned to local broadcasters who sought additional licenses during the comparative process. In spite of this, most comments were in favor of the FCC's plan.

In 1985, the FCC released its second report and order and concluded the relief for daytime AM stations was appropriate.[395] Several criteria were outlined for the enhancement preference.[396] Overall the enhancement consisted of upgrading the value of previous broadcast experience as an "integration enhancement". Prior broadcast experience would have the same weight that was given for the enhancement factors of minority ownership and local residence.

Petitions were filed for reconsideration of the order. Most petitioners agreed that daytime stations should be given preferences, but the degree of preference should be greater. However, The National Black Media Coalition

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[394] *Id.* at 279.
[395] 101 F.C.C. 2d 638 (1985).
[396] 822 F.2d 277 at 280. The enhancements were conditioned upon: 1) broadcast experience based on prior participation in management of daytime station, 2) daytime station must be in same city as proposed FM station, 3)daytime station must have been in operation for three continuous years, 4) owner proposed to become integrated in management of FM station, 5) owner must divest of the daytime station in three years.

petitioned for elimination or weakening the preference. The FCC rejected all petitions and allowed the order to stand.

The Coalition petitioned the District of Columbia Circuit Court (D.C. Cir.) and asked for invalidation or remand of the rule for further proceedings, especially with respect to the concerns of the Coalition. The Coalition was extremely concerned as to whether the new enhancement given to daytime stations: 1) reduced the number of minority owned companies that could compete for new FM license, 2) represented a departure from FCC policy of encouraging minority ownership, and 3) eliminated other alternative proposals.[397]

The court agreed with the Commission and allowed the ruling to stand. It concluded that the FCC had adequately stated its rationale for the enhancement, noting that good service under the "technically different" daytimer status would lead to reasonable conclusion of good service on the FM band. While the Coalition stated the rule would reduce the opportunities for minorities to own broadcast stations, the Court wrote the FCC properly weighed and balanced the issues of daytimer stations and minority ownership.[398] Providing a criterion that called for divestiture of the daytimer station within three years was crucial to the Court, as it showed the Commission had struck a balance between minority ownership concerns and the goal of incorporating daytime station ownership.[399] The divestiture was said by the FCC to create more daytimer stations, which would offset any negative impacts of the move to FM.

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[397] 822 F. 2d 277 at 280.
[398] *Id.* at 281.
[399] *Id.* at 282.

SHURBERG BROADCASTING OF HARTFORD V. FCC (1989)[400]

Faith Center, a television station licensed in Hartford, Connecticut, attempted to sell its station through a minority distress sane. Faith Center tried twice unsuccessfully to complete such a sale. After its second attempt, Shurberg sought to file a permit to construct a station. That application was exclusive of Faith Center's renewal application. The FCC could have 1) granted Faith Center a third attempt to sell its property to Astroline (a minority entity) or 2) granted Shurberg's request for comparative consideration. The FCC decided to allow Faith Center another chance to sell its station. Shurberg appealed the decision.

However, other events took place soon after that would halt the appeals process. First, the decision in *Steele v. FCC*[401] had the FCC wondering if the distress sale policy was still constitutional. The ruling in that case stated the FCC acted beyond its statutory authority when it extended ownership preferences to female applicants during comparative hearings. While the judges in the case acknowledged the merit and clear congressional endorsement of minority preferences, there was no such documentation pertaining to female ownership.[402] As the FCC sought to undergo examination of minority and gender preferences in media ownership, congressional appropriation riders prohibited any inquires the FCC might have made. The Commission re-instated the distress

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[400] 876 F.2d 902 (1989).
[401] *Supra* note 10. *Steele v. FCC* dealt specifically with enhancements for women and gender discrimination. This case was excluded for analysis as based upon the criteria outlined in Chapter III.
[402] Donald Gillmor, et. al, *Mass Communications Law: Cases and Comments* 720-721 (5th ed., 1990).

sale policy, thereby allowing Faith Center to pursue the sale with Astroline. Consequently, Shurberg's appeal was re-instated.

Did the FCC's minority distress sale policy violate the equal protection rights of Shurberg, as guaranteed under the Fifth Amendment? The FCC had previously ruled the policy to be constitutionally sound because the Commission contended that underrepresentation of minorities in ownership and programming would be corrected if there was an increase in minority ownership."[403] The Commission also looked to congressional action when in 1982, the Communications Act was amended to include minority preferences in the broadcast license lottery policy.[404] According to the per curiam opinion of the D.C. Circuit, the distress sale policy violated Shurberg's rights because the program was not narrowly tailored to remedy past discrimination or to promote programming diversity.[405] The court relied on the opinions of *Bakke, Fullilove, Wygant v. Jackson Board of Education,*[406] *and Croson v. City of Richmond*[407] *as* the basis for their decision.

In *Croson*, it was held that race seldom provided a basis for disparate treatment and that race classifications were potentially harmful to society. The city had developed a minority business utilization plan, which called for the major city contractors to subcontract at least thirty percent of a contract's dollar amount to one or more minority businesses. The plan, according to the high court, used

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[403] *Id.* at 906.
[404] *Id.*
[405] 876 F.2d 902 at 918.
[406] 476 U.S. 267 (1986).
[407] 488 U.S. 469 (1989).

racial quotas. State and local government had no mandate to enforce the 14th amendment. As such, race classifications ought to be clearly identified and unquestionably legitimate. The Supreme Court ruled that the city of Richmond had violated the equal protection clause. In *Wygant, a* school board policy provided minority teachers a preference over non-minority teachers with seniority during school layoffs. The Supreme Court ruled that policy unconstitutional. By providing a preference to minority teachers over non-minority teachers with seniority, the school board failed to establish the necessary evidence of past discrimination for remedial action. Due to the lack of evidence that tied past discrimination to the remedial action, the court stated the policy was not narrowly tailored to achieve its purpose.

From those four cases, the opinion in *Shurberg* generalized that government imposed minority preferences are constitutional under certain circumstances. Yet such a preference could not be prefaced on the desire to achieve some level of diversity with an institution.[408] The circuit court noted that besides remedying past discrimination, the only other rationale supported by the Supreme Court was the promotion of a diverse student body.[409] Quoting Justice Powell's opinion in *Bakke*, the D.C. court said the "goal of racial diversity might be compelling only when the greater diversity itself serves one of society's fundamental goals.[410] However, the court [*Shurberg*] asserted that neither Congress nor the FCC found evidence that linked the underrepresentation of

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[408] *Id.* at 912.
[409] This position was stated in *Bakke;* however the minority preference in this case was invalidated.
[410] 876 F.2d 902 at 913.

minorities to any discrimination by the FCC or the broadcast industry.[411] Underrepresentation alone was not appreciable proof of past discrimination.[412]

Outside of the representation issue, the preference given to minorities through distress sales was not tied to any disadvantage. The policy unfairly burdened third parties because their race eliminated them from potentially gaining a broadcast property. According to Judge Silberman, neither Congress nor the FCC linked underrepresentation to past discrimination by the FCC or the broadcasting industry.[413]

Agreeing with Silberman's analysis, Senior Circuit Judge MacKinnon wrote the FCC's program was not narrowly tailored to achieve its objectives. In fact, the program was labeled "untailored" because its open-endness allowed it to be applied to any license without regard to any past discrimination.[414] Since the offense of the licensee was in no way connected to past discrimination, the policy violated the holding in *Croson*. However Judge Wald viewed *West Michigan* as binding precedent.[415] The opinion in *West Michigan* pointed to several occasions where Congress had supported the FCC's attempts to diversify media control through minority ownership (e.g., Congress' institution of license lottery preferences for minorities, appropriations riders, etc.) Since Congress supported the policy, the outcome of *Croson* had little relevance to the current dispute.

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[411] *Id.* at 914.
[412] *Id.* at 915.
[413] *Id.* at 914.
[414] *Id.* at 930.
[415] 876 F.2d 902 at 935.

Judge Wald also argued that efforts to promote diversity were a basis to remedy past discrimination.[416] Therefore, the distress policy was not a set-aside as there was no pre-determined number of stations. The dismal figures that reflected underrepresentation of minorities emphasized why policies that encouraged general diversity had failed. The underrepresentation of minorities in the industry, coupled with the lack of diversity in programming was the direct result of past racial discrimination.[417] By implementing the distress sale policy on the basis of viewpoint diversity through minority ownership, the Commission designed the policy as a way to deal with the disproportion number of minorities in the broadcasting industry.[418] Furthermore, Judge Wald asserted the

> "distress sale policy rest on an assumption that views and listeners of *every* race will benefit from access to a broader range of broadcast fare...."[419]

WINTER PARK COMMUNICATIONS, INC. V. FCC (1989)[420]

These were the consolidated cases of Metro Broadcasting and Winter Park. Appellants sought review of a FCC order to grant a broadcast license to Rainbow Broadcasting (a minority entity). Following a 1982 rule making proceeding, the FCC assigned a new TV station to the city of Orlando. Commission rules dictated a fifteen-mile rule, so channels were to be used in communities located within fifteen miles of Orlando. Metro Broadcasting, Winter

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[416] *Id.* at 942.
[417] *Id.* at 941.
[418] *Id.* at 936.
[419] *Id.* at 942.
[420] 873 F.2D 347 (1989).

Park, and Rainbow filed mutually exclusive applications for the channel. Metro and Winter Park stated Orlando was their place of license, but Winter Park claimed a close city of Winter Park as the city of license. However all three stated they were serving the entire Orlando area.

An administrative law judge issued the license to Metro, as Metro's qualitative factors suggested that it would be a better applicant than Winter Park. Rainbow was disqualified for lack of candor on its application. Winter and Rainbow appealed to the FCC's Review Board. The Review Board reversed the lack of candor decision against Rainbow and awarded Rainbow the station. The Review Board also decided that Winter Park was not entitled to extra credit under section 307 of the Communications Act.[421] (The credit sought was under section 307(b) of the Communications Act for providing first local TV service to the Winter Park area.) However, the Board reduced the integration credit of Metro and found Rainbow had a quantitative and qualitative advantage. Rainbow had ninety percent Hispanic ownership. Metro had one black partner, which constituted less than twenty percent of minority participation. Although the qualitative comparisons between Rainbow and Metro were close, Rainbow's substantial minority interest, and female ownership somewhat outweighed Metro's local ownership and civic participation.

Winter and Metro appealed to the full Commission, which denied review of the decision. Winter and Metro appealed the FCC's decision to the D.C. Circuit

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[421] *Id.* at 349.

Court. As the appeal went forward, the FCC asked for a remand in light of its re-examination of the minority preference policies. The D.C. Circuit Court granted the FCC's request. Subsequently, the FCC found Rainbow had no clear quantitative advantage and that deletion of the minority preference would reverse the outcome of the case. Therefore, the FCC held the case pending further action in its re-examination on minority preference policies.

Shortly thereafter, President Ronald Reagan signed into law an appropriations rider that prevented any type of re-examination or changing of the minority preferences.[422] Congress also ordered the FCC to lift suspensions of any proceedings and reinstate its prior policy.[423] Consequently, the FCC reactivated the case and reaffirmed the Review Board's decision. Thus, the appeal to the D.C. Circuit Court was renewed.

One of the major questions in this case was whether the minority enhancement violated the equal protection clause of the Fifth Amendment. This question was similar to the question posed to the court in *West Michigan.* The D.C. Circuit Court noted the similarities and decided that the enhancements for minority status in this case were in accord with *West Michigan.* As such, the enhancements were constitutionally permissible.

The minority preference, as supported in *West Michigan,* was reaffirmed in this case because 1) the Commission's award of the preference was not a grant of a specific number of stations nor was it a denial to non-minorities. The

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[422] See Chapter IV, Comparative License Hearings for a detailed explanation of the appropriation riders and its accompanying public law.
[423] *873 F.2d 347* at 351.

enhancement was only one factor in light of many factors; 2) the FCC's action in this case was also attributed to a congressional action that recognized underrepresentation of minorities in broadcast mass media. The policy was designed to increase minority participation. That increased participation would further the public interest goals of viewpoint diversity.

The lone dissenting opinion believed the force of *West Michigan* was undermined by the case of *Wygant* and *Croson*. The FCC's justification of the preferences being non-remedial could not survive the *Croson* decision. Moreover, since the FCC never claimed that the policy was designed to remedy the effects of past historical underrepresentation of minorities in broadcasting, the FCC should reexamine Congress' intent in light of *Wygant* and *Croson*.

Also, congressional action (e.g., the appropriations riders) did not necessarily indicate a mandate of racial preference schemes for the FCC. The dissent argued that it "would seem anomalous for Congress to lock the FCC into a policy broader than it [Congress] had ever before applied...".[424] It was also argued that the restriction placed on the FCC by the appropriations rider was limited; so the FCC would be free to reexamine the policy. (However, it was noted in Chapter IV that the appropriations riders were renewed every year up until 1994. Although the court could not anticipate Congressional extension of the riders when it decided *Winter Park* in 1989, such congressional action can be interpreted as strong show of support for the policies and the related rationales.)

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[424] *Id.* at 364.

Outlining the FCC's decision to institute racial preferences (outgrowth of *TV 9* and Garrett), the dissent argued that underrepresentation was never linked to discrimination, only an extension of program diversity. Further, the Commission failed to consider non-racial solutions.

METRO BROADCASTING V. FCC (1990)[425]

This closely decided Supreme Court case (5-4) was a result of two cases previously heard in the D.C. Court of Appeals— *Winter Park* and *Shurberg*. Recalling the outcome in Winter Park, the Appeals Court upheld the FCC's decision to grant a broadcast license to a minority entity through qualitative enhancement credits in the comparative hearing process. However in Shurberg, the court invalidated the distress sale policy as it determined that Shurberg's equal protection rights had been violated.

Upon hearing these two cases, the Supreme Court had to decide if the two minority preference policies were constitutional. In a decision marked by two separate dissents, the court held neither the minority enhancement policy nor the distress sale policy violated the equal protection clause of the Fifth Amendment.[426] The majority opinion stated the FCC's minority ownership programs were approved and authorized by Congress. In addition, race-conscious measures that are validated by Congress are permissible only if the measures (a) serve important governmental objectives within the power of

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[425] 497 U.S. 547 (1990).

[426] Justice Brennan, who was joined by Justices White, Marshall, Blackmun, and Stevens wrote the majority opinion. Justice Stevens wrote a separate concurring opinion. Justice O'Connor, who was joined by Justices Rehnquist, Kennedy, and Scalia wrote the first dissent. Justice Kennedy wrote a separate dissent, which was joined by Justice Scalia.

Congress, and (b) are substantially related to achieve those objectives. The interest in enhancing broadcast diversity, according to the majority, was an important government objective. As such, the distress sale policy and minority enhancements in comparative hearings were substantially related to the achievement of that government interest.

The case was significant because the majority's opinion upheld the FCC policies as constitutional because the policies were viewed as being related to a substantial government interest. Additionally, the policies were within the limits of Congressional and administrative action. Most importantly, the ruling affirmed that governmental decisions that rest on race classification could be permissible as a remedy for past wrong, provided those decisions served a compelling and substantial government interest.

However the dissenting opinions, led by the lengthy argument of Justice O'Connor,[427] claimed that by upholding the FCC preferences, the Court departed from fundamental principles and from the high court's traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest. This departure, remarked Justice O'Connor, indicated a renewed toleration of racial classifications and a negation of the Constitution's equal protection guarantees, which should extend equally to all citizens. The Constitution's guarantee of equal protection bound the federal

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[427] Supra *note* 446 at 602 (1990). Justice O'Connor's dissent was thirty-one pages long.

government as well as the states; hence no intermediate level of scrutiny applies to the federal government's use of racial classifications.

Neither of the dissents by Justices O'Connor and Kennedy agreed with the majority's reliance on *Fullilove* or the application of intermediate scrutiny. According to O'Connor, *Fullilove* applied at most only to congressional measures that sought to remedy identified past discrimination. Justice Kennedy's opinion[428] went a step further in questioning the validity of viewing congressional mandates as seen in *Fullilove*.

After the decision in Metro there was relatively little federal court activity concerning minority preferences until 1993. In *Betchel II*, the minority enhancement granted in comparative hearings was ruled invalid. When Viacom wanted to sell its cable properties to an African-American broadcaster by using the minority tax certificate, the tax gains that were deferrable amounted to over $400 million dollars. That large monetary amount caught the eye of Congress who swiftly moved to abolish the policy. After two hearings on the program (one in the House, the other in Senate), the policy was repealed in 1995. Soon afterwards, the Telecommunications Act of 1996 was passed. This amendment to the 1934 Communications Act, among other things, raised local ownership limits, eliminated nationwide ownership caps, and replaced comparative hearings with a process of competitive bidding.

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[428] *Id.* at 631.

These changes had significant impacts on minority ownership. No longer could minorities rely on enhancement credit when they sought to obtain a license. The end of the tax certificate program removed enticements for white owners to do business with minority groups. Without the policy, the bargaining power of minorities was reduced greatly.

CHAPTER VI: ANALYSIS AND ASSUMPTIONS

While *Metro Broadcasting* seemed to be the Supreme Court's last word on minority ownership preferences, a 1995 Supreme Court case countered that decision. In *Adarand Constructors Inc., v. Pena,*[429] the Supreme Court held that all racial classifications, proscribed by any governmental agent, must be analyzed under a strict scrutiny standard of review. The decision in this case overruled *Metro* and the rationales for minority ownership preferences. However, the downfall of minority preferences did not start at *Adarand.* That case just culminated years of growing resistance to such policies.

1970s: ACKNOWLEDGING THE ISSUE OF RACE

In TV 9, the majority wrote that reliance on the Communications Act, as a colorblind document did not describe the breadth of the Act's public interest criterion.[430] The notion of public interest provided the FCC with the discretion to judge other factors believed to be relevant. Color blindness for the protection of individual rights should not foreclose consideration of minority group ownership.[431] The court wrote, "Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to black participation...."[432] Black ownership was a broad concept to be given realistic content.[433]

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[429] 515 U.S. 200 (1995).
[430] 495 F.2d 929 at 936.
[431] *Id.* at 936.
[432] *Id.* at 936.
[433] *Id.* at 937.

In the D.C. Circuit Court's supplemental opinion to *TV 9*, the FCC said it was forced by the court to adopt a new comparative policy of awarding a preference for black ownership. The Court disagreed. In fact, the court did not rely solely on the race of the owner and its did not dictate a preference at all. Distinguishing merit from preference, the court stated that a preference was a FCC decision on the qualities of an applicant, whereas merit was designated as favorable consideration that may or may not result in an actual preference. Under the already established criterion of public interest in broad community representation and best practicable service, Comint was entitled to an award of merit. According to the court, a preference did not necessarily follow from their decision. Other applicants were not foreclosed from seeking similar merit.

In the case of *Garrett* v. *FCC*, the Circuit court recognized that WEUP was only one of a few black operated stations in the United States.[434] At that time (1973), 33 out of approximately 7,000 radio stations were minority owned. As for television, none of the one thousand television stations were minority owned. As such, it was important to take into account the service that WEUP would provide to the minority population of Huntsville. Since *TV 9* served as the precedent case, the rationales used in that case were applied in *Garrett.*

The Court's argument in both of these cases is clear. While the court dictated no specific policy, the FCC was instructed to view minority ownership with a social and historical approach, taking into account industry trends and the

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[434] 513 F.2d at 1061.

realities of society. Interestingly, these cases were decided in the middle 1970s-during a time when the country was looking to fill the promises of the civil rights movement. The Kerner Commission, in 1968, maintained the media had done a poor job in communicating the needs and concerns of minority groups to American society.[435] The visibility of blacks (and other racial groups) in the media was low and often stereotypical. More importantly, the Kerner Commission speculated about what affect these images would have on white society and the interaction between the races.

The Kerner report led to the FCC's adoption of equal employment opportunity provisions.[436] In acknowledging the lack of progress made with earlier efforts to increase minority participation in the media, the FCC determined that minority ownership was needed to create diversity in the types of messages and programming presented to the public.[437]

The Kerner report was followed by a report from the U.S. Commission on Civil Rights.[438] Noting how the civil rights movement had captured the American public with vivid TV images, the report observed that television gave particular groups and individual's status. It followed that those chosen individuals and groups for media coverage were receiving attention to the detriment of those groups and individuals who were not.

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[435] Otto Kerner, *Report of the National Advisory Commission on Civil Disorders*, (1968).
[436] Statement on Policy of Minority Ownership, *supra* note 115.
[437] *Id.*
[438] Window *Dressing on the Set: Minorities in Television*, a report of the United States Commission on Civil Rights, (August 1977).

At the time of the *TV 9* and *Garrett* ruling, the FCC was trying to become part of the solution. By recognizing that its race-neutral polices had not helped to bring minorities into the broadcast industry or diversify viewpoints, the FCC adopted polices that provided opportunities for employment and ownership. The above reports, coupled with civil and social unrest, prompted many to believe that white majority control over the media affected how minorities were portrayed. Such control over the media by the white majority would also influence messages communicated to the general public.[439] In agreement, the Kerner Commission asserted that white dominated media would not communicate with nor provide message and programming appealing to minority audiences.[440]

More importantly, race was understood to be a symbol of cultural identity and a product of society. Consequently, race discrimination was treated as a societal issue. Affirmative action programs, set-asides, and various programs to promote racial equality began to emerge. Anti-discrimination policies were designed to remove the conditions that continued to subordinate blacks. Affirmative action, to some extent, equalized and redistributed power, resources, and wealth.[441] Such policies called upon judicial support to advance the removal of racial oppression.[442]

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[439] *Id.*
[440] *Id.*
[441] Harris, *supra* note 272.
[442] Race and reform, *supra* note 13.

The 1960s were marked by heightened social and political activism.[443] The Johnson administration tried to increase participation by disadvantaged and marginalized groups.[444] Grassroots organizations, community groups, and minority organizations began to transform their concerns and political agendas into concrete actions, especially within the communications industry.[445] Their impacts, though successful, were short lived. Inflation and productivity decline in the late 1970s were crucial forces behind the subsequent changes in various industries, such as communications.[446]

During this period, racial discrimination was primarily viewed from Freeman's "victim" perspective. Racial discrimination consisted of "conditions of actual social existence as a member of a perpetual underclass."[447] Events such as unemployment and homelessness, combined with the human feelings associated with those events (despair, anger, etc.) created a certain social condition.[448] By removing the feelings and the related conditions, racial discrimination could be remedied.

This is important to note, because in the 1980s group rights and remedies were no longer viewed in that manner. Critical race theorist Kimberlé Crenshaw asserted that affirmative action, during this period, was viewed as a mechanism that undermined the inherent property interest in being white and the related

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[443] Horowitz, *supra* note 69 at 199.
[444] *Id.* at 198.
[445] *Id.*
[446] *Id.*
[447] Freeman, *supra* note 269 at 29.
[448] *Id.*

social status of being white.[449] Agreeing with that idea, critical race theorist Cheryl Harris wrote that affirmative action and race preference polices threatened to "dismantle the actual and expected privilege that has attended white skin since the founding of the country."[450]

1980s: QUESTIONING THE RACE FACTOR

By the late 1970s, those who were privileged (i.e., white majority) began to see a tightening job market.[451] As employment opportunities began to dwindle, resentment grew toward polices that provided an "unfair advantage" to others.[452] Affirmative-action policies were attacked as a form of "reverse discrimination".[453]

As the 1980s approached, racial discrimination began to take on what Freeman labeled the "perpetrator" viewpoint.[454] In this viewpoint, racial discrimination was viewed as an action or series of actions inflicted upon a victim by a specific perpetrator. Removed from social or historical contexts, the perpetrator becomes the focus of the remedy. Freeman linked this idea to misconstrued notions of fault and causation.[455] The fault in anti-discrimination law goes to specific individuals, which separates that person from society as a whole. Causation detaches the singular instance of discrimination from the total range of experiences that could be associated with the discrimination.

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[449] Race and reform, *supra* note 13.
[450] Harris, *supra* note 272 at 288.
[451] Race and reform, *supra* note 13.
[452] *Id.* at 114-117.
[453] *Id.*
[454] Freeman, *supra* note 269.
[455] *Id.* at 30.

The focus of racial discrimination began to shift towards the specific action and specific individuals, rather than the overall existence of systemic racial inequities.[456] By labeling discriminatory actions as unintentional, responsibility for the effects of such conduct can be evaded.[457] Freeman cautioned that faultfinding with specific individuals would create "a class of innocents who need not feel any responsibility for conditions associated with discrimination and would feel great resentment when called upon to bear any burden in connection with remedying violations."[458] Indeed, cases like *Shurberg* serve as an example of what Freeman had described. While the parties in *Shurberg* were exercising their right under an established FCC provision, the challenger (Shurberg) felt he was unduly burdened by the policy. The court acknowledged that the FCC's purpose in establishing the distress sale policy was to promote diverse programming.[459] And while accepting the FCC's rationale, the court stated "... the distress sale policy requires innocent third parties to shoulder excessive burden."[460]

The case of *West Michigan* noted that underrepresentation of minorities in the media and ownership had the support and weight of congressional action.[461] In fact, Congress expressed in a 1982 conference report that the underrepresentation of minorities in the mass media was a direct result of past

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[456] *Id.*
[457] *Id.*
[458] *Id.* at 30.
[459] 876 F.2d 902 at 913.
[460] *Id.* at 917.
[461] 735 F.2d 601 at 613- 615.

racial discrimination.[462] The court deferred to that congressional action and dismissed any constitutional violations. While the appellant tried to assert that minority enhancements worked where there was a sizable minority population, the court and the FCC rejected that argument. Minority enhancements were never premised on matching broadcasters to specific communities of a specific size. Rather they [enhancements] were linked to general diversity of viewpoints in the media, regardless of community size and/or location. This case reinforced the concept of group rights in remedying discrimination. Minority ownership was viewed as a way to address the lack of minority group participation in radio and television.

Crenshaw remarked that the Reagan administration symbolized the emergence of hostility towards government.[463] Reagan's attempts to fire members of the Civil Rights Commission, his veto of the Civil Rights Restoration Act are cited as overt actions taken during the administration that showed some hostility to the furtherance of minority rights and causes.[464] Horowitz remarked that during the Reagan administration there was a great push to reduce the role of government in social regulation. The Paperwork Reduction Act (which was started under the Carter administration) and other policies aimed at removing government from the economy of many business and industries were cited as examples.[465] By appointing administrators hostile to regulation of any kind,

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[462] HR Conf. Report no 97-765, 97th Congress, 2nd Session, 1982, pages 40-41.
[463] Race and reform, *supra* note 13.
[464] *Id.*
[465] Horowitz, *supra* note 69 at 210.

instituting agency cutbacks, and through non-enforcement the Reagan administration tried to remove all forms of social regulation.[466]

That hostility was transformed into a formalized, colorblind view, which called for the removal of affirmative action and other preference based policies. During this time, many commentators remarked that the goals of the civil rights movement had been reached.[467] As Nan observed, social attitude surveys showed growing resentment towards affirmative action as a majority of American society believed that the previously labeled "disadvantaged" had become the privileged.[468]

Some suggest that the colorblind view of the Constitution was developed in conservative think tanks as a way to combat civil rights policies.[469] Seeing such policies as a "threat to the democratic political system,"[470] affirmative action and race-based policies were signaled out for attack. In addition to attacking the premise of affirmative action and race-based policies, remedies for discrimination became limited to those who could "actually" prove some harm.[471] This colorblind approach to anti-discrimination law purports a "common ownership" where everyone is equally protected under the Constitution.

The colorblind rhetoric was transformed in the broadcasting industry through broadcast deregulation. Broadcast policies such as ascertainment

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[466] *Id.* at 209.
[467] *Id.*
[468] Nan, *supra* note 22.
[469] Race and reform, *supra* note 13.
[470] *Id.* at 103.
[471] Race and reform, *supra* note 13.

(required broadcasters to survey local community to determine what the needs were), anti-trafficking (required stations to be held for no less than three years), and license challenges (ability to challenge a license holder for poor or inconsistent service) allowed the voice of marginalized persons to be heard. Their removal prompted serious concerns for minority groups. For example, Ray noted, once the anti-trafficking rule was eliminated, "the number of TV stations sold annually after being held less than two years had increased by eightfold."[472] Such activity was the early precursor to mergers, acquisitions, and eventually industry consolidation.

Regulation was considered a contributor to the falling economic productivity. Businesses no longer supported regulation as they began to worry about how the social and economic impacts of the 1970s would affect the future of profits.[473] While the industries and business were moving away from regulation, the courts had begun to view regulatory agencies as experts on the interest of consumers and the public.[474] To that end, the courts deferred to the agencies and to congressional legislation proscribed to the agencies.[475] A tension developed between businesses that wanted less control from the government and government agencies that saw fit to regulate businesses and their activities in the interest of the public.

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[472] Ray, *supra* note 137 at 165.
[473] Horowitz, *supra* note 69 at 199- 299
[474] Horowitz, *supra* note 69 at 211.
[475] *Id.*

During the late 1970s and the early 1980s, the broadcast industry was striving for deregulation. The FCC was taking cognizance of new technologies such as direct broadcast satellite, multipoint distribution services, cable services, and low power television.[476] As the Commission sought to integrate newer services with traditional broadcast, it removed regulations that were deemed to be prohibitive of new growth. Programming logs, restrictions on group ownership and certain content-based regulations were removed in order to encourage growth and competition.[477]

One of the industry's changes in the late 1970s was the rise of FM radio. As Howard and Zeigler wrote, listenership for FM radio was expanding during this time.[478] In 1975, FM radio was considered an auxiliary service to the dominant AM radio.[479] Responding to industry demands, economic, and technological developments, the FCC wanted to promote FM services.[480] In a 1983 order, the FCC adopted new rules that increased the number of FM stations and provided spectrum space for approximately 700 new FM stations.[481]

Even though the Commission had expanded the ability of daytime stations to broadcast,[482] the NTIA believed that daytime stations would be in a poor

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[476] Horowitz, *supra* note 69 at 245.
[477] Massive removal of these policies, along with others, was upheld in *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (1983). For a more in-depth discussion of radio deregulation and its impact on public interest, see Cindy Rainbow, *Radio Deregulation and Public Interest*, 4 CARDOZO ARTS & ENT. L.J. 169 (1985).
[478] Sherilyn K. Zeigler & Herbert H. Howard, *Broadcast Advertising: A Comprehensive Working Textbook* 9 (3rd ed. 1991).
[479] Krasnow, et. al, *supra* note 71 at 24.
[480] Andrew R. Reeves III, FM Radio Spectrum Allocation: The History and Chronology of Changes in the FCC Policy, Procedures and Rulemakings (1993) (Thesis, University of Tennessee, Knoxville).
[481] 49 Fed. Reg. 11214
[482] 822 F.2d 277 at 278.

competitive position with the FM stations.[483] Although the FCC wanted to expand the possibilities of FM usage, it also wanted to provide comparative hearing enhancements for daytime AM operators competing for FM license. This enhancement would be similar to minority enhancements in similar situations. In *National Black Media Coalition,* appellants argued that the enhancement would threaten the ability of minorities to compete for FM stations.

The FCC provided a divestiture provision with the daytime enhancement. The owner had to divest him/herself of the existing AM station in order to receive the enhancement in a comparative hearing for a new FM station.[484] This provision seemed fair on first glance. The policy, however, was limiting.

The *Coalition* noted that for communities with populations over 25,000 people, only 93 stations would be available.[485] And an estimated number of sixteen stations would be available only to daytime AM stations.[486] That translated into fewer opportunities for minority groups. The trading of stations had begun to increase as the industry deregulated. As a result, the value of newly purchased FM stations increased. [487] As Reeves noted, FM stations were viewed as profitable and were "being sold at multiples of up to 15 times projected cash flow."[488] The FM stations' value was being based upon future earning potential, not on what was being generated from already existing FM stations.

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[483] *Id.*
[484] 822 F.2d 277 at 282.
[485] *Id.* at 281.
[486] *Id.*
[487] Reeves, *supra* note 480 at 43.
[488] *Id.*

Conversely, most AM stations had been purchased years ago when the frequencies had first become available. The AM stations that existed were presumably good frequencies, which was important to attracting customers and advertising. A higher price for a well established, profitable AM station was more likely to occur than for an FM station whose values had yet to be proven. Even though the FM frequency would become more dominant, initially AM stations were still desired as profitable radio properties.

While preserving and maintaining minority ownership had been a major priority until this point, the *National Black Media Coalition* case showed where the needs of the industry and majority interests over-rode the interests of minority groups. This may have translated to a blockage of early minority participation in the allocation of new FM services. More importantly, the Commission rejected petitions that suggested a preference for minorities applying for new FM stations.[489]The ability to perceive potential impacts on minority ownership was outweighed by the promotion of FM radio.

The ruling in *National Black Media Coalition* suggested that minorities did not need additional help in accessing new FM services. However by its own admission in its 1978 report, the FCC discovered that bias and discrimination in advertising, the inability to discover of available properties and lack of financing were all impediments to minority involvement. [490]

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[489] Carter, *supra* note 311 at 50.
[490] *See generally* 1978 Report, *supra* note 99.

Concerning the argument for using race-neutral policies, most of the FCC ownership policies were already race-neutral. However, relying on race neutral policies creates, "an illusion that racism is no longer the primary factor responsible for the position of the black underclass."[491] Relying solely on race-neutral policies leaves the impression that race is unimportant and bares no impact or influence on systemic processes. Even when the Commission instituted rules that were not directly related to ownership, were race-neutral, and would help gather input from minorities,[492] it acknowledged, "views of racial minorities continued to be inadequately represented in the broadcast media."[493] (The majority in *Metro* would note that the ascertainment policy, a decidedly race neutral measure, had failed to determine the programming needs of a community.)[494]

The distress sale policy did not mandate the owner to sell the property. In fact, the owner had an option to proceed with a hearing and take his/her chances. Nothing precluded the owner from trying to sell the property through some other mechanism. Moreover, before the 1975 addition of the minority component to the distress sale policy, owners were able to use the policy in circumstances such as bankruptcy or extreme health conditions.

In *TV 9*, the D.C. Circuit Court wrote that regardless of whether one called the Communications Act (or even the Constitution) a colorblind document,

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[491] Race and reform, *supra* note 13.
[492] Such as ascertainment rules and equal employment opportunities.
[493] Statement on Policy of Minority Ownership, *supra* note 115 at 980.
[494] 497 U.S. 547 at 590, note 42.

attempts to live up to public interest objectives should not be ignored.[495] Since providing society with divergent viewpoints was judged a necessary component of the Communications Act, inclusion of marginalized and disadvantaged people worked to serve the overall public interest goals. Yet, in *Shurberg* those very ideals were viewed as weak arguments for minority ownership policies.[496]

Shurberg focused on "race" as a preference, rather than seeing the "policy" as a preference. The line was drawn when a white applicant believed his own race hindered him from competing for a broadcast license. The majority opinion in *Shurberg* found it impossible to say someone's race had a profound effect on his or her profession. In fact, the court said such assumptions could be called "stereotyping."[497]

Nevertheless, the court did not take into consideration studies that were conducted that showed differences in the race of owners and programming. Studies had confirmed racial differences affected the type of music played on stations,[498] employment opportunities,[499] and the type of news covered.[500] While other factors would inevitably affect a broadcaster's ability to serve the public, race should not be discounted as a realistic factor in how that service is provided. In spite of the evidence that affirmed the importance of race, the distress sale policy was ruled unconstitutional.

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[495] 495 F. 929 at 936.
[496] 876 F.2d 902 at 914.
[497] 876 F.2d 902 at 922.
[498] Jeeter, *supra* note 195.
[499] *See* NTIA, *supra* note 102; Gold, *supra* note 198.
[500] Gold, *supra* note 198.

No longer concerned with maintaining that diversity in ownership would lead to diversity in programming, the court adopted the position that underrepresentation was not a cause for minority ownership preferences. The policy was not narrowly tailored to remedy past discrimination.[501] The link that seemingly existed between minority ownership and diversity of viewpoint in prior cases had disappeared.

Critical legal scholars, such as Gotanda, provide explanations as to why the link disappeared. According to Gotanda, the courts equated discrimination, not with social conditions or effects, but to intentional action(s).[502] Limiting discrimination to intentional acts hindered the ability to address racial discrimination in its totality because each social problem was disconnected from the main component of racism.[503]

Such an approach disparages the importance of social and historical factors that contributes to racial inequality--factors that cannot be easily identified, but are embedded in our society. For example, Ofori's study documents, through interviews and analysis of advertising revenue figures, the subtle discrimination that takes place within the broadcasting industry.[504] While those in the industry may speak of the discriminatory practice such as non-urban dictates and minority discounts, to ask a minority to clearly identify an "intentional" harm that has resulted from these practices poses quite a challenge.

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[501] 876 F.2d 902 at 915.
[502] Colorblind, *supra* note 44.
[503] *Id.*
[504] Civil Rights Forum, *supra* note 83.

And when viewed in the larger context of broadcast ownership, advertising is the life that supports the health and growth of broadcast stations. Profits, from the sale of advertising, are the key to success. To disassociate the problems of advertising discrimination from the overall challenges of broadcast ownership would make it hard for a minority to explain and prove actual harm. And as Lawrence wrote,

> "requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works." [505]

The dissenting opinion in *Shurberg* had recognized that only thirty-three stations had been sold to minorities since 1978.[506] In the eleven preceding years, only a small number of stations had been exchanged using this policy. It was hardly an overused policy that burdened a potential license holder; the burden was minimal and focused on eradicating obstacles brought on by discrimination.

Winter Park, decided only a few months after *Shurberg*, was very different in rationale and contrast. As the court relied on *West Michigan* as the controlling case, congressional action was important to understanding the need for minority preferences. While *Shurberg* downplayed congressional support and involvement with minority ownership, the majority in *Winter Park* saw congressional support as validation of public interest goals and as a way to overcome discrimination

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[505] Charles R. Lawrence, III, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism* in *Critical Race Theory: Key Writings that Formed The Movement* 235-275 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas eds., 1995).
[506] 876 F.2d 902 at 938.

against minorities. In stating the FCC's goal in the creation of the policy, the court wrote it was

> "Designed to increase the participation of minority groups in the broadcast industry in furtherance of the public interest goal of diversity—to enhance the public's exposure through programming on broadcast stations of the significant diverse groups that make up the nation."[507]

The congressional influence considered important in the majority was seen as weak in the dissent. Although the dissent noted congressional action was a constitutionally necessary function in responding to societal problems, no empirical evidence had been presented that showed discrimination existed in the industry or any government agent.

Both *Shurberg* and *Winter Park* were decided at a time when affirmative action programs were constantly being challenged.[508] Regulations of any kind were viewed as a constraint. As Horowitz suggested, socially derived regulation (which minority preferences would be considered) had affected a broadcaster's degree of calculated risk.[509] There were costs associated with the compliance of government regulations. As such, regulations deprived business of its ability to exercise private privilege and autonomy.[510]

When deregulation began in the broadcast industry, it was proposed as a way to reduce paperwork and get broadcasters back into the business of broadcasting. The removals of government-sponsored regulations were equated

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[507] 873 F.2d 347 at 333, note 6.
[508] Nan, *supra* note 22.
[509] Horowitz, *supra* note 69 at 205.
[510] *Id.*

with marketplace freedom, which was supposed to lead to consumer choice. As Horowitz aptly stated, regulation was a "class" issue, with regulation and government action seen as being dictatorial over the industry. Furthermore, the judiciary began to shift away from seeing regulatory agencies as guardians of public interest, as they asserted the marketplace might be the best place to decide the issue of public interest.[511] This was solidified in the early 1980s when the courts, in *Office of Communication of the United Church of Christ v. FCC*,[512] approved legislation that eliminated socially favorable policies at the FCC.[513]

While those changes may have provided robust opportunities for new technologies and allowed broadcasters to operate at better efficiency, the removal of social regulation removed the discussion of race and minority groups. Diversity and the marketplace of ideas were to be delivered by an unrestricted market.[514] Hence, the application of viewpoint diversity became problematic in the deregulated broadcast market.[515] Horowitz suggested that as technologies changed and the market evolved, the broad notions of public interest got lost.[516] Corporate and business interests are perceived as more important, where the needs of disadvantaged and underrepresented groups are seen as secondary. Standing on the side of businesses was part of President Reagan's goal when he initialized his plan of supply-side economics (also known as trickle down

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[511] Horowitz, *supra* note 69 at 220.
[512] 707 F.2d 1413 (D.C. Cir. 1983).
[513] Horowitz, *supra* note 69 at 260. Some of the policies eliminated were equal time provision, the Fairness doctrine, and comparative license renewals.
[514] *Id.* at 21.
[515] *Id.* at 16.
[516] *Id.*

economics). The assumption was that by providing tax cuts to big business, entrepreneurs would be encouraged to use their profits as an incentive to be more productive, increase employment and to re-invest. However, instead of looking to re-invest profits, many industries (especially broadcasting) sought to remove government restrictions on how they conducted business. This equated to a reduced emphasis on public interest. Both free market rhetoric and deregulation in the telecommunications industry intensified during the 1990s, which, according to Horowitz, damaged any hopes of continuing with social regulation within the industry.[517]

1990s: RECONSTRUCTING AND DECONSTRUCTING RACE

The decision in *Metro Broadcasting,* although closely decided, was a warm reassurance that the courts still considered race and the historical discrimination against minorities as important. Race and ethnic identity provided a relevant basis for preference policies, if they were narrowly tailored to meet a specific, compelling interest. The majority correctly noted that minorities were late entrants into media ownership and were often handicapped, as they usually owned less valuable properties that served smaller audiences in geographically limited areas.[518] The fact that the Supreme Court recognized the considerable obstacles that minorities had to overcome presented a clear understanding of how race and discrimination combined to effectively keep minorities out of broadcast ownership.

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[517] *Id.* at 67.
[518] 497 U.S. 547 at 554.

The Supreme Court majority based their support of minority enhancements in comparative hearings and the distress sale policy on several issues. First, these polices promoted program diversity, which was asserted to be a compelling government interest. The policies had an overall benefit for society, not just minority groups. Second, the policy remedied past discrimination against minorities in ownership by providing entrance into the industry. The majority accurately reasoned that minority ownership policies and the quest for programming diversity did not mean programs that appealed to minorities would not appeal to non-minorities.[519] Nor did it mean that in every case minority ownership would lead to minority programming or a minority viewpoint.

The Supreme Court wrote that the Commission never completely relied on market forces to ensure audience needs were met.[520] Economics and economic theory cannot be the only determining factors regarding broadcast and telecommunications reform. There is a strong need to consider other factors, such as societal and consumer concerns as well as industry competition.[521] That was in 1990. As discussed in chapters I and II, since the Telecommunications Act of 1996, the marketplace was the sole dictator of how audience needs were

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[519] I would argue that in fact minority programming differs greatly from majority programming. A few years ago, Fox Network considered "Living Single" for cancellation. Minority groups waged a phone and letter writing campaign to save the show. When compared with viewing among the white population, Living Single ranked in the bottom 100 shows in the Nielsen ratings. However, in black viewing households the show was consistently in the top 20's. Although this is not empirical proof that minority oriented programming would not appeal to non-minorities, it serves as a real-life example of how tastes in programming and content differ by race.

[520] 497 U.S. 547 at 571 (1990).

[521] John Fortunato and Shannon E. Martin, *The Courts and the FCC: Diversity and the Broadcast Provisions of the 1996 Telecommunications Act*, 21 COMMUNICATIONS AND THE LAW (1999).

met. Minority interests continue to go unfulfilled, as demonstrated in the recent boycotts of network programming[522] and the loss of minority owned stations.[523]

The dissent disputed the need for racial preferences, stating that race-neutral polices should be used. However, the "Blue Book," the industry's first attempt at outlining public interest in broadcasting was a race-neutral document aimed at encouraging diversity of content. By the late 1960s and throughout 1970s it became evident that relying on race neutral polices to provide programming diversity was not working, at least in terms of minority programming.[524]

The dissent vigorously argued for race neutral policies that would help the nation become a "society untouched by a history of exclusion."[525] Such aspirations, wrote Justice O'Connor, were the thrust of the Constitution. But according to Bell, it is the inability of whites to recognize and accept the fact that discrimination still exists that hinders the overall efforts to achieve racial balance.[526] And although O'Connor stated the use of race classifications may stigmatize racial or ethnic groups,[527] that perspective overlooks the long-standing history of racial discrimination against minority groups.[528]

Some argue that whites are not willing to accept accountability for the problems that currently exist nor do they deem any level of personal sacrifice

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[522] Breyer, *supra* note 260.
[523] NTIA, *supra* note 102.
[524] *See* Kerner Commission, *supra* note *437;* Window Dressing, *supra* note 440.
[525] 497 U.S. 547 at 611 (1990).
[526] *Id.*
[527] *Id.* at 604
[528] Harris, *supra* note 272.

necessary to right systematic or societal wrongs.[529] The evidence that whites are still unable to accept the deep-rooted effects of racism can be inferred from the continued debate over affirmative action and preferential programs.[530] O'Connor suggests that race could never be used in ways that would not burden individuals who were not members of the preferred racial group.[531] But when systemic racism and discrimination marginalizes segments of society, how should the government go about protecting their concerns? Aren't those groups still unduly burdened in ways beyond their control?

1990S AND BEYOND: WHAT LIES AHEAD

Out of all the ownership policies, tax certificates were the only policy strongly supported by the NAB.[532] Because the policy presented a situation where minorities and white media owners would both profit, the industry embraced it. The distress sale was strongly opposed because, as Barlow reflected on the concerns of minority media owners, there was a concern that "unscrupulous minority groups would use the policy to blackmail white station owners."[533] It seemed senseless to assume that minorities would mount a campaign to blackmail major white-owned station owners to turn over their properties. Even Justice Scalia quashed the thought of a great minority backlash through preference polices as he stated in *Fullilove* that "the federal government

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[529] Bell, *supra* note 28.
[530] *Id.*
[531] 497 U.S. 547 at 630 (1990).
[532] Barlow, *supra* note 84 at 251.
[533] *Id.* at 252.

is unlikely to be captured by minority racial or ethnic groups and used as an instrument of discrimination."[534]

The FCC considered setting aside spectrum frequency for minorities, however that idea was rejected because the predominance of white broadcasters would not be able to benefit."[535] As recently as the early 1990s, major broadcasting groups were willing to provide investment finds for minorities seeking station ownership. However, the caveat was that white owners would be allowed to increase their ownership caps and nationwide concentration.[536] Such stipulations provide real-life testimony to Bell's interest-convergence theory. It would seem that through the acceptance of some polices and through the rejection of others, the fate of minority broadcast owners is inextricably tied to the overall profit and concentration potential for major media conglomerations.

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[534] 497 U.S. 547 at 566.
[535] Barlow, *supra* note 84 at 252.
[536] Rich Media, Poor Democracy, *supra* note 141 at 67. Rupert Murdoch, and his Fox group, sought an increase the nationwide coverage of its TV stations from 35% to 45%. In exchange, Murdoch proposed to donate up to $150 million dollars to an investment fund for minority broadcasters.

CHAPTER VII: SUMMARY AND CONCLUSIONS

The purpose of this study was to explore the concept of race in minority ownership policies through the analysis of court decisions. While none of the cases analyzed specifically addressed the issue of tax certificates, the issues of comparative hearings and distress sales were thoroughly examined.

Question 1: In what ways have the courts viewed the issue of race and diversity in broadcast ownership?

The courts initially viewed race within the broadcast media as a social concept and a way to diversify media ownership and media content. When deregulation began to occur, race was viewed as a discriminatory agent in the open broadcasting marketplace.

Legally and socially, the concept of race was initially defined in terms of group rights, as seen in *TV 9* and *Garrett*. Looking back to the civil rights movements of the 1950s and 1960s, race was a condition that placed certain segments of society at a disadvantage. With the remnants of segregation embedded in society, race was seen as a label. In order to correct the injustices done to races, policies needed to be sensitive and inclusive of all social groups. Up until 1995, the Supreme Court (and the lower courts) had deferred to federal agencies and the creation of affirmative action programs. In fact, the standard of review was intermediate scrutiny, which viewed racial classifications under a less suspect lens.

Racial preferences in broadcasting were based upon social benefits and the public interest- the more diverse people involved in broadcasting, the better the chances of wide-ranging programming. Diversity of programming (and ownership) was elucidated through the concepts of the "marketplace of ideas" and varied viewpoints. These principles considered part of the First Amendment, as such the FCC (through its creation and subsequent authorities and powers granted to the agency) was charged with upholding the First Amendment. As seen in *TV 9, Garrett*, and *West Michigan*, the courts acknowledged that minorities could contribute to the overall goal of viewpoint diversity. As such, when minorities were seeking to be included in broadcast programming and ownership, policies that provided them an opportunity to do so would be upheld.

However, as economic and social changes took place, there was a backlash against such policies. Such policies were perceived as forms of "reverse discrimination" against the white majority. During the 1980s, preference policies began to be invalidated, as the court no longer saw their purposes as legitimate. Race neutral laws replaced racial consciousness in the law. Supreme Court cases such as *Bakke, Croson, and Adarand* started the move away from race-consciousness towards race-neutrality. As critical race theorists lament, this colorblind view of anti-discrimination law has separated injustices against minorities from their social and historical roots. In fact, removing racial

distinctions does very little to actually prevent discrimination and it makes attempts to identify and correct discrimination very difficult.[537]

Group rights and historical perspectives of racial discrimination gave way to individual harms. Group rights that were supported in cases like *TV9* and *Garrett* were disregarded as illegitimate. Discrimination against groups began to be attributed to individual actions in isolated, specific contexts. As such, minority preferences were challenged because they did not conform to the new legal standard of race-neutrality as seen in the cases of *National Black Media Coalition and Shurberg*. But focusing on individual harms perpetrated on minority groups does not address the social conditions that cause discrimination to exist in the first place.[538]

As in *Adarand*, when a federal highway contracting provision was invalidated, the effects rippled to other areas such as broadcasting and were seen in the *Metro Broadcasting* case. *Shurberg* and Justice O'Connor's dissenting opinion in *Metro Broadcasting* spoke of the need to exclude the past from the present, in hopes for a better future. For society (and the broadcasting industry) to be more diverse, race needed to be removed from the law. Preference polices were often labeled as "stereotyping" all minorities to think, feel, and act the same way. However, that analysis is somewhat faulty in that there is a shared cultural experience within every racial group. Furthermore,

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[537] Christine Enemark, *Adarand Constructors, Inc. v. Pena: Forcing the FCC into a New Constitutional Regime*, 33 COLUM. L.J. & SOC. PROBS. 215 (1997).
[538] Robert St. Martin Westley, Fourteenth Amendment Jurisprudence: Race and the Rights of Groups (1993) (Ph.D. Dissertation, Yale University).

when a case is decided it sets a precedent for other cases that turn on similar issues, regardless of the circumstances of the case. So where a case involving a federal affirmative action set-aside for the highway construction industry ultimately influenced how the FCC could construct and administer policies that dealt with minority ownership in the media. To assume that the notion of truly "individualized" remedies exists may not be completely accurate.[539]

Bell argued that race neutrality erects barriers to achieving racial relief.[540] As minorities look to challenge bias and discrimination, they must present proof of actual behavior that produced a discriminatory effect and caused harm. Even armed with that proof, Bell asserts that the relief due would be limited to a very specific context.[541] While it may be easy to identify a placard that reads "No Blacks Allowed" in a public facility as proof of discrimination, it becomes much harder to document discrimination in the privately held broadcast industry. As so many factors can figure into the purchase and success of a broadcast station, identifying every instance of discrimination trivializes the true inequities that exist.

While the FCC rationales for minority ownership policies were still in effect, the factual basis that had long supported the policies had been questioned. Minority ownership policies were not tailored expressly to meet the goals of viewpoint diversity. The dissents written in *Metro Broadcasting* questioned whether the rationales of viewpoint diversity were compelling enough for race-conscious measures. This reflection in court decisions since *Metro*

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[539] *Id.*
[540] Bell, *supra* note 28.
[541] *Id.*

Broadcasting has hampered the FCC's ability to support its minority ownership policies or to create new ones. Note that the courts speak generally of the Constitution's extension of rights to individual citizens. Yet that concept contrasts with the way the First Amendment is often viewed. Closely tied to the marketplace of ideas, the First Amendment justifies free expression because of the benefits to society. This creates a conflict of interest, as the rights of individuals are advocated above all and then society and groups are seen as the basis for certain portions of the Constitution.

Question 2: Is there a difference in the rationales used among the various courts (e.g., Supreme Court versus Courts of Appeal) in deciding minority ownership cases?

Yes, there was change in the rationales used by the courts in deciding minority ownership cases. Even within the courts of appeals, there was some division as to what basis such cases would be decided.

The courts shifted in their interpretation of FCC rationales for minority ownership policies. Initially, the policies were supported as a way to diversify viewpoints and as a way to overcome discrimination. Overall, the rationales used by the D.C. Circuit Court and the Supreme Court was similar in many respects. Both courts deferred to administrative agencies (FCC) and congressional action, as they [courts] recognized Congress' power to promote the interest of society.

However, it is evident that the D.C. Circuit Court began to change its approach to minority ownership polices. In *National Black Media Coalition,* the courts allowed the industry's focus on technological advancements to prevail

over citizen concerns. With the coming of new technologies such as personal communication services (PCS), high-definition television (HDTV), and digital broadcast satellite (DBS), the FCC was looking to advance pro-industry, deregulatory policies. Congress soon followed the FCC's stance as comparative hearings were replaced with competitive bidding. The courts, without questioning what impact these changes may have had on minorities, upheld the deregulation of the industry.

CONCLUSION

Although minority ownership figures have improved slightly, the number of minority owned broadcast facilities is still relatively low. Financing still creates a huge barrier for many minorities, as financiers consider investing in such ventures as a "high-risk".[542] Of the $90 billion dollars of institutional equity capital invested in United States businesses, less than $2 million is targeted for minority start-ups.[543] Whites, who tend not to invest in minority ventures, control the majority of the financing. Minority-owned firms control only one percent of funds in the venture capital community.[544] Without financing, minority owners are often unable to buy properties. However, new venture capitalists, such as Queztal/Chase Capital Partners, are willing to invest monies for women and

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[542] Many of the owners did not have a great deal of broadcasting experience. Moreover, for those who did, financiers considered investing in broadcast properties to be risky, as such properties were licensed and controlled by government authorities.
[543] Christopher Williams, *In The Minority: Venture Capitalists Focused on Non-mainstream Deals are Making Headway, Slowly,* BARRONS, June 5, 2000 at 34.
[544] *Id.*

minority communications companies.[545] So things may be on the up swing, but only time will tell.

For those minority owners who own broadcast stations, competing for advertising dollars has always been difficult, even more so since deregulation. Stations that are programmed specifically for minority audiences are still unable to earn as much revenue (per listener) as more "general programming" stations.[546] Even though minority owned stations that carry minority programming average sixty-five percent greater revenues than small, majority competitors, general market non-minority broadcasters average revenues that are fourteen percent greater than minority owners in the same format.[547] As Ofori observed, minority owned stations are under performing in terms of power ratios as compared to majority broadcasters across similar formats.[548] Even more compelling is evidence that majority broadcasters that air minority programming still garner more revenues than minority owners who provide similar programming—twenty percent more on the average.[549]

Even when market size is held constant, black stations were lower priced than white stations.[550] While the lower price was attributed to format and audience characteristics,[551] recent studies affirm this to be true and note that

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[545] *Id.*
[546] Civil Rights Forum, *supra* note 83.
[547] *Id.* at 146.
[548] *Id.*
[549] *Id.*
[550] Lawrence Soley and George Hough III, *Black Ownership of Commercial Radio Stations: An Economic Evaluation*, 22 JOURNAL OF BROADCASTING 455 (1978).
[551] *Id.*

black audiences are extremely undervalued.[552] It is this underestimation of black audiences, by advertisers, that results in lower advertising revenues.[553] Lack of substantial advertising revenue, in addition to competition from group owned stations, may cause a minority broadcaster to sell its stations.

In spite of continued advertising discrimination, deregulatory effects, and poor financing, there are a few minority broadcasters that are succeeding. Radio One, founded in 1981 by African-American broadcaster Cathy Hughes, has managed to amass over twenty radio stations.[554] Many of those stations are located in the top twenty African-American media markets. As recently as March 2000, the company managed to purchase twelve radio stations in seven different markets.[555] In addition, the majority of the stations are programmed with an urban-contemporary format.[556] And according to an Arbitron report, urban formats are the most popular and well-listened formats for black Americans.[557]

Nevertheless, deregulation has had a profound impact on minority participation in the broadcast industry. Socioeconomic factors preclude the existence of minority advocacy that has existed in the 1960s and 1970s. As a result, the market has been unwilling to sustain a real effort to address minority issues and provide diverse programming. Minority interests are not being met, as

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[552] Civil Rights Forum, *supra* note 83.
[553] *Id.; See also* Soley, *supra* note 550.
[554] Njuguna Kabugi, *Radio One, Inc: Announces It's Third Acquisition in Richmond, Virginia*, THE WASHINGTON INFORMER, March 3, 1999 at 6.
[555] Katy Bachman, *Radio One Leads Second CC Wave*, MEDIAWEEK, March 20, 2000 at 17.
[556] *Id.*
[557] Arbitron, *Black Radio Today: How America Listens to Radio* (1998).

demonstrated in the recent boycotts of network programming[558] and the loss of minority owned stations.[559]

FCC public interest arguments have valued diversity in programming and ownership. Observing the small number of minority owners, policies were created to increase broadcast ownership participation in hopes of diversifying viewpoints and programming. And for a time, judicial and government involvement supported those policies.

However, the link that once existed between minority ownership and the diversity of viewpoint argument has disappeared. Individual harm, combined with race-neutral thinking foreclosed consideration of minority group ownership. All minorities do not think the same way. However, relying on that simple assumption to address the need (or lack of a need) for minority ownership is inaccurate.

As the majority accurately reasoned in *Metro Broadcasting*, minority ownership policies and the quest for programming diversity did not mean programs that appealed to minorities would not appeal to non-minorities.[560] Nor did it mean that in every case minority ownership would lead to minority programming or a minority viewpoint. Minority ownership policies ought to produce a more reflective media, accommodating other interpretations, images,

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[558] *See generally,* John P. McCarthy, *Adjusting the Color*, AMERICA, November 13, 1999 at 17; Stacy A. Teicher, *Advocacy groups work to sway Hollywood*, THE CHRISTIAN SCIENCE MONITOR, August 20, 1999 at 2; Greg Braxton and Nicholas Riccardi, *Rev. Jesse Jackson Blasts TV on Lack of Diversity Media*, LOS ANGELES TIMES, September 24, 1999 at A-35.
[559] NTIA, *supra* note 102.
[560] 497 U.S. 568, 579-580.

and views. Judge Wald, writing the dissent in *Shurberg*, said the distress sale policy rested on "the assumption that viewers and listeners of every race will benefit from access to a broader range of programming...."[561]

I certainly agree with the *Metro Broadcasting* majority in that minority programming produces a more reflective media and a recent study supports that supposition as well. A 2001 study of minority and non-minority broadcast owned radio and television stations revealed that news directors at minority owned stations were significantly more likely to report stories geared towards specific audiences, specifically minority audiences.[562] Minority owned radio stations were more often to report public affair programming that was appealing to minorities and were more likely to employ a greater percentage of on-air personnel who were racial and ethnic minorities.[563] Overall, the study showed that minority radio stations owners were more integrated into the station and played active roles in news and public affairs decisions, as the race of owners played a role in the focus of programming aimed at minority audiences.[564]

While these results do not necessarily hold true for television station (minority or non-minority owned), I would argue that in fact minority programming differs greatly from majority programming. A few years back when the Fox Network comedy show "Living Single" was considered for cancellation, minority

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[561] 876 F.2d 902 at 942.
[562] Laurie Mason, Christine Bachen, Stephanie Craft, *Support For FCC Minority Ownership Policies: How Broadcast Station Owner Race and Ethnicity Affect News and Public Affairs Programming Diversity,* 6 COMM. L. & POL'Y 37-73 AT 56 (2001).
[563] *Id.* at 58- 60.
[564] *Id.* at 66.

groups waged a massive phone and e-mail campaign to save the show.[565] When looking at viewing patterns among the white population, "Living Single" ranked in the bottom 100 shows in the Nielsen ratings. However, in black viewing households the show was consistently in the top 20s. As Newton Minow observed, present overall programming is not aimed at the public taste:

> "Ratings tell us only that some people have their television sets turned on... a rating at best is and indication of how many people saw what you gave them."[566]

Similarly, blacks and whites tend to enjoy different types of programming.[567] For example, the top 5 shows in black viewing households during the 1996-1997 season were: 1) Living Single, 2) NY Undercover, 3) Martin, 4) Family Matters, and 5) Moesha. In contrast, the top five shows for white viewers were: 1) Seinfield, 2) Friends, 3) Suddenly Susan, 4) ER, and 5) Monday Night Football.[568] Many of the "black-oriented" programs have little crossover value to white audiences, especially during prime time.[569] As a result, reaching minorities through prime time programming is difficult.[570]

Two former African-American network television producers, Claudia Pryor and Gregory Branch, know first hand how difficult it can be to convince network executives to include minorities in programming. They both note that many network executives view stories about blacks or stories with black characters as

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[565] *Popular Demand Brings "Living Single" Back for Fifth Season,* Jet, September 15, 1997 at 58.
[566] *Supra* note 3 at 25.
[567] *Id.* The article referred to a 1996-1997 study done by ad agency BBDO Worldwide, which examined viewing patterns of black and white viewers during the prime-time season.
[568] *Id.*
[569] Mark Dawidziak and Tom Feran, *Is TV's Racism Black and White or Just Green?*, THE CLEVELAND PLAIN DEALER, August 15, 1999 at 1A.
[570] *Id.*

"not marketable."[571] *Brill's Content* magazine conducted a survey of television news magazines, such as 20/20 and 48 Hours, shows over a two-month period. What they found was that the three major networks did very little to show minority stories to the general public: NBC (0%), ABC (7%), and CBS (25%).[572] The comments of Pryor and Branch echo what many network executives already knew as over twenty of the executives and reporters interviewed stated race was a "simmering" yet rarely discussed issue.[573] Often, stories with a minority focus are ignored due to lack of approval when the story is initially pitched to executives or if the story does pass the initial pitch, the failure to pass the rigorous screening process because black characters undergo tougher scrutiny.[574] To further complicate matters, most of the executive producers for network television news magazine shows are white males.

The ability to think of America as a culturally singular nation, as suggested by Justice O'Connor in *Metro Broadcasting*, might be compromised. As McChesney observed, we (America) "increasingly have little exposure to cultural experiences of broad sectors of society."[575] This lack of crossover value might be explained by Ingber's contention that the marketplace functions with a bias towards the status quo.[576] Established groups [media companies] accept ideas [programming] and alternatives [competition] from within the dominant culture,

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[571] Robert Schmidt, *Airing Race*, BRILL'S CONTENT, October 2000 at 112- 115; 145-146.
[572] *Id.* at 115.
[573] *Id.* at 115.
[574] *Id.* at 146.
[575] Rich Media, Poor Democracy, *supra* note 141 at 145.
[576] Mark Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1 DUKE L. J. 71 (1984).

which Ingber says only encourages a limited range of ideas from a limited group of marketplace participants. Thus the marketplace of ideas has very little impact on diversity of viewpoints.[577] This can be supported, practically, by industry behavior. Schmidt observed that many executives feel viewers do not want to see news stories that feature characters "unlike" themselves. [578] The stories are designed to be appealing to a mass audience, which tend to be middle class whites. It is exactly these types of approaches to programming at the network level that leave little in the way of diverse opportunities in news and entertainment.

SOLUTIONS FOR THE FUTURE

As recently as the early 1990s, major broadcasting groups were willing to provide investment funds for minorities seeking station ownership. However, such ideas are still tied to the advancement of white broadcasters. There are other ways that the industry, the regulators, and the judiciary can help promote effective minority ownership policies.

FCC Solutions

The FCC, along with Congress and the Internal Revenue Service, should re-institute the minority tax certificate. This policy was successfully supported by the broadcast industry. Although it provided white owners an opportunity to capitalize on minority progress, the policy was still a truly effective mechanism for incorporating minorities into broadcast ownership. The policy provided minorities

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[577] *Id.*
[578] Schmidt, *supra* note 571, at 145.

with bargaining power they would not have had otherwise. With some new provision, such as caps on the amount of tax gains deferred and limits on the number of times a certificate could be used, the policy can help bring new owners into a rapidly consolidating industry while limiting the financial benefit to existing majority owners.

In addition to the tax certificate, the FCC should institute a policy that would reduce discrimination in advertising. As Ofori's study showed, bias and racism towards black owned, black formatted stations still exists.[579] In 1986, Congressional Representative Cardiss Hollins introduced a bill into the House of Representatives that called for the denial of advertising expense deductions for businesses that discriminated against minority owned or formatted stations in the purchase or placement of advertising.[580] The regulation would have allowed an aggrieved party the opportunity to bring civil actions to recover lost profits. Such a policy would target the problem of discrimination by financially handicapping businesses that discriminated. In addition, broadcasters would be able to recoup monies lost based on advertising rates, market competition, and other related factors.

There is a concern with such a policy about the ability (or inability) to prove systemic advertising discrimination against a minority broadcaster. And while one could argue about restraint of speech due to punitive nature of such a policy, discrimination in any form is unlawful. If a minority broadcaster were able

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[579] Civil Rights Forum, *supra* note 83.
[580] H.R. 5373 (October 2, 1986).

to document and prove a system of discrimination against his/her business, then there would be cause to claim an injury or threat to the livelihood of their business. And as noted in The Federal Trade Commission Act, "unfair methods of competition in... commerce... and unfair practices in or affecting commerce... are herby declared unlawful."[581] If one was to ever dispute the notion that discrimination in advertising exists or if the impacts of such discrimination are real, then consider the following quote from radio salesperson Luis Alvarez taken from Ofori's study:

> "I recall being in front of a buyer and we were discussing Ivory Soap and the buyer was telling me they were not going to buy... they said "well, we have studies that show Hispanics do not bathe as frequently as non-Hispanics."[582]

More importantly, such discrimination seems to be encouraged by the industry. A national radio rep firm, Katz Media, sought to discourage media buys on minority owned and/or minority formatted stations when it issued a company-wide memo that stated,

> "When it comes to delivering **prospects not suspects** the urban [-formatted stations] deliver the largest amount of listeners who turn out to be the least likely to purchase. Median age is 23. Very young and very, very, poor qualitative profile.[583]

These examples alone may or may not be considered direct evidence of systematic discrimination. However, Ofori's study demonstrates there is good

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[581] 15 U.S.C. § 45 (a) (1).
[582] Civil Rights Forum, *supra* note 83 at 37.
[583] *Id.* at 43.

reason to believe minority owners would be able to gather substantial evidence.[584]

Lastly, the FCC can seek to dedicate frequency space in addition to what already exists for minority broadcasters. Somewhere in between educational and commercial radio, this frequency would provide women, minorities and other marginalized groups an opportunity to present diverse programming to the public. Though it is highly unlikely that any FCC proposal such as this would "pass industry muster," perhaps the FCC's creation of low-power radio will serve a similar purpose. The overall system of creating additional space on the frequencies would serve several purposes. Minority owners would be removed from competition with larger, group owned stations and could present programming without the stress of competing against larger media conglomerates. Additionally, creative and distinct programming that might be not supported by the majority of the public would have an opportunity to be aired.

Industry Solutions

The industry can also help remedy the low participation of minorities involved in broadcast ownership. As noted earlier, some major media companies were eager to establish minority financing funds but only if the FCC further relaxed restrictions on media/ market concentration. This is counter-productive to what minority ownership seeks to do, which is to diversify the viewpoints in the media. If their [minorities'] progress depends on the advancements of majority

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[584] *Id.*

interest, the true rationale behind diversity of views is lost. By increasing concentration of major media firms, they [majority media] would possibly have greater access and concentration in markets where minority owners would want to penetrate.

The broadcasting industry must make some commitments to diversifying its products. One way that can be accomplished is by establishing an industry wide fund from a portion of the gains deferred on tax certificates or other tax-free sales. The portion can be a very small amount, such as one percent. The fund would be open to minority groups for a one-time use in securing radio stations.

Another less precise solution would be to start an industry supported fund, managed by the FCC, by taking a certain percentage of broadcasters profits. All broadcasters would be required to give a portion of their profit, perhaps on a tax-deductible provision. The fund would be available to small businesses, women and minorities to use as start-up monies in the communications industry.

In addition, broadcasters should seek to increase employment and management opportunities for minorities. The usage of training and developmental programs could be useful in recruiting minority talent into the industry.

Judicial Solutions

The judiciary can also have a positive impact on the way minorities are included in media ownership. First, the judiciary should reassess its position on discrimination and affirmative action by returning to an intermediate level of

scrutiny. By reviewing race-based preferences with a lower level of scrutiny, the courts can still maintain the intent of the Constitution. The government interest would still have to be important and a substantial relationship would have to exist between the government's classification and the purpose of the policy.

By returning to an intermediate level of review, race preferences can be viewed in a historical context. As strict scrutiny makes any race preference highly suspect, it also makes it hard for government agencies to address the needs of its constituents. An intermediate level of judicial review would not undermine agency authority and would provide then with opportunities to create policies and legislation necessary to remedy discrimination in broadcasting, as well as other segments of society.

FURTHER RESEARCH

There are many directions for further research as this topic crosses the disciplines of communications, race studies, and law. Further research should endeavor to use a multi-disciplinary approach, as the issues surrounding minority ownership are not necessarily confined only to communications studies.

An analysis of FCC agency decisions on the various race based preference policies would be most useful in future research. In addition, a comparative analysis of congressional hearings and reports about minority ownership would augment FCC decisions and provide the true intent and level of evidence the judiciary now demands. In addition, continued use of critical race theory to examine the role in communications and communications policy can

provide a fresh look at marketplace forces in the industry and the impacts on minority ownership.

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VITA

Kadesha DeFrance Washington was born in Bronx, New York, on April 7, 1971. She attended Our Savior Lutheran elementary school and graduated from Cardinal Spellman High School in 1989. She entered Syracuse University during August 1989, where in May, 1993, she received the Bachelor of Arts degree in Psychology. After working in the human resources industry for one year, she entered her Master's program in Mass Communications at Murray State University (KY) in 1994, officially receiving her Master's of Science in Communications (Radio/ TV emphasis) in May 1996. In August of 1996, she enrolled in the Communications doctoral program at The University of Tennessee, Knoxville. She worked as a teaching assistant and a Graduate Teaching Associate from August 1997 until May 2000. The doctoral program was completed August 2000 and the Ph.D. was conferred August 2001.

Ms. Washington has several years of broadcast radio experience in New York, North Carolina, and Kentucky. She has worked in public affairs, production, sales, and as an on-air announcer. Currently working for the United States Department of the Interior, Kadesha works in the area of communications and policy analysis.