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Achieving Diversity in Media Ownership: *Bakke* and the FCC

“It is a peculiar sensation, this double consciousness, this sense of always looking at one’s self through the eyes of others”

W.E.B. Dubois, *The Souls of Black Folk* (1903)

The broadcast medium is the most powerful molder of the ideas and opinions of our age. Whether forceful and direct or subliminal and oblique, radio and television communications have an unmatched potential for effectiveness. This potential is multiplied by the pervasiveness of broadcast reception: in 1975, 68.5 million households used 112 million television sets,¹ while radio usage reached even higher levels of saturation. For these reasons, the breadth and perspective of broadcast content is of great importance in the quest to solve our country’s serious racial problems.

Past contributions by these media to attitudes and opinions about race have done little to remedy distorted views and stereotypes. At best, the media have ignored minorities by portraying a world without a racial dimension. At worst, the media have enforced demeaning and stereotypic role conceptions. In fact, only ten years ago the Kerner Commission reported that media treatment of blacks was a contributing factor to the racial violence and discontent of the sixties.² Since then some progress has been made—but not nearly enough.

The distorted racial content of broadcast messages reflects the virtual exclusion of minorities from the industry’s decisionmaking and control process, as the Federal Communications Commission and others have noted.³ Commentators have advocated increased minority involvement in key industry programming decisions as a means of correcting unrepresentative racial images.⁴ This Comment argues that this is a sound recommendation. While some progress can be achieved simply by outside groups pressing their discontents on the industry, merely cancelling the “Amos and Andy’s” of the airwave world will not solve the problem. A satisfactory solution requires a creative effort to correct

1. BROADCASTING YEARBOOK A-2 (1975).

2. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

3. *TV 9 Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1207 (D.C. Cir. 1971).

4. U.S. COMMISSION OF CIVIL RIGHTS, *WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION* (1977) [hereinafter cited as *CIVIL RIGHTS REPORT*].

past stereotypes and to present a realistic view of minorities. This effort is most directly assured by the professional representation of diverse racial perspectives in the regular planning and choice of media programming. Statistics on the composition of the ultimate determinators of perspective in the broadcast industry—the station owners—show that in 1977 of the 8196 licensed television stations in the continental United States, only *one* was owned by blacks, and *none* were owned by persons of Spanish-American descent.⁵ It is imperative that these figures be improved.

Indeed, improvement in these figures as a means of progressing toward America's vision of an integrated society is implicit in the general congressional mandate to the Federal Communications Commission to regulate the airwaves "in the public interest."⁶ The FCC has affirmed the desirability of diverse media ownership;⁷ and in the last two years, Congress,⁸ the President,⁹ governmental agencies,¹⁰ and

5. Statistics compiled by the U.S. Office of Telecommunications Policy, September 13, 1977, cited in Petition for Establishment of Policy to Promote Broadcast Ownership by Minorities and Related Implementing Policies, Appendix A, FCC-RM 30551 (1978). Although OTP cited only one television station as being black owned, an additional station was licensed in 1978.

Under Executive Order 12046 enacted March 27, 1978, the Office of Telecommunications Policy, once an administrative organ of the White House, was moved to the Department of Commerce and is now called the National Telecommunications and Information Agency (NTIA). 43 Fed. Reg. 61 (1978). All the agency documents cited in this Comment were published before the administrative change and therefore will be cited to the Office of Telecommunications Policy (OTP).

6. 47 U.S.C. § 307(a). Congress borrowed this "public interest" standard from the earlier Radio Act of 1927, ch. 169, § 11, 44 Stat. 1162 (1927) (repealed 1934).

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

8. The Congressional Black Caucus, under the leadership of Congressman William L. Clay (D.-Mo.), Parren Mitchell (D.-Md.), and Louis Stokes (D.-Ohio), formed a "Brain Trust" to study issues related to minority media ownership.

Congress is in the process of rewriting the Communications Act of 1934. H.R. 13015, 95th Cong. 2d Sess. The bill, which was reintroduced in the 96th Congress, contains some provisions related to the topic of minority ownership. See part II(c) *infra*.

9. President Carter has developed proposals designed to expand minority ownership of broadcasting and cable television. The proposals include the following:

1. adoption by the FCC of a minority ownership policy;
2. changes in loan policies of the Small Business Administration and the Economic Development Administration;
3. an American Indian ownership and training program in the Department of Labor;
4. changes in the Public Broadcasting Act to free more public broadcasting facilities money for minorities;
5. Federal guidelines to help ensure more agency advertising money for minority outlets and advertising firms;
6. assistance for those who are developing minority ownership assistance programs.

These proposals were released to the public on January 31, 1978 in a White House press release.

10. The FCC held two days of panel discussions on the specific topic of minority ownership on April 25-26, 1977. The result of this conference was the organization of the FCC Minority Ownership Taskforce, chaired by Patricia A. Russell, Esq., FCC Deputy Chief, Industry Equal Employment Opportunity Unit, Office of the General Counsel. The Taskforce published the REPORT ON MINORITY OWNERSHIP IN BROADCASTING (1978), which summarized the findings of the

broadcast industry associations¹¹ have drawn attention to and sought implementation of this goal.

Part I of this Comment examines the barriers to increasing media ownership by minorities. Part II identifies some inadequacies of current programs designed to rectify the situation. Part III concludes that affirmative FCC recognition of the benefits of minority ownership in the licensing process is necessary to speed achievement of diversity goals and that a program incorporating this recognition can be designed to comport with constitutional requirements as set forth in *Regents of the University of California v. Bakke*.¹²

I

ROOTS OF THE PROBLEM

Lack of minority broadcast ownership is not simply the result of blatant refusals of nonminority station owners to sell their stations to minorities. The problem is more complex and stems from the existence of a systematic series of barriers impeding minority ownership. These barriers may be divided into two groups: (1) obstructions that make it difficult for minorities to gain the prerequisites to media ownership—primarily inadequate experience and lack of financing; and (2) regulatory fetters that compound such problems, which primarily result from a general bias against any new entrant into the broadcasting industry.

The first and most important obstacle confronting a prospective minority owner is, of course, money.¹³ Not only are initial capital requirements high, but also the FCC requires potential licensees to demonstrate that they successfully can operate a station for a full year without advertising revenues (if there are no firm advance commitments from specific advertisers).¹⁴ Compounding the problem, finan-

conference. The Taskforce has sponsored a more detailed study into the problems and possible solutions of financing minority broadcast ventures that will be published when it is completed.

11. In September 1977, the Office of Community Affairs of the National Association of Broadcasters held a two-day session on issues touching on the survival of black-owned radio and television stations.

12. 98 S. Ct. 2733 (1978).

13. R. HENRY, PRIVATE SOURCES OF FINANCING FOR MINORITY BROADCAST OWNERS 3 (1977) (prepared for the FCC Conference on Minority Ownership, April 25-26, 1977) [hereinafter cited as HENRY REPORT]. Mr. Henry is president of Broadcast Enterprises Network, Inc., which is located in Philadelphia and is 90% owned by Blacks. It acquired its first broadcast property in May 1974 and has since acquired and is operating three other radio properties. A fourth is pending approval of transfer by the FCC.

In 1977, 344 radio stations were sold in the United States for \$289,871,604, and 25 television properties were sold for \$128,635,435. See BROADCASTING YEARBOOK A-54 (1978). It would be impractical to arrive at an "average" price for these stations because the price varies according to the size of the station and its broadcast market.

14. See *Ultravision*, 9 F.C.C.2d 26, 27 (1967). The U.S. Office of Telecommunications Pol-

cing sources in the broadcasting field are unusually scarce, largely because of the characteristics of the industry. The intangible nature of broadcast assets—such as the station license, audience, and advertisers—offers potential lenders little investment security.¹⁵ Moreover, lenders often view negatively the highly regulated nature of the industry.¹⁶

Lack of broadcasting experience is another problem for minorities because the FCC has stated that media management experience is of “substantial importance” to applicants¹⁷ in the competition for regulatory allocation of airwave licenses. Media experience is also necessary to convince lending sources that the applicant is a good loan risk with a predictable chance of business success.¹⁸

Both the money and experience requirements are more of an obstacle to potential minority owners than to potential nonminority owners. As members of economically depressed groups, minorities are likely not only to be too poor personally to support such major financings, but also to be members of communities that are unable to offer the same private, joint venture possibilities available to more affluent classes. These conditions, which necessitate increased reliance on external funding sources, also decrease the likelihood of obtaining external funding.

Minority experience in the broadcasting industry has been further

icy and the Department of Commerce, in their Petition for Establishment of Policy to Promote Broadcast Ownership by Minorities and Related Implementing Policies, FCC-RM 30551, has noted: “Clearly, there is little risk to the public interest in the event of an occasional failure, but much risk if the attempt is blocked *ab initio*.” These agencies proposed the following changes in this FCC requirement:

1. Reduce the required showing of availability of working capital (first year operating costs) to less than one year (*e.g.*, six months).
2. Promulgate relaxed standards allowing the presumption of some first year revenues, at least to offset operating expenses.
3. Allow reliance on less than fully liquid assets. Many minority group members own real estate and other assets not readily convertible to cash, but usable to help in collateralizing loans after their station gets on the air. Credit should be given for these assets.
4. When an existing station is being purchased, the Commission should rely heavily on the seller’s judgment as to the creditworthiness of the buyer. If the seller is willing to rely on the buyer’s ability to run the station well enough to make payments on notes and other forms of future payment (including situations where the buyer will have to improve the station’s performance to survive), the Commission generally should pass the proposal instead of making its own evaluation of the buyer’s financial status.

Id. at 21.

15. See HENRY REPORT, *supra* note 13, at 3.

16. Generally media regulation decreases business predictability because it is often time-consuming and unexpectedly imposed. Regulatory provisions can also cause problems at a more specific level. For instance, the size of required loans is usually so large that amortization over a period longer than the three years for which broadcast licenses are granted is required. This makes the lack of license renewal guarantees an obvious default hazard. *Id.*

17. 1 F.C.C.2d 393, 398 (1965).

18. See HENRY REPORT, *supra* note 13, at 2.

restricted as a result of discriminatory employment practices. In 1977, the United States Commission on Civil Rights reported that "despite advances made in portrayal as well as in employment opportunity, minorities and women—particularly minority women—continue to be underrepresented . . . on local station work forces and are almost totally excluded from decisionmaking positions."¹⁹ The Commission also found that the representation that did occur, especially among minority women, was of a token nature.²⁰ While such token practices represent some advancement over baldly exclusionary hiring practices, they hardly suggest that minorities presently have adequate access to professional experience within the industry, let alone access to positions that would give them the experience they need to enable them to undertake broadcasting activities from an ownership and entrepreneurial standpoint.²¹

Finally, even if potential minority owners succeed in overcoming the barriers presented by experience and initial financing requirements, difficulties may arise when minority-owned stations attempt to secure operating revenues through advertisement sales. Advertisers base their air time purchasing decisions on data gathered by the three major rating services: Nielsen, Arbitron, and Pulse. Those ratings are probably inaccurate with respect to minority viewers, however, largely because of the surveytakers' reluctance to venture physically into ghetto areas, the distortion in telephone polls caused by the large number of minorities with unlisted telephone numbers, and the sizeable number of written questionnaires that are not returned.²² These inaccuracies and the asserted preferences of some advertisers for general format stations result in decreased sponsorship opportunities for minority stations.

The financial and experience barriers to minority-owned stations aggregate to make the appearance and the marketplace success of minority media owners less likely. Unfortunately, these same barriers are exacerbated at the regulatory stage of broadcast licensing. Licenses are usually hotly contested because they are a valuable profitmaking resource and because of the relative scarcity of suitably separated spaces on the broadcast spectrum.²³ Thus, the need to outperform adminis-

19. CIVIL RIGHTS REPORT, *supra* note 4, at ii.

In its follow-up report, the Civil Rights Commission repeatedly noted that there was no real change in the overall employment figures for minorities and women. See generally U.S. COMMISSION ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: AN UPDATE (1979).

20. *Id.* at 148.

21. *Id.* at 148-49.

22. See generally S. FINLEY, REPORT TO FCC MINORITY OWNERSHIP CONFERENCE (1977).

23. For detailed discussions of the problems of spectrum scarcity, allocation, and the licensing process, see M. BOTEIN, LEGAL RESTRICTIONS ON THE OWNERSHIP OF THE MASS MEDIA 66-95 (1977); W. JONES, ELECTRONIC MASS MEDIA (1976); Jackson, *Policy Options for the Spectrum Resource*, in STAFF OF HOUSE SUBCOMM. ON COMMUNICATIONS IN INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., OPTIONS PAPERS 1 (Comm. Print 1977). See also Coase, *The*

trative competitors in the FCC administrative hearing on ownership capability adds another hurdle to minorities with limited access to resources. This problem would be significant enough if the FCC's practice was to judge all applicants on the basis of nominal equality. But the FCC's licensing criteria historically have favored existing owners. For two decades after the comparative hearing process was first established by judicial mandate,²⁴ the Commission explicitly granted preference to existing media owners under the rationale that those with a proven record would presumptively provide superior service.²⁵ The Commission gradually has moved, or has been ordered to move, from this presumptive bias in favor of experienced applicants toward a concern for diversity of ownership.²⁶ Unfortunately, this process has been halting at best. The FCC's broadcast allocation policy continues to favor the status quo and has further dimmed the already slight opportunities for minority ownership in the media.

II

CURRENT EFFORTS TO IMPROVE MINORITY OWNERSHIP CAPABILITIES

The plight of prospective minority media owners has received some attention from policymakers. As a result, programs have been established that are designed to improve the financial and professional qualifications of minorities. An overview of these programs is important to establish the contribution that they can be expected to make toward the goal of diversified media ownership.

A. Financing

The federal government has established a number of programs to improve minority access to capital sources. In particular, the Small Business Investment Act of 1958²⁷ established incentives to stimulate the availability of private funds, while direct government assistance has

Federal Communications Commission, 2 J.L. & ECON. 1 (1959) (proposal to allocate stations by auction).

24. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949).

25. *See Hearst Radio, Inc.*, 15 F.C.C. 1149 (1951).

26. *See* text accompanying notes 66-86 *infra*.

27. 15 U.S.C. § 661 (1976). The purpose of the Act is:

to improve and stimulate the national economy in general and the small business segment thereof in particular by establishing a program to stimulate and supplement the flow of private funds which small business concerns need for the sound financing of their business operations and for their growth, expansion, and modernization, and which are not available in adequate supply: *Provided*, however, that this policy shall be carried out in such manner as to insure the maximum participation of private financing sources.

Id.

been provided through the Small Business Administration and the Economic Development Administration.

The stimulation of private funds has operated through the Small Business Investment Company (SBIC), a legislatively funded program designed to stimulate the availability of equity capital, long term loans, and business advisory services to designated applicants.²⁸ When it was instituted in 1958, the SBIC was designed to subsidize small businesses in general. A 1969 Executive Order established the Minority Enterprise Small Business Investment Company (MESBIC) program which operates under the same rules as the SBIC program, but is specifically targeted at small business concerns that are at least fifty percent owned and managed by socially or economically disadvantaged groups.²⁹ This program provides an opportunity for qualifying investors to gain significant tax advantages.³⁰ Under current provisions, minority enterprises can qualify for SBIC financial benefits if they first independently raise a minimum amount of private capital (based on a variable formula requiring at least \$150,000 of private funds) and if they are "small" businesses.³¹

28. The Small Business Investment Act introduced the concept of privately owned and managed small business investment companies organized under state law for the purpose of performing the functions and conducting the activities contemplated by the Act. These investment companies are licensed and regulated by the SBA and, depending on the amount of their private capital, today may be eligible for SBA funds up to four times the amount of private capital. Act of June 4, 1976, Pub. L. No. 94-305, 90 Stat. 663 (amending 15 U.S.C. § 683 (1976)).

29. To avoid the connotation that the program was only for minorities, Congress dropped the "MESBIC" label and instead named it the "Section 301(d) SBIC Program." For convenience, this Comment will use the name "MESBIC." The SBA added the following factors to be considered in determining social or economic disadvantage in addition to minority status: (1) low income; (2) unfavorable business location, such as in an urban ghetto, a depressed rural area or an area of high unemployment; (3) limited education; (4) physical or other special handicap; (5) inability to compete effectively in the marketplace; (6) Vietnam-era service in the Armed Forces and honorably discharged; or (7) other factors that contribute to a disadvantaged condition in the ordinary meaning of the word—that is, lacking in basic resources or conditions necessary independently to attain an equal position in society. S.B.A. POLICY AND PROCEDURAL RELEASE NO. 2017 (1978).

30. Some of the major tax advantages to a MESBIC licensee are:

- (1) the treatment of gains on the sale of the stock as capital gains, I.R.C. § 1221,
- (2) an unlimited ordinary loss deduction on losses from the sale, exchange, or worthlessness of SBIC stock. I.R.C. § 1242,
- (3) a deduction of 100% of dividends received from portfolio concerns, I.R.C. § 1243(a)(2), and
- (4) the possibility of "pass through" of income to shareholders in lieu of payment of corporate tax. I.R.C. § 1373.

31. Small Business Administration, 13 C.F.R. § 107.101 (1)(d)(i) & (2) (1978).

In general, the SBA considers a firm to be a small business if its total assets do not exceed \$9 million, if its net worth does not exceed \$4 million, and if its average annual net (after tax) income for the preceding two years did not exceed \$400 million. 15 U.S.C. § 301(d) (1978); 13 C.F.R. § 107.3 (1978).

Other conditions for the authorization of loans are:

- (1) cooperation with other lenders, incorporated or unincorporated, through agreements to participate on an immediate or deferred basis, 15 U.S.C. § 685 (1978);

While the SBIC program has been very helpful in opening funding opportunities for potential minority owners, the minimum capital requirement and the total business size limitation restrict its application to individuals with some preexisting financial access who seek to acquire *radio* broadcasting stations of only moderate size. These and other limitations have made the direct availability of government loans important supplements to the SBIC approach.

Direct government loan assistance is available from the Small Business Administration and the Economic Development Administration. While SBA loans previously were not available for enterprises "engaged in the dissemination of ideas or values,"³² this proscription has been amended to permit an exception for broadcasting acquisition or construction.³³ Direct SBA loans are conditioned, however, on the same business size limitations used in the SBIC program, thus similarly constricting their availability to *radio* station acquisitions of only moderate scale.

Direct assistance from the Economic Development Administration may also be available—in the form of either loans or loan guarantees—if at least one direct job is created for every \$10,000 spent, or if the EDA has already given extensive assistance to a particular community and additional assistance is integral to the community's further development.³⁴

These financing programs, while still subject to significant limitations, have at least opened avenues previously unavailable to minority groups. Such opportunities may prove to be most successful at the intermediate level by allowing a minority individual who has succeeded in raising private "seed money" to boost this sum into an amount of capital sufficient to gain the interest and confidence of traditional private funding sources. Once this position is achieved, the prospective minority purchaser may be able to take advantage of a recently adopted FCC ruling that, under certain circumstances, makes the sale of a broadcasting station to minority interests attractive to existing owners by deferring taxation of any resulting gain to the seller.³⁵ The

(2) a maximum rate of interest: the lower of the applicable rate under local usury statutes, or 15%, 13 C.F.R. § 107.301(c) (1978); and

(3) a maturity not exceeding 20 years.

By regulation, the SBA has ruled that the minimum period for financings to disadvantaged concerns is 30 months, and five years for all other concerns, 15 U.S.C. § 685 (1978).

32. 13 C.F.R. § 120.2(d)(4) (1977).

33. *Id.* (amended January 27, 1978). The SBA program will extend direct loans of up to \$350,000 and guarantee loans of up to \$500,000.

34. FCC, REPORT ON MINORITY OWNERSHIP IN BROADCASTING, 22 n.42 (1978).

35. On May 25, 1978, the FCC adopted a petition submitted by the National Association of Broadcasters, 68 F.C.C. 979 (1978), that recommended that an I.R.C. § 1071(a) tax certificate be issued whenever a broadcast property is transferred to a buyer which is minority owned or controlled. This would allow the seller to avoid capital gains taxation if a purchase of a similar

same ruling also facilitates minority acquisition of broadcast stations from owners threatened with administrative revocation of their licenses by authorizing sales to minorities at distress prices.³⁶

Unfortunately, this recent progress in assisting the purchasing capabilities of minorities has not been matched by progress in assuring their equal access to operating revenues from advertising sales. Little action has been taken to improve the quality of rating service reporting on minority viewing habits; discussion of the matter rests solely at the stage of third-party proposals that minority owners and rating services cooperate in improving survey techniques.³⁷ Although the cooperative approach has not yet been demonstrated to be ineffective, it may be that concrete action in this area requires government oversight.³⁸

B. Experience: Ending Discrimination in Employment

One of the best ways to have gained the experience the FCC requires is to have been employed by the media. Progress has been made in remedying minority underrepresentation in media employment, but significant problems persist. The FCC did not concern itself with discriminatory media hiring practices until public and private pressure groups,³⁹ aided by the highly critical Kerner Commission report,⁴⁰ persuaded the Commission to institute a rulemaking proceeding designed

property occurs within the requisite time period. Such a credit would be attractive to sellers since they could use the money they would have spent in taxes to buy a new broadcast property.

36. *Id.*

37. *See* note 22 *supra*.

38. The government can more actively oversee rating services. It can also purchase more advertising time on minority-owned stations. But, to date, government agencies have failed to consider minority stations as a viable market. In a chart prepared by the Library of Congress for the office of Representative William L. Clay (D.-Mo.), the following governmental agencies were shown to spend the following amounts of advertising dollars in the black-owned segment of broadcast industry and in the industry as a whole:

Department of Housing and Urban Development

Black Media—\$164,500

Total—\$6,008,000

Postal Service

Black Media—none

Total—\$11,170,300

Department of Transportation

Black Media—\$150,200

Total—\$823,400

Department of the Treasury

Black media—none

Total—\$1,820,000

Congressman Clay and the Congressional Black Caucus are urging these agencies to allocate a greater portion of their advertising expenditures to minority media. President Carter has also made this part of his proposal to promote minority ownership. *See* note 9 *supra*.

39. These pressure groups included the Office of Communications, the Board for Homeland Ministries, and the United Church of Christ.

40. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

to articulate a basic nondiscrimination policy.⁴¹ In 1969, the Commission adopted rules forbidding discrimination and requiring equal employment opportunity⁴² and promulgated guidelines for the implementation of the program.⁴³ A year later, the Commission began requiring annual reports on the number of minorities employed by each licensee⁴⁴ and, in 1972, the required detail of the reports was greatly increased for those stations with more than five employees.⁴⁵

By 1975, information furnished by the stations showed that relatively few minorities and women were hired even by businesses in which a substantial number of vacancies occurred annually. In response, the Commission proposed and adopted an affirmative action program for minority employment by licensees.⁴⁶ This program was reviewed by the United States Commission on Civil Rights, which recommended a number of measures to strengthen its provisions. The recommendations included requiring licensees to analyze their workforces, extending reporting requirements, establishing employ-

41. Nondiscrimination in Employment Practices of Broadcast Licensees, 13 F.C.C.2d 766 (1968).

42. Nondiscrimination in Employment Practices of Broadcast Licensees, 18 F.C.C.2d 240, 245 (1969).

43. The new guidelines required that broadcasters (1) make management personnel responsible for implementing equal employment opportunity policies and establish review procedures to assess managerial and supervisory performance; (2) inform employees and employee organizations of the program and enlist their cooperation; (3) communicate the program and the employment needs to sources of qualified applicants and solicit their recruitment assistance; (4) continuously strive to remove employment discrimination from personnel practices and working conditions; and (5) continuously review job structure and practices and actively recruit and train as needed to insure full participation in organizational units, occupations, and levels of responsibility. *Id.*

44. Nondiscrimination in Employment Practices of Broadcast Licensees, 23 F.C.C.2d 430, 436 (1970) (requiring the listing of the numbers of black, Oriental, American Indian, and Spanish suruamed American employees in the targeted job categories).

45. Equal Employment Opportunity Inquiry, 36 F.C.C.2d 515, 518 (1972). The stations were asked to state whether they (1) employed no women, or showed a decline in the number of women employees from one period to the next; or (2) employed no minorities or showed a decline in minority employees between reporting periods if they operated in an area containing at least five percent minorities in the population.

46. Nondiscrimination of Licensees Employment Practices, 54 F.C.C.2d 354 (1975). The new program required stations to give the following information:

- (1) a statement of equal opportunity policy,
- (2) the name of the person responsible for implementation of the program,
- (3) the methods used in giving public notice of its equal employment opportunity policy,
- (4) the methods used to recruit minorities and women,
- (5) the available on-the-job training services,
- (6) the data regarding percentage of minorities and women employed in the station compared to the percentage in the area's workforce,
- (7) the methods of development of the station's 395 form,
- (8) the number of minorities and women hired in the last 12 months,
- (9) the number of minorities and women promoted in the last 12 months, and
- (10) the effectiveness of an overall affirmative action plan.

Id.

ment diversity standards, and adopting strengthened enforcement procedures.⁴⁷ The FCC is presently considering further proposals made by the Civil Rights Commission and other interested parties.⁴⁸

The most salient common characteristic of the new proposals is their recommendation for more specificity by stations in their reports to the FCC. Perhaps one of the reasons that the FCC previously has not required greater specificity is to avoid imposing too difficult a burden of time and expense on reporting stations. Yet, since the purpose of the FCC's Equal Employment Opportunity program is to assure adequate representation for minorities and women in every level of employment in the broadcast industry,⁴⁹ the Commission should not allow licensees to exclude data necessary for a fair assessment of their compliance with its rules merely because of financial and temporal expediency. Fortunately, the FCC appears to be facing this need for more extensive data; it is anticipated to revise the data reporting format (EEO Form 395) in response to the various suggestions that have been made.⁵⁰ One important suggestion has been to delineate more precisely the categories of employment. Broad categories have been used to mislead searches for true affirmative action attempts.⁵¹

47. CIVIL RIGHTS REPORT, *supra* note 4, at 150-52.

48. F.C.C. 77-779, Docket No. 21474, RM 1968, RM 2810. This rulemaking proposal was submitted to the FCC by Dr. John Abel, former Associate Professor of Telecommunications at Michigan State University, and Mrs. Judith E. Saxon, a doctoral student in mass media. Others who submitted proposals to amend the EEO Form 395 included the National Organization for Women, the Corporation for Public Broadcasting, American Women in Radio and Television, the FCC Broadcast Bureau's Policy Analysis Branch, the American Federation of Television and Radio Artists, the U.S. Office of Management and Budget, and the U.S. Commission on Civil Rights. The FCC invited comments to these proposals, as well as on the issue of whether licensees should be required to file an organization chart, a summary of the reasons for the termination of women and minority employees, and employee salary information.

49. Nondiscrimination in Employment Practices of Broadcast Licensees, 23 F.C.C.2d 430 (1970); Nondiscrimination in Employment Practices of Broadcast Licensees, 13 F.C.C.2d 766 (1968).

50. The most significant suggestions of the various proposals are as follows:

(1) All but one proposal would divide Form 395's "Officials and Managers" category into subgroups to reflect the level of management. The CIVIL RIGHTS REPORT, *supra* note 4, at 88, showed that this category has been a source of reporting abuse because it has allowed licensees to place minorities and women in this category who were really on the fringes of management or in nonmanagement positions. The further subdivision of this category would ensure accurate reflection of the true positions of minorities and women in the industry.

(2) Three out of five proposals submitted would also further subdivide the "professionals" category. This category has also been a source of abuse and has failed to indicate the exact professional positions that employees have held.

(3) Abel and Saxon, *supra* note 48, the Corporation for Public Broadcasting, and American Women in Radio and Television proposed retaining the present "On-the-Job Trainees" category as found in the present Form 395.

51. Form 395 should subdivide the positions to obtain a clearer idea of what positions minorities hold and which minorities hold them. Borrowing from proposals offered by the groups participating in this rulemaking procedure, *see* note 48 *supra*, including the Office of Management and Budget's standards for racial and ethnic designations, I suggest that the following form be used:

One suggestion not made was to include ownership data in the Form 395 reporting format. The FCC keeps no current data on the extent of minority ownership of broadcast stations, yet owners can be extremely influential in their stations' employment and programming policymaking. If the FCC had access to information such as the percentage holdings of minority owners, it could study and quantify the effect such ownership would have on increased minority employment and culturally diverse programming. The FCC should add this category.

The FCC also might require that licensees submit a report of reasons for termination of employment of minorities and women. Such information is important to determine whether the terminations were a result of employer bias, personal circumstance of employees, or the minorities' and women's lack of requisite skills for the position. If lack of skills is the problem, the FCC should determine which skills were lacking and whether they could have been augmented by on-the-job training. If on-the-job training would have been impractical under the circumstances, the Commission would have a clear-cut idea of what types of courses to recommend to universities in order better to train future minority and women employees. Finally, the FCC should require broadcasters to submit such information annually. An annual reporting requirement would encourage licensees' continuous, positive efforts at hiring minorities and women, rather than only forcing sporadic, defensive responses to the problem once every three years during license renewal.

More rigorous enforcement is also necessary. Presently, the Commission will undertake a review process—comprised of specific data re-

	American Indian or Alaska Native		Asian or Pacific Islander		Black, not of Hispanic Origin		Hispanic		White, not of Hispanic Origin	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
1. Owners										
51% or more										
25 - 50%										
10 - 24%										
5 - 9%										
below 5%										
2. Top Management										
3. Department Heads										
4. Producers-Directors-Writers-Editors										
5. On-the-Air Talent News and Public Affairs										
6. On-the-Air Talent Entertainment										
7. Technicians										
8. Office and Clerical										
9. Craftsmen (skilled)										
10. Operatives (semi-skilled)										
11. Laborers										
12. Service Workers										

Note: There would be 3 charts of this type—one for full-time, one for part-time, and one for on-the-job trainees. The second and third charts would contain only categories 4-10.

quests, subsequent field examinations, and, if necessary, mandatory minority employment orders—only if it finds that a licensee has violated a quantified “zone of reasonableness” for levels of minority employment.⁵² The FCC stated in 1976, however, that it would only invoke this procedure in response to independent complaints about discriminatory practices if such complaints fell beyond the jurisdiction of other government agencies.⁵³ The Commission has adhered to this restricted position in subsequent litigation.⁵⁴ This attitude is overly deferential. As the agency specifically charged with regulation of broadcast licensees, the FCC has superior capabilities for detecting discriminatory employment behavior and for imposing effective antidiscrimination sanctions such as denial of licenses.⁵⁵ That other agencies

52. The quantification of the “zone of reasonableness” standard was made in response to suggestions by the U.S. Commission on Civil Rights. The quantified standard requires a licensee to employ minorities and women in numbers sufficient to make their percentage of the total station workforce to be at least 50% of the percentage of minorities and women in the overall available workforce. This requirement is relaxed to a comparable 25% for the top four job categories on the current EEO Form 395. CIVIL RIGHTS REPORT, *supra* note 4, at 151. These percentages logically should be expected to increase as minority employment patterns improve. The FCC has not stated this directly, but it seems implicit in other Commission statements. See, e.g., Mission Cent. Co., 56 F.C.C.2d 782 (1975).

This quantitative approach presently represents only an administratively promulgated trigger for further administrative action, not a determinative legal standard of liability. Past judicial decisions have endorsed the “zone of reasonableness” concept in general. See, e.g., Stone v. FCC, 446 F.2d 316 (D.C. Cir. 1971). Courts have also indicated, however, that simple percentages are not determinative because that which is unreasonable in one context may be reasonable in another, especially with regard to affirmative action recruitment efforts. Bilingual-Bicultural Coalition of Mass Media Inc. v. FCC, 492 F.2d 656 (D.C. Cir. 1974); Stone v. FCC, 446 F.2d 316 (D.C. Cir. 1971).

53. Nondiscrimination in Employment Practices, 60 F.C.C.2d 226 (1976).

54. The complaints filed by 27 women in National Organization of Women v. FCC, 555 F.2d 1002 (D.C. Cir. 1977), resulted in a preliminary finding by the Equal Employment Opportunity Commission (EEOC) of “reasonable cause to believe” that television station WRC of Washington, D.C., was guilty of discriminatory employment practices. Because such a finding authorized negotiated conciliation between the EEOC and the employer, see 29 C.F.R. § 1601.19(b), the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC decision to defer action until the issue was resolved by the EEOC or the courts. When negotiations reached an impasse, the FCC obtained a temporary remand from the court of appeals and requested more detailed employment information, such as lists of new hiring and promotions.

55. The proposed revision of the Communications Act of 1934 that is currently before Congress, H.R. 13015, 95th Cong., 2d Sess. (1978), would codify this policy by requiring any potential licensee to notify the FCC of

any final determination by any Federal, State, or other court, or by any Government agency, of any violation by such applicant, licensee, or permit holder of any applicable civil rights or equal employment opportunity law . . . not later than 5 days after the date upon which the applicant, licensee, or permit holder receives notice of such final determination

Id. at § 435(a). The bill further states that

[it] shall consider any determination specified [above] in determining whether to grant, revoke, or deny a license or construction permit. *The Commission shall not have any authority, other than the authority established in this section, to regulate applicants, licensees, or permit holders in order to ensure compliance with applicable civil rights or equal employment opportunity laws.*

such as the Equal Employment Opportunity Commission and the Fair Employment Practices Commission have specific antidiscrimination mandates should not permit the FCC to ignore reported instances of discriminatory behavior by its licensees. While regard for avoiding interference with another government agency's negotiations with charged civil rights offenders suggests that the FCC not automatically involve itself every time another agency finds a probable civil rights violation, the FCC should establish a threshold standard indicating the point at which it will initiate its own antidiscrimination procedures.⁵⁶ In this manner, the FCC could ensure that its special attributes would be utilized fully to oppose discrimination in media employment without contributing to wasteful duplication of government effort.

The effectiveness of the FCC's nondiscrimination efforts is further hampered by the Commission's decision to allow licensees charged with employment discrimination during a given license term to defend themselves with evidence of employment improvement in subsequent terms.⁵⁷ While such an approach is consistent with the rationale that the FCC's efforts are to be "prospective" only in application,⁵⁸ this posture ignores the dysfunctional incentives that it creates. Rather than being spurred by a threat of future liability for failure immediately to implement equal employment opportunity guidelines, reluctant stations instead are thus permitted to delay until they become aware that the Commission is aware of their faulty employment program. The Commission must rely, however, on the imperfect mechanisms of either private complaint or independent government investigation. If stations are then permitted to escape liability through the hasty hiring of additional minority personnel, the FCC's goal of inducing stations to adopt

Id. at § 435(b) (emphasis added). Such a law, if passed, would vitiate the FCC's previous efforts to design and implement its own affirmative action policy.

56. In *NOW v. FCC*, 555 F.2d 1002 (D.C. Cir. 1977), the EEOC's ruling, after finding "reasonable cause to believe" that the station was engaging in discriminatory employment practice, called for negotiated conciliation between the EEOC and the employer, *id.* at 1016 n.94. This ruling illustrates why the FCC should not automatically order an evidentiary hearing every time some government agency makes a finding of possible licensee discriminatory behavior. If a licensee causes a moderate number of complaints, say five to ten, coupled with an EEOC finding of "reasonable cause," however, the FCC should regard this as suspect and should request more specific employment data that reflects only the period before the complaints were filed. More than ten complaints with an EEOC "reasonable cause" determination should result in an evidentiary hearing. Finally, if the EEOC makes an ultimate determination or "prima facie" case of discrimination, even in one case, the FCC should order an evidentiary hearing to determine whether this was an isolated incident or whether the licensee's overall employment policies need closer scrutiny. If such scrutiny uncovers other violations, the FCC should determine whether to limit or revoke the station's broadcast license.

57. See *NOW v. FCC*, 555 F.2d 1002 (D.C. Cir. 1977); *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 329 (D.C. Cir. 1974).

58. *NOW v. FCC*, 555 F.2d 1002, 1017 (D.C. Cir. 1977).

a continuous and good faith minority recruitment program will have been subverted.

Thus, while the Commission has made significant progress toward achieving a genuinely effective nondiscrimination program for the broadcast industry, serious shortcomings still mar its efforts. Even if the Commission acts to correct these deficiencies, however, it is likely only modestly to succeed in eradicating discrimination. As the United States Civil Rights Commission remarked:

The overriding deterrent to assuring equal employment opportunities for minorities and women in the television industry is not necessarily the failure of the FCC's EEO guidelines to be specific and result-oriented. It is not entirely the failure of the licensees to implement affirmative measures to assure non-discrimination; nor is it the ineffectiveness of each of the affirmative measures they do undertake. All of these factors detract from realizing equal employment opportunity, but *the real deterrent is a lack of a genuine commitment by licensees which was conveyed in their attitude toward minorities and women.*⁵⁹

C. *The Van Deerlin Bill*

The progress that I have just described and advocated might be for naught if Congress passes certain provisions of the Van Deerlin Bill,⁶⁰ a rewrite of the the Communications Act of 1934.⁶¹ One laudable purpose of the bill is to use the *public* broadcast system to increase minority access to broadcast experience by imposing a small fee for the granting of a license and using the resulting "Telecommunications Fund" to subsidize minority ownership of public television stations.⁶² But other provisions would, in effect, eviscerate the progress that has been made and is still to be made in the more lucrative and, hence, more sought after *commercial* sector. First, the bill would lengthen the period of licensing from three to five years, with provisions enabling an eventual indefinite licensing term.⁶³ Second, the bill would eliminate the ascertainment process for commercial licensing, under which stations now must demonstrate an awareness of their service area's

59. CIVIL RIGHTS REPORT, *supra* note 4, at 148-49 (emphasis added).

60. H.R. 13015, 95th Cong., 2d Sess. (1978). Representative Van Deerlin (D.-Cal.) is Chairman of the House Subcommittee on Communications. He and Representative Louis Frey (R.-Fla.) are sponsoring the bill, which was reintroduced in the 96th Congress.

Other commentators also have noted the detrimental effect these provisions would have on the FCC Equal Employment Opportunity Program. See Bowie, N., "The Communications Act of 1978": An Expression of Congressional Will to End Civil Rights and Equal Employment Opportunity in the Broadcast Industry (Dec. 15, 1978) (unpublished report of the Citizens' Communications Center, Washington, D.C.).

61. 47 U.S.C. § 1 *et seq.*

62. H.R. 13015, 95th Cong., 2d Sess. § 413 (1978).

63. *Id.* at § 431(b) & (c).

problems, needs, and interests.⁶⁴ Third, the legislation would replace the comparative hearing process, which airs the respective merits of applicants' proposals, with a random selection process.⁶⁵

The operative philosophy of this type of approach—that minorities may be allowed increased access to the public stations if incumbents are allowed to strengthen their hold on the commercial sector—is regressive. While some minorities may regard public broadcasting as an ultimate career goal, paths that lead into the commercial sector also need to be widened for those who aspire to this sector. The Van Deerlin Bill would constrict those very processes that historically have offered minorities their only opportunity for input into the regulatory process. Indefinite licensing would favor incumbents—who at present are not minorities. Elimination of the need for a demonstration of an awareness of community problems is an invitation to forget about those problems. Moreover, a random selection process would eliminate existing efforts to obtain diversity in licensing.

Like efforts to correct the racial diversity of graduate students by improving the quality of minorities' preparatory education, the means of increasing minority ownership discussed in this Comment will take considerable time to produce the desired results. In both contexts, an approach aimed at the roots of the problem is important, and must dominate in the long run. The problem is that sole reliance on such tactics *now* will produce change only at a snail's pace. The importance of achieving diversity in the broadcast industry demands other, more direct action.

III

THE CASE FOR MINORITY PREFERENCE IN THE ALLOCATION OF AIRSPACE

Fair minority representation in television and radio control ought to be a fact of American life. The aid of the powerful instruments of mass communication is critical to current efforts to overcome our society's tradition of racism and bigotry. After a century of formal equality belied by a reality of social oppression, America has just recently approached a point where overtly hostile discrimination is considered to be legally and socially unacceptable. This long-overdue progress must now turn its focus from censuring blatantly racist actions to the more subtle and difficult task of building authentically healthy racial attitudes throughout the society. Such an effort requires much more active assistance from opinionmakers and attitude shapers than is reasonable to expect from a majority-controlled communication system dogged by

64. *Id.* at 434(b).

65. *Id.* at 414(c).

external demands for signs of change. Minorities who know the problem firsthand must share in designing its solution.

Minority contributions must proceed from a position of power if they are to be effective. Ultimate power in our system of commercial broadcasting is vested in the station owners. As it has been observed, however, significant progress in a reasonable time frame demands more than actions designed merely to aid minorities in the long process of preparing someday to become owners. Until a more balanced cycle of minority participation and experience within the industry has been established, diversity in media ownership can only be achieved by direct allocation of station licenses to minorities.

This is far from a novel idea. Indeed, a review of recent FCC proceedings reveals a growing, though sometimes reluctant, appreciation of the importance of diversity in media ownership. Historically, the FCC held that existing media ownership and experience entitled applicants to preference in the allocation and renewal of rights to use broadcast frequencies.⁶⁶ The Commission first expressed awareness of the desirability of diverse ownership when it promulgated standards for *new* station allocation decisions in 1965.⁶⁷ The Commission listed diversification of station ownership and control as one of seven relevant considerations for such decisions.⁶⁸

Until 1969 the desirability of diversification was not reflected in the FCC's criteria for renewal of previously licensed frequencies. In that year, however, the United States Court of Appeals for the District of Columbia extended the diversity criterion to include consideration of the "special circumstances" presented by station WHDH, an incumbent licensee.⁶⁹

Yet even this minor extension of the diversity criterion to renewals brought forth a surge of criticism from established broadcasting interests. In response to this pressure, the Commission promulgated its 1970 Policy Statement providing that a challenged incumbent would receive

66. *E.g.*, *Hearst Radio, Inc. v. FCC*, 15 F.C.C. 1149 (1951).

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

68. The other six criteria were: (1) full-time participation in station operation by owners; (2) proposed program service; (3) past broadcast record; (4) efficient use of frequency; (5) character; and (6) other factors. *Id.* at 395-99. As an explanation of the "other factors," the Commission noted that its "interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude full examination of any relevant and substantial factor. [It] will thus favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be adduced." *Id.* at 399.

69. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970), *aff'g* *WHDH, Inc.*, 16 F.C.C.2d 1 (1969). WHDH applied for a license renewal. The bulk of the applicant's prior operating experience had occurred under temporary permits granted while its right to an ordinary three-year license was under challenge. The court of appeals supported the FCC's right *under such circumstances* to give preference to applicants who would "speak out with fresh voice" and "expand diversity of approach and opinion." *Id.* at 860.

automatic license renewal if the Commission found a past record of "substantial service."⁷⁰ A year later, however, in *Citizen's Communication Center v. FCC*,⁷¹ the United States Court of Appeals for the District of Columbia Circuit overturned that policy, holding that such an approach violated the full hearing requirements of the Communications Act. The significance of this decision was the court's pathbreaking association of diversification of ownership with the "public interest" standard for FCC regulation set forth in the Communications Act.⁷² The decision emphasized the salutary effect of diffusion of media ownership on first amendment concerns about promoting diversity of ideas and expression.⁷³ The court went on to stress the additional importance of diversification of both ownership and opinion arising from the emergence of "hitherto silent" racial minorities.⁷⁴ The stage was thus set for the landmark decision of *TV 9 Inc. v. FCC*.⁷⁵

In *TV 9*, the FCC refused to accord significance to the partial black ownership and management of one of two competing applicants when it allocated the right to serve an area with a twenty-five percent black population. The Commission's position was that "the Communications Act, like the Constitution, is color blind. What the Communications Act demands is service to the public in the programming of the station and that factor alone must control the licensing process, not the race, color, or creed of the applicant."⁷⁶ The Commission further stated that Comint—the applicant with the fourteen percent black-owned interest—had failed to show that its programming would better serve the black community as a result of its partial black ownership and management.⁷⁷ Commissioner Benjamin Hooks, who concurred on the merits of the Commission's ruling, vigorously disagreed with the find-

70. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 425 (1970).

71. 447 F.2d 1201 (D.C. Cir. 1971).

72. *Id.* at 1213 n.36. The leading case interpreting the public interest standard is *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

73. 447 F.2d at 1213 n.36.

74. *Id.*

75. 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). For commentary on the *TV 9* case, see Ratliff, *Minority Ownership Likely to Increase Diversity Must Be Accorded Merit in FCC Licensing Hearing*, 52 TEXAS L. REV. 806 (1974); Sahakian, *Racial Characteristics of License Applicants Considered in Comparative Broadcast Hearings*, 9 SUFFOLK U.L. REV. 225 (1974).

76. *Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17 (1972) (quoting Hearing Examiner's Initial Decision, FCC 70D-20, ¶ 872 (June 1, 1970)).

77. The Commission stated:

There is nothing in the degree or type of participation proposed by [the black owners] which gives assurance that the benefits of their racial background would inure in any material degree to the operation of the station. . . . We believe that, in a comparative broadcast proceeding, which is governed by the Commission's Policy Statement . . . Black ownership cannot and should not be an independent comparative factor . . . rather such ownership must be shown on the record to result in some public interest benefit.

Id. at 17-18.

ings of the Administrative Law Judge and Review Board that they could not award a preference to an applicant proposing substantial minority ownership.⁷⁸

The United States Court of Appeals for the District of Columbia overturned the Commission's decision because:

To say that the Communications Act, like the Constitution, is color blind does not fully describe the breadth of the public interest criterion embodied in the Act The thrust of the public interest opens to the Commission a wide discretion to consider factors which do not find expression in constitutional law. Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to Black participation among principals of applicants for television rights. However elusive the public interest may be, it has reality. It is a broad concept to be given realistic content.⁷⁹

The court noted that it was consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission to afford favorable consideration in a comparative proceeding to an applicant who broadened community representation through management and ownership means. The court stated that "no quota system is recommended or required We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded."⁸⁰ Finally, the court stated, "Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors."⁸¹

Despite the important advances represented by the *TV 9* decision, the D.C. Circuit's method of allocating station licenses to minorities may have confused the FCC and other courts. The court distinguished between "preference" and "merit" in its specification of the Commis-

78. *Mid-Florida Television Corp.*, 37 F.C.C.2d 559, 560 (1972) (Hooks, Comm'r., concurring). In his concurrence, Commissioner Hooks stated:

If this Commission—and this government—are sincere (and I believe that they are) in their espousal of hopes of redressing past injustices, then I have projected one simple, painless step to turn this polarized society around. I am asking only for a "preference" to be computed along with the various other criteria; nowhere have I suggested that black ownership, standing alone, should be dispositive. If this device is criticized for being racist and artificial, it must be remembered that Blacks have been, for so many years, oppressed by racist and artificial devices that it may take other "artificial" measures to offset the prevailing conditions.

Id. at 565.

79. *TV 9 v. FCC*, 495 F.2d 929, 936 (D.C. Cir. 1973).

80. *Id.* at 937-38 (footnotes omitted).

81. *Id.* at 938. In a supplemental opinion to the case, Judge Fahy stated:

[I]n view of . . . the probability that Black persons having substantial identification with minority rights will be able to translate their positions, though not technically managerial, and their ownership stake, into meaningful effect on this aspect of station programming, we think that such material factors residing in the evidence cannot reasonably be totally and rigidly excluded from favorable consideration.

Id. at 942.

sion's permissible recognition of minority status in its allocation decisions. It defined "merit" as

favorable consideration [resulting from a] recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference. "Merit," therefore, is not a "preference" but a plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded a preference.⁸²

The court, on the other hand, defined "preference" as

a decision by the Commission that the qualifications of a particular applicant in a comparative hearing are superior to those of another applicant with respect to one or more of the issues upon which the grant of a permit or license turns.⁸³

The court clearly stated that Comint's black ownership and management were merit factors, but that a "preference did not necessarily follow since competing applicants were not foreclosed from seeking similar or greater merit."⁸⁴ It added that another applicant could gain preference over a black owned and managed applicant by proving "that it could better have served the public interest in promoting diversification of opinion and viewpoint in the respects with which the court is concerned in this case."⁸⁵

The court of appeals' choice of the terms "merit" and "preference" was unfortunate because the court apparently would grant "preference" to applicants that evidenced minority representation in station ownership and control, when other factors were equal. The significance of the distinction seems merely to be that a competitor can rebut the presumption that a minority owned and operated company would better promote diversity of broadcast perspective by demonstrating a superior capability to serve this public interest. The court apparently engaged in this bit of semantic obfuscation to avoid the constitutional issues surrounding an explicit recognition of racial criteria.⁸⁶ The Supreme Court's decision in *Regents of the University of California v. Bakke*⁸⁷ should, however, assuage this fear.

In *Bakke*, a white applicant to the University of California, Davis, School of Medicine alleged that he was denied admission because the school employed an unconstitutional affirmative action admissions program. In a sharply divided set of opinions, the United States Supreme Court required Davis to admit Allan Bakke and prohibited the school from continuing its affirmative action program.

82. *Id.* at 941 n.2.

83. *Id.*

84. *Id.* at 941 (Fahy, J., supp. opinion).

85. *Id.* at 941 n.3.

86. *Id.* at 942.

87. 98 S. Ct. 2733 (1978).

The University offered four justifications for its use of racial quotas in its special admissions program: (1) reduction of the historical deficit of traditionally disfavored minorities in medical school and the medical profession; (2) the need to counter the effects of past societal discrimination against minorities; (3) the importance of increasing the number of physicians who will practice in presently underserved minority communities; and (4) the goal of obtaining the educational benefits of an ethnically diverse student body.⁸⁸

Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, voted that the Civil Rights Act of 1964 barred educational institutions receiving federal funds from discriminating on the basis of race.⁸⁹ Justice Stevens declined to consider the constitutionality of the Davis program.⁹⁰ Justices Brennan, White, Marshall, and Blackmun voted to uphold the Davis program, finding it substantially to further the important governmental interests set forth by the University.⁹¹ Justice Powell, the swing vote, voted to strike down the Davis program as violative of both Title VI and the fourteenth amendment, but held that Davis could, in the future, employ a more flexible race conscious admissions program.⁹²

Justice Powell, employing the strict scrutiny equal protection test, found that of the four justifications offered by the University for its program, only the fourth—a racially diverse student body—was a:

constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern for the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.⁹³

Under Justice Powell's conception of a constitutionally permissible special admissions program, Davis could not use race as the sole diversification criterion: "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single, though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."⁹⁴ He used the Harvard College Special Admissions Program as an example of a constitutionally acceptable program because Harvard set no quotas and did not use race as its sole criterion of

88. *Id.* at 2757.

89. *Id.* at 2811-15.

90. *Id.* at 2810-11.

91. *Id.* at 2785-94.

92. *Id.* at 2739.

93. *Id.* at 2760.

94. *Id.* at 2761.

diversity.⁹⁵

After *Bakke*, there can be little doubt that the FCC can design an evaluation system for station allocation that at once recognizes the benefits of minority ownership and management and comports with constitutional requirements. First, Justice Powell's acceptance of diversity as a compelling state interest because of its links with first amendment concerns is directly analogous to the diversity goals of broadcast licensing that the FCC in its *1965 Policy Statement*,⁹⁶ and the D.C. Circuit in *WHDH*,⁹⁷ *Citizen's Communication Center*,⁹⁸ and *TV 9*⁹⁹ have articulated. Second, the FCC need not employ racial classifications in the manner that the Court found objectionable: as with quotas or as sole indicators of diversity. Indeed, the *TV 9* decision expressly disavowed the need for a quota approach in implementing its order to the FCC to recognize the benefits accruing from broadcast diversity.¹⁰⁰

One logical format for structuring an FCC license allocation process that explicitly values the benefits of racial diversity is suggested by the system that the FCC itself introduced in 1965 for evaluating applicants for *new* broadcast licenses.¹⁰¹ Although this system previously has not been extended to cover incumbents, a unified method of evaluation applied in *all* licensing proceedings¹⁰² which included a merit

95. *Id.* at 2762.

96. 1 F.C.C.2d 393 (1965).

97. 444 F.2d 841 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970), *aff'g* WHDH, Inc., 16 F.C.C.2d 1 (1969).

98. 447 F.2d 1201 (D.C. Cir. 1971).

99. 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

100. *Id.* at 941.

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

102. This preference should also be applied to cases involving divestiture because of violations of cross-ownership rules and to VHF drop-ins. In 1956, the Supreme Court upheld Commission regulations limiting the number of nationwide broadcast stations a person or corporation could own to five UHF television stations and seven AM and FM stations. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). The Court also accepted the Commission's ruling that prohibits networks from having any cable interests and telephone companies from owning cable systems in their service areas. *See, e.g., Iacopi v. FCC*, 451 F.2d 1142 (9th Cir. 1971). In 1971, the Commission adopted rulemakings which prohibited common ownership of UHF television stations and aural stations in the same market, but permitted AM-FM combinations. Multiple Ownership Rules, 28 F.C.C.2d 662 (1971).

The United States Supreme Court decided that the FCC has authority under the Communications Act to forbid future formation of jointly owned, newspaper-broadcast station combinations located in the same community and to require divestiture within five years of those existing "egregious" combinations that involve a community's sole daily newspaper or sole broadcast station. *FCC v. National Citizen's Comm. for Broadcasting*, 98 S. Ct. 2096, 2122 (1978). It also decided that cross-ownership regulations do not violate the first amendment, because there is no "unabridgeable First Amendment right to broadcast" and the regulations constitute a reasonable means of promoting the public interest in diversified mass communications. *Id.* at 2114.

While a prospective ban is imperative to minority involvement in broadcast, it alone will not ensure adequate responsiveness to the needs of minority communities unless it is coupled with a strong Commission policy of granting a minority preference in the area of diversity. The problem is even more aggravated in the divestiture area. Divestiture alone can not ensure minority partici-

award for an applicant's diversity would satisfy both policy demands¹⁰³ and constitutional requirements. Such a scheme might arrange the relevant criteria in a weighing system as follows:

	up to:
(1) Diversification of ownership and control	
(a) Race	20 points
(b) Other diversity factors	5 points
(2) Past broadcast record	20 points
(3) Full-time participation in station operation	

pation in broadcasting. The Commission ruling, in an effort to minimize the financial effects of divestiture upon the owners, provided favorable tax treatment to them. 22 F.C.C. 2d 347 (1970). The Commission also suggested, however, that broadcast stations could exchange or "swap" their stations with those of other owners required to divest, but who were in different markets. This policy does not promote minority ownership, or even simple diversity. In oral argument before the Commission on July 24, 1974, Kujaatele Kweli of the National Black Media Coalition stated: "Guidelines must be developed which not only require divestiture, but which also increase diversity; otherwise new rules might only reorganize vested interests. Any new ruling must be conceived in the spirit of creating new opportunities for the previously deprived."

Although § 310(b) of the Communications Act prohibits the Commission from considering "whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee," the Commission must decide whether the assignee, himself, meets these qualifications. If diversity of ideas and ownership is a goal of the Commission, and if minority ownership is a component of such diversity, the Commission must set guidelines in its transfer regulations that would make it likely that potential transferees in divestiture cases have some degree of minority ownership.

A VHF drop-in is the placement of a VHF station between two assigned VHF frequency spaces. The history of proposals for VHF drop-ins has been fraught with controversy. See Petition for Rule Making to Amend the Television Table of Assignments to Add New VHF Stations to the Top 100 Markets and to Assure that the New Stations Maximize Diversity of Ownership, Control and Programming, RAD. REG. Current Service 53:233, Docket No. 20418, FCC RM-2346, FCC RM-2727 (1977). Where viable, minority ownership of applicants should be given a preference, however, because of the benefits to the public interest cited by the court of appeals in *TV 9* and listed in the Communications Act.

103. The former Office of Telecommunications Policy (OTP) and the Department of Commerce also stressed the need for the Commission to promote ownership by minority applicants. They suggested the following Commission Policy to be applied in comparative cases involving new applicants in service areas having significant minority populations:

(1) Where minority participation is significant but neither controlling nor of a managerial nature (i.e., full time), it must be considered as a plus; the weight of this favorable consideration depends on the facts, and could lead to a decisive preference in the circumstances of the particular case.

(2) Where the minority participation is substantial (e.g., 20 percent or more) and managerial (full-time), the plus becomes correspondingly stronger. For such participation is *very likely* to be translated into "meaningful effect" on service to the public and "genuine diversity of programming."

(3) Where minority stock ownership in an applicant represents a controlling interest, full credit for such ownership should be awarded in the form of a *solid plus*. This modification is called for because *controlling* ownership provides full authority over programming decisions such that "ownership is likely to increase diversity of content."

(4) For the same reason, where the minority owner is *locally resident* and controlling, the plus should be even stronger. Such on-the-spot control by the minority interest is bound to be reflected in "genuine and meaningful diversity of programming."

Petition for Establishment of Policy to Promote Broadcast Ownership by Minorities and Related Implementing Policies, FCC-RM 30551, at 15-16 (1978) (citations and footnotes omitted).

by owners	15 points
(4) Proposed program service	15 points
(5) Efficient use of frequency	10 points
(6) Character	10 points
(7) Other factors	<u>5 points</u>

100 points

The Commission has, in the past, given more weight in evaluating incumbent licensees to past broadcast record than to diversity on the theory that proven meritorious service improves the quality of broadcast to the public, provides continuity of such quality service, and prevents losses to those providing such service.¹⁰⁴ This policy should be reconsidered. While a meritorious past broadcast record is an extremely important factor in granting a broadcast license, it effectively precludes efforts by new licensees to compete with incumbents in the allocation of scarce airwave space. On the other hand, the diversity criterion is one that every applicant, both new and incumbent, can fulfill. Thus, I recommend that slightly more weight be attributed to the diversity factor to provide an incentive for all applicants to diversify their ownership and control.

In his *Bakke* opinion, Justice Powell stated that a school admissions program must be "flexible enough to consider all elements of diversity"—not only race—and to "place them on the same footing for consideration, although not necessarily according them the same weight."¹⁰⁵ Justice Powell also noted that "the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and applicants for the incoming class."¹⁰⁶ As the FCC, the Civil Rights Commission, and the courts have recognized, the gross underrepresentation of minorities in the industry requires that the greatest weight be attached to minority ownership until the underrepresentation has been corrected and parity is reached. Therefore, I have assigned the racial diversity factor up to twenty points depending on the degree of minority ownership exhibited by the applicant. Other diversity factors could receive up to five points. The above proposal should apply to all licensing procedures—comparative and noncomparative. This would encourage incumbent licensees to seek more minority representation on the proprietary level to augment their chances for licensing.

104. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970); *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 F.C.C.2d 419 (1977).

105. 98 S. Ct. at 2763.

106. *Id.*

CONCLUSION

The achievement of diversity in media ownership and control is a goal of pressing importance. The means of moving toward the goal are administratively feasible and constitutionally legitimate. The Federal Communications Commission must now exhibit the political resolve necessary to ensure that its regulation encourages broadcasting as diverse as the public in whose name it acts.

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