ENHANCING THE SPECTRUM: MEDIA POWER, DEMOCRACY, AND THE MARKETPLACE OF IDEAS

*Ronald J. Krotoszynski, Jr.**
*A. Richard M. Blaiklock***

In their article, Professor Krotoszynski and Mr. Blaiklock assess diversity and broadcast media regulation in contemporary America. First, the authors consider the Federal Communications Commission's regulatory attempts to promote diversity in television and radio broadcasting. The authors discuss the Commission's difficulties in defining and characterizing "diversity" and further note some of the inconsistencies inherent in the Commission's dual emphasis on competition and diversity in broadcast programming, also mentioning the threat to democratic values posed by unduly concentrated media ownership. Next, the authors chronicle the burgeoning judicial hostility to race-conscious governmental policies and practices. They discuss the related shift from intermediate scrutiny to strict scrutiny in equal protection jurisprudence and the Commission's frantic efforts to provide justifications for its increasingly endangered race-based diversity regulations. The authors also examine the need for diversity in programming, both arguing that structural diversity among broadcast media outlets presents the best means of securing ideologically diverse programming and responding to potential objections to structural regulations aimed at securing such diversity. Finally, the authors elaborate on how such structural media regulations do not raise serious equal protection problems and conclude with a reminder that a healthy democracy depends upon a myriad of voices.

* *Associate Professor of Law, Washington and Lee University School of Law.*

** *Associate, Ice Miller. B.A., Hanover College; J.D., Indiana University School of Law—Indianapolis. The views expressed in this article are those of Mr. Blaiklock and not those of his employer.*

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I. INTRODUCTION

Since the inception of federal mass media regulation, the Federal Communications Commission (the Commission) has regulated the airwaves using its "public interest, convenience, and necessity" standard.[1] A central component of the Commission's public interest program historically has been to further diversity in both broadcast programming and program outlets.[2] Over the years, the Commission has invoked this concept to justify myriad restrictions on the distribution of licenses to operate radio and television stations,[3] as well as a broad array of complimentary regulatory polices that shape the day-to-day operation of stations after the Commission has licensed them.[4] Diversity, thus, is at the very core of contemporary broadcast media regulation. Indeed, it is second in importance only to the public interest standard from which it is derived.

Careful consideration of the Commission's diversity project reveals that a variety of cross-cutting and conflicting objectives have obscured the most important role that government regulations designed to enhance media diversity can play: thwarting the creation of undue concentrations of media power, thereby advancing the project of democratic deliberation. Disentangling the complex web of diversity-inspired regulations is no easy task, for the Commission's efforts to promote diversity, not unlike a coral reef, have grown both incrementally and haphazardly. The Commission has invoked the diversity rationale to support a variety of disparate programs, including, but hardly limited to, structural regulations that divide and separate media ownership. Content- and viewpoint-neutral regulations that prevent the undue concentration of media ownership should be maintained and, perhaps, even strengthened. Conversely, diversity regulations aimed at controlling the content of programming, whether directly or indirectly, should be abandoned.

The diversity question is especially deserving of close attention at the moment because Congress and the Commission are actively considering a variety of proposals that would weaken the structural regulations promoting diversity of ownership among media outlets.[5] The Telecommunications

1. 47 U.S.C. §§ 303, 309(a) (1994); *see also* Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2102 (1997); Erwin G. Krasnow & Jack K. Goodman, *The Public Interest Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 607 (1998).

2. *See* Krasnow & Goodman, *supra* note 1, at 627–28.

3. *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 59–101 (1994); Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1431–50 (1996).

4. *See infra* text and accompanying notes 14–21.

5. *See* Newspaper/Radio Cross Ownership Waiver Policy, 11 F.C.C.R. 13,003, 13,003–08 (paras. 1–8) (1996) (notice of inquiry); Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975), *reconsidered*, 53 F.C.C.2d 589 (1975), *aff'd sub nom.* FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 779 (1978); 47 C.F.R § 73.3555 (1998). The newspaper-radio cross-ownership rule, *id.* § (d)(1)–(2), which generally prohibits a daily newspaper and a station in the same community from being owned, operated, or controlled, either directly or indirectly, by the same party, is

Act of 1996 also significantly weakened both national and local multiple ownership rules,[6] leading to a feeding frenzy of consolidation within the commercial radio and television broadcasting industry.[7] Although this round of consolidation has not yet been completed, the national networks and large station groups immediately showed interest in acquiring even more radio and television stations.[8]

In August 1999, the Commission surrendered to industry pressure and adopted regulations that significantly weaken the multiple ownership rules.[9] Not content with this success, the broadcasting industry and its con-

under review. *See* Newspaper/Radio Cross-Ownership Waiver Policy, 11 F.C.C.R. at 13,003–08 (paras. 1–8). In addition, as part of its biennial review, the Commission issued a notice of inquiry reviewing its broadcast ownership rules. *See* Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996, 13 F.C.C.R. 11,276, 11,276–79 (paras. 1–8) (1998) (notice of inquiry). Among the rules under review are a national television ownership rule that limits the audience reach of a television network to an aggregate reach of 35%, *see* 47 C.F.R. § 73.3555(e)(1), a newspaper broadcast cross-ownership rule that prohibits a daily newspaper and a broadcast station in the same community from being owned, operated, or controlled, either directly or indirectly, by the same party, see *id.* § (d)(3), a local radio ownership rule that limits the number of radio stations in a particular market that can be owned, operated, or controlled by a party, *see id.* § (a)(1), and the cable/television cross-ownership rule that prohibits a television station and a cable system in the same local community from being owned, operated, or controlled, either directly or indirectly, by the same party, *see id.* § 76.501(1).

6. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

7. The Telecommunications Act of 1996 instructed the Commission to eliminate the national cap on the number of radio stations that can be jointly owned, *see id.* § 202(a), 110 Stat. at 110; increase the number of stations in an individual market that can be owned by one entity, *see id.* § 202(b), 110 Stat. at 110; eliminate the national cap on the number of television stations that can be jointly owned and increase the national audience reach to 35%, *see id.* § 202(c)(1), 110 Stat. at 111; conduct hearings concerning the limits on the number of television stations that an entity may own, operate, or control in the same television market, *see id.* § 202(c)(2), 110 Stat. at 111; extend its waiver policy with respect to the one-to-a-market ownership rule for the top twenty-five markets to the top fifty markets, see *id.* § 202(d), 110 Stat. at 111; and eliminate the prohibition on broadcast network-cable cross-ownership; *see id.* § 202(f)(1), 110 Stat. at 111. The results of these provisions have been both startling and swift, producing an orgy of consolidation. *See* Al Brumley, *Radio Signals Are Hard to Read*, DALLAS MORNING NEWS, Oct. 19, 1997, at C1; Tim Jones, *Radio's Human Conglomerate*, CHI. TRIB., Feb. 22, 1998, at C1; Tom Steighorst, *Diversity Lost Among Station Sales*, SUN-SENTINEL (Fort Lauderdale), Nov. 30, 1997, at F1.

8. *See* Paige Albiniak & Bill McConnell, *Strange Bedfellows*, BROADCASTING & CABLE, Aug. 16, 1999, at 6, 22 (reporting on the increasing pressure that Wall Street and the broadcasting industry, aided by their friends in Congress, are applying to FCC Chairman Kennard and his colleagues to liberalize the multiple ownership rules, thereby permitting greater concentrations of local and national broadcast media holdings).

9. The television duopoly rule, which precludes television broadcast stations with overlapping Grade B contours from being owned, operated, or controlled, either directly or indirectly, by the same party, *see* 47 C.F.R. § 73.3555(b) (1970), has been under review recently; *see* Review of the Commission's Regulations Governing Television Broadcasting, 7 F.C.C.R. 4111, 4116–17 (paras. 22–28) (1992) (notice of proposed rulemaking); Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 11 F.C.C.R. 21,655, 21,661–63 (paras. 10–13) (1996) (second further notice of proposed rulemaking). On August 5, 1999, the Commission repealed in part the duopoly rule, allowing a single entity to own or control more than one television station in a single market if certain conditions are met. *See generally* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903 (1999) (report and order); *see also* David Fiske, *FCC Revises Local Television Ownership Rules*, FCC REP. NO. 99-8, Aug. 5, 1999, *available in* 1999 FCC LEXIS 3736 (providing an executive summary of the changes in the multiple ownership rules); Albiniak & McConnell, *supra* note 8, at 6 (describing the policy changes in the local ownership rules and the politics surrounding these changes). The one-to-a-market rule, which

gressional allies are seeking even further deregulation of the ownership of television stations.[10] Before facilitating another buying spree, the Commission should consider very carefully the wisdom of permitting the further consolidation of radio and television holdings. A better course of action would be to weigh the potential negative effects of the increased concentration of media power in fewer and fewer hands against the broadcasting industry's claims that "bigger is better."[11]

A systematic reconsideration of the diversity project must also include the Commission's efforts over the last thirty years to increase the number of racial minorities and women in the broadcasting industry. Although the Commission's efforts to ensure that the public's airwaves are not controlled by those who engage in racial- or gender-based discrimination merit continued support, the Commission's untested assumptions about the diversity-enhancing effects of minority or female station owner-

generally prohibits a television station and a radio station in the same market from being owned, operated, or controlled, either directly or indirectly, by the same party, *see* 47 C.F.R. § 73.3555(c) (1970), was repealed by the same report and order that rescinded the duopoly rule; *see* Review of the Commission's Regulations Governing Television Broadcasting, 14 F.C.C.R. at 12,947–54 (paras. 100–114). The attribution rules, although not included within the broad category of broadcast ownership rules, are also relevant because they define what the Commission considers a cognizable interest for purposes of the ownership rules. *See* 47 C.F.R. § 73.3555, at nn.1–10 (1998). After reviewing the attribution rules, *see* Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, 10 F.C.C.R. 3606 (1995) (notice of proposed rulemaking); Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, 11 F.C.C.R. 19,895 (1996) (further notice of proposed rulemaking), the Commission modified these rules to include local marketing agreements, a variety of equity holdings, and contractual arrangements in which one station controls the programming decisions of another station in the same market; *see* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 F.C.C.R. 12,559 (1999) (report and order); *see also* Ken Silverstein, *His Biggest Takeover: How Murdoch Bought Washington*, NATION, June 8, 1998, at 18, 31–32 (describing Murdoch's interest in the rule change); *Broadcast Ownership Inquiry May Show FCC's Philosophical Differences*, COMM. DAILY, Mar. 13, 1998, *available in* 1998 WL 10696068; *Ownership Restrictions Debated*, TELEVISION DIGEST, Feb. 17, 1997, at 5, 5. To its credit, the Commission actually strengthened the attribution rules. *See* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 F.C.C.R. at 12,563, 12,587–88, 12,592–93, 12,597–99 (paras. 6, 60, 69, 83–88). Finally, the Commission modified its national ownership rules to take into account the changes to its attribution rules. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. at 12,903. For an overview of the Commission's recent efforts to revise the multiple ownership rules, see Elizabeth A. Rathbun & Dan Trigoboff, *Ready, Set . . . Duopoly*, BROADCASTING & CABLE, Aug. 9, 1999, at 4, 4–5.

10. *See* Paige Albiniak, *GOP Pushes Ownership Dereg*, BROADCASTING & CABLE, Sept. 20, 1999, at 19, 19 (describing efforts by the major networks, large station groups, and their friends in Congress to browbeat the Commission into further rollbacks of the multiple ownership rules); Bill McConnell, *NAB Offers $10M for Minority Plan*, BROADCASTING & CABLE, Feb. 22, 1999, at 14, 14–15 (describing National Association of Broadcasters' (NAB) proposal to fund minority ownership of radio and television stations and the possibility of relaxed limitations on the number of television and radio stations that a single owner could own or control).

11. *See generally* Louis B. Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U. L. REV. 4, 9–14, 22–24 (1960) (discussing the potential ill effects associated with corporate size generally and the dangers of undue concentrations of media power in particular).

ship should be met with skepticism.[12] Given the importance of the diversity project, the Commission should not permit short-term political efforts that reward select constituencies with valuable ownership and employment opportunities to overshadow or endanger the long-term project of ensuring a healthy and open marketplace of ideas.

Part I of this article considers some of the scattershot ways in which the Commission has attempted to promote diversity through regulation. Part II examines in greater detail the Commission's efforts to use race and gender as a means of furthering its diversity project, an effort that seems to be misguided. Part III considers the potential benefits associated with a regulatory program that maintains structural diversity among broadcast media outlets, an effort that constitutes an important, perhaps crucial, regulatory objective. Part IV distinguishes between the Commission's attempts to foster program diversity (efforts that are both ineffective and unnecessary) and its attempts to maintain structural diversity and localism (efforts that are both necessary and laudable). Finally, Part V suggests a program of reform that would disentangle the Commission's regulatory efforts at enhancing and promoting diversity from its efforts to ensure nondiscrimination by the public trustees holding licenses for broadcast stations. In the end, the Commission's failure to articulate a coherent vision for its diversity efforts is less a reflection of the importance and validity of the underlying policies themselves and more a reflection of the Commission's inability to escape interest group politics when formulating its regulatory policies.[13]

II. THE ROLE OF DIVERSITY IN MASS MEDIA REGULATION

The concept of diversity is a central component of contemporary broadcast regulation. Under the authority vested in it by the Communications Act of 1934,[14] the Commission regulates broadcasters using the "public interest, convenience, and necessity" standard.[15] For many years, the Commission has taken the view that public interest encompasses not merely a general obligation on the part of broadcasters to provide prosocial programming but also the general public's right to receive "a diversity of views and information over the airwaves."[16] Because physical con-

12. *See infra* notes 125–40 and accompanying text; *see also* Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 13 F.C.C.R. 23,004 (1998) (notice of proposed rulemaking) [hereinafter Broadcast & Cable EEO Review].

13. *See generally* ERWIN G. KRASNOW & LAWRENCE D. LINGLEY, THE POLITICS OF BROADCAST REGULATION 31–41 (1973); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 106–30 (1997).

14. Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–609 (1994)); *see also* TV9, Inc. v. FCC, 495 F.2d 929, 942 (D.C. Cir. 1973) (noting that the Communications Act of 1934 "is the Commission's basic charter").

15. 47 U.S.C. §§ 303, 309(a).

16. Metro Broad., Inc. v. FCC, 497 U.S. 547, 567 (1990) (quoting FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 795 (1978)). The "public interest" is, like diversity, an amorphous concept. *See*

straints limit the number of broadcast licenses that the Commission may issue, government regulation of the airwaves ostensibly is necessary to foster such diversity. These physical constraints are said to give rise to a "scarcity" of available electromagnetic frequencies.[17] Accordingly, government regulations are necessary to ensure that those granted the privilege of broadcasting do not abuse that privilege by failing to operate their stations in the public interest.

Consistent with furthering the public interest, the Commission's regulation of broadcasters has historically been guided by two goals: competition and diversity.[18] Despite the existence of these dual goals, the diversity project has served as the primary justification for the majority of the Commission's broadcast regulations, particularly its race-based affirmative action regulations.[19] More specifically, the Commission's diversity regulations and policies are designed to advance three types of diversity: viewpoint, outlet, and source.[20]

A. Definitional Difficulties

For a concept of such sweeping importance, the Commission's core definition of diversity has remained conspicuously elusive. As used by the Commission over time, the concept of diversity can and does mean a great

KRATTENMAKER & POWE, *supra* note 3, at 34 ("Because the Communications Act provides no guidance, the FCC, along with its supporters and critics, must redefine every few years just what 'public interest' regulation might mean in the context of the industry and the technology that exists at that specific time."). As Professors Krattenmaker and Powe put it: "neither the words nor history of the standard provides a useful guide to its application." *Id.*

17. *See Metro Broad.*, 497 U.S. at 566–67 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)). The continuing validity of "scarcity" theory has been called into serious question. *See, e.g.*, Nancy R. Selbst, *"Unregulation" and Broadcast Financing: New Ways for the Federal Communications Commission to Serve the Public Interest*, 58 U. CHI. L. REV. 1423, 1426 (1991) ("Many courts and the FCC [have] rejected the scarcity rationale, thereby removing the FCC's primary justification for regulation."). To date, however, the Supreme Court has proven unwilling to scrap the scarcity concept. *See* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1702 (1997) ("Has the Supreme Court gotten the message? It may be sinking in, however slowly."). Both the desirability and the continuing validity of the scarcity rationale are beyond the scope of this article.

18. *See* 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 13 F.C.C.R. 11,276, 11,277 (para. 4) (1998) (notice of inquiry) [hereinafter 1998 Biennial Review].

19. *See Metro Broad.*, 497 U.S. at 566 ("[T]he FCC has selected the minority ownership policies primarily to promote programming diversity . . . ."). The diversity goal is separate from the goal of promoting competition. *See id.* ("Indeed, the Supreme Court has recently stated that 'federal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation.'"); *see also* 1998 Biennial Review, *supra* note 18, at 11,277 (para. 4).

20. *See* 1998 Biennial Review, *supra* note 18, at 11,278 (para. 6). Viewpoint diversity occurs when:

> the material presented by the media reflects a wide range of diverse and antagonistic opinions and interpretations . . . . Outlet diversity refers to a variety of delivery services (*e.g.*, broadcast stations, newspapers, cable and DBS) that select and present programming directly to the public . . . . Source diversity refers to promoting a variety of program or information producers and owners.

Id.

many things: it can refer to the race or gender of a broadcast station's owners;[21] it can refer to the ideology of the owners;[22] it can refer to the net number of separately owned media outlets, whether locally or nationally;[23] it can refer to the types of programs that a particular television or radio station owner broadcasts; or it can refer to the sources of broadcast programming.[24] As will be demonstrated in greater detail below, the diversity concept means all of these things (or so the Commission would have us believe). Given its highly protean nature, the concept of diversity in mass media regulation seems in danger of becoming so hopelessly amorphous as to verge on being meaningless. Notwithstanding this lack of clarity, the Commission invokes the concept with a regularity suggesting that, although the Commission may have difficulty defining diversity, the commissioners, like Justice Potter Stewart with respect to obscenity, "know it when [they] see it."[25]

The Commission's inability to define coherently the concept of diversity has resulted in a confused mix of regulatory policies—a regulatory gumbo that lacks even the pretense of some overarching goal or objective. Instead, the Commission's policies point in all directions of the compass, constituting a series of independent, self-justifying means rather than logical attempts to further some articulable regulatory end.[26]

Notwithstanding this abundant lack of clarity, the federal courts traditionally have deferred to the Commission's various attempts to pursue the public interest goal of diversity.[27] The result is an ambiguous policy without

21. *See Metro Broad.*, 497 U.S. at 554; Lamprecht v. FCC, 958 F.2d 382, 390 (D.C. Cir. 1992).

22. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); *see also* KRATTENMAKER & POWE, *supra* note 3, at 237–75.

23. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 10 F.C.C.R. 3524, 3550–53, 3573–74 (paras. 62–65, 113–15) (1995) (further notice of proposed rulemaking).

24. *See* Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 316 (7th Cir. 1994); Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1054 (7th Cir. 1992).

25. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *cf.* Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145, 147 (1993) (describing the "public interest" standard as so "ill-defined" that it verges on "the point of being meaningless"). Some years ago, the Commission conducted a comprehensive study of its diversity policies. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 10 F.C.C.R. at 3524. Incident to this project, the Commission's staff considered the mish mash of policies that collectively constitute the Commission's diversity project. *See id.* at 3546–59 (paras. 54–80). Notwithstanding this promising start, the Commission has made little progress on reconsidering its diversity programs in a comprehensive fashion. As Commissioner Michael K. Powell recently explained, "diversity is very hard to define, and is at some level a visceral concept." Broadcast Television National Ownership Rules, Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903, 12,987 (1999) (report and order) (separate statement of Commissioner Michael K. Powell).

26. *See generally* Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 582–94 (2000) (describing and critiquing the Commission's various efforts to promote diversity and competition through structural regulation of the commercial broadcasting industry).

27. *See, e.g.*, Metro Broad., Inc.v. FCC, 497 U.S. 547, 596 (1990); *Red Lion Broad.*, 395 U.S. at 396; National Broad. Co. v. United States, 319 U.S. 190 (1943).

focus or direction; the kind of policy that one would expect in the absence of bureaucratic accountability or serious judicial scrutiny.

There is now reason to believe that this state of affairs may be coming to an end. In April 1998, the U.S. Court of Appeals for the District of Columbia Circuit struck down the Commission's equal employment opportunity (EEO) guidelines.[28] Although the court rested its holding on *Adarand*[29] and equal protection principles,[30] it also registered its displeasure with the Commission's attempts to justify the EEO guidelines on diversity grounds. Judge Laurence Silberman not only questioned the Commission's assertion of a link between race and program diversity but also suggested that the Commission had failed to define the goal of diversity in a minimally coherent fashion.[31] In another relatively recent case, Judge Richard Posner, rejecting the Commission's financial interest and syndication rules as arbitrary and capricious, similarly observed that "while the word diversity appears with incantatory frequency in the Commission's opinion, it is never defined."[32]

The federal courts are not alone in their skepticism about the Commission's quest for diversity. Legal scholars have also attacked the Commission's diversity-based policies.[33] Some commentators have gone so far as to call for an end to the Commission's diversity efforts in favor of a free-market paradigm for broadcast regulation.[34] Such an approach is, however, deceptively attractive. Although some of the Commission's policies may be ill-considered—perhaps even incoherent—the objective of avoiding undue concentrations of media power is, and for the foreseeable future will remain, critically important.

B. Manifestations of Diversity

As noted above, the Commission has described its efforts to promote diversity as ongoing attempts to achieve viewpoint, outlet, and source diversity within the broadcast media.[35] In its own way, each of the regulatory manifestations of the diversity goal significantly tax the broadcast indus-

28. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998).

29. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

30. *See Lutheran Church-Missouri Synod*, 141 F.3d at 351–56.

31. *See id.* at 355–56 ("It is at least understandable why the Commission would seek station to station differences, but its purported goal of making a single station all things to all people makes no sense."); *see also* Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 311 (7th Cir. 1994) (dismissing the Commission's attempt to justify its financial interest and syndication rules on program diversity grounds); Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1045–46, 1050–52, 1054 (7th Cir. 1992) (same).

32. *Schurz Comm.*, 982 F.2d at 1054.

33. *See* KRATTENMAKER & POWE, *supra* note 3, at 59–101; Chen, *supra* note 3, at 1440–58; J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1228–38 (1993).

34. *See* PETER HUBER, LAW AND DISORDER IN CYBERSPACE 44–45, 69–75, 156–59, 178–81, 204–05 (1997); KRATTENMAKER & POWE, *supra* note 3, at 278–96; Chen, *supra* note 3, at 1486–1502; Sidak, *supra* note 33, at 1237–38; *see also* 1998 Biennial Review, *supra* note 18, at 11,302 n.1 (separate statement of Commissioner Harold W. Furchtgott-Roth).

35. *See supra* notes 10–20 and accompanying text.

try—including a station's broad strategic business decisions and its day-to-day operations.[36] It is questionable whether these efforts meaningfully advance their stated justifications.

1. Viewpoint Diversity

In 1969, the Commission promulgated rules to further its policy of equal employment opportunity.[37] These rules imposed two basic obligations on broadcasters. First, broadcasters could not discriminate in employment against any person "because of race, color, religion, national origin, or sex."[38] Second, stations had to adopt an affirmative action program targeted at ensuring proper recruitment and retention of female and minority employees.[39] According to the Commission's pre-2000 EEO rules,[40] broadcast stations must "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice."[41] The rules required stations to target minority organizations and other potential sources of minorities for employment recruitment purposes.[42] To monitor compliance, stations with five or more full-time employees had to file a report with the Commission documenting "the number of minority . . . referrals received from [minority sources]."[43] The Commission also compared "the composition of the station's work force . . . with the relevant labor force"[44] to determine whether the following guidelines were met:

36. *See* FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 780 (1978) (characterizing regulations as "stringent restrictions"); *Lutheran Church-Missouri Synod*, 141 F.3d at 349–50 (observing that the EEO program increases "an already significant regulatory burden" and that the regulations "can be burdensome").

37. *See* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240, 243, 245 (para. 6, app. A) (1969) (report and order); *see also* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 23 F.C.C. 2d 430, 435 (app. A) (1970) (report and order); Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766 (1968) (memorandum opinion and order); Leigh Hermance, Comment, *Constitutionality of Affirmative Action Regulations Imposed Under the Cable Communications Policy Act of 1984*, 35 CATH. U. L. REV. 807, 812–15 (describing the early history of the Commission's EEO rules).

38. 47 C.F.R. § 73.2080(a) (1999).

39. *See id.* § 73.2080(b)–(c).

40. On January 21, 2000, the Commission significantly revised its EEO rules. *See* Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies, 15 F.C.C.R. 2329 (2000) (report and order). For a consideration of the content of these new rules, see *infra* notes 67–73 and accompanying text. The Commission's old EEO rules and policies nevertheless remain important because of their significance in understanding the Commission's overarching effort to promote diversity in broadcasting.

41. 47 C.F.R. § 73.2080(b) (1999).

42. *See id.* §§ 73.2080(c)(2)–(3).

43. Streamlining Broadcasting EEO Rule and Policies Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guideline, 11 F.C.C.R. 5154, 5159 (paras. 8–9) (1996) (order and notice of proposed rulemaking) [hereinafter Streamlining Broadcast EEO Rule].

44. *Id.* at 5159–60 (paras. 8–11).

> [S]tations with five to ten full-time employees meet the guidelines if the proportion of minority and female representation on their overall staffs is at least 50% of that relevant labor force, and [if] their upper-level staff is at least 25% of that of the relevant labor force. Stations with 11 or more full-time employees meet the guidelines if the proportion of minority and female representation is at least 50% of that of the relevant labor force for both overall and upper-level job categories.[45]

In short, "[e]very broadcast station must develop a fairly elaborate EEO program and document its compliance."[46] Those requirements involved "paperwork, monitoring, and spending more money on advertisements."[47] The entire program was "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation."[48]

In 1980, the Commission issued revised processing guidelines disclosing the criteria used to select stations for an in-depth EEO program review when those stations' licenses came up for renewal.[49] Those criteria were based solely on a station's ability to demonstrate that it was satisfying certain statistical requirements.[50] In other words, the Commission had established numerical goals that, if met, would mean that a broadcaster was not subject to an onerous, in-depth EEO review.[51]

In 1987, the Commission changed its policy, ostensibly to de-emphasize statistical compliance.[52] Although the Commission continued to place significant reliance on a station's hiring statistics, it announced that it would also consider the station's self-description of its EEO program and policies, any EEO complaints filed against the station, and any other pertinent information.[53] At least as a formal matter, the Commission was abandoning a numbers-based enforcement scheme. As a practical matter, it remained reasonably clear to most licensees that race-based statistical

45. *Id.* at 5160 (para. 11).

46. Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 350 (D.C. Cir. 1998), *reh'g and reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998) (en banc); *see also* 47 C.F.R. §§ 73.2080(b)–(c) (1999).

47. *Lutheran Church-Missouri Synod*, 141 F.3d at 350; *see also* Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 707 (9th Cir. 1997).

48. *Lutheran Church-Missouri Synod*, 141 F.3d at 352.

49. *See In re* EEO Processing Guidelines for Broadcast Renewal Applicants, 46 Rad. Reg. 2d (P&F) 1693, 1693 (1980) [hereinafter EEO Processing Guidelines], *reconsideration denied*, 79 F.C.C.2d 922 (1980); *see* Amendment of Part 73 of the Commission Rules Concerning Equal Employment Opportunity in the Broadcasting, Radio, and Television Services, 2 F.C.C.R. 3967, 3973–74 (paras. 44–50) (1987) (report and order) [hereinafter Part 73 Amendment].

50. Essentially the Commission required that a station recruit and retain a workforce that contained minority persons in numbers equal to 50% of their total numbers within the local community. Hence, if Hispanics comprised 12% of the local community's population, then at least 6% of the a local station's employees must be Hispanic to avoid full review of its compliance with the EEO requirements. *See* EEO Processing Guidelines, *supra* note 49, at 1693.

51. *See* Part 73 Amendment, *supra* note 49, at 3969–70, 3973–74 (paras. 17–23, 44–50); *see also Lutheran Church-Missouri Synod*, 141 F.3d at 353 (noting that these regulations "operated as a '*de facto* hiring quota'").

52. *See* Part 73 Amendment, *supra* note 49, at 3969–70, 3973–74 (paras. 17–23, 44–50).

53. *See id.* at 3974 (paras. 48–50).

analyses would continue to constitute an important component of the Commission's EEO enforcement regime. As under the earlier iterations of its EEO rules, if the Commission concluded that a station failed to comply with its EEO rules and policies, the station's application for license renewal could be denied[54] or a panoply of lesser sanctions brought to bear.[55]

In 1996, the Commission proposed new EEO rules that would exempt from the reporting requirements those stations that satisfy an as-yet-undetermined benchmark.[56] Under this approach:

> [Q]ualifying stations would remain subject to the EEO rule and to reporting requirements regarding their employment profile and other EEO information called for as part of the renewal application but could elect not to file, submit, or retain detailed job-by-job recruitment and hiring records if their employment profile for overall and upper-level positions met certain benchmarks for most of the licensed term.[57]

In essence, the benchmark would expressly serve as a safe harbor for stations. Yet the current EEO rules, as interpreted by the Commission and its staff, already effectively established a numerical safe harbor for broadcasters, albeit not expressly.

Following a significant judicial setback in the U.S. Court of Appeals for the District of Columbia Circuit in *Lutheran Church-Missouri Synod v. FCC*,[58] the Commission issued another notice of proposed rulemaking in an attempt to rehabilitate its EEO rules and policies in the wake of *Adarand*.[59] Repeating its earlier position, the Commission argued that it "believe[d] that a Commission recruitment policy that operates only to enhance the pool of candidates for a job opening will not subject anyone to unequal treatment on the basis of race and will not raise equal protection concerns."[60] After citing evidence of congressional approval of its outreach efforts,[61] the Commission proposed to modify its EEO program by abandoning the statistical parity requirements contained in its processing guidelines: "We stress that there is no maximum, minimum, or even optimal level of diversity in employment."[62]

Although the Commission stubbornly refuses to abandon its diversity rationale to support its revised EEO program,[63] it wisely adopted—as an

54. *See* Streamlining Broadcast EEO Rule, *supra* note 43, at 5160–61 (paras. 11–15).

55. The less draconian options open to the Commission included short-term license renewal, the imposition of special reporting requirements during the renewal period, or the imposition of monetary penalties (or a "forfeiture" in Commission parlance). *See* Broadcast and Cable EEO Review, *supra* note 12, at 23,006–08 (paras. 7–10).

56. *See* Streamlining Broadcast EEO Rule, *supra* note 43, at 5166–67 (paras. 24–27).

57. *Id.*

58. 141 F.3d 344 (D.C. Cir. 1998).

59. *See* Broadcast & Cable EEO Review, *supra* note 12, at 23,008–12 (paras. 11–21).

60. *Id.* at 23,012 (para. 21).

61. *See id.* at 23,014–23 (paras. 26–35).

62. *Id.* at 23,028 (para. 67).

63. *See id.* at 23,019–22 (paras. 39–45).

alternative justification for the rules—the deterrence of both conscious and unconscious forms of discrimination by Commission licensees.[64] Moreover, the Commission's introduction to the proposed new rules also invokes nondiscrimination as the principal motivation for attempting to retain the policy.[65] The Commission describes its proposed policy as an antidiscrimination rule, rather than a type of diversity-enhancement rule.[66]

On January 20, 2000, the Commission adopted a report and order revising the EEO guidelines to bring them into compliance with the mandate of the *Lutheran Church* opinion.[67] The report and order largely tracks the notice of proposed rulemaking: it abandons numerical benchmarks in favor of an open-ended recruiting obligation to seek out and hire well-qualified minorities and women, coupled with extensive record keeping and reporting obligations on the success (or failure) of these efforts.[68] The Commission takes great pains to "emphasize that, in the case of those broadcasters who utilize applicant pool data, there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force."[69] The Commission also asserts that the required outreach measures "do not require employers to take any action based on race, ethnicity, or gender, and do not favor or disadvantage any job applicant based on his or her race, ethnicity, or gender."[70]

To the extent that the Commission has abandoned direct reliance on statistical quotas or benchmarks, the revised EEO rules are largely responsive to the D.C. Circuit's mandate in *Lutheran Church*. On the other hand, the Commission stubbornly continues to rely on the diversity rationale to support its revised EEO program.[71] The new rules would stand a better chance of surviving judicial review if the Commission would simply abandon the diversity rationale as the basis for its EEO program and instead rely solely on preventing both conscious and unconscious forms of discrimination.[72] Simply put, the Commission would have advanced its cause

64. *See id.* at 23,025–26 (paras. 59–60).

65. *See id.* at 23,005–06 (paras. 1–6).

66. *See id.* at 23,013–14 (paras. 24–25).

67. *See* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rule and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. 2329 (2000) (report and order).

68. *See id.* at 2331–33, 2358–89 (paras. 2–9, 63–148), *see also* Neil A. Lewis, *F.C.C. Revises Rule on Hiring of Women and Minorities*, N.Y. TIMES, Jan. 21, 2000, at A16 (describing the new EEO rules and the broadcasting industry's skeptical initial reaction to them).

69. Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rule and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. at 2378 (para. 120).

70. *Id*. at 2416 (para. 219); *see also id.* at 2417 (para. 222) ("We have made it clear that there is no requirement of applicant pool 'proportionality' to the composition of the local work force, nor could there be, since employers cannot control who applies for a position."); *id.* at 2418 (para. 226) ("Moreover, having stated that we will not use the employment profile data collected on Form 395 to assess compliance with our EEO rules, we will be legally foreclosed from doing so.").

71. *See id.* at 2331, 2345–46, 2349–58 (paras. 2, 41, 48–62).

72. *See, e.g.*, *id.* at 2419 (para. 228) ("Thus, we are confident that we can take steps to ensure that minorities and women are not either intentionally or 'unthinkingly' denied an equal opportunity to compete for jobs in the broadcast and cable industries without treading on rights guaranteed by the Equal Protection Clause.").

more effectively had it straightforwardly abandoned the diversity project as a principal reason for maintaining its EEO policies.[73]

Even in its most recent pronouncements on the subject, including the newly revised EEO rules, the Commission continues to rest its EEO program (at least in part) on the viewpoint definition of diversity.[74] Implicit in this position is the Commission's belief that by employing minorities at broadcast stations, minority viewpoints will be reflected in the station's programming.[75] There is good reason, however, to question the veracity of this proposition.

First, the Commission has, at least implicitly, based its position on an untested assumption that most individuals within a particular minority group generally share a common editorial viewpoint.[76] Second, the Commission's approach also assumes that all employees at a given broadcast station, including janitorial staff (all employees fall within the EEO rules), have an impact on the viewpoints expressed in a station's programming.[77] Both assumptions rest on questionable foundations.

In addition to its EEO policies, the Commission has established four separate programs—two are still in effect today—to further its goal of enhancing viewpoint diversity by distributing licenses to those believed to hold unique editorial perspectives. These programs are lottery preferences,[78] comparative hearing preferences,[79] distress sales,[80] and tax certificates.[81]

The Federal Communications Act gives the Commission the power to grant broadcast licenses through a lottery, with additional chances given to minority groups.[82] The relevant provision of the Communications Act defines minorities for this purpose as "Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders."[83] The purpose of the additional chances is "[t]o further diversify the ownership" of stations.[84]

73. *See infra* notes 435–63 and accompanying text.

74. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354–56 (D.C. Cir. 1998); Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rule and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. at 2332, 2336–37, 2345, 2349–58 (paras. 4, 21, 41, 48–62).

75. *See* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rule and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. at 2349–58 (paras. 48–62).

76. *See infra* notes 125–26 and accompanying text.

77. *See Lutheran Church-Missouri Synod*, 141 F.3d at 354–56.

78. *See infra* notes 82–84 and accompanying text.

79. *See infra* notes 85–95 and accompanying text.

80. *See infra* notes 96–101 and accompanying text.

81. *See infra* notes 102–07 and accompanying text.

82. *See* 47 U.S.C. § 309(i) (1994).

83. *Id.* § 309(i)(3)(C)(ii).

84. *Id.* § 309(i)(3)(A); *see* Implementation of Section 309(j) of the Communications Act, 14 F.C.C.R. 12,541 (1999) (memorandum opinion and order); Implementation of Section 309(j) of the Communications Act, 13 F.C.C.R. 15,920, 15,921 (para. 1) (1998) (first report and order).

Until very recently, the Commission also utilized comparative hearings to award radio and television licenses.[85] Under this scheme, "[w]hen several applicants ask the [Commission] for the same license, the [Commission] compares several relevant characteristics of the applicants, combines the comparisons to form an overall evaluation of which broadcaster would best serve the 'public interest' and then awards the license to the best applicant."[86] Ordinarily, the relevant "comparative criteria" would include "diversification of ownership of mass media, integration of ownership with management, and technical virtuosity."[87] Under certain circumstances, however, the Commission would assign an "enhancement" or "merit" point to a minority applicant.[88] For example, "[t]he FCC awards a merit under the diversification-of-ownership criterion to an applicant if a substantial percentage of the applicant is owned by one or more minorities."[89]

Interestingly, in *TV 9, Inc. v. Federal Communications Commission*,[90] the Commission argued that "because the Federal Communications Act was 'color-blind,' it would take an applicant's race into account only to the extent that the applicant could show that its owner's race would likely lead to better, more diverse programming in the particular case."[91] The U.S. Court of Appeals for the District of Columbia Circuit rejected the Commission's position. Instead, the court "essentially requir[ed] the FCC to award a merit to all minority applicants without any demonstration that the award would improve programming service."[92] Accordingly, in the comparative hearing context, minority status[93] by itself would potentially result in preferential treatment. The Commission did not require any proof of a meaningful connection between minority station ownership and viewpoint diversity before granting a preference.[94] Although the Commission attempted to extend its comparative hearing preference to female applicants, the D.C.

85. The Communications Act of 1996 generally requires the Commission to auction unissued licenses for television and radio stations to the highest bidder. *See* 47 U.S.C. §§ 309(j) (Supp. III 1997). Consistent with this mandate, the Commission is planning on using auctions to distribute all open licenses for commercial television and radio stations. *See* Bill McConnell, *FCC Sets Broadcast Auction*, BROADCASTING & CABLE, May 17, 1999, at 19, 19–20.

86. Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 297–98 (1990–91); *see also* 47 U.S.C. §§ 301, 307, 309 (1994).

87. Spitzer, *supra* note 86, at 298; *see also* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394–95 (1965).

88. Spitzer, *supra* note 86, at 298; *see also* West Mich. Broad. Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); Central Fla. Enter. v. FCC, 598 F.2d 37, 49–51 (D.C. Cir 1978), *cert. dismissed*, 441 U.S. 957 (1979).

89. Spitzer, *supra* note 86, at 298.

90. 495 F.2d 929, 936 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

91. Spitzer, *supra* note 86, at 298.

92. *Id.* at 298–99 (citing *TV 9*, 495 F.2d at 938).

93. The Commission later expanded this rule to include women; however, the Commission granted women a preference "of lesser significance." *See* Application of Mid-Florida Television Corp., 69 F.C.C.2d 607, 652 (para. 95) (1978).

94. *See* Spitzer, *supra* note 86, at 299.

Circuit twice rejected the Commission's effort to expand the program in this way.[95]

The distress sale program likewise grants minorities a benefit based solely on their minority status and on the assumption that a reasonably direct link exists between minority ownership and a station's programming policies.[96] When the Commission has good cause to question whether a particular broadcast licensee remains qualified to hold a license, the Commission issues an order to show cause and schedules a hearing to take evidence on the question of the licensee's fitness and character.[97] Before that hearing takes place, "the licensee may arrange to sell the license to a minority purchaser for not more than seventy-five percent of fair market value."[98] In return for that investment, the minority purchaser receives a "clean" license.[99] The Commission implemented the distress sale policy to further the goal of "[f]ull minority participation in the ownership and management of broadcast facilities [that] results in a more diverse selection of programming."[100] The Commission has not extended the distress sale policy to female purchasers.[101]

The final policy, tax certificates, was designed to increase minority ownership and management of broadcast facilities, thereby diversifying the programming available to the public.[102] Under the tax certificate policy, the Commission granted the seller of a license a tax certificate when the seller transferred a station to "parties with a significant minority interest."[103] Via the tax certificate, the seller was permitted to defer any capital gain tax on the sale, provided that the monies were reinvested within a certain time.[104]

95. *See* Lamprecht v. FCC, 958 F.2d 382, 383–86 (D.C. Cir. 1992); Steele v. FCC, 770 F.2d 1192, 1193–94, 1196–99 (D.C. Cir. 1985).

96. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 567–72, 579–89 (1990) (sustaining the distress sale policy on diversity grounds and accepting the Commission's argument that race serves as an effective proxy for viewpoint); Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980–81 (1978) (defending the need for distress sales because "representation of minority viewpoints in programming serves not only the needs and interests of the minority community . . . . It enhances the diversified programming which is a key objective . . . of the Communications Act of 1934."); David P. Stoelting, Case Note, *Minority Business Set-Asides Must Be Supported by Specific Evidence of Prior Discrimination*, 58 U. CIN. L. REV. 1097, 1133 (1990) ("The purpose of the distress sale policy was to encourage a diversity of viewpoints in the airwaves by diversifying ownership and to remedy the effects of past discrimination in the broadcast industry.").

97. *See* Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d at 981; *see also* Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841, 845 (1995).

98. Dubin & Spitzer, *supra* note 97, at 845.

99. *See id.*

100. Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d at 981. Of course, there is no empirical data to support that conclusion.

101. *See* Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration, 69 F.C.C.2d 1591, 1593 n.9 (1978) (memorandum opinion and order) ("[W]e have not concluded that the historical and contemporary disadvantagement suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a majority of the nation's population in a preferential category defined by the presence of 'minority groups.'").

102. *See* Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d at 983.

103. *Id.*; *see also* 26 U.S.C. § 1071 (1994).

104. *See* Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d at 983.

Because of the clear tax benefits, "[t]his policy gave the seller a substantial incentive to seek out qualified minority buyers and accept offers from minority buyers even where the minorities offered less money than prospective white purchasers."[105] As with the distress sale program, the tax certificate program when in force did not apply to women.[106] In 1995, Congress repealed the statutory provision authorizing the issuance of tax certificates; to date, Congress has not passed legislation reinstating the availability of the tax certificate program.[107]

2. Outlet Diversity

The Commission has imposed several restrictions on the number and combination of stations that any one broadcaster may own or control.[108] These restrictions include the "duopoly" rule,[109] the "one-to-a-market" rule,[110] the daily newspaper/radio cross-ownership rule,[111] local radio owner-

105. *Id.* at 981.

106. *See* Spitzer, *supra* note 86, at 299–300.

107. *See* Bill McConnell, *Push for Minority Tax Certificates*, BROADCASTING & CABLE, Mar. 29, 1999, at 9, 9. Commissioner Michael Powell and Senator John McCain currently support legislation to revive the minority tax certificate program. *See* Paige Albiniak & Bill McConnell, *McCain Floats Tax Certificate Draft*, BROADCASTING & CABLE, Sept. 20, 1999, at 22, 22; David Hatch, *McCain Unveils Tax Certificate Plan*, ELECTRONIC MEDIA, Apr. 26, 1999, at 4, 27.

108. *See* 47 C.F.R. § 73.3555 (1998) .

109. This rule formerly stated "that a party may not own, operate or control two or more broadcast television stations with overlapping 'Grade B' signal contours." 1998 Biennial Review, *supra* note 18, at 11,279–80 (para. 9) (quoting 47 C.F.R. § 73.3555(b) (1998)). This effectively meant that a single entity could not own or control two television stations within the same community or even in closely neighboring communities (e.g., Washington, D.C., and Baltimore, Maryland). The Commission repealed the duopoly rule in August 1999 and replaced it with a "two-to-a-market" rule, provided that certain conditions are satisfied. Under the new rules, a single entity may own or control two television stations in the same market if the second station is not among the top four stations in ratings and the market has at least eight separately owned stations. *See* 47 C.F.R. § 73.3555 (1998); Broadcast Television National Ownership Rules, Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903, 12,907–12, 12,975–77 (paras. 8–12, app. B) (report and order) (1999). The Commission will also permit a single entity to own or control two television stations in a market if the second station has failed, is failing, or remains unbuilt notwithstanding the issuance of a valid license and construction permit. *See* 47 C.F.R. § 73.3555 n.7 (1998); Broadcast Television National Ownership Rules, Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. at 12,954–58 (paras. 115–25).

110. Prior to August 1999, this rule "generally prohibit[ed] the common ownership of a television and radio station in the same market." 1998 Biennial Review, *supra* note 18, at 11,279 (para. 9) (quoting 47 C.F.R. § 73.3555(c) (1998)). In 1989, the Commission amended this rule to state that it would:

> "look favorably" on requests for waiver of the restrictions in the top 25 television markets if, after the merger, at least 30 independently owned broadcast voices remain, or if the merger involved a "failed station." Case-by-case review of a waiver of request is also provided for in instances where the presumptive waiver of criteria are not present. Section 202(d) of the [Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(d), 110 Stat. 56, 111] directed the Commission to extend its presumptive waiver policy to the top fifty television markets if it finds that doing so would be in the public interest.

Id. In August 1999, the Commission abandoned the one-to-a-market rule, permitting a single entity to own both a television station and a radio station in the same community of license. *See* Broadcast Television National Ownership Rules, Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. at 12,947–53 (paras. 100–114). Having repealed the one-to-a-market rule, the Commission now claims to be out of the waiver business. *See* Bill McConnell, *No Favors, No Waivers*, BROADCASTING & CABLE, Sept. 13, 1999, at 24, 24.

ship rules,[112] the dual network rule,[113] the UHF and television discount,[114] and the daily newspaper/broadcast cross-ownership rule.[115] All of these multiple ownership rules rest on the "twin goals of promoting diversity and economic competition."[116] Outlet diversity bears a close relationship to viewpoint diversity; by dividing up the ownership of media assets, the Commission hopes to ensure the distribution of diverse programming and, hence, viewpoints.

3. Source Diversity

The Commission, in its continuing effort to foster source diversity, adopted financial interest and syndication rules (commonly known as the

111. This rule "generally prohibits the common ownership of a daily newspaper and a radio station in the same community" and applies to all newspaper/broadcast cross-ownership situations. 1998 Biennial Review, *supra* note 18, at 11,279 (para. 9) (citing 47 C.F.R. § 73.3555(d) (1998)).

112. Section 202(b) of the Telecommunications Act of 1996 directed the Commission to relax its radio multiple ownership rules to allow common ownership as follows:

> (A) in radio markets with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (B) markets with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service; (C) markets with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service; and (D) in markets with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(b)(1), 110 Stat. 56, 110. Also, Section 202(a) of the Telecom Act directed the Commission to eliminate its national radio ownership restrictions, which the Commission has now done; consequently, there are now no limits on the number of radio stations that may be owned nationally. *See id*. § 202(a), 56 Stat. at 110; Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996, 11 F.C.C.R. 12368, 12,368–69 (para. 2) (1996) (order).

113. Section 202(e) of the Telecom Act directed the Commission to revise its "dual network" rule order, 47 C.F.R. § 73.658(g). *See* Telecommunications Act § 202(e), 56 Stat. at 111. Under the pre-Telecom Act dual network rule, "the Commission generally prohibited a party from affiliating with a network organization that maintained more than one network of television broadcast stations." 1998 Biennial Review, *supra* note 18, at 11,283–84 (para. 24). Pursuant to a directive in the Telecom Act, the Commission revised the rule:

> to permit a television broadcast station to affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such networks are composed of: (1) two or more persons or entities that were "networks" upon the date the Telecom Act was enacted; or (2) any such network in an English-language program distribution service that on the date of the Telecom Act's enactment provided 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations and markets reaching more than 75 percent of television households.

Id. (footnotes omitted).

114. The national television ownership rule states that an entity may own any number of television stations (subject to the restrictions of the local ownership rule) so long as "the combined audience reach of the stations does not exceed 35 percent, as measured by the number of television households and their respective ADIs [Area of Dominant Influence]. Under [the Commission's] rules, UHF television stations are attributed with 50 percent of the television households in their ADI market." 1998 Biennial Review, *supra* note 18, at 11,284 (para. 25) (citing 47 C.F.R. § 73.3555(e)(2)(i) (1997)).

115. This "rule prohibits the common ownership of a broadcast station and a daily newspaper in the same locale." *Id.* at 11,285–86 (para. 28) (citing 47 C.F.R. § 73.3555(d) (1994)).

116. *Id.*

fin/syn rules).[117] These rules "limit network control over television programming and thereby foster diversity of programming through the development of diverse and antagonistic programming sources, [and restrict] the ability of the three established networks (ABC, CBS, NBC) to own and syndicate television programming."[118]

Under severe judicial criticism,[119] the Commission "voluntarily" scrapped these rules because it was unable to demonstrate that the rules advanced the goal of ensuring diversity with respect to programming sources.[120] Given the existence of a competitive marketplace for programming and the emergence of two new television networks,[121] the fin/syn rules no longer served their original purpose of fostering diversity in television program production and distribution markets.[122] The Commission also determined that the networks likely would not act in ways detrimental to programming source diversity following deregulation,[123] and if they should attempt to do so, antitrust laws would provide an adequate remedy.[124]

C. Incoherence and Contradictions in the Diversity Programs' Definitions and Goals

With the possible exception of the Commission's attempts to create structural diversity through its multiple station ownership restrictions, the Commission's diversity efforts have not achieved their intended goals and purposes. Indeed, in at least some instances, the Commission's efforts have perhaps impeded the goal of promoting a particular manifestation of diversity.

117. *See* Suzanne Rosencrans, *The Questionable Validity of the Network Syndication and Financial Interest Rules in the Present Environment*, 43 FED. COMM. L.J. 65, 65–68 (1990); Tamber Christian, *The Financial Interest and Syndication Rules—Take Two*, 3 COMMLAW CONSPECTUS 107, 107–09 (1995); Marc L. Herskovitz, Note, *The Repeal of the Financial Interest and Syndication Rules: The Demise of Program Diversity and Television Network Competition?*, 15 CARDOZO ARTS & ENT. L.J. 177 (1997).

118. Review of the Syndication and Financial Interest Rules, Sections 73.659–73.663 of the Commission's Rules, 10 F.C.C.R. 12,165, 12,165 (para. 3) (1995) (report and order).

119. *See, e.g.*, Capital Cities/ABC, Inc., v. FCC, 29 F.3d 309 (7th Cir. 1994); Schurz Comm. v. FCC, 982 F.2d 1043 (7th Cir. 1992).

120. *See* Review of the Syndication and Financial Interest Rules, Sections 73.659–73.663 of the Commission's Rules, 10 F.C.C.R. at 12,168–71 (paras. 16–30); Review of the Syndication and Financial Interest Rules, Sections 73.655–73.663 of the Commission's Rules, 10 F.C.C.R. 5672, 5672–73 (paras. 1–9) (1995) (notice of proposed rule making); Evaluation of the Syndication and Financial Interest Rules, 8 F.C.C.R. 3282, 3284–3311 (paras. 3–52) (1993).

121. The Commission was referring to UPN and Fox. *See* Review of the Syndication and Financial Interest Rules, 10 F.C.C.R. at 12,169–71 (paras. 23–27). In the last five years, two additional networks have entered the scene: Warner Brothers and PAX. *See* John Marks, *TV's Lucky Seventh?*, U.S. NEWS & WORLD REP., Sept. 7, 1998, at 38.

122. *See* 1998 Biennial Review, *supra* note 18, at 11,285–86 (para. 28).

123. *See id.* at 11,277 (para. 3).

124. *See id.*

1. Race as a Proxy for Programming

Historically, the Commission's EEO rules assume that a person holds a predetermined set of viewpoints based on his race.[125] Those viewpoints will then, by virtue of that person's mere presence at a broadcast station, contribute to the diversity of viewpoints reflected in that station's programming. Yet there simply is no reliable empirical evidence linking a person's minority status to his viewpoints.[126] Moreover, the Commission has failed to consider other means of promoting program diversity that do not rely on suspect race- and gender-based classifications.[127] These same observations also apply to the Commission's attempts to vest broadcasting licenses with minority station owners.[128]

2. Monopoly Promotes Programming Diversity

The multiple ownership restrictions the Commission has imposed[129] are effective at fostering competition in local media markets. A consequence of fostering that competition, however, might be a net decrease in the number of programming formats available within a particular media market. More specifically, broadcasters receive their income from advertising revenues. In turn, these advertising revenues are contingent on the popularity of the station's programming with local viewers or listeners. The larger the audience the station generates, the higher the station's potential advertising revenues. Broadcasters, therefore, attempt to find and air programming that will appeal to the largest possible audience. In doing so, broadcasters necessarily air programming that is likely to appeal to most people within the potential audience—that is, they air programming that appeals to the majority culture's viewpoint.

In contrast, if a broadcast station owner owned multiple stations in a particular local market, he would be better able to target individual niche markets (minority culture viewpoints) via different programming formats on separate stations without fearing a diminution in his core or base audience.[130] In the presence of a competing station with the same or a similar format, however, the core local audience might simply tune in to the competitor if the broadcaster did not offer a host of fairly similar programming options. Preventing or limiting the ability of broadcasters to own multiple

125. *See supra* notes 21–34 and accompanying text.

126. The Commission has been unable to point to "a single piece of evidence" that links low-level employees to programming content. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998); *see also* Lamprecht v. FCC, 958 F.2d 382, 398 (D.C. Cir. 1992) (holding that the Commission's attempts to establish a sex-based preference were unconstitutional because the Commission failed to proffer evidence supporting a link between female ownership and "female programming").

127. *See infra* notes 252–56 and accompanying text.

128. *See infra* notes 257–316 and accompanying text.

129. *See supra* notes 37–67 and accompanying text.

130. *See* Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1054–55 (7th Cir. 1992); KRATTENMAKER & POWE, *supra* note 3, at 40–45.

stations within a single market significantly impairs the ability of broadcasters to target niche audiences, primarily because doing so would result in a net loss of advertising revenue. Thus, the multiple ownership restrictions can actually diminish programming diversity within a single market.

On the other hand, significant benefits may be associated with diversifying the ownership of media outlets, even if such diversification leads to fewer programming formats within a particular market.[131] The owners of a television or radio station possess a unique ability to influence the direction of public affairs through selective coverage of contemporary events and candidates for public office.[132] Thus, the Commission must choose a course between pursuing policies likely to lead to diversity in program formats and policies designed to limit the concentration of media holdings in too few hands. Because the means to each objective are directly contradictory, it is not possible to pursue both objectives simultaneously.

D. Divided Media Power as Public Good

The Framers took great pains to divide and separate political power. Not content with creating a federal system in which the states and the federal government would compete for power and influence, they further divided power at the federal level by establishing three largely independent branches of government.[133] The Framers feared that undue concentrations of political power would lead to tyranny.[134] If it was prudent for the Framers to fear the ill effects of unchecked political power, we should consider carefully the potential ill effects associated with unchecked concentrations of media power.

To be sure, concentrations of political power present a more direct kind of threat to democracy than do concentrations of media power. That said, it is possible to use media power as a means of channeling, if not controlling, the flow of political power.[135] The owner of a television or radio station has a unique opportunity to influence the outcomes of electoral contests—both by reporting on candidates favorably and unfavorably and

131. *See infra* notes 317–38 and accompanying text; *see also* Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903, 12,914–16 (paras. 21–24) (1999) (report and order).

132. *See* Office of Comm. of the United Church of Christ v. FCC, 359 F.2d 994, 998 (D.C. Cir. 1966); *see also* Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. at 12,911–14 (paras. 17–21).

133. *See* THE FEDERALIST NO. 9, at 47 (Alexander Hamilton) (Random House 1937); THE FEDERALIST NO. 46, at 304 (James Madison) (Random House 1937); THE FEDERALIST NO. 47, at 312 (James Madison) (Random House 1937); THE FEDERALIST NO. 51, at 335 (Alexander Hamilton & James Madison) (Random House 1937).

134. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1362–74, 1403–05 (1997).

135. As Professor Patricia Williams has explained: "[T]he property of the communications industry is all about the production of ideas, images, and cultural representations, but it also selectively silences even as it creates." Patricia J. Williams, Comment, Metro Broadcasting, Inc. v. FCC*: Regrouping in Singular Times*, 104 HARV. L. REV. 523, 537 (1990).

through benign (or malign) neglect. Media exposure is like oxygen to candidates for political office, particularly at the federal level. If a television station pretends that a candidate does not exist, her chances of election are considerably reduced.[136]

It is certainly true that candidates for federal office have a statutory right of access to television and radio stations.[137] Accordingly, if a candidate for federal office has sufficient funds available, she can use the mass media to reach the electorate regardless of whether a particular radio or television station's owners support the candidate or her policies.[138] As a practical matter, however, this right of access means little in the face of concerted negative media coverage. Ross Perot, for example, spent millions of dollars to promote his candidacy for the presidency in 1992 and 1996, but persistent negative media coverage of his candidacy significantly blunted the effectiveness of those expenditures.[139] Although money can be used to influence the outcome of elections, sometimes even distorting the process of democratic deliberation,[140] its power is significantly limited by the broadcast media's ability to drown out any message it does not find congenial.

This linkage between media power and political power gives rise to a compelling need to check media power to avoid disruption of the electoral process. Just as unchecked political power presents an unacceptable threat to liberty, so, too, unchecked media power requires structural controls to maintain a viable marketplace of ideas.[141] To the extent that the Commission's diversity policies have as their objective dividing and checking media power, these policies serve a critical function. Critics of the Commission's policies who advocate sole reliance on market forces to protect diversity have simply failed to consider the importance of maintaining structural di-

136. In this regard, consider the fate of minor party presidential candidates. Very few readers could even name the Libertarian Party's candidate for president in the 1996 general election, even though Harry Browne's name appeared on every state ballot in the country. *See* Donald P. Baker, *Third Party "Musketeers" Duel on TV*, WASH. POST, Oct. 23, 1996, at A20. *But see* Arkansas Educ. Television Comm. v. Forbes, 523 U.S. 666, 683 (1998) (upholding against a First Amendment challenge the editorial discretion of a publicly owned and operated television station to exclude "minor" candidates from a televised candidates' debate). In the 1996 presidential election, local television and radio stations did not go out of their way to disparage the Libertarian Party candidate—they simply ignored him. The net effect was quite the same.

137. *See* 47 U.S.C. §§ 312(a)(7), 315 (1994).

138. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

139. This is not to say, however, that Mr. Perot's own efforts did his candidacy much good. *See* Kenneth T. Walsh & Linda Kulman, *The Gilded Age of American Politics: Millionaires Are Lining up to Run for Office*, U.S. NEWS & WORLD REP., May 20, 1996, at 26. Although Mr. Perot spent over $60 million of his own money on his 1992 presidential campaign, he won only 19% of the popular vote. *See id.* Other unsuccessful candidates who have expended large sums of money without generating much electoral success include Michael Huffington, who spent $30 million on his 1994 California senate race; Steve Forbes, who spent $37 million on his 1996 primary campaign for the GOP presidential nomination; and Al Checchi, who spent a record-setting $38 million on his primary campaign for governor of California but received only 22% of the popular vote. *See* Dan Balz, *Once Again, It's Okay to Be a Politician*, WASH. POST, June 4, 1998, at A1; Jack Germond & Jules Witcover, *Elections for Sale? Not Very Often*, SAN DIEGO UNION-TRIBUNE, Nov. 29, 1997, at B10; *Big Spenders Facing California Voters*, NEWSDAY, June 3, 1998, at A19.

140. *See* Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470 (1997).

141. *See infra* notes 317–38 and accompanying text; *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 56 (1948).

versity among the electronic media as a means of enhancing democracy. Of course, to concede that a strong rationale exists for structural regulations that promote diversity within the broadcast media is not to say that the Commission's current regulations meet this need effectively.

III. DIVERSITY AS RACE: A PROBLEMATIC APPROACH TO IMPLEMENTING THE DIVERSITY PROGRAM

Even conceding the utility of diversity as a cornerstone principle in federal broadcast regulation, the Commission's efforts to implement this goal have been wildly wide of the mark. Consider, for example, the Commission's attempts to increase the number of minority-owned radio and television stations and its concurrent efforts to promote the employment of minorities by broadcast licensees. Using the rubric of diversity, the Commission has attempted to implement a variety of race- and gender-based programs. Although the federal courts once demonstrated a willingness to acquiesce in such efforts, recent developments suggest that this aspect of the Commission's diversity agenda could be in grave danger.

A. Metro Broadcasting *and Diversity*

In 1990, the Supreme Court issued its landmark opinion *Metro Broadcasting, Inc. v. FCC*.[142] *Metro Broadcasting* upheld the validity of the Commission's comparative preference and distress sale policies against arguments that these policies violated the equal protection principle implicit in the concept of due process of law.[143] The Court held that ostensibly "benign" racial classifications would pass constitutional muster only if the classifications "serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."[144] Applying that standard, the Court concluded that programming diversity is an "important governmental objective" and can "serve as a constitutional basis for the preference policies."[145] The Court then found program diversity "substantially related" to minority ownership.[146] In so doing, however, the Court gave "Congress and the FCC every possible benefit of the doubt."[147] In fact, "[t]he Court refused to examine the facts behind FCC policies, refused to question congressional findings, and characterized the

142. 497 U.S. 547 (1990).

143. *Id.* at 552; *see* Bolling v. Sharpe, 347 U.S. 497, 500 (1954); *see also* U.S. CONST. amend. XIV, § 1.

144. *Metro Broad.*, 497 U.S. at 549.

145. *Id.* at 566.

146. *Id.*

147. Dubin & Spitzer, *supra* note 97, at 849–50. As a preliminary matter, the Court noted that "[i]t is of overriding significance . . . that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress." *Metro Broad.*, 497 U.S. at 563. The Court observed that based on general separation of powers principles, it should provide an appropriate level of deference to such congressional findings. *Id.* (citing Fullilove v. Klutznick, 448 U.S. 448 (1980)). Ultimately, the Court placed great emphasis on the fact that Congress had blessed the Commission's programs. *See id.* at 564–65.

relevant legislative history in a very deferential fashion."[148] Whether such deference was actually justified is a matter open to serious doubts.[149]

Although the Court noted that Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications,"[150] the Court explained that "Congress and the Commission [did] not justify the minority ownership policies strictly as remedies for victims of this discrimination . . . ."[151] Instead, the Commission argued that its minority ownership policies existed "primarily to promote programming diversity."[152] The Court accepted this justification and concluded that the "interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies."[153]

In analyzing the second prong of its equal protection inquiry, the Court held that "the minority ownership policies are substantially related to the achievement of the Government's interest" in enhancing broadcast diversity.[154] The Court reached this conclusion without the benefit of any definitive empirical evidence demonstrating the existence of such a relationship. Indeed, the Court relied on the Commission's conclusory statement that there is "an empirical nexus between minority ownership and broadcasting diversity,"[155] noting that this conclusion was a "product of [the Commission's] expertise."[156] In consequence, the Court accorded the Commission's statements the requisite deference.[157] The Court also noted that "Congress . . . has made clear its view that the minority ownership policies advance the goal of diverse programming."[158] Although the Court engaged in a lengthy discussion of the congressional history of dealing with minority ownership issues in the broadcast context,[159] nowhere did the Court point to any concrete congressional factual findings demonstrating that the policies effectively advanced the goal of diverse programming.[160]

Four dissenting Justices (who subsequently joined the *Adarand* majority) maintained that the Commission's desire to use race as a proxy for

148. *Id.*

149. *See generally* Neal Devins, Metro Broadcasting, Inc. v. FCC*: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990).

150. *Metro Broad.*, 497 U.S. at 566 (quoting H.R. CONF. REP. NO. 97-765, at 43 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2261, 2287).

151. *Id.* at 566; *see also id.* at 611 (O'Connor, J., dissenting) ("The FCC appropriately concedes that its policies embodied no remedial purpose . . . and has disclaimed the possibility that discrimination infected the allocation of licenses.").

152. *Id.* at 566.

153. *Id.* at 567.

154. *Id.* at 569.

155. *Id.* at 570.

156. *Id.*

157. *See id.*

158. *Id.* at 572.

159. *Id.* at 572–79.

160. *See generally* Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312 (1998).

program diversity was fundamentally at odds with the equal protection principle.[161] Justice O'Connor, writing for the dissenters, described the Commission's interests as "certainly amorphous"[162] and emphasized that "the interest in diversity of viewpoint provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior."[163]

B. After the Fall: Adarand *and the Diversity Project*

In *Adarand Constructors, Inc. v. Pena*,[164] the Supreme Court revisited its *Metro Broadcasting* holding that benign race-based affirmative action programs are subject to an intermediate level of scrutiny. The program at issue in *Adarand* was the brainchild of the Department of Transportation rather than the Commission.

Essentially, the department provided significant financial bonuses to primary contractors who enlisted the help of minority-owned and -operated subcontractors.[165] The *Adarand* Court declined to follow *Metro Broadcasting* and squarely held "that *all* racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[166] Writing for the majority, Justice O'Connor explained that under this standard of review, "such classifications are constitutional only if they are narrowly tailored measures that further a compelling governmental interest."[167] The *Adarand* Court expressly overruled *Metro Broadcasting*, at least insofar as anything in *Metro Broadcasting* conflicted with the Court's opinion in *Adarand*.[168]

In the Commission's first response to *Adarand*, it amazingly concluded that *Adarand* did not implicate its EEO program.[169] The Commission maintained that the EEO program was an efforts-based program that did not require a station to hire anyone based on race—in other words, it

161. *See Metro Broad.*, 497 U.S. at 602–03 (O'Connor, J., dissenting).

162. *Id.* at 614.

163. *Id.* at 615. Justice O'Connor added:

> The FCC and the majority of this Court understandably do not suggest how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast viewpoints. Like the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of various races. And the interest would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to insure that the broadcasting spectrum continues to reflect that mixture. We cannot deem to be constitutionally adequate an interest that would support measures that amount to the core constitutional violation of "outright racial balancing."

Id. at 614.

164. 515 U.S. 200 (1995).

165. *See id.* at 204–05.

166. *Id.* at 227 (emphasis added).

167. *Id.*

168. *See id.*

169. *See* WCCB-TV, Inc., 11 F.C.C.R. 19,680, 19,682–83 (para. 11) (1996) ("[W]e conclude that *Adarand* does not implicate our EEO program.").

was race-neutral.[170] According to the Commission, race-neutral programs did not violate equal protection principles, much less trigger strict judicial scrutiny.[171] The Commission relied heavily on a memorandum authored by then-Assistant Attorney General Walter E. Dellinger, III.[172] Dellinger's analysis of *Adarand* concluded that:

> Mere outreach and recruitment efforts . . . typically should not be subject to *Adarand* standards. Indeed, post-[*Richmond v. JA Croson, Co.*[173]] cases indicate that such efforts are considered a race-neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, *Adarand* ordinarily would be inapplicable.[174]

Scrutiny of Professor Dellinger's analysis reveals its flaws. On its face, *Adarand* requires strict scrutiny of *any* use of race as a shorthand, regardless of the government's purpose in doing so. Moreover, the use of outreach efforts, if coupled with statistical analysis of the success or failure of such efforts, could effectively bypass *Adarand*'s mandate by simply substituting an obligation to recruit broadly (coupled with quantitative analysis of the success of these efforts) for direct, outcome-based hiring quotas.[175] To the extent that outreach based efforts constitute a response to the problem of race- or gender-based discrimination, such efforts could well be constitutional. That said, *Adarand*'s analysis would apply to such programs; it seems quite possible, however, that antidiscrimination, outreach-based programs would survive strict scrutiny.[176] The Supreme Court's most recent pronouncements on the "benign" use of race-based classifications support these conclusions.

In *Croson*, which the *Adarand* Court cited with approval,[177] Justice O'Connor, writing for the majority, cited the following examples of race-neutral measures to increase minority participation in the construction industry: (1) small business preferences; (2) simplification of bidding procedures; (3) reduced bond requirements; and (4) "training and financial aid for disadvantaged entrepreneurs of all races."[178] According to the *Croson*

170. *See supra* notes 37–66 and accompanying text.

171. *See, e.g.*, Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 350–52 (D.C. Cir. 1998).

172. *See* Streamlining Broadcast EEO Rule, *supra* note 43, at 5162 (para. 15).

173. 488 U.S. 469 (1989).

174. Memorandum from Walter Dellinger, III, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, to all Agency General Counsels 7 (June 28, 1995), *reprinted in* Streamlining Broadcast EEO Rule, *supra* note 43, at 5162 (para. 15) (citations omitted).

175. *See infra* notes 252–316, 457–64 and accompanying text.

176. *See infra* notes 435–68 and accompanying text.

177. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 221–22 (1995).

178. *Croson*, 488 U.S. at 509–10. On the other hand, following *Croson*, several federal courts recog-

majority, these measures reflected classifications based on factors other than race and/or gender and were, correspondingly, not subject to strict scrutiny.[179] Significantly, none of these alternatives rely directly upon classifications of race (or gender) for inclusion.

The Supreme Court reiterated its position regarding the necessity of using race-neutral classifications, rather that race-based classifications, in *Miller v. Johnson*,[180] a case decided only weeks after *Adarand.* The *Miller* Court explained that because the targeting of socioeconomic groups is not a distinction based on race, it is not a classification subject to strict scrutiny.[181] Because the classification is facially race-neutral, it will be deemed a race-neutral classification even though a disproportionate number of minorities might fall within it.[182] This conclusion would probably hold true even if increasing the number of minorities contracting with the government agency is one of the principal reasons motivating the adoption of the classification.[183] Consistent with this analysis, the Commission's EEO rules are thus race-neutral only if they require stations to target, or interview, individuals from sectors of the public based on factors *other than* the race and/or gender of the specified applicant pool.

Of course, the EEO rules are not facially race-neutral. Rather than requiring licensees to seek job applications from broad segments of the community without regard to the applicants' race or gender, in several instances the EEO rules make express reference to the specific targeting of minorities for a station's recruitment efforts.[184] Without a doubt, the EEO rules require a station to make a decision—who to target for an interview—based on race.

The initial argument advanced by the Commission, and those courts that have substantively addressed the issue, was explained in *Raso v. Lago*,[185] a case finding a housing plan designed to recruit minority applicants to be race-neutral:

> Although the affirmative recruitment of minority applicants is race-conscious, . . . such conduct alone does not constitute a "preference" within the meaning of *Croson* and *Adarand* that is subject

nized certain affirmative action programs to be race-neutral. *See, e.g.*, Branch v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994); Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557–58 (11th Cir. 1994); Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992), *rev'd on other grounds en banc*, 989 F.2d 890 (7th Cir. 1993); Raso v. Lago, 958 F. Supp. 686, 701–04 (D. Mass. 1997); Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1553 (M.D. Ala. 1995).

179. *See Croson*, 488 U.S. at 493–98.

180. 515 U.S. 900, 916 (1995) (targeting of socioeconomic community is not a distinction based on race.).

181. *See id.*

182. *See id.*

183. *See* Washington v. Davis, 426 U.S. 229, 242 (1976); McCray v. United States, 195 U.S. 27, 56 (1904).

184. *See* 47 C.F.R. § 73.2080(c)(2) (1997) ("use minority organizations"); *id.* § (c)(2)(i)–(v) (describing how the requirements of (c)(2) may be satisfied); *id.* § (c)(3) (comparing the composition of the relevant labor area workforce with the racial composition of a station's workforce).

185. 958 F. Supp. 686 (D. Mass. 1997).

> to strict scrutiny because: "the crucial distinction is between expanding the applicant pool and actually selecting from that pool. Expanding the pool is an inclusive act. Exclusion 'based on race[] . . . can only occur at the selection stage.'"[186]

Central to this analysis is the conclusion that the equal protection principle protects against laws that give an individual a race-based preference only with respect to a hiring *decision*. This is, however, a particularly narrow reading of the equal protection mandate. Because the wording of a court's inquiry necessarily predetermines the outcome of an equal protection challenge, one must be careful to determine precisely what the equal protection principle prohibits.[187]

Although the Court in *Adarand* framed the constitutional equal protection mandate in terms of protections against "preference[s] based on racial or ethnic criteria,"[188] it ultimately held that *all* racial classifications were subject to strict scrutiny.[189] In its first post-*Adarand* Equal Protection Clause decision, the Supreme Court stated that the clause's "central mandate is racial neutrality in governmental *decision making*. Though application of this imperative raises difficult questions, the basic principle is straightforward: "'*Racial and ethnic distinctions of any sort* are inherently suspect and call for the most exacting judicial examination.'"[190] Although some lingering doubts might remain,[191] the best conclusion that can be drawn from these and other judicial pronouncements is that the Equal Protection Clause prohibits *any* law or regulation that requires *any sort* of racial or ethnic distinction to be factored into *any* decision, absent a compelling justification (such as the remediation of prior unlawful discrimination).

The Commission's initial contention that its EEO rules are race-neutral is premised implicitly on the assumption that within the realm of employment-related equal protection jurisprudence, the Equal Protection Clause only impacts hiring decisions. Indeed, the Commission's conclusion accepts the fact that affirmative recruitment of minority applicants is race-conscious conduct yet labels such recruitment race-neutral because it is an

186. *Id.* at 702.

187. For example, if the inquiry is whether the EEO rules require a preference in the decision to hire an individual, the answer—at least based on the facial requirements of the rules—is no. On the other hand, if the inquiry is whether the EEO rules require a station to make a race or gender distinction in the decision of whom to target for an interview, the answer is yes. Clearly the same facts, under differing inquiries, would probably lead to different outcomes as to the constitutionality of the Commission's EEO rules.

188. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 219 (1995).

189. *See id.* at 227; *see also id.* at 201 ("[A]ny racial classification subjecting that person to *unequal treatment*" is suspect. (emphasis added)); *id.* at 223 ("[A]ny official action that *treats a person differently*" is suspect. (emphasis added)) (quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting)); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("*[R]acial classifications* [are] 'constitutionally suspect.'" (emphasis added)); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("*Distinctions* between citizens" are suspect. (emphasis added)).

190. Miller v. Johnson, 515 U.S. 900, 904 (1995) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)) (citations omitted) (emphasis added).

191. *See, e.g.*, Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1446–62; Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79 *passim* (1994).

inclusive, rather than exclusive, act.[192] The Commission is in essence concluding that unequal treatment based on race is race-neutral because nobody has been denied a benefit (that is, a job). It is clear, however, that within the meaning of the Equal Protection Clause, the harm at issue is the "denial of equal treatment . . . , not the ultimate inability to obtain [a] benefit."[193] Upon close examination, the Commission's argument that the tangible harm done as a result of unequal treatment impacts the level of scrutiny appears to be little more than a contention that the EEO rules—that require unequal treatment—are not subject to strict scrutiny because the Commission has classified the harm caused by the unequal treatment as both benign and race-neutral as to its effects. Thus, the Commission essentially is asserting that strict scrutiny does not apply to benign, race-based decisions, precisely the conclusion expressly rejected in *Adarand*.[194]

Even accepting for the sake of argument the Commission's contentions that its pre-2000 EEO rules were facially race-neutral, they were not race-neutral in practice and for that reason were properly subject to strict scrutiny analysis.[195] If there is "concrete evidence" that facially race-neutral measures are being "manipulated to provide a preference" on the basis of race, the facially race-neutral measure is subject to strict scrutiny.[196] The Commission maintained that "[t]he numbers and percentages [utilized for comparing workforce profiles pursuant to 47 C.F.R. § 73.2080(c)(3)] are simply analytical aides . . . and are not determinative [of compliance with the EEO rules]."[197] Despite the Commission's position, even proponents of the EEO rules (for example, the National Black Media Coalition)[198] have

192. *See* Shuford v. Alabama State Bd. of Educ, 897 F. Supp. 1535, 1550–57 (M.D. Ala. 1995).

193. Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993); *see also Adarand*, 515 U.S. at 229–30 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury. . . ."). The Supreme Court has made plain that being placed in one electoral district or another based solely on race constitutes a violation of the Equal Protection Clause. *See Miller*, 515 U.S. at 905; Shaw v. Reno, 509 U.S. 630, 642 (1993). Under the Commission's logic, race-based districting decisions might be outside the purview of strict scrutiny because no one is required to vote based on their racial identity. The Supreme Court, however, in *Shaw* and *Miller*, has squarely rejected such logic. The mere fact of government classification by race for districting purposes violates the equal protection rights of the voters so classified. *See* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymandering*, 111 HARV. L. REV. 576, 594–95 (1997).

194. 515 U.S. 200 (1995). One should note, however, that the application of strict scrutiny should not mean that the government's attempt to utilize a race-based classification always fails. *See* Wittmer v. Peters, 87 F.3d 916, 918–20 (7th Cir. 1996); Adams, *supra* note 191, at 1461–62.

195. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 352–53 (D.C. Cir. 1998); 47 C.F.R. § 73.2080 (1997); Streamlining Broadcast EEO Rules, *supra* note 43, at 5162 (paras. 14–15).

196. South-Suburban Housing Ctr. v. Board of Realtors, 935 F.2d 868, 884 (7th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992); *see also Miller*, 515 U.S. at 913 (recognizing that statutes are subject to strict scrutiny under the Equal Protection Clause when they involve racial classifications or when they are race-neutral on their face but are motivated by a racial purpose).

197. Catawaba Valley Broad. Co., 3 F.C.C.R. 1913, 1914 (para. 9) (1988) (memorandum opinion and order); *see also* Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 4 F.C.C.R 1715, 1715 (para. 5) (1989) (memorandum opinion and order) ("[T]he Commission believe[s] that the principal element of a good EEO program was the effort undertaken to attract qualified minority and female applicant's whenever a vacancy has occurred, rather than relying on a station's statistical profile.")

198. *See* Catawaba Valley Broad. Co., 3 F.C.C.R. at 1913 (para. 4) (1988).

acknowledged that "many licensees view the [statistical] guidelines as a 'ceiling' rather than a 'floor' for minority employment. . . [and that many] licensees [operate] just above or just below the numerical 50% parity guidelines throughout their respective license terms."[199]

Adarand and its progeny effectively shift the burden of persuasion from those challenging the use of race as an administrative shorthand to the government entity wishing to use race incident to administering a particular program. As a burden-shifting device, *Adarand* places a nearly insurmountable barrier in the way of a governmental agency that wishes to engage or facilitate race-conscious behavior of any sort. Absent the most compelling reasons and an utter inability to achieve the government's objective using race-neutral means, the government loses. This turns the burden of proof on its head; in most cases, government action enjoys a strong presumption of validity.[200] The Commission does not seem to have internalized this aspect of *Adarand*. Whereas the Commission's actions usually enjoy a presumption of legality, this presumption does not exist when the Commission uses race as a shorthand, whether to promote diversity or to achieve some other objective.

Accordingly, if a reviewing court were to apply strict scrutiny to any or all of the Commission's race-based programs,[201] then all of those programs—each one of which rests on the diversity justification—is in serious jeopardy of being struck down as violative of the equal protection principle. In her dissenting opinion in *Metro Broadcasting*,[202] Justice O'Connor, who later authored the majority opinion in *Adarand*, wrote that "[m]odern equal protection doctrine has recognized only one . . . [compelling] interest: remedying the effects of racial discrimination. *The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest*."[203] Even though Justice O'Connor has opined otherwise with respect to the compelling nature of the same interest in higher education,[204] her strong statement in *Metro Broadcasting* has led even a pro-Commission commentator to conclude that "it is probable that the FCC's primary objective of promoting a diversity of voices . . . would not qualify as a compelling governmental in-

199. *Id.* Even though the Commission's EEO rules force private employers into race-based hiring decisions, the state action requirement is nevertheless satisfied. *See* Reitman v. Mulkey, 387 U.S. 369, 380–81 (1967). Government cannot do indirectly that which it could not accomplish directly by forcing nonstate actors to implement constitutionally dubious policies. *See id.*; *see also* Ronald J. Krotoszynski, *Back to the Briarpatch: An Argument for Constitutional Meta-Analysis in State Actor Determinations*, 94 MICH. L. REV. 302, 320–21 (1995). Because the Commission could not directly mandate race-based hiring and recruitment decisions, it likewise cannot encourage or facilitate such behavior by private sector employers.

200. *See, e.g.*, 5 U.S.C § 706(2) (1994).

201. *See supra* notes 35–132 and accompanying text.

202. Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting).

203. *Id.* (emphasis added); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (holding that race-based affirmative action programs "are strictly reserved for remedial settings").

204. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

terest for equal protection purposes—effectively failing the first prong of strict scrutiny."[205]

The Commission's conclusion that its pre-2000 EEO rules did not conflict with the strict scrutiny standard in *Adarand* was, at best, a doubtful proposition. Indeed, the Commission's initial reaction to *Adarand* could be read to acknowledge implicitly the perils of arguing that its race-based regulations could satisfy strict scrutiny.[206] Notwithstanding the Commission's protests that its EEO programs should survive *Adarand*, it did not take long for the other shoe to drop.

C. Lutheran Church-Missouri Synod *and the Impact of* Adarand

In *Lutheran Church-Missouri Synod v. FCC*,[207] the Commission faced a direct *Adarand*-based challenge to the constitutionality of its EEO rules.[208] The D.C. Circuit found that the Commission's EEO rules violated the Fifth Amendment's implied equal protection guarantee.[209] This result has ominous implications for all of the Commission's race-based affirmative action programs, which rest on the diversity rationale emphatically rejected in *Lutheran Church*.[210]

The facts of the case are relatively straightforward. The Lutheran Church-Missouri Synod holds licenses for two radio stations in Missouri. One, KFUO (AM), operates as a noncommercial station with a religious format. The other station, KFUO-FM, operates commercially and broadcasts classical music with a religious orientation, as well as some religious programming. Both stations are dedicated to the task of carrying out the "Great Commission which Christ gave to His Church, to preach the Gospel to every creature and to nurture and serve the people in a variety of ways."[211] Because of that mission, the church believes that many, if not most, of the positions at the station require a knowledge of the Lutheran doctrine.

205. S. Jenell Trigg, *The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of* Adarand Constructors, Inc. v. Pena, 4 COMMLAW CONSPECTUS 237, 253 (1996); *see also* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996). Ms. Trigg served as a telecommunications policy analyst in the Office of Communications Business Opportunities at the Commission.

206. *Cf.* Mark. A. Neuser, Note, *FCC's Block Auction in the Wake of* Adarand*: Harbinger or Hoax?*, 1996 WIS. L. REV. 821 (describing the Commission's speedy decision in the wake of *Adarand* to abandon spectrum set-asides for women and minority bidders in the personal communications services (PCS) spectrum auctions).

207. 141 F.3d 344 (D.C. Cir. 1998), *reh'g and reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998). The Commission declined to seek Supreme Court review of the Court of Appeals's decision. *See FCC Will Not Seek Supreme Court Review of Decision Striking Down EEO Program*, 67 U.S.L.W. 2377 (Jan. 5, 1999).

208. *See Lutheran Church-Missouri Synod*, 141 F.3d at 345–46.

209. *See id.* at 351–56; *see also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Due Process Clause of the Fifth Amendment provides citizens with an equal protection right as against the federal government).

210. *See supra* notes 35–107, 125–28, 141–91 and accompanying text.

211. *Lutheran Church-Missouri Synod*, 141 F.3d at 346.

After receiving the church's 1989 license renewal applications, the Commission's staff requested more information about both stations' affirmative action efforts during the preceding license term. In response, the church offered two primary explanations for its relative lack of success in recruiting and retaining African American employees.[212] First, it responded that it did have minority employees, including African Americans.[213] Second, the church explained that it did engage in minority-specific recruitment.[214] Shortly thereafter, the NAACP filed a petition to deny the applications, contending that the church's EEO efforts were insufficient and that the stations had failed to employ an adequate number of minority employees.[215] The case then proceeded to a hearing before an administrative law judge (ALJ).[216]

Before the ALJ, the church reiterated and expanded upon its earlier two-pronged defense. First, it claimed that its hiring criteria of "knowledge of Lutheran doctrine" and "classical music training" narrowed the local pool of available minorities.[217] Relying on the Commission's prior assurance that "the Commission will, in its in-depth reviews, take cognizance of a licensee's inability to employ women or minorities in positions for which the licensee documents that only a very limited number of women or minority groups have the requisite skills,"[218] the church asserted that the NAACP's claim of deficient minority hiring practices did not constitute evidence of discriminatory hiring or recruiting.[219]

Second, the church explained that it did not engage in any outside recruiting for many job openings, largely because it drew many of its employees from its seminary, located on the same grounds as the radio station broadcast studios.[220] Because the church viewed the radio stations as integral to its religious mission and to the conduct of its ministry, it considered employment at the stations an important part of the seminarians' overall education.[221] As Judge Silberman explained, however, "[t]hese explanations . . . did not satisfy the Commission and they further upset the NAACP, who thought that the station's estimates of minorities with classical musical expertise reinforced negative stereotypes of blacks."[222]

212. As an indication of the sort of argument that goes on in these proceedings, it is interesting to note that in this case the NAACP "argued that the Church should not receive credit for hiring a Hispanic because there were so few Hispanics in the labor market." *Id.* at 346 n.1.

213. *See id.* at 346.

214. *See id.*

215. *See id.*

216. *See id*. at 346.

217. "[T]he Church estimated that only 2% of the area population were minorities with Lutheran training and 0.1% were minorities with classical music training." *Id.*

218. *Id.* at 347 (citing Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, 79 F.C.C.2d 922 (1980) (memorandum opinion and order)).

219. *See id.*

220. *See id.*

221. *See id.*

222. *Id.*

Following the receipt of pleadings from all parties and the hearing, the ALJ determined that the church's Lutheran hiring preference was too broad, despite the fact that Commission policy "exempts religious broadcasters from the ban on religious discrimination, but only when hiring employees who are reasonably connected to the espousal of religious philosophy over the air."[223] The Commission concluded that it was unnecessary for receptionists, secretaries, engineers, and business managers to have knowledge of Lutheran doctrine.[224] The Commission also found that the church violated the EEO rules by making insufficient efforts to recruit minorities.[225] Because the ALJ did not find any evidence that the church intentionally discriminated against minorities, he recommended that the Commission grant the church's license renewal application.[226] The Commission accepted this recommendation but conditioned the renewal on a special reporting requirement, requiring the church to submit four reports at six-month intervals to the Commission.[227] These reports were to include detailed information regarding compliance with the Commission's EEO rules.[228]

The church objected to the reporting requirement and appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. On appeal, the church contended that "the affirmative action portion of the Commission's EEO Regulations is a race-based employment program in violation of the equal protection component of the Fifth Amendment,"[229] a challenge that the reviewing court characterized as "quite serious and far-reaching."[230] After quickly dismissing the Commission's argument that the church lacked Article III standing to raise an equal protection challenge because it had not suffered an equal protection injury,[231] the court directly engaged the equal protection issue.

223. *Id.*; *see also* King's Garden, Inc., 38 F.C.C.2d 339 (1972) (memorandum opinion and order), *aff'd sub nom.* King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974).

224. The Lutheran Church/Missouri Synod, 12 F.C.C.R. 2152, 2153 (1997) (memorandum opinion and order), *aff'g* 10 F.C.C.R. 9980 (1995) (initial decision).

225. *See Lutheran Church-Missouri Synod*, 141 F.3d at 347.

226. *See id.* at 347–49.

227. The Commission required the church to provide it with the following information at those intervals:

> (1) a list of all job applicants and hires, indicating their referral or recruitment source, job title, part-time or full-time status, date of hire, sex, and race or national origin; (2) a list of all employees ranked from highest paid to lowest paid, indicating job title, part-time or full-time status, date of hire, sex, and race or national origin; and (3) a narrative statement detailing the stations' efforts to recruit minorities.

Id. (citing Lutheran Church/Missouri Synod, 10 F.C.C.R. at 9912). The Commission also imposed a $25,000 fine on the church for misrepresenting the importance of classical music training in its hiring decisions. *See* Lutheran Church/Missouri Synod, 12 F.C.C.R. at 2165. On appeal, the imposition of that fine was determined to be arbitrary and capricious and was vacated. *See Lutheran Church-Missouri Synod*, 141 F.3d at 356–57.

228. *See Lutheran Church-Missouri Synod*, 141 F.3d at 349.

229. *Id.*

230. *Id.*

231. In dismissing this assertion, the court found that "[i]t is undeniable . . . that the Church has been harmed by the Commission's order finding it in violation of the EEO Regulations. The order is a black

As expected,[232] the Commission argued that the race-based classifications inherent in its EEO rules did not trigger the strict scrutiny standard of review set forth in *Adarand*. Significantly, the Commission did not directly argue—as it had earlier[233]—that its EEO rules are race-neutral and, therefore, do not implicate the equal protection principle. Instead, the Commission argued that because the EEO rules stopped short of establishing preferences, quotas, or set asides, the rational basis standard of review should govern the court's evaluation of the church's claims.[234] The Commission maintained that *Adarand* did not go "as far as it appears," arguing before the D.C. Circuit that *Adarand* applies only to race-conscious hiring decisions.[235] Essentially, the Commission suggested that its EEO rules do nothing more than "seek non-discriminatory treatment of minorities."[236] This argument—that logically suggests the government should have challenged the very application of the Fifth Amendment—presupposes that nondiscriminatory treatment typically will result in proportional representation in a station's work force.

The reviewing court immediately recognized and rejected the Commission's end-run around its previous race-neutral position. In Judge Silberman's view, the Commission's arguments were little more than an assertion that equal protection principles, at least as explicated in *Adarand*, should not apply to the Commission's EEO rules.[237] The court accordingly rejected the Commission's arguments that strict scrutiny should not apply because the "crucial point is not . . . whether [the EEO rules] require hiring in accordance with fixed quotas; rather, it is whether they oblige stations to grant some degree of preference to minorities in hiring."[238] The EEO rules were built on notions that broadcasters should aspire to a workforce that attains, or at least approaches, proportional representation of the population of the community of license and that broadcasters' compliance with the EEO rules would be measured, at least in the first instance, by a yardstick exclusively defined by proportionate representation. The court thus concluded that the EEO rules effectively required broadcasters to grant some degree of preference to minorities in hiring.[239] Consistent with the Supreme Court's holding in *Adarand*, the *Lutheran Church* court held that the Commission's EEO rules were subject to strict scrutiny analysis.[240]

mark on the Church's previously spotless licensing record and could affect its chance for license renewal down the road. . . . And the remedial reporting conditions, which require the Church to keep extremely detailed employment records, further aggrieve the Church by increasing an already significant regulatory burden." *Id.*

232. *See supra* notes 164–206 and accompanying text.

233. *See* Lutheran Church/Missouri Synod, 12 F.C.C.R. 2152, 2156 (1997) (memorandum opinion and order), *aff'g* 10 F.C.C.R. 9880 (1995) (initial decision); *see also* notes 207–31 and accompanying text.

234. *Lutheran Church-Missouri Synod*, 141 F.3d at 349–50.

235. *See id.* at 351.

236. *Id.*

237. *See id.* at 352–54.

238. *Id.* at 351.

239. *See id.* at 352–54.

240. *See id*. at 354–56.

For equal protection purposes, Judge Silberman explained, it mattered not whether a "government hiring program imposes hard quotas, soft quotas, or goals."[241] The strictest necessity must justify any sort of government compelled, race-based classifications of individuals. In this regard, the court next considered whether the EEO rules were "narrowly tailored to serve a compelling governmental interest."[242]

As noted above, the Commission had "unequivocally stated" that its EEO rules "rest solely on its desire to foster 'diverse' programming content."[243] Judge Silberman astutely observed that "[t]he Commission never defines exactly what it means by 'diverse programming.'"[244] Undaunted by the Commission's lack of definitional clarity, the court determined that "diverse" programming constitutes "the fostering of programming that reflects minority viewpoints or appeals to minority tastes."[245] Judge Silberman then rejected the Commission's argument that *Metro Broadcasting* should control the outcome of the case because it held that the government's interest in advancing diversity is "important," reasoning that "[e]ven if *Metro Broadcasting* remained good law in that respect, it held only that the diversity interest was 'important.'"[246] He conceded that the *Metro Broadcasting* Court had determined that "the Commission and Congress had produced adequate evidence of a nexus between minority ownership and programming that reflects minority viewpoints."[247] That said, the Supreme Court has "never explained why it was in the government's interest to encourage the notion that minorities have racially based views."[248] Then, relying on Justice O'Connor's "powerful dissent" in *Metro Broadcasting*, Judge Silberman held that the definition of "diversity" in this context was "amorphous" and that "it is impossible to conclude that the government's interest, no matter how articulated, is a compelling one."[249] Providing further problems for the Commission, Judge Silberman then held that even assuming that the Commission's diversity interest is compelling, the EEO rules were "quite

241. *Id.* at 354 ("Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target, . . . they can and will surely result in individuals being granted a preference because of their race.").

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 355.

248. *Id.*

249. *Id.* at 354–55. As a final parting shot, Judge Silberman noted:

> [T]he sort of diversity at stake in this case has even less force than the "important" interest at stake in *Metro Broadcasting*. While the minority ownership preferences involved in *Metro Broadcasting* rested on an *inter-station* diversity rationale, the EEO rules seek *intra-station* diversity. It is at least understandable why the Commission would seek station to station differences, but its purported goal of making a single station all things to all people makes no sense. It clashes with the reality of the radio market, where a station targets a particular segment: one pop, one country, one news radio, and so on.

Id. at 355–56.

obviously not narrowly tailored."[250] In other words, whatever interest the Commission might have in diverse programming could be accomplished in race-neutral ways.

The importance of *Lutheran Church* and *Adarand* to the Commission's diversity programs cannot be overstated. As it happens, all of the Commission's race-based regulations, not just its EEO rules, rest on the diversity rationale. In consequence, the constitutionality of all of these regulations is now in doubt. More broadly still, the *Lutheran Church* decision continues a recent trend of judicial skepticism regarding the Commission's efforts to promote diversity.[251] If the Commission intends to retain these programs, it will need to muster more plausible defenses of their necessity. Although the Commission's ability to defend successfully its race- and gender-based diversity programs seems (at best) uncertain, the prognosis for its structural diversity-enhancing regulations should be somewhat brighter.

IV. DIVERSITY AND THE SEARCH FOR MEANING

A. On Means, Ends, and Recognizing the Difference: Diversity as Race Reconsidered

According to the Commission, "as more minorities and women are employed in the broadcasting industry, varying perspectives are more likely to be aired."[252] Thus, the underlying rationale for the Commission's EEO policies is not the direct prevention of unlawful discrimination per se but "rather [the advancement of] the Commission's unique . . . diversity-related mandate."[253]

The Commission could, of course, seek to ground its EEO policies on a remedial, as opposed to diversity-based, foundation. To date, however, the Commission has not wavered in its justification of its EEO policies on diversity-enhancement grounds.[254] The problem with this approach is that race and gender are both underinclusive and overinclusive markers for diversity. Surely characteristics beyond race must be factored into the relative diversity of broadcast programming; in this sense the EEO policies are underinclusive because they define diversity solely in terms of the station owner's immutable characteristics rather than in terms of ideology or aes-

250. *Id.* ("The majority in *Metro Broadcasting* never suggested that low-level employees, as opposed to upper-level employees, would have any broadcast influence. Nor did the Commission introduce a single piece of evidence in this case linking low-level employees to programming content."). Accordingly, the Court noted that "[t]he regulations could not pass the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny." *Id.*

251. *See, e.g.*, Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994); Schurz Comm., Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992).

252. Streamlining Broadcast EEO Rules, *supra* note 43, at 5156 (para. 3).

253. *Id.* at 5158 (para. 5).

254. *But see* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 13 F.C.C.R. 23,004, 23,005–06, 23,025–26 (paras. 1–6, 59–60) (1998) (notice of proposed rulemaking); *see also id.* at 23,019–22 (paras. 39–45) (invoking the diversity rationale to justify race-based recruitment efforts by broadcasters).

thetic sensibilities.[255] Likewise, there is likely as much diversity of opinion within a particular racial, ethnic, or gender group as there is between or among such groups; the Commission's EEO policies are thus overinclusive because they assume that race and gender will serve as a meaningful predictor of a station owner's programming decisions.[256]

Over the years, a number of commentators have attempted to justify the Commission's race- and gender-based diversity programs. One of the most recent efforts by former Commission staffer Jenell Trigg attempts to demonstrate how the EEO policies are actually consistent with *Adarand*.[257] According to Ms. Trigg, "[t]he need for employment affirmative action in the broadcast industry continues to be evident and the FCC's efforts-based program is a means within the law to achieve this diversity."[258] She also asserts that "[t]he history of broadcasting in America is riddled with discriminatory practices that have prevented minorities and women from full participation in employment, management and ownership positions."[259] Like the Commission, Ms. Trigg makes no attempt to document either assertion. The Commission has not done a particularly effective job of demonstrating broadcasters' rampant discrimination.[260] Nor has the Commission maintained a consistent pattern of preventing racial minorities or women from obtaining federal broadcast licenses.[261]

Contrast the behavior of voting registrars in the Deep South with that of the Commission. Voting registrars in many Southern jurisdictions simply refused to register African American citizens in the 1960s.[262] By operation of both law and custom, local authorities denied minority citizens suffrage. The Commission, however, has never maintained an official policy of racial- or gender-based discrimination. At its worst, it proved grossly indiffer-

255. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978) (Powell, J.) (plurality opinion); *see also* Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 569–74 (1998) (arguing that direct inquiries into the social, political, and economic viewpoints of potential applicants would yield a more diverse class of students than sole reliance on race- or gender-based shorthands).

256. *Cf.* Hall, *supra* note 255, at 573–74 (suggesting that the use of race or gender is a crude selection device).

257. *See* Trigg, *supra* note 205.

258. *Id.* at 262; *see also* Streamlining Broadcast EEO Rule, *supra* note 43, at 5161–62 (paras. 13–15).

259. Trigg, *supra* note 205, at 262.

260. In this regard, it bears noting that the Commission presently is seeking "evidence, particularly empirical evidence, to support commenters' assertions with respect to this issue." Broadcast & Cable EEO Review, *supra* note 12, at 23,022 (para. 45). Such evidence will be crucial to sustaining any Commission diversity program that relies on race or gender as an effective proxy for viewpoint.

261. *See Croson*, 488 U.S. at 493; *see also* David Honig, *The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities*, 27 HOW. L.J. 859, 873 (1984) ("As far as is publicly known, the Commission has never refused to grant a license because the applicant was a minority."); Neuser, *supra* note 206, at 849–50 ("Any discrimination suffered by minority applicants came from sources other than the FCC, particularly considering the FCC's long tradition of encouraging minority participation in the communications industry.").

262. *See* South Carolina v. Katzenbach, 383 U.S. 301, 312 (1966); Louisiana v. United States, 380 U.S. 145, 152 (1965); Gomillion v. Lightfoot, 364 U.S. 339, 341–42 (1960); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1960).

ent to racism and sexism on the part of some licensees.[263] Thus, it is not really plausible for the Commission to assume responsibility for the relative paucity of broadcast stations owned and operated by racial minorities and women.[264]

If the Commission hopes to defend its EEO policies, including both the EEO guidelines and its programs to encourage minority ownership of broadcast stations, it must do a better job of documenting a problem in need of solution. Blithely asserting that "[i]t is only appropriate that a greater representation of qualified minorities and women participate" in the "future of the communications industry" will not suffice.[265] Invoking the shibboleth of affirmative action[266] will do little to convince reviewing courts that the Commission's affirmative action policies are serious and considered efforts to remedy past discrimination against racial minorities and women.

Instead of isolating instances of discrimination against racial minorities and women, the Commission historically has pursued a kind of statistical fanaticism. Using statistics comparing the number of racial minorities and women in the general population to the numbers of such persons in the broadcasting industry, the Commission concludes that a problem exists.[267] As any first-year constitutional law student knows, however, a disparate

263. *See, e.g.*, Office of Comm. of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (presenting the sad spectacle of the Commission doing its best to justify granting the renewal application of WLBT-TV, a blatantly racist Mississippi television station); Lamar Life Ins. Co., 14 F.C.C.2d 495, 550 (para. 34) (1967) (initial decision of Hearing Examiner Jay A. Kyle) (granting the renewal request and denying standing to viewers challenging WLBT-TV's renewal application). For a detailed account of the conflict over the renewal of WLBT-TV's license, see FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING 89–102 (1976).

264. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); J.A. Croson Co. v. Richmond, 488 U.S. 469, 492, 498–99, 504–06, 509 (1989). This is not to say that there are not remarkably few minority broadcasters. It is rather to suggest that the reasons for the relatively low number of minority broadcasters have much more to do with discriminatory lending practices and general lack of access to investment capital than with bad faith or overt racism on the part of the Commission. *See* Honig, *supra* note 261, at 873–75; *cf.* Croson, 488 U.S. at 498–500 (applying strict scrutiny to a race-based government program and holding that a "generalized assertion that there has been past discrimination in an entire industry" is insufficient to meet this standard, as are "a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record").

265. Streamlining Broadcast EEO Rule, *supra* note 43, at 5158–62 (paras. 7–15); Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 10 F.C.C.R. 2788, 2788–91 (paras. 1–10) (1995) (notice of proposed rulemaking); *see also Croson*, 488 U.S. at 499 ("An amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."); Trigg, *supra* note 205, at 259.

266. *See* Trigg, *supra* note 205, at 259 ("Unfortunately, there is still a need for affirmative action to create diversity in employment, especially in the broadcast industry."). *But see* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1877–84, 1900–10 (1996) (attacking the diversity rationale for affirmative action as politically motivated and stigmatizing). Sadly, Ms. Trigg never bothers to identify *why* such a need exists or *how* the Commission's EEO programs are responsive to the identified problems.

267. *See* Streamlining Broadcast EEO Rule, *supra* note 43, at 5155–62 (paras. 3–15); Trigg, *supra* note 205, at 258. *But see Croson*, 488 U.S. at 507–08 (rejecting as "completely unrealistic" the idea that "minorities will choose a particular trade in lockstep proportion to their representation in the local population").

impact, standing alone, is insufficient to establish an equal protection claim.[268] One must demonstrate intentional discrimination to make out an equal protection claim against the government;[269] correlation is not the same as causation.

Even under the more generous provisions of Title VII, which permit the use of disparate impact analysis to establish violations,[270] one generally must use a comparison of the number of minorities in a particular labor pool.[271] For example, suppose that Hispanics constitute ten percent of the population in a particular community, but there are virtually no Hispanic electrical engineers within the local labor pool. An engineering firm with no Hispanic electrical engineers would not be subject to a disparate impact claim alleging racial discrimination against Hispanics based on the disparity between the presence of a sizable local Hispanic population and the utter paucity of Hispanic electrical engineers at the firm. Of course, an individual who believed that she was denied employment on the basis of race could pursue a discrimination claim against the firm; it just would not constitute a disparate impact claim.

Let us now return to the Commission's pre-2000 EEO guidelines. The so-called processing guidelines made no effort to determine whether the total percentage of minorities within a given labor market reflected the percentage of minorities seeking particular kinds of jobs. To be sure, the processing guideline permitted a fifty percent deviation from the baseline demographic statistics.[272] Even so, if the specific labor pool did not contain minorities seeking particular jobs (for example, engineers), the station was potentially subject to invasive discovery and protracted litigation to demonstrate that it was complying with its EEO obligations in spite of its apparent failure to hire the appropriate number of minorities.

In short, the Commission had failed to document an ongoing pattern of discrimination against racial minorities and women by either the Commission or its licensees. It also had adopted a remedial scheme that bore little (if any) relationship to the reality of local labor conditions.[273] Given

268. *See* Washington v. Davis, 426 U.S. 229 (1976); *see also* McClesky v. Kemp, 481 U.S. 279 (1987).

269. *See McClesky*, 481 U.S. at 292–93.

270. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

271. *See Croson*, 488 U.S. 469, 501–02; Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650–55 (1989); Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part). Although Congress legislatively overturned portions of the Supreme Court's holding in *Wards Cove* with the Civil Rights Act of 1991, it intentionally left the Supreme Court's definition of "disparate impact" untouched. *See* H.R. REP. NO. 102-40, at 33 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 571 ("[T]he concept of disparate impact, as it has been developed by the courts would remain unchanged by this legislation.").

272. *See* EEO Processing Guidelines, *supra* note 49, at 1693; *see also* Streamlining Broadcast EEO Rule, *supra* note 43, at 5159–60 (para. 10) (describing the processing guideline mandate of 50% representation of each demographic group).

273. *See Croson*, 488 U.S. at 492, 501–02, 507–08. *But see* Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1419 n.111, 1440 (1996) (arguing that racial stereotyping undergirds arguments that the absence of members of particular minority groups within a given profession reflects a free choice on the part of members of the minority group rather than the product of social discrimination and racism).

these circumstances, it is easy to understand why the D.C. Circuit found the program unconstitutional.

In fairness to the Commission, it does seem to be receiving the message. Its most recent notice of proposed rulemaking regarding the EEO rules and policies abandons all reliance on numerical goals or quotas, whether as an absolute requirement or as a trigger for more intense review of a licensee's application for renewal.[274] Although the Commission continues to embrace diversity as a motivating rationale for its EEO rules and policies, it also embraces nondiscrimination as a co-equal objective.[275] Whether the Commission has truly internalized the new limitations on the use of race or gender as a proxy for viewpoint is unclear; for example, the recently adopted report and order amending the Commission's EEO program places as much reliance on diversity concerns as it does on preventing race- and gender-based discrimination.[276] This suggests that the Commission has not quite internalized *Lutheran Church*'s basic message.[277]

Turning from the EEO employment programs to the Commission's attempts to increase the number of minority-owned and -operated television and radio stations, one again finds a lack of empirical support for the Commission's EEO efforts. The Commission historically has refused to justify its distress sale, tax certificate, and comparative hearing preference programs on remedial grounds, instead relying on a supposed link between minority ownership and program diversity. Such a connection might exist—to date, however, the Commission has failed to document any such relationship. As Ms. Trigg puts it: "[I]t may be difficult to gather the factual predicate necessary for such an evaluation because the benefits of a diverse workforce are often subtle and intangible, but certainly not 'insubstantial.'"[278] The fact of the matter is that the Commission has done very little beyond offering anecdotal evidence for such a link.

274. *See* Broadcast & Cable EEO Review, *supra* note 12, at 23,024–30 (paras. 52–77). As the Commission explains: "[I]n keeping with the Court's reasoning in *Lutheran Church*, entities would be sanctioned for deficiencies in their recruitment and recordkeeping efforts and not for the results of their hiring decisions, subject of course to their duty to refrain from unlawful discrimination." *Id.* at 23,030 (para. 74).

275. *Compare id.* at 23,019–22 (paras. 39–45) (defending the EEO program on the basis of a presumed nexus between the race and gender of a station's employees and the diversity of its programming), *with id.* at 23,025–26, 23,030 (paras. 56–60, 74) (defending the need for a revised EEO program on the basis of preventing racial- and gender-based discrimination).

276. *See* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. 2329, 2358 (para. 62) (2000) (report and order) ("[W]e believe that equal employment opportunities for minorities and women further the public interest goal of diversity of programming . . . by promoting minority and female ownership. Accordingly, we believe that the governmental interest in fostering diversity of programming provides additional authority for reinstating EEO rules.").

277. The diversity analysis is not strengthened by the Commission's repeated references and quotations to the mortally wounded majority opinion in *Metro Broadcasting*. *See id.* at 2351–53 (paras. 51–53). Given *Adarand*'s express rejection of key portions of *Metro Broadcasting* and Judge Silberman's rejection of arguments premised on *Metro Broadcasting* in *Lutheran Church*, the Commission's reliance on *Metro Broadcasting* seems badly misplaced. Indeed, the diversity argument tends to undermine, rather than enhance, the overall persuasiveness of the Commission's arguments. *See id.* at 2496–98 (statement of Commissioner Michael K. Powell).

278. Trigg, *supra* note 205, at 254.

As Justice O'Connor observed in *Metro Broadcasting*, there is no necessary connection between the race of a station owner and that station's programming decisions. Indeed, a rational businessperson is likely to pursue the programming strategy that will maximize her return on equity. Thus, there is no reason to believe that a minority-culture station owner would refuse to program an FM radio station with country and western music or that a majority-culture station owner would refuse to select a program format that appeals to a minority-culture audience (for example, Tejano music), *if* either format would generate the highest return on equity. Nevertheless, "[w]ith respect to the FCC preference [programs], the diversity rationale presumes that racial status will influence the programming decisions of black and white license holders."[279]

Professor Matthew Spitzer has assisted the Commission by searching for a plausible link between the race and/or gender of a station owner and that station's programming decisions.[280] His efforts may have earned him the gratitude of the Commission, but he and his coauthor have failed to establish any conclusive empirical link between the race or gender of a station owner and the programming decisions of that station. By assuming that all white males are "profit maximizers"[281] and most persons of color and women are socially conscious,[282] he is able to produce a theoretical defense of *Metro Broadcasting*'s embrace of a linear relationship between the color of the licensee's skin and major programming decisions.[283] Professor Spitzer, like the Commission itself, is simply engaged in an exercise in racial- and gender-based essentialism by assuming that members of a particular minority group share a common set of values, aesthetics, and ideological commitments.[284] General Colin Powell, Ward Connerly, Derrick Bell, and the Reverend Al Sharpton are all African Americans. To suggest that they share a common set of viewpoints is simply ludicrous.[285]

In many respects, it is insulting to assume that minority station owners would be more likely to forego sound business decisions to pursue an ideological agenda.[286] From the perspective of an equity holder, the object

279. Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15, 35 (1991); *see also* Paul J. Mishkin, *Foreword: The Making of a Turning Point—*Metro *and* Adarand, 84 CAL. L. REV. 875, 882 (1996).

280. *See* Spitzer, *supra* note 86; *see also* Dubin & Spitzer, *supra* note 97.

281. Spitzer, *supra* note 86, at 296 n.11.

282. *See id.* at 319–34.

283. *See id.* at 357–61.

284. *See* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity*," 1993 WIS. L. REV. 105, 130–42.

285. *See* Hall, *supra* note 255, at 574 ("The use of race or even gender as a proxy for a particular sought-after perspective, while not unreasonable per se, is nevertheless a crude selection device, calculated to satisfy neither the asserted needs of an institution nor of a scholar." (footnote omitted)).

286. We certainly do not claim that minorities who participate in these programs must themselves feel ill-used, nor do we claim to speak on behalf of persons of color in these matters. *See generally* Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2141 (1989) ("Blacks, for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be *hired* based on the color of our skin. Such is the silliness of simplistic either-or inversions as remedies to complex problems . . . . It is demeaning to be told what we find demeaning.").

of the enterprise is to make money, not political statements.[287] Professor Spitzer's assumption that nonminority station owners will seek to maximize shareholder returns while minorities will use corporate assets to advance an ideological agenda suggests that minorities are poor managers. In a free market, a manager who fails to maximize shareholder value will find the value of her enterprise in sharp decline. Ultimately, companies that fail to compete effectively will be swallowed up by less socially conscious enterprises.

It is also insulting to suggest that, to the extent a station owner might forego profits to promote particular social goods, only minority station owners will make this decision. Are Ted Turner and Rupert Murdoch incapable of corporate altruism by virtue of their race and gender? Professor Spitzer would have us think so, suggesting that they could not even successfully program a station targeting a minority audience if they wanted to do so.[288] If Ted Turner or Rupert Murdoch wishes to program a radio station that sought to build a Spanish-speaking audience, no reason suggests that either gentleman could not locate and employ a program director quite capable of undertaking the task of selecting programming likely to appeal to this audience.[289] Professor Spitzer suggests that this solution raises the transaction costs involved and, moreover, that the owner could not effectively monitor the effectiveness of the station.[290]

These arguments are specious. It is doubtful that the owners of alternative rock radio stations understand or relate to the music. They hire program directors to ensure that the station plays music that will appeal to its target audience. Moreover, station owners have little trouble monitoring the relative success of program directors; they follow the station's ratings within the demographic group that the programming ostensibly is reaching. An Anglo owner could easily determine whether his program director is succeeding in reaching a Spanish-speaking audience simply by consulting the station's ratings for any given day, week, month, or year. If the programming director's efforts fail to produce acceptable ratings (which, in turn, predetermine the price that the station can charge for advertising time), then the owner will fire the program director and find someone more effective.

That some inextricable link exists between race and gender and programming patterns seems, at best, dubious.[291] Consider the example of Cox

287. *See* Krotoszynski, *supra* note 1, at 2108–17 (describing how the profit motive drives most major programming decisions in commercial television stations).

288. Spitzer, *supra* note 86, at 328–32.

289. *See, e.g.*, Deborah D. McAdams, *Turner Courts Women*, BROADCASTING & CABLE, June 14, 1999, at 14, 14 (describing cable station TBS's efforts to recruit more female talent and to produce more programming aimed at a female audience).

290. *See* Spitzer, *supra* note 86, at 328–32.

291. *See* Mishkin, *supra* note 279, at 880–83. However, in a follow-up effort to Professor Spitzer's initial efforts in this field, Dubin and Spitzer analyze FCC data to determine whether a linkage exists between minority or women station owners and programming aimed at minority or female audiences. *See* Dubin & Spitzer, *supra* note 97, at 853–72. "To sum up the test of our hypotheses, then, we have seen that minority

Cable. Based in Atlanta, Georgia, Cox Cable is a major multiple system operator (MSO).[292] For many years, two sisters, Anne Cox Chambers and Barbara Cox Anthony, owned and controlled Cox Cable.[293] No published report exists that Cox's cable systems provided a significantly different line up of channels or programming than other multiple cable system operators. Indeed, it would be quite surprising if there were evidence of such behavior.[294] Contrary to Professor Spitzer's supposition that female programmers would offer "programs geared to the special biological concerns of women—menstruation, childbearing, breast-feeding, menopause, and diseases of female organs,"[295] no Cox local system has ever offered such a channel, its female owners notwithstanding. In 1994, the Cox sisters sold a substantial stake in the company, collecting a cool $1.6 billion in exchange for relinquishing a portion of their equity interest in the enterprise.[296] This

ownership has a distinct and significant impact on minority programming, even after we control for the composition of minorities in the marketplace." *Id.* at 869 (footnote omitted). One could quibble about the reliability of Dubin and Spitzer's data set—something that the authors candidly acknowledge: "Numerous problems inherent in the FCC survey prevent us from being as certain about this conclusion as we might be." *Id.* at 872. For example, the survey instrument failed to make any serious effort at limiting definitional terms: "The FCC survey failed to include any definition of minority programming, relying on respondents to make what they wished of crucial survey terminology." *Id.* Nor were any survey responses cross-checked for accuracy. *See id.* If an empirical study is only as good as its data, Dubin and Spitzer's study is not very good. Even if one were to credit fully their data and conclusions, they fail to make the case for minority ownership of commercial broadcasting stations as an effective proxy for programming diversity. The real question is not whether minorities will elect to use minority-friendly programming formats more frequently than nonminorities. Instead, the Commission must show that nonminorities simply will not provide minority-friendly programming, thus necessitating the use of race as a proxy for program format. Dubin and Spitzer have not demonstrated that nonminorities will fail to target reliably minority audiences when it is economically feasible to do so.

292. *See* Paul Farhi & Sandra Sugawara, *Southwestern Bell, Cox Plan Cable Partnership*, WASH. POST, Dec. 8, 1993, at F1.

293. *See id.*

294. The only credible empirical evidence Professor Spitzer offers, a Congressional Research Service analysis of self-reported survey data from radio and television stations, does not demonstrate a causal relationship between the race or gender of a station owner and the station's programming format. *See* Spitzer, *supra* note 86, at 342–45. As he puts it: "[T]he problem[] with the extant data would prevent any reputable social scientist from placing much weight upon them." *Id.* at 345. Moreover, even assuming that the methodological flaws do not zero out the value of the study, the results demonstrate that nonminorities often program their stations to appeal to minority audiences. Although 79% of minority-owned stations reported programming to a minority audience and only 20% of non-minority-owned stations reported targeting minority audiences, there are numerically more non-minority-owned stations that target minority audiences. *See id.* at 339. Six hundred nineteen minority-owned stations responded, whereas 3000 nonminority-owned stations responded. *See id.* at 338. Professor Spitzer never bothered to do the math: 20% of 3000 nonminority stations means that 600 nonminority-owned stations attempt to reach minority audiences, whereas 79% of 619 stations yields a total of 495 minority-owned stations programming to minority audiences. This data—warts and all—suggests that it is fallacious to assume that only minorities will attempt to reach minority audiences. Given that 1 in 5 nonminority owners will voluntarily adopt a format that attempts to generate a minority audience, relatively minor incentives would easily ensure an adequate supply of minority programming—that is, a comparative preference point or a bidding credit for voluntarily programming to the tastes of minority viewers or listeners. This data suggests that an absolute preference for persons of color and women is akin to building the Golden Gate Bridge to span a creek.

295. Spitzer, *supra* note 86, at 330.

296. *See* Farhi & Sugawara, *supra* note 292, at F1; *see also* Jerry Knight, *Law That's Supposed to Preserve Newspaper Competition Actually Precludes It*, WASH. POST, Oct. 18, 1988, at C3 (noting that the Cox sisters owned a 98% stake of Cox Enterprises Inc., which was worth approximately $4.5 billion in 1988). Yet another example is Katherine Graham, who for many years exercised effective control of The Wash-

demonstrates that women are quite capable of effectively managing large telecommunications concerns. It also suggests that women, like their male counterparts, seek to maximize return on equity; fidelity to fiduciary duty knows no immutable characteristics.

It is certainly true that racial minorities and women do not enjoy access to positions of leadership in many U.S. companies.[297] The reasons for this phenomenon have much to do with systemic forms of racial and gender bias—issues that deserve beady-eyed scrutiny by policymakers at all levels of government. This state of affairs does not, however, justify engaging in racial- or gender-based stereotyping when awarding broadcast licenses.[298]

This is not to say that ownership of media outlets is utterly irrelevant.[299] Plainly, control of a radio or television station gives the owner the ability to influence the station's coverage of both politics and current events. It is also possible that many members of a racial minority or women might view a particular matter differently than white males. We are not suggesting—nor would we suggest—that race or gender is utterly irrelevant to the way people perceive the world around them.[300] Rather, given the strong, almost unyielding mandate against the use of race and gender as a proxy post-*Adarand*, one should question whether the links among race, gender, and viewpoint are sufficiently robust to survive strict scrutiny, including a requirement that no race-neutral means of achieving the government's objective be available.

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ington Post Company as its president, chairperson of the board, and CEO, *see* MARQUIS WHO'S WHO, WHO'S WHO IN AMERICA 1647 (1998), and who continues to play a significant role as chairperson of the executive committee, *see* HOOVER'S BUSINESS PRESS, HOOVER'S HANDBOOK OF AMERICAN BUSINESS 1998, at 1508 (1998). The Washington Post Company owns and operates both television and cable systems through various subsidiaries. *See id.* Although Ms. Graham is generally recognized as an astute businesswoman and manager, and even called by some "'the most powerful woman in the world,'" CAROL FELSENTHAL, POWER PRIVILEGE AND THE POST: THE KATHERINE GRAHAM STORY 293 (1993), no one has ever suggested that she undertook special efforts to promote gender-based causes with the company's formidable media assets, *see id.* at 273.

297. *See, e.g.*, Elizabeth A. Rathbun, *Woman's Work Still Excludes Top Jobs*, BROADCASTING & CABLE, Aug. 3, 1998, at 22, 22–27 (describing the paucity of women in top jobs within the broadcasting industry and the short-term prospects for improvement in this area). *But see* Kay McFadden, *Tuning in to Women*, SEATTLE TIMES, July 4, 1999, at M1 (reporting on the relative success and visibility of female journalists on local television stations in Seattle, Washington).

298. *Cf.* Addis, *supra* note 273, at 1417–19, 1462–67 (arguing that nonminorities establish baseline assumptions for particular jobs that tend to fence out minorities and suggesting that affirmative action efforts are needed to reach a critical mass of minority participation in such fields, a critical mass that will then redefine the exclusionary baseline assumptions); Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 5 (1998) (arguing against "the avoidance of race and gender as influential issues in bargaining" to maintain an "egalitarian facade" and suggesting that "ignor[ing] disparity when it is evident from the facts begets a fragmentary analysis at best").

299. *Cf.* BEN PROCTOR, WILLIAM RANDOLPH HEARST: THE EARLY YEARS, 1863–1910, at 115–34 (1998) (describing how Mr. Hearst deployed his formidable media assets to advance causes that he deemed just, including the Spanish-American War of 1898); Clifford Krauss, *Remember Yellow Journalism*, N.Y. TIMES, Feb. 15, 1998, at 3 (noting that contemporary media practices are quite tame in relative historical terms).

300. *See, e.g.*, Williams, *supra* note 135, at 533 ("And yet clearly there is *some* relation between programming and the beliefs of an owner. And clearly there is some relation between one's heritage and one's beliefs." (footnote omitted)).

Thus, it is possible to question the legality of race- and gender-based programs aimed at promoting diversity in the marketplace of ideas without rejecting the idea that ownership of broadcast media outlets is terribly important.[301] Indeed, undue concentration of media outlet ownership would present a grave threat to the ongoing project of democratic deliberation.[302] Accordingly, the point is a more limited one: the race or gender of a station owner is an insufficiently precise shorthand for programming decisions to justify the deployment of an otherwise impermissible form of race- or gender-based classification. This is doubly so when more direct means of advancing the government's interest in program diversity are both available and potentially as effective as the race- and gender-based approaches.

If providing the public with particular programming formats is essential to serving the public interest, the Commission could easily deploy regulations that would ensure the existence of a wide variety of program formats. Rather than using race as a proxy for programming preferences, the Commission could simply condition the grant of a license on programming to a particular audience.[303] *Adarand* and *Croson* make clear that government must use race-neutral means to achieve its objectives whenever such means are both available and effective.[304]

301. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 190 (1997) (emphasizing the importance of multiple, independently owned and operated broadcast television stations to the maintenance of democratic deliberation); *id.* at 227 (Breyer, J., concurring) (agreeing with the majority to uphold the "must-carry provisions" of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534–535 (1994), as legitimate and constitutional regulations that "seek[] to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) ("[A]ssuring that the public has access to a multiplicity of information sources is a government purpose of the highest order, for it promotes values central to the First Amendment."); *id.* ("Indeed, it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (internal quotations and citations omitted)).

302. *See infra* notes 317–38 and accompanying text; *see also* Williams, *supra* note 135, at 535–37.

303. In this regard, Professor Spitzer is also mistaken in his assumption that the Commission could not directly command that licensees provide programming that speaks to a particular target audience. *See* Spitzer, *supra* note 86, at 294 & 294 n.6. Command and control regulations could directly advance the government's interest in programming diversity. *See* Devins, *supra* note 149, at 147 ("The notion that first-amendment diversity concerns, in general, outweigh core equal protection concerns is dumbfounding."). We agree that regulations that attempt to force commercial programmers to air programming that they do not wish to air are unlikely to be effective in some larger sense. *See* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1236–46 (1996). The problem is not that the government's efforts to strong arm broadcasters will fail to yield additional programming of the desired sort, *see id.* at 1240–41; it is, rather, that the conscripted programming is unlikely to be very good and, therefore, is unlikely to be widely viewed, even by its target audience. *See id.* at 1241–42.

304. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 237–38 (1995) (requiring consideration of whether a race-based measure is "narrowly tailored" even if the government interest at stake is "compelling" and defining "narrow tailoring" to include the unavailability of race-neutral means to achieve the government's objective); Richmond v. J.A. Croson Co., 488 U.S. 469, 507–08 (1989) (requiring narrow tailoring when the government uses race to classify citizens and defining this inquiry in terms of "consideration of the use of racial-neutral means" to accomplish the government's objective).

In fact, the Commission has proven to be supremely indifferent to broadcast stations' programming formats,[305] arguing that the market can best decide how a particular station should be programmed.[306] The Commission has suggested that dictating program format might run afoul of cherished First Amendment principles[307] (principles the Commission routinely flouts when convenient[308]). It also has opined that it lacks the ability to determine whether a particular programming format is needed within a market.[309] Even if one credits these claims, the Commission could ensure some measure of program diversity simply by imposing limited common carrier obligations on broadcasters.[310] The Commission cannot credibly maintain that it lacks the ability to identify underserved listener populations, but, notwithstanding this limitation, vesting station licenses with racial minorities and women will ensure greater programming diversity and thereby satisfy viewer or listener preferences that would otherwise go unmet.

Perhaps the most glaring deficiency in the Commission's EEO programs is its history of permitting minority licensees to "flip," or transfer, their new licenses within a few months of receiving the licenses.[311] Even if

305. *See* Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858 (1976) (memorandum opinion and order).

306. *See* WNCN Listeners Guild v. FCC, 450 U.S. 582 (1981).

307. *See* Revision of Programming and Commercialization Policies (Television Deregulation), 98 F.C.C.2d 1076, 1084–91 (1984) (report and order); Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d at 863, 865–66 (1976), *rev'd en banc sub nom.* WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

308. *See* Letter from William F. Caton, Acting Secretary, FCC, to Mel Karmazin, President, Infinity Broadcasting Corp., 9 F.C.C.R. 1746, 1746 (1994) (proposing a fine of $400,000 for indecency rule violations associated with "The Howard Stern Show"); *see also* FCC v. Pacifica Found., 438 U.S. 726, 731–32 (1978); Action for Children's Television v. FCC, 58 F. 3d 654, 656 (D.C. Cir. 1995); KRATTENMAKER & POWE, *supra* note 3, at 104–19.

309. *See* Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d at 861–65.

310. Under such an approach, commercial television broadcasters would be required to make available blocks of air time for the use of third-party programmers. These third-party programmers would presumably provide diverse programming or at least different programming than the station management would itself have selected. *See* KRATTENMAKER & POWE, *supra* note 3, at 327–29; Krotoszynski, *supra* note 1, at 2128–29; *see also WNCN Listeners Guild*, 610 F.2d at 849–59, *rev'd*, 450 U.S. 582 (1981); Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 250–52, 261–62, 266–68 (D.C. Cir. 1974) (en banc).

311. *See* Jonathan D. Blake, *FCC Licensing: From Comparative Hearings to Auctions*, 47 FED. COMM. L.J. 179, 182 (1995); Peter W. Barnes, *Bending the Rules: Investors Use Blacks as Fronts to Obtain Broadcasting Licenses*, WALL ST. J., Dec. 11, 1987, at 1. Another persistent criticism of the program is the charge that the minority acts as a "front person" while actual control of the station is in the hands of whites. *See id.*; *see also* Steven A. Holmes, *TV Station Deal Draws Opposition*, N.Y. TIMES, Apr. 11, 1999, at A26 (stating that Glencairn's detractors, including the Rev. Jesse L. Jackson's Rainbow/PUSH Coalition, view Glencairn as "a sham whose company, Glencairn Limited, is little more than a black front to enable a major white company, Sinclair Broadcasting, to evade the Federal ban on owning more than one television station in a given market"); Elisabeth A. Rathbun, *Glencairn's Dicey LMAs*, BROADCASTING & CABLE, Mar. 29, 1999, at 34, 34 (describing the accusation that minority broadcaster Glencairn serves as a front operation for Sinclair Broadcasting, a non-minority-controlled entity). One frequently cited example involves Vernon Jordan, an informal political advisor to President Clinton. When the FCC awards licenses, it gives a preference to owners actively involved in the management of the station as opposed to passive investors. Although Jordan's group ultimately did not win the license, he was strongly criticized for stating in a 1983 license application that he intended to work 40 hours a week as editorial director while simultaneously maintaining a partnership at a major law firm, continuing to perform pro bono work, and serving as a direc-

one were to accept the Commission's undocumented assertion that minority ownership of broadcast stations remediates past discrimination and diversifies programming, the simple fact remains that these programs have not succeeded in keeping minorities at the helm.[312] If the Commission really believed its own rhetoric, it would impose relatively long minimum holding periods for licenses obtained through the distress sale policy or, better still, simply prohibit their transfer to non-minority-controlled enterprises. Should a minority licensee attempt to transfer such a license to a non-minority-controlled enterprise, the license should forfeit to the government. Rather than causing a surge in minority-controlled media, one suspects that such policies would lead instead to a significant decrease in minority interest in the distress sale policy.[313]

Ultimately, the Commission's efforts to invoke the diversity rationale to defend glaringly obvious forms of "racial politics"[314] undermines the legitimacy of the diversity project more generally. The Commission has so debased the concept of diversity that both reviewing courts and commentators have come to dismiss the diversity rationale as little more than empty bureaucratic verbiage, a fig leaf inartfully used to conceal the Commission's

tor on numerous corporate boards. *See* Evan Gahr, *FCC Preferences: Affirmative Action for the Wealthy*, INSIGHT MAGAZINE, Feb. 22, 1993, at 6; *see also* Bill McConnell, *FCC Yanks Trinity License*, BROADCASTING & CABLE, Apr. 19, 1999, at 14, 14 (describing a fraudulent scheme to evade the multiple ownership rules by establishing a "front" company headed by a person of color); Bill McConnell, *FCC Probes Glencairn Deal*, BROADCASTING & CABLE, Apr. 19, 1999, at 22, 22 (describing the Commission's concerns about the allegation by the Rainbow Coalition/Operation PUSH that Glencairn serves as a front for another multiple station owner, Sinclair Broadcasting, and that Sinclair uses Glencairn to evade the duopoly rule). *See generally Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995 (Magazine), at 36 (describing the Commission's minority tax certificate policy as an "egregious" form of affirmative action "that should be jettisoned" because of persistent abuse).

312. *See, e.g.*, Bruce R. Wilde, Note, *FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Reexamination of Policy*, 138 U. PA. L. REV. 979, 1018–20 (1990) (describing a particularly egregious case involving use of tax certificates to effectuate the transfer of licenses at a discount from fair market value); Chris McConnell, *Minority Ownership: A Not-Much-Progress Report*, BROADCASTING & CABLE, July 20, 1998, at 7, 7 (reporting that notwithstanding the Commission's arsenal of EEO programs, minority ownership of television and radio stations has remained "stuck at a mere 3%" for the past 20 years); *see also* Steighorst, *supra* note 7, at 1 ("While minority ownership has always been low, it now stands at 2.8 percent of the nation's 11,475 commercial radio and TV stations, according to the Department of Commerce."); Dan Trigoboff, *PUSH Seeks FCC Hearing on Glencairn*, BROADCASTING & CABLE, Aug. 10, 1998, at 18, 18 (describing the Rev. Jesse Jackson's concerns about whether Eddie Edwards, President of Glencairn, Ltd., an ostensibly minority-controlled entity holding broadcast licenses, effectively controls the operation and management of his stations).

313. In fairness to the Commission, antitrafficking rules *did* exist in 1978 when the Commission adopted its distress sale and comparative hearing preference rules. *See* Nancy R. Selbst, Note, "*Unregulation" and Broadcast Financing: New Ways for the Federal Communications Commission to Serve the Public Interest*, 58 U. CHI. L. REV. 1423, 1427–28 (1991). Prior to 1982, a new licensee could not transfer a broadcasting license until after a waiting period of three years. *In re* Amendment of Section 73.3597 of the Commission's Rules, 55 Rad. Reg. 2d (P & F) 1081, 1082–88 (1982). Repeal of the antitrafficking rules, coupled with the distress sale policy, permitted minority purchasers to buy radio and television stations at a discount of not less than 25% of fair market value and almost immediately resell the asset at fair market value. This process did little to increase the number of minority station owner/operators but did offer the potential for a quick profit to politically well-connected minorities, such as former Democratic National Committee Chairman and Department of Commerce Secretary Ron Brown and the super-lobbyist Vernon Jordan. *See supra* note 311.

314. Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989).

shame.[315] This is the real tragedy of the race-based component of the Commission's diversity project.[316]

B. The Need for Diversity

Imagine a world in which someone like Bill Gates controls not only a ubiquitous program for a computer operating system but also every radio station, television station, and newspaper within a single community. For the sake of discussion, let us call this hypothetical community "Seattle." The citizens of Seattle would have good cause for concern. If a single person controlled virtually all mass media outlets within the community, he would enjoy a near-perfect discretion to censor those materials, viewpoints, and programs that he deemed offensive or subversive of his interests.

At one level, one could conceive of the problem as sounding in antitrust. Consumers suffer when monopolies or oligopolies choke off competition.[317] Note, however, that antitrust law's principal concern is not with a diversity of products for its own sake but, rather, focuses on protecting the benefits of efficiency, a policy that generally leads to lower costs for goods and services in the market. Antitrust law is about maintaining open markets and fair pricing structures, not the maintenance of democratic deliberation.[318] One could imagine a situation in which sufficient competition existed to provide fair prices to purchasers of advertising time or sellers of programming but failed to provide sufficient ownership diversity to ensure coverage of all major news of the day or coverage of all candidates for a particular office.[319]

315. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 351–56 (D.C. Cir. 1998).

316. *See* Devins, *supra* note 279, at 35 ("In focusing on groups, diversity directly contradicts the ethos of individualism that underlies antidiscrimination."). Commissioner Michael K. Powell has recognized the danger of invoking the diversity rationale to defend policies more easily conceptualized as antidiscrimination efforts:

> I must confess, however, my discomfort about our continued desire to place extraordinary weight on the relatively tenuous nexus between the hiring of low level employees and its impact on diversity of programming. I am dubious of its validity and deeply worried that the courts have begun to view such rationale with dire skepticism. I certainly hope that by proffering this rationale (again despite the *Lutheran Church* court's disapproval), we have not invited the judiciary to fracture any remaining legal foundation for diversity objectives.

Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. 2329, 2498 (2000) (report and order) (statement of Commissioner Michael K. Powell) (footnotes omitted).

317. *See* EARL W. KINTNER, AN ANTITRUST PRIMER 7–25 (2d ed. 1973); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67, 74–77, 93–106, 112–14, 150–51 (1982); *cf.* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1141–42, 1146–55 (1981) (arguing that antitrust laws exist to facilitate democracy by preventing undue concentrations of wealth and economic power).

318. *See* KINTNER, *supra* note 317, at 15 ("In summary, the antitrust laws seek to prevent conduct which weakens or destroys competition."); Lande, *supra* note 317, at 76–77 ("This Article argues that Congress decided that consumers were entitled to the benefits of a competitive economic system. . . . Congress believed consumers were entitled to products priced at competitive levels and to the opportunity to buy the quantity of products a competitive market would offer.")

319. *See generally* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 225–29 (1997) (Breyer, J., concurring). Justice Breyer voted to uphold the must-carry provisions of the 1992 Cable Act on First Amendment

It is difficult enough to gauge the level of competition sufficient to satisfy antitrust concerns. After all, the Department of Justice and the Federal Trade Commission have permitted Boeing to acquire its principal domestic competitor, McDonnell-Douglas,[320] and have similarly permitted regional Bell operating companies to merge.[321] Thus, a certain degree of subjectivity seems inherent in deciding how big is too big.[322] There is even more room for debate regarding the optimal number of media outlets within a given community when viewed from the perspective of facilitating democratic deliberation.

It is not possible to offer up a specific formula to determine how many media outlets are sufficient to safeguard meaningful democratic deliberation.[323] Even so, the consequences associated with the absence of a sufficient number of independently owned media outlets are sufficiently unappealing to justify rules incorporating a healthy margin of safety. As Federal Communications Commission Chairman Kennard has put the question: "What if four group owners owned every television station in every market in America? Would this have an effect on the quality of news coverage in America?"[324] One cannot reasonably gainsay Kennard's answer: "Of course it would."[325]

Returning to the hypothetical, although Gates's stranglehold of Seattle media outlets could be conceptualized as simply an antitrust problem, the nature of the problem transcends higher prices for advertisers or subscribers. The concentration of media power threatens to stifle meaningful public debate about matters essential to the community. In this regard, consider the fate of another fictional western metropolis, Cicely, Alaska. Former astronaut Maurice Minnifield, the owner of KBHR, the local radio station, attempted to use his media power to shape (if not control) the terms

grounds and rejected antitrust justifications for the statute, explaining that:

> [w]hether or not the statute does or does not sensibly compensate for some significant market defect, it undoubtedly seeks to provide over-the-air viewers who lack cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate . . . .

Id. at 226; *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 ("Likewise, assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.").

320. *See* Adam Bryant, *McDonnell Douglas-Boeing Merger Wins F.T.C. Approval*, N.Y. TIMES, July 2, 1999, at D3.

321. *See* Steve Lohr, *Telephone Giant: The Industry*, N.Y. TIMES, May 12, 1998, at D1; *see also* David Ignatius, *Big Doings in the "Pipeline" Biz*, WASH. POST., Oct. 10, 1999, at B7; *SBC-Ameritech Deal Gets One Approval from U.S.*, N.Y. TIMES, Mar. 24, 1999, at C6.

322. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903, 12,987 (1999) (report and order) (separate statement of Commissioner Michael K. Powell).

323. *See id.* at 12,923–24 (paras. 40–41).

324. Jon Lafayette, *Consolidation: They May Be Giants*, ELECTRONIC MEDIA, Oct. 5, 1998, *available in* 1998 WL 7998722 (quoting William Kennard, chairman of the FCC, address at a meeting of the Radio-Television News Directors Association (Sept. 25, 1998)).

325. *Id.*; *see also* C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317 (1998) (arguing that the media play a crucial role in facilitating democratic deliberation and examining several First Amendment responses that incorporate this insight).

of various local controversies.[326] Returning ever-so-briefly to the real world, in contemporary Moscow, competing media moguls very clearly demonstrate how ownership of media can be used to create or mobilize political power.[327] A city in which media ownership is divided should, at least theoretically, feature more diversity in its coverage of local and national news, politics, and current events.

As a practical matter, one should not attempt to oversell the point. In most newspaper and television newsrooms, the same maxim applies: if it bleeds, it leads.[328] The ability to attract and maintain a mass audience remains the principal objective, regardless of who owns a particular television or radio station. In many respects, the danger media concentration presents is more of a theoretical threat than a certainty. That said, why assume such a risk if it can be avoided? This is doubly so when one considers that the Commission's restrictions on multiple ownership of media outlets are completely race-neutral and, accordingly, enjoy a high presumption of validity.[329] The burden of proof should be placed squarely on the shoulders of those who object to the continuing existence of these regulations.

Potential objections to bigness qua bigness also exist. Professor Louis Schwartz posits that "the main significance of large size in units of social organization lies in their tendency to substitute compulsion in place of persuasion, to emphasize discipline rather than liberty."[330] Even if consolidation can bring benefits, "it is nevertheless important to bear in mind the disadvantages as well as the advantages of bigness, to disentangle the real advantages from the mythical one with which all important institutions surround themselves, and to ask constantly whether on balance the units are not bigger than they need to be."[331] Professor Schwartz is particularly concerned with consolidation of media resources, believing that it leads to an absence of "critical judgment" and at times gives rise to a "consensus of error."[332] These consequences may be joined by mass circulations "nourished on the blandest of diets," in which "bigness in journalism blunts the edge of criticism in regard to news and ideas," especially in regard to "journalistic

326. *See* Robert P. Laurence, *"Northern Exposure" Was a Tale of Real People*, SAN DIEGO UNION-TRIB., May 29, 1995, at E2 (describing Minnifield's decision unilaterally to displace a Walt Whitman reading with "music he likes—Broadway musicals"); *see also* Don Freeman, *The Life and Times in Today's Cicely, Alaska*, SAN DIEGO UNION-TRIB., Mar. 25, 1996, at E2 ("Maurice Minnifield, with his controlling interest, remains in denial that Cicely is not a thriving metropolis in the wilds of Alaska. He still struts his stuff like a proud papa, as he gazes over the little burg, with a population of 615, that he perceives as his very own.").

327. Christian Caryl, *Crisis? What Crisis?*, U.S. NEWS & WORLD REP., June 22, 1998, at 44 (reporting on the new Russian media moguls' overt use of their media holdings to shape public opinion, resulting in a pattern of "selective—even bizarre coverage" that "depend[s] on the financial interests of the tycoons who own" the media outlets).

328. *See* Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 45–46 (1997).

329. *See infra* note 344 and accompanying text.

330. Schwartz, *supra* note 11, at 4.

331. *Id.* at 4–5.

332. *Id.* at 10–11.

criticism of government and business."[333] Schwartz's ultimate fear is that bigness leads to authoritarianism, often the most efficient means of ordering society: "Mussolini made the Italian trains run on time."[334]

Professor Schwartz correctly intuits that efficiency cannot be equated with the social good; the most efficient ordering of media outlets might not be the most socially beneficial if the values associated with the media extend beyond maximizing shareholder value. "Antitrust laws and principles can make a limited contribution by restraining the number of [media outlets] that come under common control, and by preventing the affiliation of newspapers and broadcasting facilities."[335] Schwartz believes that "more than this is called for," perhaps more than could "be secured by law."[336]

In light of these considerations, the Commission's diversity project, at least insofar as structural regulations aimed at diversifying the control of media outlets are concerned, presents a necessary program in addition to traditional antitrust regulation.[337] The diversity project should, at its best, protect the citizenry against the dangers associated with undue power to control the free flow of news and information. Commission regulations should relate in some logical fashion to the project of avoiding the concentration of too much media power in too few private hands. The question in every case should be whether the proposed regulation will promote structural diversity in some tangible fashion, thereby sustaining the project of democratic deliberation.[338]

C. Some Preliminary Thoughts on Redeeming Diversity

If misguided and ill-conceived government regulation of mass media outlets imposes unnecessary and wasteful costs on the nation's consumers, an overzealous, evangelical faith in the ability of markets to provide public goods presents an equally misguided regulatory paradigm. As Aristotle explained in his *Nicomachean Ethics*, more often than not one must seek the virtuous mean between two undesirable extremes.[339]

Professor Jim Chen and American Enterprise Institute Fellow Gregory Sidak have launched a sustained attack on the Commission's attempt to

333. *Id.* at 11–13.
334. *Id.* at 16–19.
335. *Id.* at 23.
336. *Id.*
337. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 225–29 (1997) (Breyer, J., concurring); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 622, 663–64 (1994).
338. *See generally* Schwartz, *supra* note 11, at 23–24.
339. *See* ARISTOTLE, NICOMACHEAN ETHICS 42–53, ¶¶ 1106a5–1109b (Terence Irwin trans., Hackett Publishing Co. 1985); *see also* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 286–88 (1996) (discussing the Aristotelian notion that virtue lies in choosing the mean rather than the extreme forms of behavior); THE FEDERALIST NO. 10, at 60 (James Madison) (Random House 1937) ("It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie.").

use government regulation to encourage the provision of public goods.[340] This point of view enjoys relatively broad, though far from unanimous, support within the legal academy.[341] At the other end of the ideological spectrum, several prominent legal academics, including Professors Owen Fiss and Cass Sunstein, have argued in favor of more aggressive government regulatory efforts to force broadcasters to serve the public good.[342]

Both sets of arguments have merit. As a baseline matter, the Commission's critics must take into consideration the deference that administrative agencies usually receive when making policy judgments.[343] Thus, so long as the Commission's assertion that diversification of the ownership of media outlets promotes the public interest is reasonable, it may lay claim to the benefit of the doubt. In point of fact, the Commission's policies are not merely rational but critically important to facilitating democratic deliberation. In this respect, the policies designed to promote structural diversity stand on a very different footing than its race- and gender-based diversity programs. Given *Adarand*, the Commission bears a heavy burden when it relies on race or gender as an administrative shorthand; conversely, when the Commission uses regulatory criteria that do not implicate suspect classifications, its work product enjoys a strong presumption of validity.[344] Critics of the Commission's structural diversity-enhancing regulations carry a much higher burden of proof than do the critics of the Commission's race- and gender-based diversity programs.

340. *See* Chen, *supra* note 3, at 1415; Sidak, *supra* note 33, at 1209 (1993); *see also* GEORGE A. KEYWORTH II ET AL., THE TELECOM REVOLUTION: AN AMERICAN OPPORTUNITY 31–36, 52–68 (Progress and Freedom Found. ed., 1995) (proposing the abolition of the Commission and the adoption of market-based policies regarding all communications services, including broadcasting).

341. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 3, at 298–315; KEYWORTH ET AL., *supra* note 340, at 31–34. In fairness to Krattenmaker and Powe, it bears noting that although they generally embrace a market-based paradigm for broadcast regulation, especially with respect to basic programming decisions, they do not believe that efforts to promote structural or outlet diversity should be completely abandoned. *See* KRATTENMAKER & POWE, *supra* note 3, at 319–21.

342. OWEN H. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499 (2000).

343. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981); FCC v. National Citizens Comm. for Broad., 436 U.S. 775 (1978); Gray v. Powell, 314 U.S. 402 (1941); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 263 (1955).

344. *See* Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935) ("[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies."); *see also* United States v. Shimer, 367 U.S. 374, 382–83 (1961) (holding that if an agency decision maker's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned"); Bates & Guild Co. v. Payne, 194 U.S. 106, 108–09 (1904) ("[W]here Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong."). *See generally* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850–53 (D.C. Cir. 1970).

Although the Commission's efforts to produce structural diversity in the ownership of media outlets generally deserve support, Professors Fiss and Sunstein appear to have underestimated seriously the difficulties associated with drafting and enforcing effective regulations that will force commercial broadcasters to act as public trustees.[345] Nonstructural, content-based regulations designed to coerce diverse programming might be constitutional but are unlikely to be effective.

By the same token, commentators like Professor Chen and Mr. Sidak grossly overestimate the benefits of the market. Although markets are incredibly efficient ways of distributing goods and services, they will not reliably serve all communities nor will they meet all preferences absent a state of perfect competition (which, in the real world, will never exist). Moreover, other shortcomings inherent in the market's performance as a distributor of goods and services, including imperfect information and externalities—not to mention public goods, which everyone benefits from but has no incentive to purchase—effectively preclude sole reliance on market forces to regulate broadcasting.[346]

Without some sort of government subsidy, persons living in rural areas are unlikely to enjoy access to the newest communications services, including access to state-of-the-art fiberoptic telecommunications networks or new PCS services.[347] The cost of wiring relatively isolated, sparsely populated communities will make undertaking the project financially unattractive to entities seeking to maximize investors' returns on equity. Left to its own devices, the market would create a nation of information "haves" and "have nots." Of course, one could snidely invite those who live in rural communities to move to New York City if they desire access to the Internet or advanced telecommunications services. Since the New Deal, however, there has been a political consensus that government has a responsibility to correct the inequalities the Invisible Hand has visited upon rural America. For example, government subsidies were needed to ensure that rural America enjoyed access to electricity and basic telephone service, and the federal government provided this financial aid.[348]

In the case of telecommunications services, Congress and the Commission have embraced a new statutory mandate termed Universal Serv-

345. *See* Krotoszynski, *supra* note 1, at 2108–22.

346. *See* Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887.

347. "PCS" stands for "personal communications services." PCS includes new wireless, audio, visual, and data communications systems. *See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, 7 F.C.C.R. 6886, 6886 (para. 2) (1992) (first report and order); Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, 7 F.C.C.R. 1542, 1542–43 (paras. 4–8) (1992) (notice of proposed rulemaking).

348. *See, e.g.*, Rural Electrification Act of 1936, 7 U.S.C. §§ 901–950aa (1994).

ice.[349] Taxes on inter- and intra-state telecommunications services will be used to subsidize the provision of telecommunications services to rural America and to schools, hospitals, and libraries.[350] If, as Thomas Jefferson suggested, only an educated and enlightened populace is capable of self-government,[351] the Universal Service project makes a great deal of sense.

Given the market's failure to provide telecommunications services consistently and equally to all, it is only reasonable to question whether the market can be trusted to meet the nation's programming needs. One need not argue in favor of heavy-handed command and control regulations that would mandate the airing of particular amounts of politically favored programming to support content- and viewpoint-neutral structural ownership regulations designed to foster programming diversity. If one believes the possibility that government regulation might be necessary to correct shortcomings inherent in the market, such structural regulation would be an entirely rational response.

Take, for example, the value of localism.[352] It would be technically feasible to offer national television licenses rather than issuing licenses on a community-by-community basis.[353] The Commission historically has placed a high value on local control of broadcasting on the theory that local control would result in the provision of programming that better meets the needs of the community of license.[354] When threatening weather ap-

349. *See* 47 U.S.C.A. § 254 (West Supp. 1999); Universal Service, 47 C.F.R. pt. 54 (1998); Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776 (1997).

350. *See* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 21–23 (1996). Notwithstanding the high hopes of its supporters, there has been tremendous controversy over the universal service program at the federal level, and its future is in some doubt. *See* Thomas K. Crowe, *The Controversy over Universal Service Costs*, TELECOMMUNICATIONS, June 1998, at 20, 20; David Schoenbrod & Marci Hamilton, *Congress Passes the Buck: Your Tax Buck*, WALL ST. J., June 12, 1998, at A10. The FCC's order implementing the universal service program has been challenged by numerous parties in court, see *California PUC Joins Court Challenge Against Universal Service Order*, COMM. TODAY, Aug. 14, 1997, *available in* 1997 WL 10864757, and an association representing small long distance carriers has challenged the program as an unconstitutional delegation of the taxation power, *see ACTA Challenges Constitutionality of Universal Service Regulations*, COMM. TODAY, Mar. 11, 1998, *available in* 1998 WL 5265068.

351. *See* Letter from Thomas Jefferson to Joseph P. Cabell (Feb. 2, 1816), *in* THE BEST LETTERS OF THOMAS JEFFERSON 208–12 (J.G. de Roulhac Hamilton ed., 1926); Letter from Thomas Jefferson to Joseph P. Cabel (Sept. 9, 1817), *in* 17 WRITINGS OF THOMAS JEFFERSON 417–18 (Paul L. Ford ed., 1899); THOMAS JEFFERSON, *A Bill for the More General Diffusion of Knowledge*, *in* THE COMPLETE JEFFERSON 1048 (Saul K. Padover ed., 1943).

352. "Localism" refers to the Commission's effort to distribute broadcasting licenses over a wide geographic area to provide as many individual communities as possible with television and radio stations. *See generally* FCC Policy Statement on Comparative Hearings, 1 F.C.C.2d 393 (1965) (public notice); Sixth Report and Order on Television Allocations, 17 Fed. Reg. 3905 (1952). Ideally, every community will enjoy access to a television or radio station located within or proximate to the community, thereby ensuring that matters of local concern receive coverage in the broadcast media. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994).

353. *See* T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND FIFTH ESTATE 47 (4th ed. 1996) ("High power stations in major urban centers could serve the entire country in only one-third the spectrum space presently used.").

354. *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d at 395–96 (1965); Network Programming Inquiry, 25 Fed. Reg. 7291 (1960); *see also Turner Broad.*, 512 U.S. at 662–63; United States v. Southwestern Cable, 392 U.S. 157, 173–74 (1968).

proaches or a major local event takes place, a locally based broadcaster is far more likely to provide coverage than a national station programmed from New York City, Chicago, or Los Angeles.[355]

A quick perusal of cable programming practices demonstrates the veracity of the proposition. With the exception of PEG[356] and leased-access channels, cable programming presents very little programming responsive to the needs, wants, and desires of local communities.[357] If you want the prized hog competition at the state fair covered live, you need a local media presence. Elections for city, county, and even state officers might go uncovered if left to the networks or national cable news channels. Although alternate sources of information exist, including the Internet and local newspapers, most Americans continue to rely upon local and network television for their news programming.[358] With respect to local news, local broadcasters are effectively the only game in town.[359]

Given economies of scale, it might be inefficient to cover the hog competition at the state fair. Perhaps Jerry Springer or Montel Williams would generate higher ratings or cost less to broadcast. From a purely eco-

355. *See* CARTER ET AL., *supra* note 353, at 47 ("[L]ocal stations are important; they are outlets for local news and forums for local citizens to express their views, they serve local advertisers, and they provide such local services as weather reports (which might be critical in areas subject to flash flooding or sudden tornadoes or storms).").

356. "PEG" is an acronym for "public, educational, and governmental" cable access channels. PEG channels provide a platform for locally produced cable programming (e.g., real-world cable shows of the sort parodied on *Saturday Night Live*'s "Wayne's World" and "Goth Talk" sketches). *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 734 (1996); *id.* at 781–82 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

357. There are exceptions of course, such as local weather and news channels. In our view, a quick perusal of these cable stations' program offerings—especially when contrasted with locally originated broadcast television programming—simply confirms our general statement about the primacy of local commercial broadcast television. Moreover, the paucity of advertisers on such cable stations also confirms their marginal status.

358. Television is most important with respect to disinterested or marginally interested voters, whereas politically active individuals rely more on newspapers. *See* Steven Chaffee & Stacey Frank, *How Americans Get Political Information: Print Versus Broadcast News*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 58 (1996). Although use of the Internet is increasing, especially among elites, it supplements rather than replaces traditional news sources. *See* Ted Bridis, *More Americans Getting Their News on Internet*, SEATTLE TIMES, June 8, 1998, at A5.

359. Local broadcasters have become the predominant source for news. *See* Steven D. Stark, *Local News: The Biggest Scandal on TV*, WASH. MONTHLY, June 1, 1997, at 38. One article even went so far as to call local television news the "heavyweight champion" because in a recent survey, local news received both a high trust rating and was ranked as one of "two most frequent sources of news." *See* Frank Newport & Lydia Saad, *A Matter of Trust*, AM. JOURNALISM REV., July 17, 1998, at 30, 30. According to provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 325(b)(1)), a local cable system must have the consent of a local broadcast station to retransmit that station's signal. Every three years, broadcasters must choose whether to demand mandatory carriage or negotiate for compensation. *See* 47 U.S.C.A. § 325(b)(3)(B) (West Supp. 1999); *see also* Michael Katz, *Table Time Approaches for Retrans: Cable and Broadcast Industries Prepare for Negotiations as 1992 Agreements Come Due*, BROADCASTING & CABLE, Feb. 26, 1996, at 46, 46. As a result of retransmission consent negotiations with cable companies, a handful of local news and weather channels were created in communities across the country. *See* Linda Moss, *The Upside of Retrans*, MULTICHANNEL NEWS, Jan. 27, 1997, at 34A. However, few viewers watch such channels on a regular basis. Furthermore, when retransmission consent agreements were renegotiated in 1996, some channels were merged or condensed and are no longer operating as stand alone channels. *See id.*

nomic point of view, covering a debate between the candidates for local office might be a complete disaster. Many local television and radio stations nevertheless provide such coverage on a voluntary basis. Perhaps local commercial television broadcasters do not provide such coverage solely out of the goodness of their hearts or a keen sense of civic responsibility. Nevertheless, the fact remains that a national television channel generally would not cover the lieutenant governor's race in South Dakota absent the most extraordinary and unlikely of circumstances.

The Commission's practice of issuing broadcasting licenses on a community-by-community basis has the salutary effect of ensuring a local media presence. It also has the ancillary effect of dividing up ownership rights to the mass media. When coupled with the duopoly rule and local and national ownership restrictions, the Commission's rules have the effect of dispersing media power among multiple owners. If Madison was correct in asserting that the best safeguard of liberty is to set faction against faction,[360] the Commission's approach to dividing ownership among multiple constituencies makes a great deal of sense.[361]

Employees are unlikely to criticize their employers, and this truism holds true for the Fourth Estate.[362] Accordingly, as fewer and fewer entities control more and more broadcast outlets, the incentive to expose disinformation or to correct for undercoverage of a particular story decreases.[363] If Ted Turner enjoyed a media monopoly, would CNN and *Time* have fallen upon their swords so quickly in the aftermath of the Operation Tailwind story scandal?[364] It seems highly unlikely. The pervasive, negative attention

360. *See* THE FEDERALIST NO. 10, at 58–60 (James Madison) (Random House 1937); THE FEDERALIST NO. 51, at 322 (James Madison) (Random House 1937); THE FEDERALIST NO. 53, at 322–26 (James Madison) (Random House 1937).

361. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189–92 (1997); *id.* at 225–29 (Breyer, J., concurring); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663–64 (1994).

362. *See* BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 217 (4th ed. 1992) (indicating that 33% of American newspaper editors said they would not feel free to print an item damaging to their parent firms); *see also* Howard Kurtz, *ABC Kills Story Critical of Disney*, WASH. POST, Oct. 14, 1998, at C2. The term "Fourth Estate" describes the role of the press in eighteenth- and nineteenth-century Great Britain. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF SPEECH IN AMERICA 233–34, 260–61 (1991) (describing the source of the phrase "Fourth Estate" and Justice Potter Stewart's importation of the phrase into modern First Amendment jurisprudence); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634, 35 (1975). In English constitutional theory, the government consists of three main components or estates: the Crown, the Lords Temporal and Ecclesiastical, and the Commons. Thomas Carlyle quoted Edmund Burke on the status of the press as a Fourth Estate, or fourth component of the English government, as follows: "Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentus [sic] to us in these times." Stewart, *supra*, at 634. Given the importance of the press to the process of democratic deliberation, Burke's appraisal of the press was undoubtedly correct.

363. *See* Schwartz, *supra* note 11, at 11–13, 23–24.

364. *See* Steve McClellan, *CNN Takes a Fall*, BROADCASTING & CABLE, July 6, 1998, at 10, 10–11; *see also* Dan Trigoboff, *Ex-Green Beret Sues CNN Over Tailwind*, BROADCASTING & CABLE, Aug. 10, 1998, at 12, 12.

brought to bear on CNN's and *Time*'s conduct in reporting this story forced Time Warner to take aggressive corrective action.[365]

When proponents of exclusive reliance on the market to regulate the broadcasting industry argue that media concentration promotes program diversity, they are only partially correct. It is certainly true that a person who owns two radio stations within the same market will probably select different program formats for each station, whereas divided ownership might lead to competition within the same format.[366] Suppose, however, that Disney owned both stations. Would the stations' news bureau report on Disney misdeeds with the same salacious alacrity of a competing local station unaffiliated with Disney? It seems rather unlikely.[367] Just as divided political power fosters accountability—a central tenet of federalism—so, too, divided media power fosters accountability.

The project of outlet diversity bears a clear relationship to the project of maintaining a viable, participatory democracy. To the extent that the Commission maintains rules and policies that divide and subdivide media ownership, it does the public a service. Moreover, this service is independent of antitrust concerns regarding price fixing or undue market power. The Commission's pursuit of diversity in the context of media regulation relates to fostering accountability to the public. Even if competition existed with respect to advertising rates or program purchasers, consolidation of media ownership could stifle the incentive to report on important issues of the day. As Professor Patricia Williams has observed: "[T]he degree to which the major media, the culture-creators in our society, are owned by very few or are subsidiaries of each other's financial interests, must be confronted as a skewing of the way in which cultural information is collected and distributed."[368]

D. Potential Objections to Pursuing Media Diversity Through Government Regulation

The problem with the Commission's efforts to foster diversity is that too many of its diversity efforts have had precious little to do with enhancing structural diversity among media outlets. Mr. Sidak correctly notes that "[a]s an initial matter, 'diversity of expression' is a remarkably vague objective for the United States government to pursue, considering that it directly touches freedom of speech."[369] Mr. Sidak further asserts that the Commis-

365. *See* Steve McClellan & Dan Trigoboff, *Role Confusion in TV News*, BROADCASTING & CABLE, July 13, 1998, at 14, 14–15.

366. *See* Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1054–55 (7th Cir. 1992); KRATTENMAKER & POWE, *supra* note 3, at 40–45; Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1017 (1996); Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 212–17 (1952).

367. *See* Kurtz, *supra* note 362, at C2; Laurie Mifflin, *An ABC News Reporter Tests the Boundaries of Investigating Disney and Finds Them*, N.Y. TIMES, Oct. 19, 1998, at C8.

368. Williams, *supra* note 135, at 535.

369. Sidak, *supra* note 33, at 1229.

sion has been less than effective in defining the objectives and scope of its diversity project; at some times "the phrase connotes diverse ownership," and "[a]t other times, it connotes a nannyish concern that listeners and viewers receive their recommended daily amount of various intellectual and cultural nutrients."[370] The EEO guidelines and race-based licensing preferences are a case in point—does the Commission equate race or gender with predetermined attitudes toward programming (a highly essentialist point of view), or does it view minority ownership (however brief) as working a kind of social magic?

Mr. Sidak argues that "[o]nly a Panglossian would suppose that an agency as politicized as the FCC would arrive at a definition of 'diversity of expression' that was truly neutral with respect to content."[371] He ultimately rejects the diversity project entirely, dismissing it as "a euphemism for government's appetite to control resource allocation in the telecommunications industry."[372] At most, in Mr. Sidak's view, the "FCC should construe diversity of expression to be an objective coextensive with the antitrust laws' goal of maximizing consumer welfare by promoting competition in the markets for goods and services."[373] Given the Commission's history of confusing means with ends, one can understand Mr. Sidak's eagerness to declare the project a failure.

Mr. Sidak's critique of the Commission's diversity project contains two assumptions, both of which are highly contestable. First, he assumes that the diversity project cannot work because some of the Commission's past efforts have been ineffective. Second, he believes that the market, tempered by antitrust law, will ensure sufficient opportunities for the dissemination of differing viewpoints.

Even if the Commission's attempts at promoting diversity have not always worked, this does not mean that regulatory efforts aimed at preventing concentrations of media power have no social value. The flaw in many of the Commission's diversity efforts has been its failure to consider the ends its diversity policies are meant to achieve. Rather than establishing objectives, the Commission has instead pursued a variety of means, many of which act in opposition to each other. For the diversity project to work, it must be implemented through policies designed to advance a coherent theory of media power and democracy.

Given the free-wheeling nature of much Commission policymaking and the unyielding pursuit of interest group advantage,[374] Mr. Sidak might be correct in arguing that the Commission is simply incapable of designing and implementing a meaningful diversity program. Even if, in theory, such a program could be designed, the Commissioners might simply lack the po-

370. *Id.*
371. *Id.* at 1230.
372. *Id.* at 1232.
373. *Id.* at 1238.
374. *See* MASHAW, *supra* note 13, at 23–29, 106–30.

litical capital to draft, implement, and enforce it in light of the unyielding pressures brought to bear against the Commission.[375] As between inept regulation and faith in the market, most reasonable people might prefer the tender mercies of the market.

The Commission has proven itself to be incapable of enforcing open-ended public interest requirements that require more than a modicum of discretion.[376] At the same time, however, the Commission has demonstrated its ability to enforce public interest regulations that contain objective, quantifiable standards; limitations on commercial matter in children's television programming provide a good example.[377] To the extent that diversity-enhancing regulations do not rely on hopelessly subjective criteria for enforcement, there is good cause to believe that the regulations might work as intended.

Turning to Mr. Sidak's second premise, faith in the market, one should think twice before consigning the airwaves to the person or entity with the deepest pockets. Just as a government monopoly over the airwaves would present a grave risk to democracy,[378] so, too, the private accumulation of media power presents a threat to free and open debate. Unchecked concentrations of media power constitute a tangible threat to democracy.[379] If someone like Rupert Murdoch controlled the broadcast media in a particular community, he would enjoy tremendous power to set the terms of the public agenda.[380]

Carefully separating and dividing political power will do little good if a handful of media oligarchs enjoy a stranglehold on the means of obtaining political power. In a mass, participatory democracy, candidates for public office rely on the broadcast media to reach the voters. Consider the case of California: with over 35 million citizens spread out across a vast expanse of land, a candidate for statewide office must of necessity conduct her campaign over the airwaves. Notwithstanding the ballyhooed claims of a new media era, television provides the most effective means of generating a mass audience. Whether for Princess Diana's funeral or the Super Bowl,

375. *See* KRASNOW & LINGLEY, *supra* note 13, at 127–39; *see also* Bill McConnell & Paige Albaniak, *Kennard Catches Hill*, BROADCASTING & CABLE, Mar. 22, 1999, at 8, 8–11 (describing the efforts of various members of Congress to browbeat the incumbent chairman into working their individual wills, often at cross purposes).

376. *See* Krotoszynski, *supra* note 1, at 2117–22.

377. *See id.* at 2120–21.

378. *See generally* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 31–37, 114–16 (1983); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530, 531–36 (1966).

379. *See* BAGDIKIAN, *supra* note 362, at 216–18.

380. *See* Geraldine Fabrikent, *Fox Drops Drama Based on Charge Against Justice Thomas*, N.Y. TIMES, Sept. 14, 1998, at C1 (reporting that Rupert Murdoch personally killed programming highly critical of Associate Justice Clarence Thomas that was slated to run on the FOX network because "Justice Thomas was a friend of his").

broadcast television continues to serve as a first among ostensible equals within the Fourth Estate.[381]

Mr. Sidak suggests that the electronic media should be treated like the publishing industry, periodicals, and newspapers.[382] Using print regulation as a paradigm, he questions why broadcasters should be subjected to a different regulatory regime.[383] His proposed analogy to print and newspapers is not, however, entirely apt. Newspapers tend to be very local in their scope. Local advertisers want to reach local consumers. The Commission's multiple ownership restrictions, network-affiliate rules, and localism policies have, through regulation, largely replicated for the electronic media the local nature of newspaper publishing. Absent such policies, it is not only possible, but quite likely, that programming decisions would be more highly centralized.[384] There is good reason to fear that the massive consolidation taking place in broadcasting, and particularly in radio broadcasting, will inevitably lead to "homogenized radio that sounds the same in every city, less and less local programming, less and less input from the listeners."[385] Without the ownership rules, broadcast television would probably look more like cable television, which generally programs to a mass, national audience twenty-four hours a day, seven days a week.

Under the current regulatory regime, local television broadcasters do not necessarily adhere to this "one size fits all" model. That is to say, a local broadcaster will sometimes elect not to clear network programming that the station manager believes local viewers will find offensive. Although most local affiliates air most network programming, this is not universally true.[386] The Commission's efforts to preserve localism as a feature of the

381. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903, 12,912 (para. 18) (1999) (report and order). Although the networks' share of the total television audience continues to decline, it nevertheless remains true that only network television is capable of drawing a huge national audience for special events such as the Superbowl or the final episode of *Seinfeld*. *See* Brian Lowry, *Peacock Clinches Top Spot: NBC Wins Season's Battle for Viewers as Big-Network Ratings Continue to Slide*, L.A. TIMES, May 22, 1998, at F1; Jon Krampner, *On the Edge at 50*, L.A. TIMES, May 17, 1998, at 8; *see also* Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 341–42 (1996). Moreover, local and network television remain the electorate's principal source of information about candidates and campaigns. *See* David Ho, *Americans Seeking Alternative News Sources*, INDIANAPOLIS STAR, Feb. 6, 2000, at A9 (reporting that a "January [2000] poll showed that while three fourths of the public still get most of their campaign news from television, viewers have migrated from the networks since the last presidential election").

382. *See, e.g.*, Sidak, *supra* note 33, at 1230–31.

383. *See id.*

384. As one irate commentator has remarked: "I wonder if Congress knew when it passed the telecom bill that people are pigs?" Al Brumley, *Radio's Signals Are Hard to Read*, DALLAS MORNING NEWS, Oct. 19, 1997, at 5C. Goff Lebhar, the commentator and general manager at a locally owned radio station in Washington, D.C., followed up with an equally pithy second rhetorical question: "Did they realize that half a dozen people, all males, would someday control what goes on the radio [and] have no obligation to satisfy anyone but Wall Street?" *Id.*

385. *Id.*

386. For example, WLOX-TV, an ABC network affiliate that operates on channel 13 in Biloxi, Mississippi, does not air *NYPD Blue*, preferring instead to air two syndicated "Seinfeld" shows in its place. Similarly, several public television stations refused to air Armistead Maupin's *Tales of the City*, believing the subject matter to be too controversial for local audiences to tolerate. *See* Krotoszynski, *supra* note 303, at 1231 n.181; *see also* Lisa de Moraes, *Two NBC Affiliates, Refusing to Play "God,"* WASH. POST, Mar. 7,

broadcast media will be effectively thwarted if large, corporate entities are permitted to amass large station holdings and use central programming techniques to achieve economies of scale and scope.[387]

The dangers associated with consolidation of media power in fewer and fewer hands presents more than a threat to locally based programming decisions. Uncontrolled centralization of media power presents a threat to liberty no less acute than the uncontrolled centralization of political power. Concentrated media power is utterly unaccountable to the citizenry.[388] Simply put, those who control the electronic media could, with sufficient concentrations of media power, effectively displace citizens as the de facto rulers.[389] Of course, resolving this difficulty by making the electronic media democratically accountable would be a cure worse than the disease.[390] A free and independent Fourth Estate is essential to the functioning of our participatory democracy. Even if one concedes that imposing democratic accountability would be both undesirable and infeasible, the use of content- and viewpoint-neutral government regulations to ensure accountability through structural diversity remains a viable solution to the problem.

To date, the Commission has not forcefully and consistently articulated the connection between its diversity project and democracy.[391] Its fail-

2000, at C7 (reporting on the decision of NBC affiliates in Salt Lake City, Utah, and Pocatello, Idaho, to refuse to air the NBC primetime cartoon *God, the Devil, and Bob* because of its controversial content); *In Brief*, BROADCASTING & CABLE, Apr. 3, 2000, at 104, 104 (reporting that NBC had cancelled *God, the Devil, and Bob* and that twenty-two NBC affiliate stations, representing about 5% of the country, did not air the series). Local programming decisions also run in the other direction—WKRG-TV, a CBS affiliate broadcasting on channel five in Mobile, Alabama, regularly preempts network programming to broadcast the Rev. Billy Graham's crusades. These localized programming decisions would be far less likely to exist in a regime characterized by effectively nationalized ownership of broadcast stations.

387. *See* Frank McCoy, *A New Media Giant Is Born*, U.S. NEWS & WORLD REP., Sept. 7, 1998, at 50 (describing the phenomenal growth of Chancellor Media Group, which is controlled by Hicks, Muse, Tate & Furst, Inc., a company run by Tom Hicks); Jones, *supra* note 7, at C1 (reporting that "[w]ithin two to three years," Tom Hicks "will own 600 to 700 radio stations nationwide" and "50 to 100 television stations").

388. *Cf.* THE FEDERALIST NO. 10 (James Madison) (Random House 1937).

389. At the moment, this prospect admittedly remains the stuff of James Bond films. *See* TOMORROW NEVER DIES (Universal Pictures 1997) (featuring the geopolitical machinations of fictional media mogul Elliot Carver, who seems to be loosely modeled on Rupert Murdoch). In the absence of effective government regulations that disperse media power, it is far from certain that this danger will remain solely a work of fiction.

390. *See* Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* THE PORTABLE THOMAS JEFFERSON 414 (Merill D. Peterson ed., 1975) ("[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."); Letter from Thomas Jefferson to Elbridge Gerry (Jan. 26, 1799), *in* THE PORTABLE THOMAS JEFFERSON, *supra*, at 477–78 ("I am for . . . freedom of the press, & against all violations of the constitution to silence by force & not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agents."). Of course, after serving as president for two terms, Jefferson's enthusiasm for the press declined precipitously, although he never abandoned his formal position that a free and uncensored press was essential to the maintenance of a participatory democracy. *See* Letter from Thomas Jefferson to John Norvell (June 14, 1807), *reprinted in* THE PORTABLE THOMAS JEFFERSON, *supra*, at 506 ("Perhaps an editor might begin a reformation in some such way as this. Divide his paper into 4 chapters, heading the 1st, Truths. 2d, Probabilities. 3d, Possibilities. 4th, Lies.").

391. The Commission's recent report and order regarding the limited repeal of the duopoly and one-to-a-market rules provides an important possible exception. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R.

ure to do so has left the Commission's diversity programs subject to sharp attack. By dividing and limiting the concentration of media power, the Commission's diversity policies enhance democracy. From a law-and-economics perspective, this objective might not be worthy of foregoing the efficiencies of an unregulated market. Reasonable minds can disagree.

E. The Need for Structural Regulations to Maintain Ownership Diversity

Daniel Brenner, vice-president of the National Cable Television Association, has argued that "it is difficult to predict that large owners vis-à-vis small ones are more inclined towards antidemocratic values."[392] He suggests that the size of a company or the number of stations it controls does not necessarily correlate with the broad mindedness of its programming decisions.[393] This observation may well be true. In some circumstances, bigger might be better, and smaller might translate into small minded. That said, if the ownership of local media outlets is centralized among a few owners, the dangers of self-serving and, perhaps, antidemocratic, behavior loom much larger. As Brenner himself recognizes, a frenzy of consolidation has occurred in the mass media industry over the past decade.[394]

The need for structural regulation does not, however, translate into a need for behavioral regulation. The Commission has demonstrated its utter inability to police meaningfully content-based regulations of broadcast programming.[395] As Brenner puts it, "[t]he *goals* of behavioral regulation aren't the problem; its enforcement is."[396] This is so because this type of regulation requires the Commission to make subjective determinations about the content of programming—a task for which bureaucrats are extremely ill-suited.[397] For the most part, the Commission has wisely given up on this quixotic endeavor.[398]

Structural regulation—limiting the number of stations that a single entity can control, divorcing ownership of print media from ownership of broadcast media within the same community, limiting the number of stations that a single entity can own or control within a community, or licensing stations on a community-by-community basis—operates quite differently. These rules are mechanical in operation; the Commission does not

12,903, 12,911–16 (paras. 16–24) (1999) (report and order) (justifying the Commission's continuing concern about undue concentrations of mass media ownership in terms of facilitating democratic deliberation). It remains to be seen whether the Commission will consistently invoke democratic deliberation as the touchstone of its diversity policies in general or its multiple ownership rules in particular.

392. Brenner, *supra* note 366, at 1033–34; *cf.* Schwartz, *supra* note 11, at 4–7, 11–13, 22–24.

393. *See* Brenner, *supra* note 366; at 1034; *cf.* Schwartz, *supra* note 11, at 11–13.

394. *See* Brenner, *supra* note 366, at 1010–11.

395. *See* Krotoszynski, *supra* note 1, at 2110–13.

396. Brenner, *supra* note 366, at 1015.

397. *See* KRATTENMAKER & POWE, *supra* note 3, at 70–84, 298–309, 313–15; Krotoszynski, *supra* note 1, at 2119–20.

398. *See* Brenner, *supra* note 366, at 1013–15.

engage in content-based inquiries to determine whether a licensee (or would-be licensee) is in compliance. They are also viewpoint-neutral. The Commission is not picking and choosing among potential speakers in drafting or applying these rules.

Given the inherent dangers associated with undue and unchecked concentrations of media ownership, these Commission rules and policies serve the public quite well. They also go well beyond the concerns of traditional antitrust regulation.[399] The Commission is not attempting to protect consumers of commercial advertising time from unfair prices but rather is trying to ensure that the community enjoys access to a competitive marketplace of ideas.

Indeed, the marketplace metaphor aptly describes the Commission's structural diversity policies. Consider a typical farmers market containing several dozen tables for would-be sellers to use to display their produce. Suppose that a large grocery chain, Bigco, purchases the property. Suppose further that Bigco reserves about the half the stalls for its own use and leases the remaining stalls on a highly selective basis, generally permitting only those with inferior produce to obtain space. Assuming that other opportunities to sell produce exist within the community, Bigco has not committed any antitrust violation. Indeed, Bigco could have torn down the market and erected a shiny new superstore on the property, if it were so inclined.

The town's farmers market is no more. To the extent that the community derived some utility from shopping at a traditional farmers market, that utility has been lost, even if produce is otherwise available on competitive price terms elsewhere within the community. A community can do without an open-air, multiple-vendor market for fresh produce. A community committed to democratic self-government cannot do without a competitive marketplace of ideas, and, for better or worse, locally based television broadcasters continue to play a special role in facilitating the process of democratic deliberation.[400]

The free-market crowd would probably assert that even if media concentrations led to oligopolistic concentrations of media power, market forces would nevertheless prevent the owners from acting irrationally. Judge Richard Posner made exactly this sort of argument in *Schurz Communications, Inc. v. Federal Communications Commission*,[401] a case that struck down the Commission's financial interest and syndication rules.[402] Law-and-economics types generally assume that human beings will always seek to maximize rents. In plain English, this means that people consis-

399. *Cf.* Chen, *supra* note 3, at 1482–94.

400. *See* S. REP. NO. 102-92, at 38–46, 50–62 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1171–79, 1183–95; *see also* Cable Television and Consumer Protection Act of 1992, Pub. L. No. 102-385, §§ 2(a)(6) & (a)(9)–(11), 106 Stat. 1460, 1461.

401. 982 F.2d 1043 (7th Cir. 1992); *see also* Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 312 (7th Cir. 1994).

402. *Schurz*, 982 F.2d at 1043.

tently will act in a fashion that provides them with the most money. This assumption, however, does not hold true in the real world.[403]

As Professor Steven Lubet has demonstrated, intervening "cultural or historical variables" can interfere with economic predictions of rent-maximizing behavior.[404] As he puts it, "[e]conomic modeling . . . is a pastime that should be limited to consenting adults."[405] Lubet cautions against using economic analysis of the law as a substitute for careful judicial analysis of actual human behavior and the predicative insights history and culture offer.[406] In this regard, Lord Acton has more than a little relevance: "Power tends to corrupt and absolute power corrupts absolutely."[407]

There is simply no reason to believe that someone like Ted Turner or Rupert Murdoch will consistently seek to maximize economic returns rather than use his media power to influence political events in ways he deems desirable.[408] Rather than attempting to control the content of programming via regulation—the Fairness Doctrine provides an example of such behavior[409]—a better regulatory approach is to ensure that media power is diluted and widely dispersed. To a large extent, the Commission's regulations incorporate this view.

Finally, it is difficult to quibble with the free-market crowd's assertion that competition is a good thing. Common ownership of media outlets is not conducive to competition in news and other local content programming. Consolidated news departments, like consolidated marketing de-

403. *See* Steven Lubet, *Notes on the Bedouin Horse Trade or "Why Won't the Market Clear, Daddy?*," 74 TEX. L. REV. 1039, 1050–57 (1996).

404. *Id.* at 1054–57.

405. *Id.* at 1057.

406. *See id.*

407. Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), *reprinted in* LORD ACTON, ESSAYS ON FREEDOM AND POWER 329, 335–36 (Gertrude Himmelfarb ed., 1955).

408. At the turn of the century, "yellow journalism" flourished as publishers such as William Randolph Hearst and Joseph Pulitzer competed vigorously against each other for readers and shamelessly used their newspapers to further their own personal agendas. *See* PROCTOR, *supra* note 299, at 115–34. Historians generally acknowledge that screaming headlines and inaccurate, one-sided stories in Hearst's newspapers fanned public sentiment against Spain and greatly contributed to bringing about the Spanish-American War. *See id.*; *see also* Krauss, *supra* note 299, at A3.

409. The Fairness Doctrine required commercial broadcasters to provide minimum amounts of even-handed coverage of the day's controversial issues. *See generally* Inquiry into Section 73.1010 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) (providing a history of the now-defunct Fairness Doctrine, which required television broadcasters to air programming on controversial issues of the day in a balanced fashion); KRATTENMAKER & POWE, *supra* note 3, at 61–65, 150–56, 237–75 (describing and critiquing the Fairness Doctrine); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151 (severely criticizing the Fairness Doctrine as difficult to enforce and inconsistent with free speech rights). Under severe pressure from the federal courts, the Commission abandoned the Fairness Doctrine in 1987. *See* Syracuse Peace Doctrine v. Television Station WTVH, 52 Fed. Reg. 31,768 (1987) (adjudication ruling); *see also* R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 293–302 (1993) (tracing the development and demise of the Fairness Doctrine).

partments, are a common feature of multiple stations groups.[410] Divided control of media outlets within a community creates a healthy competition among news and programming sources, and, as noted before, it creates and sustains a healthy checking function that ensures that news and information are accurate.

V. TOWARD IMPLEMENTING DEMOCRACY-ENHANCING DIVERSITY REGULATIONS

The Commission's structural regulatory efforts to maintain a diversity of media outlets should be continued and, perhaps, strengthened. In recent years, both Congress and the Commission have permitted greater concentrations of media power by relaxing both national and local ownership restrictions.[411] These efforts assist economically marginal media outlets by providing the opportunity for station owners to benefit from economies of scale. If a station might go dark in the absence of a takeover by another entity that already operates a radio station within the same market, better that the station should remain on the air even if it is owned by a company that also owns another station within the same market. In other words, having two stations owned by the same entity within the same market is preferable to having only one station. For reasons that will be discussed more fully below, this logic should not be given controlling weight, at least insofar as ownership of television stations is concerned.[412]

A. Media Consolidation and the Differences Between Radio and Television

As noted earlier, television plays a unique role in contemporary American society.[413] Accordingly, concentrations of media ownership that encompass television stations represent a more tangible threat to the marketplace of ideas than other kinds of concentrations of media power.[414] Un-

410. *See* Dan Trigoboff, *Shared News: Strained Bedfellows*, BROADCASTING & CABLE, Aug. 31, 1998, at 36, 36–37; Steve McClellan, *The Urge to Merge*, BROADCASTING & CABLE, Sept. 4, 1995, at 29, 29–30.

411. *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 202(c)–(f), 110 Stat. 56, 111; H.R. REP. NO. 104-204, at 118–20, 161–64 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 85–87, 174–77; Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903, 12,904–10, 12,922–24 (paras. 2–14, 37–41) (1999) (report and order); *see also* Randi M. Albert, *A New "Program for Action": Stereotyping the Standards for Non-Commercial Licensees*, 21 HASTINGS COMM. & ENT. L.J. 129, 150–52 (1998); Paige Albiniak, *A House Divided*, BROADCASTING & CABLE, June 28, 1999, at 16, 16–18; Chris McConnell, *Broadcasters Say More Is Better*, BROADCASTING & CABLE, July 27, 1998, at 14, 14; Elizabeth A. Rathbun, *Duopoly Race Sets Busy Pace*, BROADCASTING & CABLE, Nov. 22, 1999, at 6, 6.

412. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. at 12,907, 12,910–11 (paras. 7, 15).

413. *See supra* notes 135–41 and accompanying text.

414. For example, someone might own all the *Thrifty Nickel*-type publications within a single market. This publisher would have monopoly powers with respect to advertisements for the sale of 1982 Ford Fairmonts but would not enjoy any meaningful measure of control over the process of democratic deliberation. To be sure, consolidation of the ownership of advertising compendiums might raise antitrust problems, but

der this reasoning, it might be acceptable to permit multiple ownership of some media assets within a single market and not permit multiple or cross-ownership of other media assets.[415]

Such an approach could help to maintain program diversity because an entity that owns two radio stations within the same market is likely to select different formats for both stations.[416] One cannot deny that this arrangement benefits the listening public, at least insofar as access to entertainment programming is concerned. Moreover, although most radio stations provide limited news and weather coverage, most people do not rely on radio as their primary source of news and information. There are also many more radio stations in most markets than television stations. For example, metropolitan Los Angeles has eighty-seven radio stations but only twenty-five television stations.[417] In light of these considerations, concentrations of radio ownership present less of a threat to the marketplace of ideas than do concentrations of television ownership.

Concentrations of television station ownership present a different matter entirely, particularly within a single market. Historically, the Commission has prohibited the ownership of multiple television stations within a single market.[418] Recently, broadcasters successfully have lobbied the Commission to repeal its "duopoly" rule, thereby permitting multiple ownership of television stations that reach a common audience.[419] In some respects, this repeal simply ratified what some station owners have accomplished de facto through leased access agreements. In a leased access agreement, the owner of television station *A* agrees to assume principal responsibility for some portion of the programming selections on station *B*. In return for the power to program station *B*, station *A* pays station *B* a fee.[420] Although the owners of station *A* do not legally own or directly control station *B*, the leased access arrangement (also known as a local marketing agreement or LMA) gives them the practical ability to control a second sta-

such issues would have little to do with the project of maintaining a meaningful dialogue about self-government. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24–28, 70–75 (1965).

415. *See* Lee C. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976) (arguing that different First Amendment paradigms for different kinds of media might optimize the mass media's collective contribution to facilitating democratic self-government).

416. *See* KRATTENMAKER & POWE, *supra* note 3, at 40–45; Chen, *supra* note 3, at 1448–50.

417. *See* Application of Fouce Amusement Enterprises (Transferor) and LBI Holding I, Inc. (Transferee); For Consent to the Transfer of Control of Station KRCA(TV), 12 F.C.C.R. 22,009, 22,011 (para. 3) (1997).

418. *See* KRATTENMAKER & POWE, *supra* note 3, at 94–96; Chen, *supra* note 3, at 1443–50.

419. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903, 12,907–10 (paras. 8–13) (1999) (report and order); *see also* 1998 Biennial Regulatory Review, *supra* note 18, at 11,279–80 (paras. 9–10); *cf.* 47 C.F.R. § 73.3555(b) (1998) (prohibiting common ownership or control of television stations with overlapping Grade B contours).

420. *See* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 F.C.C.R. 12,559, 12,563, 12,591–604 (paras. 6, 66–99) (1999) (report and order).

tion within the same market. For several years, Commissioner Susan Ness has called for a Commission investigation of these arrangements.[421]

In August 1999, the Commission adopted new rules that attribute LMAs as ownership interests if a television station controls fifteen percent or more of the programming schedule of another station in the same market.[422] The Commission grandfathered existing LMAs for a limited time[423] and simultaneously repealed the duopoly rule, which had forced broadcasters to resort to LMAs in the first place.[424] Commissioner Ness characterized these changes as "forward-looking," providing "increased flexibility and clarity, while still avoiding the dangers of undue concentration of ownership of vital sources of news and information."[425]

To maintain structural diversity, the Commission should resist efforts to further weaken its multiple ownership rules, particularly with respect to television stations. These rules ensure a healthy diversity of voices in the local marketplace of ideas and provide an important checking function in local media markets.[426] On the other hand, the Commission's attempts to promote diversity through behavioral regulations should be abandoned.

The market, rather than the Commission, is the best arbiter of what the public wishes to see and hear. The Commission is in a very poor position to decide what kinds of programming should be aired. Both the national networks and the local stations have proven themselves quite adept at producing and airing programming that appeals to mass audiences on a consistent basis. Given this track record of success, there is little cause for Commission concern about maintaining programs that appeal to broad segments of the community. Moreover, even if broadcasters somehow collude to deny viewers access to a particular kind of programming, other fungible program delivery services would bridge the gap. Cable programmers, for example, have demonstrated that they are quite capable of developing

421. *See Mass Media*, COMM. DAILY, June 11, 1998, at 1, *available in* 1998 WL 10696625 ("We are overdue to count LMA's towards ownership restrictions."); Chris McConnell, *LMA Comes Under Fire*, BROADCASTING & CABLE, May 20, 1996, at 19, 22 (describing Commissioner Susan Ness's concerns about the effects of LMAs on media diversity); *see also* Chris McConnell, *Ness, Tristani Criticize FCC's Review of Radio*, BROADCASTING & CABLE, Aug. 17, 1998, at 14, 14–15 (describing Commissioners Ness and Tristani's concerns about the Commission's analyses of the competitive effects of several recent radio buyouts). In August 1999, the Commission adopted an attribution rule that would apply the duopoly rule to any leased access agreement for 15% or more of the lessor station's programming schedule. *See* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 F.C.C.R. at 12,597–601 (paras. 83–91).

422. *See* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 F.C.C.R. at 12,591–92, 12,597–98 (paras. 66–67, 83–85).

423. *See id.* at 12,600–02 (paras. 91–94).

424. *See* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, 14 F.C.C.R. 12,903, 12,929–44 (paras. 54–91) (1999) (report and order).

425. Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 F.C.C.R. at 12,660 (separate statement of Commissioner Susan Ness).

426. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663–64 (1994) (describing the importance of a local media presence, even in the era of cable and direct broadcast satellite (DBS) program distribution).

programming that appeals both to mass and niche audiences.[427] With the explosive growth of the Internet and the growing phenomenon of direct-to-video programming, there is little reason for the government to concern itself with the market for programming.

In this regard, the Commission's distress sale and comparative hearing preference programs should be deemed behavioral, rather than structural, efforts. The Commission's staff would no doubt assert that the two programs are structural, rather than behavioral, in nature; these programs decide who receives a license, not what one must do with a particular license. In operation, however, the programs are behavioral in nature. The Commission gives preferences to minority-owned enterprises on the assumption that these new licensees will program in a specific fashion (e.g., to a minority audience).[428]

For the Commission to move beyond an unjustifiable form of racial essentialism in its diversity project,[429] it must expand its definition of diversity to include other characteristics that might affect a station's editorial and programming decisions.[430] There is no preference program for religious organizations, labor organizations, civic groups, or other entities that might bring to bear a particular editorial or programming sensibility.[431] The Commission could attempt to develop a more inclusive diversity program—a policy that seeks to spread licenses around to different persons and organizations on a theory that the widest possible distribution of licenses will result in the most diverse programming decisions.

Such a policy would surely fail, notwithstanding the Commission's best efforts. Even if the Commission could redistribute de novo radio and television licenses based on a new and improved diversity plan, the market would simply re-redistribute those licenses over time to those who place the highest value on them. The Commission could avoid this problem by adopting stringent antitrafficking rules. Since the 1980s, however, the Commission has generally allowed the free alienability of licenses for broadcast stations[432] and also has taken the view that the market is the most

427. *See* Donna Petrozello, *Basic Cable Beats Broadcast Networks for Week*, BROADCASTING & CABLE, Aug. 31, 1998, at 13, 13. Although cable programming has eroded the broadcast networks' viewer base, ratings for individual cable shows still tend to be quite low relative to the ratings for highly viewed broadcast programming. *See Cable's Top 25*, BROADCASTING & CABLE, Aug. 17, 1998, at 68, 68 (containing Nielsen Media Research data).

428. *See* Streamlining Broadcast EEO Rule, *supra* note 43, at 5155–56 (paras. 1–3); *see also* Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 10 F.C.C.R. 2788, 2788–91 (paras. 1–10) (1995); Devins, *supra* note 279, at 35; Devins, *supra* note 149, at 129, 144.

429. *See* Foster, *supra* note 284, at 126–42.

430. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (Powell, J.) (plurality opinion) ("The diversity that furthers a compelling government interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

431. *Cf. id.* at 315–19 (explaining that an exclusive focus on race or ethnicity would tend to "hinder" rather than facilitate the "further attainment of genuine diversity"); Hall, *supra* note 255, at 585–91 (noting that sole reliance on race and gender to secure diversity cannot be explained in light of other potential markers for viewpoint, such as religious belief).

432. *See* Jennifer L. Gimer, Note, *Tender Offers in the Broadcast Industry*, 1991 DUKE L.J. 240.

reliable programmer.[433] The new diversity project could ensure that licenses are held by an eclectic lot, but it would not be able to guarantee effective programming decisions or, more importantly, a significant viewership. Given the fungible sources of programming that presently exist, strong anti-trafficking rules would simply accelerate the decline of broadcast television in favor of cablecasting, DBS,[434] and other alternative means of program distribution.

The Commission should instead pursue a content- and viewpoint-neutral approach to broadcast regulation, adopting and enforcing strong structural regulations that prevent the creation of undue concentrations of media power. Such an approach would well serve the goal of maintaining diversity without incurring the costs associated with fighting the market forces that currently shape (if not control) most programming and editorial decisions.

B. Remediation and Diversity Distinguished

The Commission's EEO guidelines, like its distress sale, tax certificate,[435] and comparative preference programs, could be defended on either diversity or remediation grounds. The diversity justification would posit a nexus between station personnel and a station's editorial and programming decisions. Hence, the argument goes, a station with an employee group that roughly mirrors the local population should be more sensitive to minority sensibilities than a station comprised entirely of nonminorities.

As with the distress sale and comparative preference programs, there is a kernel of truth to the assertion that people from different backgrounds view the same event from different perspectives.[436] The problem with this reasoning is that the nexus among race, gender, and viewpoint is too attenuated to justify a set of rules that virtually compel local television and radio broadcasters to make race- or gender-based employment decisions.[437] Moreover, race is hardly a comprehensive means of defining diversity.[438] If the Commission attempts to justify its EEO guidelines solely on diversity grounds, it is not likely to convince reviewing courts that it has satisfied *Adarand*'s strict scrutiny standard of review.

433. *See* Mark S. Fowler & Daniel C. Brenner, *A Marketplace Approach to Deregulation*, 60 TEX. L. REV. 207 (1982).

434. "DBS" stands for "direct broadcast satellite." *See* Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, 55 Rad. Reg. (P & F) 1341, 1343 n.1 (1982); Logan, *supra* note 17, at 1705 n.106.

435. Congress killed the tax certificate program in 1995 and has not yet reauthorized it. *See* McConnell, *supra* note 107, at 24. *But see In Brief*, *supra* note 386, at 80 (describing Senate Majority Leader Trent Lott's support of pending legislation that would reinstate the Commission's minority tax certificate program).

436. *See* Williams, *supra* note 135, at 533–34.

437. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 351–56 (D.C. Cir. 1998).

438. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978) (Powell, J.) (plurality opinion); Hall, *supra* note 255, at 569–74.

Remediation presents a much stronger basis upon which the Commission could rest its EEO guidelines. Even if the Commission itself has not engaged in overt forms of discrimination, local television and radio stations have done so.[439] This illegal behavior is not attributable to the Commission, of course, but the Commission should nevertheless ensure nondiscrimination by its licensees and can do so constitutionally.[440]

Indeed, the Commission's case is particularly strong on remedial grounds.[441] Commercial television and radio stations require licenses from the government to operate. Although licensing, by itself, does not transform television and radio stations into state actors,[442] the public trustee status of commercial broadcasters provides the Commission with a legitimate basis for requiring active nondiscrimination efforts.[443] The Commission is acting well within this public trustee concept by requiring licensees to maintain active efforts against both conscious and unconscious forms of racial discrimination and gender bias in employment.[444]

Some might object that the Commission's EEO guidelines are merely duplicative of the Equal Employment Opportunity Commission's (EEOC) efforts. This objection is without merit. The EEOC's efforts are largely reactive; the EEOC acts only after a complaint has been filed. Given the public trustee status of licensees and the Commission's duty to ensure that licensees use the airwaves in a fashion that promotes the public interest,[445] it is reasonable for the Commission to maintain proactive rules that require licensees to demonstrate their ongoing compliance with the nondiscrimination principle. In many respects, such treatment differs little from federal contractors subject to a variety of executive orders requiring affirmative ef-

439. *See*, *e.g.*, Office of Comm. of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

440. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."); *id.* at 492 ("Thus, if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.").

441. *Cf.* Streamlining Broadcast EEO Rule, *supra* note 43, at 5157–58 (paras. 5–6) (justifying EEO programs not on remedial grounds but rather on diversity grounds); Mishkin, *supra* note 279, at 880, 882 (questioning reliance on diversity enhancement rather than remediation as the rationale for the Commission's race-conscious licensing and employment programs).

442. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350–52, 358 (1974); *see also* Krotoszynski, *supra* note 199, at 302.

443. *See generally* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388–90 (1969); *see also* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination, 18 F.C.C.2d 240 (1969).

444. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 598–99 (1983) (rejecting tax exempt status for Bob Jones University because the university practiced racial discrimination and, therefore, did not qualify as a "charitable" institution). If it is constitutionally permissible for the Internal Revenue Service to deny tax exempt status to an institution of higher learning that practices racial discrimination incident to its religious beliefs on a theory that the university's practices contravened the public interest and, therefore, were not charitable, then surely the Commission can require licensees, who voluntarily assume the duties of "public trustees," to refrain from discrimination in their hiring and promotion policies. *See id.* at 591–96; *see also Red Lion Broad. Co.*, 395 U.S. at 388–90.

445. *See* 47 U.S.C. §§ 303, 309(a) (1994).

forts to seek minority candidates for jobs and subcontracts and imposing reporting requirements on the success of such efforts.[446]

The Commission seems to be receiving the federal judiciary's message. As noted earlier,[447] the Commission recently issued a notice of proposed rulemaking that proposes reforming the EEO guidelines. More specifically, it supports abandoning any use of numerical goals or incentives and reorienting the program away from promoting diversity and toward preventing discrimination. The recently adopted report and order in this proceeding boldly reorients the EEO program to advance the nondiscrimination project.[448] This rationale goes a long way toward resolving the most serious constitutional objections to the program. Because preventing acts of discrimination is one of the few compelling government interests that the Supreme Court has identified in the post-*Croson*/*Adarand* era, to the extent that the Commission rests its EEO guidelines on preventing discrimination, it stands a much better chance of the guidelines surviving judicial review.[449]

On the other hand, the Commission's stubborn refusal to abandon the diversity rationale as a co-equal basis for its EEO policies leaves its revised EEO program subject to constitutional attack. Moreover, judicial skepticism of the diversity rationale in the EEO context could easily have unintended, adverse consequence for diversity regulations in other contexts.[450] Because the nondiscrimination project provides more than ample support for the revised EEO guidelines, it is difficult to understand why the Commission did not simply abandon the diversity rationale as a justification for its revised EEO policies.[451]

446. *See* Exec. Order No. 8802, 3 C.F.R. 957 (1938–1943); Exec. Order No. 10,925, 3 C.F.R. 339 (1964–1965), *reprinted as amended* 5 U.S.C. § 3301 (1994); Exec. Order No. 11,246, 3 C.F.R. 339 (1964–65), *reprinted as amended* 42 U.S.C. § 2000e-2 (1994); 41 C.F.R. 60–61 (1999); *see also* Adams, *supra* note 191, at 1403–07 (describing outreach-based federal affirmative action programs); Barbra Murray, *New Minority Contract Rules*, U.S. NEWS & WORLD REP., July 6, 1998, at 59 (describing recent changes to outreach-based federal affirmative action programs).

447. *See supra* note 274 and accompanying text.

448. *See* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Procedure, 15 F.C.C.R. 2329, 2331–32, 2359–63 (paras. 2–4, 65–75, 228) (2000) (report and order).

449. It is telling that one recent commentator on the *Lutheran Church* case, Professor Michelle Adams, makes no effort to defend the Commission's EEO program on diversity grounds, relying instead on the nondiscrimination project to justify the program. *See* Adams, *supra* note 191, at 1445–50. This is perfectly understandable—the Commission's EEO program is much easier to justify as an effort to ensure nondiscrimination by licensees than as a means of securing diverse programming. *See id.* at 1461–62.

450. *See* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. at 2496–98 (2000) (statement of Commissioner Michael K. Powell).

451. One reason for this approach might be the potential collateral effect such a concession would have on the Commission's ability to defend its distress sale policy. In addition, a renewed tax certificate policy would have to rely on the diversity rationale, rather than the nondiscrimination project, as a justification for its existence. Had the Commission abandoned the diversity rationale in the context of its EEO program, it would have been hard pressed to defend the diversity rationale in the context of its distress sale policy or a new tax certificate policy; accordingly, the Commission retained the diversity rationale in the EEO context, thereby maintaining its ability to defend these other programs on the same basis. The distress sale policy and a race- or gender-based tax certificate policy would probably not survive scrutiny under

Thus, the history of discrimination within the broadcasting industry, coupled with the public trustee duties of licensees and the Commission's obligation to manage the airwaves to promote the public interest, support the Commission's decision to require licensees to take affirmative steps to avoid discriminating against minorities and women in their hiring and promotion decisions. Yet the Commission historically has overseen a program that virtually requires licensees to engage in race-based hiring to avoid onerous Commission EEO compliance proceedings.[452] Even if the Commission may lawfully require licensees to refrain from discriminating, including the adoption of proactive policies to avoid both conscious and unconscious forms of discrimination, the Commission may not require licensees to engage in race-based hiring efforts.[453]

The U.S. Court of Appeals for the District of Columbia Circuit was correct in concluding that the Commission's then-existing EEO policies effectively compelled licensees to meet the Commission's processing guidelines.[454] A licensee who satisfied the processing guidelines is presumptively in compliance with the Commission's nondiscrimination policies.[455] A licensee who failed to meet the benchmarks, in contrast, was subject to expensive and time-consuming discovery in a process that could lead to the revocation of the station's license[456]—literally, the death of the station. Given the stakes, any rational station manager would have attempted to ensure that the station stayed within the benchmarks, even if this meant preferring less qualified minority candidates over more qualified nonminority candidates. In practice, the pre-2000 guidelines went even further and strongly induced the hiring of specific minorities. Thus, if the best qualified candidate for a job happened to be African American, but the station was running low on Hispanics, for purposes of the Commission's racial benchmarks, the Commission's processing guidelines would have induced the

Adarand (although the Commission appears prepared to fight for both programs). The better course of action, at least from the perspective of surviving an equal protection-based challenge, would have been to decouple the EEO program from the diversity rationale, relocating it entirely as a nondiscrimination effort.

452. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 351–52 (D.C. Cir. 1998); *cf.* Adams, *supra* note 191, at 1446–47 (arguing that the D.C. Circuit should have divorced the EEO rules from the Commission's numerical processing guidelines).

453. Professor Adams suggests that nonpreferential, outreach-based affirmative action programs may not survive *Adarand* scrutiny. *See* Adams, *supra* note 191, at 1397–98. She notes, correctly in our view, that "[t]he irony is that non-preferential forms of affirmative action actually support the very thing affirmative action's critics say they want: A truly competitive and free market composed of qualified individuals from which employers, contract makers, universities, and other decision-makers can choose without regard to race." *Id.* at 1413. That said, one could easily disagree with Professor Adams's harsh assessment of *Lutheran Church*. *See id.* at 1426–31, 1445–50. A reasonable person could part company with Professor Adams on the question of whether the Commission's rules were truly efforts-based, as opposed to outcome-based. *See supra* notes 170–84 and accompanying text. Even so, she correctly asserts that nonpreferential, outreach-based programs adopted in response to histories of discrimination do not warrant strict scrutiny under *Adarand* or *Croson*. Moreover, even if such schemes *do* trigger strict scrutiny, the government's interest in eradicating the lingering effects of past discrimination should be sufficient to justify such programs.

454. *See Lutheran Church-Missouri Synod*, 141 F.3d at 351–53.

455. *See* Part 73 Amendment, *supra* note 49, at 3967 (paras. 1–3); EEO Processing Guidelines, *supra* note 49, at 1693; *see also* 47 C.F.R. § 73.2080(c) (1999).

456. *See* Part 73 Amendment, *supra* note 49, at 3974 (para. 50).

station manager to prefer a less qualified Hispanic candidate to a better qualified African American candidate. This outcome turns the nondiscrimination principle on its head.

The Commission attempted to avoid responsibility for these sorts of undesirable outcomes; it noted that its processing guidelines were merely illustrative of one means of demonstrating compliance with its EEO policies.[457] As Ms. Trigg explains it, "[t]he key factor that makes the Commission's EEO program race-neutral is that consideration of race or gender is not required in the actual hiring decision."[458] She may be correct in asserting that "[a] licensee is free to hire any candidate, regardless of race, ethnicity, or gender[,]"[459] but the reality is that few station managers were going to miss hitting the benchmarks. Judge Silberman was correct to label the net effects of the Commission's EEO policies, at least as implemented at that time, as race-based hiring.[460]

It is, of course, true that private companies may adopt and enforce affirmative action plans voluntarily.[461] This observation has little bearing on the relationship between the Commission's pre-2000 safe harbor guidelines and broadcasters' hiring practices. Just as the government may not directly discriminate on the basis of race or gender,[462] it is likewise prohibited from either encouraging private parties to engage in this sort of behavior or directly facilitating such behavior.[463] Here, the Commission's safe harbor guidelines did just that: they strongly encouraged private parties (that is, commercial television and radio stations) to use race as an absolute qualification in making certain hiring decisions.

The Commission cannot create an incentive structure that virtually demands race-based hiring decisions and then suggest it has no responsibility for the private conduct that results from the system. Indeed, if the Commission's attempt to characterize the pre-2000 EEO guidelines as merely "efforts-based" had succeeded, virtually every affirmative action program in the nation could be saved from undergoing strict scrutiny by simply replacing hard quotas with safe harbors and establishing a sufficiently unappealing administrative consequence for failing to meet the safe harbor targets. The Commission unsuccessfully attempted to elevate form over substance in a fashion that was both unconvincing and unappealing.[464] Whether the Commission had labeled the minimum acceptable number of minority employees as a quota, a target, a benchmark, or a processing

457. *See* Applications of Kelly Communications, Inc., 12 F.C.C.R. 17868, 17869 (para. 5) (1997) (memorandum opinion and order and notice of apparent liability); Streamlining Broadcast EEO rule, *supra* note 43, at 5155–61 (paras. 3–12); Trigg, *supra* note 205, at 241–46.

458. Trigg, *supra* note 205, at 246.

459. *Id.*

460. *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 351 (D.C. Cir. 1998).

461. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 197 (1979).

462. *See* United States v. Virginia, 518 U.S. 515, 529–35 (1996).

463. *See* Reitman v. Mulkey, 387 U.S. 369, 375–76 (1967); *see also* Krotoszynski, *supra* note 199, at 320–21.

464. *See* Trigg, *supra* note 205, at 247–51.

guideline, the net effect of the policy was not difficult for anyone outside the Commission's bureaucracy to see. The Commission's revised EEO program avoids the vice of statistical fanaticism and begins to reorient its rationale from diversity to nondiscrimination. These are welcome changes that significantly enhance the revised program's prospects for surviving judicial review.

Thus, although the Commission undoubtedly possesses both the power and the responsibility to ensure that licensees do not engage in race- or gender-based employment discrimination, a reasonable person could nevertheless question the constitutional integrity of the now-defunct efforts-based program.[465] Rather than holding licensees to strict numeric quotas, the Commission can and should simply require licensees to demonstrate that they do not engage in employment discrimination and have taken affirmative efforts to encourage racial minorities and women to seek employment. The Commission could require documentation of such efforts; if the documentation leaves the Commission with serious doubts about the sincerity of the licensee's efforts, it could designate the station's renewal application for hearing or, if the license is not up for renewal, issue an order to show cause on pain of a fine or forfeiture. Rather than prescribing the precise levels of minority employment required to show good faith, the Commission should require generalized proof of reasonable efforts to include minorities and women in the candidate pool. Fortunately, the Commission's revised EEO program reflects and incorporates these principles.[466]

Both commissioners and the Commission's staff are likely to argue that the safe harbor processing guidelines work to the advantage of licensees; they provide licensees with clear guidance on how much effort is sufficient to satisfy the Commission.[467] They also make life easier on the staff by reducing the need for the Commission to exercise discretion when reviewing EEO compliance materials. The simple answer to these observations is that mere administrative convenience is not a sufficient justification for

465. Professor Adams correctly notes that discrimination is not always intentional. As she puts it: "[T]he recognition of inadvertence here accepts the notion that critical race scholars and others have advanced for years: that much discriminatory activity is motivated by unconscious beliefs, and to construct a legal system that attains true equality, we must acknowledge that race-based decision-making still exists." Adams, *supra* note 191, at 1448.

466. *See* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 15 F.C.C.R. 2329, 2336–37, 2359–63, 2414–19 (paras. 20–21, 65–75, 217–28) (2000) (report and order).

467. *See, e.g.*, NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 192 (1995) (arguing that broadcasters should err on the side of compliance with public interest obligations and asking the rhetorical question: "Why should you want to know how close you can come to the edge of a cliff?"); Reed E. Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 16–19 (1995) (arguing that broadcasters should welcome clear guidance from the Commission on how to comply with public interest duties); Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1110–17 (1996) (arguing that clear rules with quantified standards benefit broadcasters by facilitating easy compliance).

rules that virtually command Commission licensees to make race-based hiring decisions.[468] Moreover, to the extent that licensees are uncertain that their minority outreach efforts are sufficient to satisfy the Commission, they would be wise to err on the side of overkill. Rather than resorting to a quota-based formula, licensees would be compelled to demonstrate policies that promote nondiscriminatory and inclusive hiring practices. In many respects, a certain measure of uncertainty would promote, rather than impede, the attainment of what should be the Commission's goal in maintaining its EEO policies—nondiscriminatory hiring practices by Commission licensees.

There are, no doubt, many other details that one should consider in developing a constitutionally unobjectionable EEO policy. For present purposes, however, this article will abjure further analysis of this issue because it lies largely outside the scope of its project—an exploration of the concept of diversity in mass media regulation. As indicated above, the most promising justification for EEO policies lies in remedying the effects of past and ongoing discrimination, and thereby furthering the public trustee concept, rather than in increasing viewpoint diversity within individual television and radio stations. In fact, as explained above, the Commission has good cause for maintaining an EEO policy that advances the cause of nondiscrimination. At the same time, one should simply reject out-of-hand viewpoint diversity as the basis on which the Commission can justify such a program.

VI. CONCLUSION

James Madison warned that to protect liberty, "[a]mbition must be made to counteract ambition."[469] In his view, a strong separation of powers was "necessary to control the abuses of government."[470] The Framers took great pains to establish a system of government that would provide adequate security for the citizens' liberty. This scheme of government, however, presupposes a free and open marketplace of ideas. An uninformed citizenry is incapable of self-government.[471]

At the beginning of the twenty-first century, one cannot reasonably dispute that the electronic media play an essential role not only with respect to the ongoing national debate about who should govern in Washington and what should be done once a candidate is in office but also with respect to who should serve in the state house or in city hall. For better or worse, at

468. *See* Frontiero v. Richardson, 411 U.S. 677, 690 (1973) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."); *see also* Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989) (rejecting "simple administrative convenience" as a justification for maintaining "a quota system").

469. THE FEDERALIST NO. 51, at 337 (James Madison and Alexander Hamilton) (Random House 1937).

470. *Id.*

471. *See* MEIKLEJOHN, *supra* note 414, at 24–28, 70–75.

the local, state, and national levels of government, television serves as the nation's town hall.[472] Given the dependency of our democratic practices on this medium, it seems reasonable to ask whether it should be for sale to the highest bidder, for such uses and for such purposes as the buyer might require. We think it reasonably self-evident that this proposition must be rejected.

Historically, the Commission has attempted to impose structural regulations on the electronic media that limited the ability of any one person or entity to corner the marketplace of ideas, whether nationally or in a particular community. At present, these efforts are under sustained attack by powerful industry groups, and the Commission's resolve to maintain its structural regulations is open to serious doubt. Ideally, the Commission will take a lesson from the Framers and insist on dividing media control, thereby ensuring that structural checks preserve accountability within the powerful Fourth Estate.

472. This is a state of affairs not lost on William Jefferson Clinton, who demonstrated the potential power of the electronic media to rally the citizenry to a particular policy agenda.