

HOW THE FCC SUPPRESSED MINORITY BROADCAST OWNERSHIP, AND HOW THE FCC CAN UNDO THE DAMAGE IT CAUSED

BY:

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I. INTRODUCTION

Broadcasting is the most influential industry in the nation. It is our signature export. It defines and facilitates our democracy, it drives our culture, it sets our policy agenda, and it brings the promise of equal opportunity within our grasp.

Among media outlets, over-the-air broadcasting, including both television and radio network (local and syndicated programming), has the greatest impact upon our society's educational, cultural, and political development.¹ It is the medium of last resort in the wake of a hurricane; when the electric, wireline, and wireless grids go down, broadcast stations with generators may continue to operate.² Although newer technologies have captured the public's imagination and purse, the Federal Communications Commission (FCC) continues to regard free over-the-air broadcasting as the lifeline for millions of Americans.³

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¹ Our political system depends on broadcasting. Section 315 of the Communications Act presumes the existence of free broadcasting as a critical component of the democratic system. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969).

² When the federal government shuts down, leaving only "essential" (e.g. National Security) employees on the job, the Media Bureau is expected to maintain a skeleton staff to ensure that the nation's broadcasting infrastructure continues to operate.

³ See *Remarks of FCC Chairman Ajit Pai at the North American Broadcasters Association's Future of Radio and*

Certainly, the deliberate exclusion of people of color from ownership of the airwaves would be profoundly anti-competitive. What could be a more inefficient deployment of resources than having the entrepreneurial, managerial, and creative wealth of one-third of the country unable to find expression in the nation's most influential industries?

Such exclusion would also be morally wrong. Yet, it happened—on a grand scale—from 1932 to 1978. And, in some respects, it continues to this day.

Thus, it is no accident that 88 years after the FCC's birth, when 38.7% of Americans are persons of color,⁴ minority television ownership stands at 2.6% and is dropping fast,⁵ and minority radio ownership is stagnant at about 5%.⁶ Most of these stations are small, and consequently these holdings amount to less than 1% of industry asset value.⁷

Today, although people of color often appear in front of the camera and in front of the microphone, they are seldom found in positions of authority behind the camera and behind the microphone. People of color own none of the powerful large market network-affiliated television stations that dominate public discourse.

This wasn't an accident. Diving into dusty old cases, this article exposes how the FCC, for five decades, openly, deliberately, and shamefully discriminated against minority broadcasters, making it virtually impossible for them to obtain access to publicly owned broadcast spectrum.

People of color were never lacking in the business acumen, creative capacity or educational attainments required for broadcast stewardship. In the mid-1950s, it was no more difficult to

Audio Symposium, FCC (Feb. 16, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343529A1.pdf.

⁴ See *Quick Facts, United States*, U.S. CENSUS BUREAU (2017), <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

⁵ *Third Report of Commercial Broadcast Stations, FCC Form 323 Ownership Data as of October 1, 2015*, FCC (2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344821A1.pdf.

⁶ *Id.*

⁷ Estimate by author, who tracks this as president of MMTTC's media and telecom brokerage.

publish a newspaper than to operate a radio station. Yet, by 1950, minorities owned zero radio stations but had owned, at various time intervals since the early 19th Century, over 3,000 (mostly weekly and a few daily) newspapers,⁸ as well as several magazines. That feat was made possible by the fact that there was no “Federal Newspaper Commission” acting as a gatekeeper to confer licenses on preferred customers and deny licenses to second-class citizens.

Since the radiofrequency spectrum is public property⁹—and is about as critical as public infrastructure can ever get¹⁰—how could there possibly have been so vast a disparity in ownership of this asset?

Minority exclusion from the airwaves has had, and continues to have, profound consequences. Even in the internet age, broadcasting is by far the most influential institution in society, doing more than any other to determine the issues debated in elections and the ultimate outcome of those elections.¹¹ The relative powerlessness of people of color in the nation’s political and economic agenda-setting can fairly be traced to their systematic exclusion from ownership of the instruments of mass communications.¹²

This fact has not been lost on the courts, the Congress, or the Federal Communications Commission (FCC). They have long been of one voice that minority ownership must be addressed

⁸ According to Armistead Pride, (then) Dean of the School of Journalism at Lincoln University in Jefferson City, Missouri, there had been by 1967 “approximately three thousand Negro newspapers” published in the United States. ARMISTEAD S. PRIDE, *THE BLACK AMERICAN AND THE PRESS* 3 (Jack Lyle 1968). There were also dozens of Hispanic, Asian American, and Native American owned newspapers by the mid-20th Century.

⁹ Communications Act of 1934, 47 U.S.C. § 307(a) (1982 and Supp. V 1987).

¹⁰ See Brent Skorup, *The Importance of Spectrum Access to the Future of Innovation*, MERCATUS CTR. (Dec. 20, 2016), <https://www.mercatus.org/system/files/skorup-spectrum-access-future-innovation-mop-v2.pdf>.

¹¹ See Jeffrey Gottfried et al., *The 2016 Presidential Campaign – A News Event That’s Hard to Miss*, PEW RESEARCH CTR. (Feb. 4, 2016), <https://ircsofia.wordpress.com/2016/03/07/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/>.

¹² See Ta-Nehisi Coates, *The First White President*, THE ATLANTIC (Oct. 2017), <https://www.theatlantic.com/video/index/539754/ta-nehisi-coates-trump-first-white-president-animation/> (discussing how transient and ephemeral Black political power really is, and how the long-pending issue of “agenda setting” by the mass media continues to place people of color at a profound logistical disadvantage).

as a central element of structural broadcast ownership regulation.¹³ Further, as this article illustrates, the courts, Congress, and the FCC have recognized four legal justifications for intervention to enable minority broadcast entrepreneurs to compete: (1) promoting diversity of voices, viewpoints, and information;¹⁴ (2) promoting economic competition;¹⁵ (3) remedying the present effects of past discrimination;¹⁶ and (4) preventing discrimination in the future.¹⁷

Agencies do not like to confess error, and thus it is unsurprising that only *once* has the FCC acknowledged its own history of systemic discrimination.¹⁸

The first sentence of the Communications Act expressly provides for the FCC's administration of the spectrum "without discrimination on the basis of race, color, religion, national origin, or sex."¹⁹ Yet, this powerful non-discrimination provision is not self-executing. And to the nation's shame, this provision has never been executed.

Here are the six specific devices the FCC used to maintain segregation of the airwaves:

- The FCC and its predecessor, the Federal Radio Commission (FRC) outright refused to grant radio station licenses to African Americans and Jewish Americans because of their race and religion, until World War II,²⁰
- The FCC used its licensing power to facilitate the schemes of segregated state

¹³ See Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, NPRM, 17 FCC Rcd 18503, 18509 ¶14 (2002).

¹⁴ See *infra* pp. 53-57.

¹⁵ See *infra* pp. 57-61.

¹⁶ See *infra* pp. 61-62.

¹⁷ ¹⁷ See *infra* pp. 62-63.

¹⁸ See Section 257 Proceeding for Identifying and Eliminating Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280, 6306 (1996) (1996 Section 257 NOI) (citing *Southland Television*, 10 RR 699, *recon. denied*, 20 FCC 159 (1955) (discussed *infra* pp. 71-71)) and acknowledging that a good case could be made that "[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and. . .special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum" (citing Statement of David Honig, Executive Director, Minority Media and Telecommunications Council, *En Banc* Advanced Television Hearing, MM Docket No. 87-268 (December 12, 1995) at 2-3 and n. 2).

¹⁹ 47 U.S.C. § 151 (1934), providing that the FCC was created, *inter alia*, "so as to make available, so far as possible, to all the people of the United States, without discrimination *on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, nation-wide and world-wide wire and radio communication service." (emphasizes added).

²⁰ See *infra* pp. 65-68.

university systems to exclude minorities from equal access to broadcast education;²¹

- The FCC licensed and relicensed open segregationists, thereby preventing minorities from gaining a foothold in commercial broadcast employment for generations;²²
- The FCC used absurdly stringent financial qualifications requirements to keep minorities out of the comparative licensing process; and applied broadcast experience, past broadcast record, and ownership of a daytime-only station as preferential licensing criteria sufficient to overcome minority status as comparative factors;²³
- The FCC repeatedly ignored a court decision that required it to take minority ownership impact into account when considering technical radio allotment and allocation issues;²⁴ and
- The FCC adopted a broadcast equal employment opportunity rule, but then failed to this day to meaningfully enforce it or even measure whether it has had any impact.²⁵

To be sure, in 1977, aware of much of this history and deeply troubled by it, FCC Chairman Richard E. Wiley convened the Minority Ownership Task Force and charged it with arriving at new, pro-active policies to advance minority broadcast ownership. Soon thereafter, the FCC adopted the Tax Certificate Policy,²⁶ a “win-win” incentive program which the Government Accountability Office (GAO) has found to have been one of the three primary factors driving minority ownership.²⁷ The Tax Certificate Policy quintupled minority station

²¹ See *infra* pp. 68-71.

²² See *infra* pp. 71-88.

²³ See *infra* pp. 78-83.

²⁴ See *infra* pp. 83-86 in the FCC’s administration of its spectrum management policies.

²⁵ See *infra* pp. 86-91.

²⁶ See Statement of Policy on Minority Ownership of Broadcast Facilities (1978 Minority Ownership Policy Statement), 68 FCC2d 979, 983 (1978).

²⁷ See Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, *Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess*, GAO 5 (Mar. 2008), <https://www.gao.gov/assets/280/273682.pdf> [hereinafter *GAO Media Ownership Study*] (identifying these factors: “(1) the large scale of ownership in the media industry, (2) a lack of easy access to sufficient capital for financing the purchases of stations, and (3) the repeal of the tax certificate program—which allowed for the deferral of capital gains taxes on the sale of broadcast and other media outlets and, thereby, provided financial incentives for incumbents to sell stations to minorities.”).

ownership by 1995,²⁸ when Congress killed it.²⁹ Other modest 1970s-era policies to advance minority ownership have been revoked, repealed, eviscerated, or overruled, only to have the FCC fail or refuse to develop replacement policies.³⁰

What about discrimination in advertising—the notorious “no urban dictates” and “no Spanish dictates” many advertisers use to keep their messages off Black and Spanish radio and thus, out of the hearing of most African and Hispanic shoppers? In 2007, after 23 years of delay and a cost of \$200 million a year in foregone revenue to minority broadcasters, the FCC finally banned advertising discrimination.³¹ Yet, the FCC still hasn’t created an enforcement program giving teeth to this rule; unsurprisingly, this practice has returned with a vengeance and the advertising industry has had to engage in “self-regulation” to try to cure it.³²

What about equal employment opportunity (EEO)—the route to a broadcast management track that can lead to ownership?³³ Thanks to the pioneering efforts of the Office of Communication of the United Church of Christ, the FCC adopted broadcast, cable, and common carrier EEO rules in the 1970s—then almost always proceeded not to enforce them.³⁴

²⁸ See Catherine J.K. Sandoval et al., *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity, and Service in the Public Interest*, MMTc 14 (2009), http://mmtconline.org/wp-content/uploads/2012/05/Minority_Commercial_Radio_Broadcasters_Sandoval-_MMTC_2009_final_report.pdf [hereinafter *Sandoval Study*].

²⁹ Deduction for Health Insurance Costs of Self-Employment Individuals, Pub. L. No. 104-78, §2, 109 Stat. 93, 93-94 (1995) (attaching repeal of the Tax Certificate Policy to an unrelated bill affecting 1995’s IRS Form 1040 that landed on President Clinton’s desk on April 13, 1995 and therefore had to be signed to avoid a tax-deadline disaster).

³⁰ There were notable exceptions. In 2000, FCC Chairman William Kennard facilitated the publication of the five “*Adarand Studies*.” They examined in copious detail how and why minorities have been excluded from broadcast ownership. See *infra* pp. 90-91.

³¹ See *Diversification of Ownership In the Broadcasting Services, 2006 Quadrennial Regulatory Review, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5922, 5941-42 ¶¶49-50 (2008) (banning racial discrimination in the placement of broadcast advertising).

³² See American Association of Advertising Agencies, *Issues Fair Play Charter for Minority-Owned and Minority-Targeted Media* AAAA (Feb. 6, 2018) <https://www.aaaa.org/4as-issues-fair-play-charter-minority-owned-minority-targeted-media/> (asking media agencies, and media departments within agencies, to recommit to fair and equitable treatment of minority media owners).

³³ See *infra* pp. 86-91.

³⁴ See *infra* p. 87.

What slight EEO enforcement the FCC undertook in the 1990s died in 2001, leading to a purge of almost all minorities from English language radio journalism.³⁵

This article concludes with a series of recommendations for remedial action in the form of new incentive programs, elimination of market entry barriers, fashioning structural ownership rules in a manner that does not harm minority ownership, and resuming long-dormant EEO enforcement.³⁶ To jump-start this process, this article proposes that the FCC convene a Minority Ownership Summit to fully expose the harm the agency did and develop remedies tailored to the nature and extent of the harm—remedies designed to ensure that the awful history detailed in this article can never happen again.³⁷

II. THE LEGAL JUSTIFICATIONS FOR FCC INTERVENTION TO ENABLE MINORITY BROADCAST ENTREPRENEURS TO COMPETE

In 1995, the Supreme Court held in *Adarand Constructors, Inc. v. Peña* that any federal program that uses racial criteria as a basis for decision-making must satisfy strict scrutiny; that is, it must serve a compelling governmental interest and must be narrowly tailored to serve that interest.³⁸ There may be four FCC broadcast regulatory policies that could satisfy strict scrutiny: (1) promoting diversity of voices, viewpoints, and information; (2) promoting economic competition; (3) remedying the effects of past discrimination, and (4) preventing and proscribing discrimination.

These four interests are, or may be, compelling governmental interests that potentially could justify race-conscious decision-making. However, race-conscious remedies would be

³⁵ *See infra* pp. 88-90.

³⁶ *See infra* pp. 96-105.

³⁷ *See infra* p. 96.

³⁸ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that strict scrutiny applies to equal protection evaluation of federal race-conscious programs, and thereby overruling the holding in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), that intermediate scrutiny applies to review of these federal programs).

premature, since the FCC has not yet exhausted the potential race-neutral remedies that are a necessary predicate for consideration of race-conscious ones.³⁹ Thus, the four legal justifications given below have value irrespective of whether they would satisfy strict scrutiny. Rather, they are worthy of consideration because they collectively define the wide range of reasons why the FCC should be affording minority entrepreneurs a fair opportunity to access scarce, federally protected broadcast spectrum.

A. Minority Ownership Policies Promote Diversity of Voices, Viewpoints, and Information

The viewpoints of minorities—including the diversity of viewpoints held *within* minority communities—can enrich public discourse, reduce stereotyping, and help unify the nation. Thus, promoting diversity of viewpoints has always been and should continue to be a primary reason for FCC action to preserve, protect, and promote minority ownership. That interest is particularly compelling in light of the central role of the electronic mass media in maintaining social cohesion⁴⁰ and cultural vibrancy⁴¹ and indeed in sustaining our democracy itself.⁴²

³⁹ See *infra* pp. 91-92.

⁴⁰ The socially unifying nature of mass communications was recognized in *Waters Broadcasting Corp.*, 91 FCC2d 1260 (1982) *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (1984), *cert. denied*, 470 U.S. 1027 (1984). In *Waters*, the Commission awarded an FM station construction permit to an African American woman who proposed to serve a nearly all-White community. The Commission held that “minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation.” *Id.* at 1265. *Waters* validated the fact that communication between minorities and nonminorities, rather than just communication within a minority group, is an essential aspect of the diversity-promoting goal of the comparative hearing process.

⁴¹ The Commission’s diversity jurisprudence has focused largely on informational, public affairs and instructional content. See, e.g., *Deregulation of Radio* (Report and Order), 84 FCC2d 968, 975, *recon. granted in part*, 87 FCC2d 797 (1981), *aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Yet, it is cultural broadcast content which most influences and mediates social norms. The inclusion of culture among the elements of media content affecting due process or equal protection rights may be analogized to the inclusion of cultural (as well as athletic) activities in the scope of educational opportunities covered by desegregation decrees. *Brown v. Bd. of Educ. of Topeka (Brown I)*, 347 U.S. 483 (1954), held that education is “a principal instrument in awakening the child to cultural values.” *Id.* at 493. Courts have not wavered in requiring the integration of school bands and orchestras, sporting events, and extracurricular clubs. See, e.g., *Davis v. Bd. of Sch. Commissioners of Mobile Cty.*, 393 F.2d 690, 696 (5th Cir. 1968) (declaring that failure to schedule games between all-Black teams against all-White teams “is no longer tolerable; the integration of activities must be complete.”)

⁴² See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the right of the public to receive suitable

As long ago as 1946, the FCC recognized that “the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time.”⁴³ In 1960, the FCC recognized that “service to minority groups” serves the public interest,⁴⁴ and more recently it has recognized that minority ownership is a valuable way to foster diversity of viewpoints.⁴⁵

For its part, Congress has recognized that minority ownership is an important element of broadcast structural ownership diversity.⁴⁶

In 1990, the FCC’s interest in promoting racial diversity in broadcast ownership won the endorsement of five Supreme Court justices. In *Metro Broadcasting*, the Court upheld two race-conscious minority ownership incentive programs on the basis that these programs helped

access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (“The broadcast media have established a uniquely pervasive presence in the lives of all Americans.”); *Turner Broad. System, Inc. v. FCC (Turner II)*, 520 U.S. 180, 195 (1997) (stating that broadcasting is “an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.”) (internal citations omitted).

⁴³ FED. COMM’N COMMISSION, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (TELECOMMUNICATIONS) 15 (1946) [hereinafter *Blue Book*].

⁴⁴ See 1960 Programming Statement, *infra* note 110.

⁴⁵ See 1978 Minority Ownership Policy Statement, *supra* note 26 at 979; *Waters*, 91 FCC2d at 1264-1265 ¶¶ 8-9 (recognizing that a minority broadcaster could provide nonminorities with minority viewpoints they are unlikely to receive elsewhere.)

⁴⁶ In 1982, Congress determined that “an important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities. . . it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public.” Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087; H.R. Conf. Rep. 97-765, at 26 (1982). In 1993, Congress adopted 47 U.S.C. § 309(i)(A)(3), which provided that:

for each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall include safeguards to protect the public interest in use of the spectrum by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including . . . businesses owned by members of minority groups, and women.

In 1993, when Congress replaced comparative hearings for spectrum with auctions, Congress again reiterated that minority ownership was an important objective in fostering minority telecom ownership. See 47 U.S.C. §309(j)(3)(B) (1993) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. § 309(j)(4)(c)(ii) (1993) (same with respect to assigning areas and bandwidths); 47 U.S.C. § 309(j)(4)(i) (1993) (provision of spectrum based services).

promote the broadcast of diverse viewpoints.⁴⁷ *Metro Broadcasting* was decided under the intermediate scrutiny standard five years before *Adarand* established strict scrutiny as the standard for race-conscious federal programs.

Diversity in the media is at least as important as it is in public education—a field in which the compelling nature of diversity is settled law.⁴⁸ Indeed, the diversity interest ranks very high on the scale of interests protected by the FCC. As the FCC acknowledged in 1969 when it initially adopted its equal employment opportunity rule, “it has been argued that because of the relationship between the government and broadcasting stations, ‘the Commission has a constitutional duty to assure equal employment opportunity.’”⁴⁹ No less can be said about media

⁴⁷ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). The two programs were: (1) an enhancement for minority ownership in comparative hearings for broadcast licenses (*see TV-9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert denied*, 418 U.S. 986 (1974)) and; (2) the distress sale policy, which provided financial incentives for the transfer of broadcast licenses, in hearing status, to minority-owned firms (*see* 1978 Minority Ownership Policy Statement, *supra* note 26 at 979). The Commission no longer conducts comparative hearings and the distress sale policy has been used only twice since 1990.

⁴⁸ In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court held that a law school has a compelling interest in maintaining a diverse student body, since diversity in higher education improves learning, promotes cross-cultural understanding, fosters equal access to academic institutions, and contributes to our national prosperity by producing leaders equipped to thrive in a globalized, multicultural marketplace. *Id.* at 330. The mass media, like education, is essential to the attainment or enjoyment of every element of civilized life in a modern democracy, including housing, health care, defense of one’s civil liberties, and informed participation in the political process. *See Blue Book*, *supra* note 43 at 4. What school desegregation jurisprudence tells us about the importance of public education can also be said about free broadcast media today. Public education has traditionally been recognized as vital to the “preservation of a democratic system of government.” *Brown I*, 347 U.S. at 493; *see Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). Further, public education is necessary to prepare individuals to be self-reliant and self-sufficient participants in society. *Brown I*, 347 U.S. at 493.

⁴⁹ *Nondiscrimination in the Employment Practices of Broadcast Licensees (Nondiscrimination - 1969)*, 18 FCC2d 240, 241 (1969) (adopting the recruitment portions of the EEO rule). The Commission cited the Letter of Assistant Attorney General Stephen J. Pollack, Dep’t of Justice 4 (Mar. 21, 1968) [hereinafter Pollack Letter], which identified *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) as a citation which had been given in support of that proposition. *Nondiscrimination – 1969*, 18 FCC2d at 241 n. 2. The party that made this argument in 1969 was the Department of Justice. Citing *Burton*, the Department argued that “the use of the public domain would appear to confer upon broadcast licensees enough of a ‘public’ character to permit the Commission to require the licensee to follow the constitutionally grounded obligation not to discriminate on the grounds of race, color, or national origin.” Pollack Letter in *Nondiscrimination in the Employment Practices of Broadcast Licensees (Nondiscrimination – 1968) (MO&O and NPRM)*, 13 FCC Red 766, 776-77 (1968) (adopting employment nondiscrimination requirement for broadcasters). The Department was correct. Indeed, the case for federal enforcement of due process or equal protection rights in broadcasting is even stronger than the case for enforcement of those rights in *Burton*. *Burton* involved a luncheonette which (owing to its location in a municipal building) could not have existed absent state action, but which was not essential to the performance of the state’s functions. Free broadcasting cannot exist absent state action and it is essential to the performance of state functions.

ownership, which the FCC has long recognized as derivative of equal employment opportunity.⁵⁰

Numerous research studies have illustrated the nexus between minority ownership and the minority-targeted programming that minority audiences prefer, finding that minority ownership promotes diversity because minority owners serve interests and address needs not served or often recognized by most majority media.⁵¹ African American audiences, Hispanic American audiences, and White American audiences differ greatly in their radio programming preferences.⁵² A 2011 FCC-commissioned study found that minority-owned stations tend to broadcast minority-targeted programming,⁵³ and that while the majority of the minority-formatted stations are not minority-owned,⁵⁴ the presence of a minority-owned station increases the amount of minority-targeted programming in a market.⁵⁵ A 2009 study demonstrates that approximately 73% of minority-owned stations serve the community by broadcasting minority oriented programming in “Spanish, Urban, Urban News, Asian, Ethnic, and Minority-oriented Religious formats.”⁵⁶ Further, a 2006 study found that minority targeted local news can promote civic engagement, finding that “Spanish-language news programs boost Hispanic [voter] turnout by five to ten percentage points overall.”⁵⁷ Extensive research documents that minority owned broadcasters offer viewpoints not provided elsewhere.⁵⁸ Much of this research on the distinct

⁵⁰ See *infra* pp. 87-88.

⁵¹ See Joel Waldfoegel, *Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009*, U. OF MINN. 24 (July 18, 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-307482A1.pdf [hereinafter *Media Ownership Study 7*]; see also *Sandoval Study*, *supra* note 28, at 20.

⁵² See *Media Ownership Study 7*, *supra* note 51, at 2, 8-9, 24.

⁵³ See *id.* at 9-10. See also *Sandoval Study*, *supra* note 28, at 19.

⁵⁴ See *Media Ownership Study 7*, *supra* note 51, at 9-10.

⁵⁵ See *id.* at 21, 24.

⁵⁶ See *Sandoval Study*, *supra* note 28, at 19-21.

⁵⁷ See Felix Obelholzer-Gee & Joel Waldfoegel, *Media Markets and Localism: Does Local News En Espanol Boost Hispanic Voter Turnout?*, NAT'L BUREAU OF ECON. RESEARCH 11 (June 2006), <http://www.nber.org/papers/w12317.pdf> [hereinafter *Obelholzer-Gee and Waldfoegel Study*].

⁵⁸ These studies are collected in Comments of Consumers Union *et al.* in MM Docket No. 01-235 (Cross-Ownership of Broadcast Station and Newspapers) (filed December 3, 2001), pp. 53-54 ns. 87-89. Additional studies are collected in the Comments of EEO Supporters (MMTC *et al.*) in MM Docket No. 98-204 (Broadcast and Cable Equal Employment

programming offered by minority broadcasters was collected in the majority opinion in *Metro Broadcasting*.⁵⁹ One of the FCC's 2000 *Adarand* studies, the Santa Clara Study, also reaches this conclusion.⁶⁰

These scholarly findings not only hold up empirically, they stand up intuitively. Recall the exclusively segregationist programming of virtually all southern television stations before and during the 1960s, until the WLBT-TV, Jackson, Mississippi litigation, which led to the loss of that station's license renewal at the hands of the D.C. Circuit in 1969.⁶¹ Consider how different and better Jackson, Mississippi's WLBT-TV was after 1980 when it came to be minority owned and managed, with a racially integrated workforce.⁶² Now imagine that in the 1950s, the publishers of the Black newspapers of the day had also owned television stations. Think of how much shorter the civil rights struggles would have been and how many fewer people would have suffered and died. After a few years under the microscope of integrated television stations'

Opportunity Rules and Policies) (filed March 5, 1999), pp. 166-71 (incorporated by reference).

⁵⁹ Summarizing this evidence, Justice Brennan's majority opinion concluded:

[e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities. . . minority owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities. . . [w]hile we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves (emphasis added).

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 580-82 (1990).

⁶⁰ Christine Bachen, Allen Hammond, Laurie Mason & Stephanie Craft, *Diversity of Programming In The Broadcast Spectrum: Is There A Link Between Owner Race or Ethnicity and News and Public Affairs Programming?*, SANTA CLARA U. (Dec. 1999), https://transition.fcc.gov/opportunity/meb_study/content_ownership_study.pdf [hereinafter *Santa Clara Study*]. This study found that minority-owned radio stations aired more racially diverse programming than did majority owned stations. Minority-owned radio stations were significantly more likely than majority owned stations to broadcast programming about women's issues and live coverage of government meetings. They were also more likely to have a minority format for their music programming. Minority-owned television stations were significantly more likely than their majority owned counterparts to have current events related programming and issues relevant to senior citizens. Furthermore, radio stations and television stations with more minorities on their staffs had more racially diverse programming than comparable stations with few minority employees.

⁶¹ See *infra* pp. 75-76.

⁶² See generally KAY MILLS, *CHANGING CHANNELS: THE CIVIL RIGHTS CASE THAT TRANSFORMED TELEVISION* (2004).

news and public affairs programs, segregation would have crumbled under its own weight.

B. Minority Ownership Policies Promote Economic Competition

Minority ownership promotes competition by ensuring that all sources of intellectual and creative capital are put to their highest use. And because an integrated industry serves the public better, it competes more effectively than a segregated industry.

And conversely, when talented persons are prevented from contributing competitive acumen to the marketplace based on their membership in a racial group, consumers are denied the full range of products and services that the marketplace otherwise would provide.

In broadcasting, as in other industries ailing from the absence of minority competition, nonminorities have had a cushier ride to business success because they did not have to face competition from minorities. Lacking the maximum possible competitive spur, these nonminorities inevitably produced an inferior product. For example, the product called “major league baseball,” as it was played before Jackie Robinson, was laughably inferior to today’s major league baseball. Not only were minorities unable to add their competitive skills to the game, the nonminority players lacked the impetus to play their best either. If Babe Ruth and Walter Johnson had had to bat against Satchel Paige and throw to Josh Gibson, imagine how much better Ruth and Johnson would have played the game.

The impact of integration on competitiveness has been well established by the Defense Department’s pioneering and highly successful work in promoting racial inclusiveness.⁶³ In the banking field, federal regulators understand the uniqueness of minority owned banks and have undertaken aggressive efforts to foster their success.⁶⁴

⁶³ This book describes the Army’s aggressive efforts to stay competitive by ending segregation and ensuring full integration at all levels. *See generally* CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, *ALL THAT WE CAN BE* (1996).

⁶⁴ *See FDIC Chairman Gruenberg on Minority Deposit Institutions (Video Statement)*, Federal Deposit Insurance Corporation (FDIC) (released June 2017); *see also Policy Statement Regarding Minority-Owned Depository*

In any industry, the irrational exclusion of any input to production distorts the marketplace, reduces the quantity and quality of outputs, drives up prices, and leaves consumer demand unsatisfied. In the electronic media, a key input into production is the quality and diversity of the ownership pool, consisting of the companies whose management teams, business plans, talent, and creativity are the basis for organizing and deploying all other inputs to production. The diversity of the ownership pool is an especially critical input in broadcasting, for which business creativity so often translates into an ability to attract creative people to the line staff and manage them effectively. In a business whose product is the distribution of the fruits of talent, it is unsound economic policy to allow market imperfections to exclude anyone who can add value.

The underutilization of minority talent imposes an extraordinary financial drain on the U.S. economy. In 1995, Dr. Andrew Brimmer, an economist and former member of the Federal Reserve Board, concluded that discrimination against African Americans in the labor market resulted in a loss of over \$138 billion (in 1995 dollars) per year to the American economy, a staggering sum that represented 2.15% of the gross national product.⁶⁵ Dr. Brimmer's conclusions are still valid today, but the loss would now be equal to almost \$400 billion per year.⁶⁶

Institutions, Federal Deposit Insurance Corporation (FDIC), 67 F.R. 77-80 (released January 2, 2002), which calls for comments on how the FDIC can implement provisions of Section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 that requires the Secretary of the Treasury to consult with the Director of the Office of Thrift Supervision and the Chairperson of the Board of Directors of the FDIC to determine the best methods for preserving and encouraging minority ownership of depository institutions. The FDIC noted that it "has long recognized the unique role and importance of minority-owned depository institutions and has historically taken steps to preserve and encourage minority ownership of financial institutions." *Id.* at 77.

⁶⁵ See ANDREW F. BRIMMER, *THE ECONOMIC COST OF DISCRIMINATION AGAINST BLACK AMERICANS* 11-29 (1995).

⁶⁶ See Alex Gray, *Racial Discrimination in the Workplace is Hurting People and Economies. Here's What We Can Do About It*, WORLD ECON. FORUM (Mar. 14, 2017), <https://www.weforum.org/agenda/2017/03/racial-discrimination-in-the-workplace-is-hurting-people-and-economies-here-s-what-we-can-do-about-it/>; see also Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 373 (2004).

As shown above,⁶⁷ minorities control only a minuscule proportion of broadcast stations and industry asset value. Minority broadcast ownership has been depressed by government action and inaction, as well as by societal discrimination.⁶⁸ But whatever its causes, the resulting nonparticipation of minorities in ownership is inefficient as a means of organizing production in a business uniquely based on talent. Since talent is equally distributed throughout society, the nonparticipation of large sectors of society in the generation of production of the fruits of talent is inherently inefficient. Whether or not it is anticompetitive, it is macroscopically noncompetitive.⁶⁹

Greater minority inclusion in broadcast ownership would strengthen the competitiveness of the broadcasting industry in three ways:

- First, by enabling the minority owned segment of the industry to compete effectively, the FCC would bring about an increase in the number of broadcast stations that are operating successfully, staying on the air, and serving the public.
- Second, minority owned facilities would create jobs that would not exist but for minority entrepreneurs who are empowered to use their unique skills and backgrounds to compete in the marketplace.⁷⁰
- Third, new facilities owned by minorities and reaching heretofore underserved minority audiences have a net positive effect on the ability of advertisers to reach the entire public.

Congress has required the FCC to assess competition on a regular basis as part of the

⁶⁷ See *supra* p. 47.

⁶⁸ See *infra* pp. 68-90.

⁶⁹ This principle applies with special force in industries like radio and television, journalism, movies, music, sports, medicine, education, and law, each of which depend heavily on human talent—even if it may not necessarily apply to industries whose primary inputs in production are natural resources such as electricity. See *NAACP v. FPC*, 425 U.S. 662 (1976) (affirming FPC decision not to apply EEO rules to the power industry on the theory that such rules would make the power industry more competitive as contemplated by the Federal Power Act).

⁷⁰ Minority-owned broadcasters employ over half of the minorities in the radio industry, making such broadcasters both an entry point and a sanctuary for the full integration of the industry. See *Comments of EEO Supporters, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket No. 98-204 (April 15, 2002) at 52-53. Consequently, minority broadcasters help ensure that the industry will have at its disposal the well trained, heterogeneous workforce this culture-driven industry will need to compete effectively in serving the needs of an increasingly multicultural audience.

FCC’s quadrennial “Section 202(h)” structural review of media ownership.⁷¹ In addition, Section 257 of the Communications Act, adopted in 1996, requires the FCC to “promote. . .vigorous economic competition.”⁷² Moreover, Section 309(j) of the Communications Act, adopted in 1993, requires the Congress to seek methods to “promote economic opportunity and competition” by “disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women.”⁷³

Although the Supreme Court has not yet decided whether promoting competition could justify a race-conscious remedy under strict scrutiny, courts have recognized the importance of a healthy, competitive marketplace in the industries regulated by the FCC. There is no dispute that promoting competition in broadcasting is at least an important governmental interest.⁷⁴ As Commissioner (later Chairman) Kevin Martin explained in 2002 when he voted in favor of adopting new EEO rules to replace rules that had been vacated by the D.C. Circuit,⁷⁵ “[a] more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition.”⁷⁶

C. Minority Ownership Policies Can Help Remedy the Present Effects of Past Discrimination

⁷¹ See Telecommunications Act of 1996, Pub. L. 104-104, § 202(h), 110 Stat. 56, 111-12 (codified at 47 U.S.C. § 161) (mandating that the Commission review its ownership rules biennially to determine which rules are “necessary in the public interest as the result of competition.”); see Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (providing that such review shall henceforth be quadrennial).

⁷² 47 U.S.C. § 257(b) (1996).

⁷³ 47 U.S.C. § 309(j)(3)(B) (2015), adopted as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-392.

⁷⁴ See, e.g., *Turner II*, 520 U.S. at 189-90 (holding that fair competition in the market for licensed regulated facilities is an important government interest).

⁷⁵ The rules were vacated and remanded in *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (2000), *petition for rehearing and rehearing en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom.* *MMTC v. FCC*, 534 U.S. 1113 (2002).

⁷⁶ Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (EEO Second R&O and Third NPRM), 17 FCC Rcd 24018, 24129 (2002) (Separate Statement of Commissioner Kevin J. Martin).

Minority ownership policies provide the only meaningful remedy for decades of deliberate, well-documented discrimination in which the FCC itself was a participant.

In the 1996 *Section 257 Inquiry*, the FCC acknowledged that discrimination can be a market entry barrier.⁷⁷ Further, the Supreme Court has found that the governmental interest in remedying past discrimination can meet the compelling interest standard.⁷⁸ That interest permits an agency to remedy the consequences of its own discrimination and of its ratification, validation, and facilitation of discrimination.⁷⁹

This article has documented the scope and the nature of the FCC's own involvement in the discrimination against minority broadcasters, including its assistance to segregated state universities, its licensing of segregationists and discriminators, its use of irrationally stringent financial and other attributes as licensing criteria, and its failure to enforce its equal employment regulations.⁸⁰ Whether characterized as ratification, validation, permissiveness, benign neglect, or passive participation, the agency's acts and omissions were a very significant reason why minority ownership is so palpably inadequate. To be sure, there were other causes of minority media exclusion, but the fact that an injury has many causes neither nullifies any of these causes nor exempts any causing party from its responsibility to help cure the injury.

⁷⁷ See Section 257 Proceeding for Identifying and Eliminating Market Entry Barriers for Small Businesses (Section 257 Inquiry) (Notice of Inquiry), 11 FCC Rcd 6280, 6282-83 ¶3 (1996).

⁷⁸ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (Croson), finding that in order to establish a compelling interest, the government must show "a strong basis in evidence for its conclusion that remedial action (i)s necessary" (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)). The *Croson* court also held that a government actor may not rely on general societal discrimination in order to justify a race conscious program. *Id.* at 499. Instead, the government must show that it is remedying either its own discrimination, or discrimination in the private sector in which the government has become a "passive participant." *Id.* at 492 (plurality opinion). The governmental actor must possess evidence that its own practices were "exacerbating a pattern of prior discrimination," and must "identify that discrimination, public or private, with some specificity," to establish the factual predicate necessary for race conscious relief. *Id.* at 504. Justice O'Connor's majority opinion in *Adarand* recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

⁷⁹ This article does not advocate race-conscious action at this time, given that the FCC has not yet exhausted potential race-neutral remedies as it is required by law to do. See *infra* pp. 91-92.

⁸⁰ See *infra* pp. 63-90.

D. Minority Ownership Policies Can Help Prevent Discrimination

Discrimination prevention is the purpose of the broadcast EEO rules.⁸¹ If broadcast employment is close-knit enough to justify regulatory intervention to prevent discrimination, the same is true for broadcast ownership, which is even more close-knit. People spend decades preparing for the day when they can become owners. To find the door blocked even by unconscious prejudice would be unconscionable. Congress made this easy: in the first section of the Communications Act, Congress directed the FCC to prevent discrimination.⁸²

III. HOW THE FCC DELIBERATELY INTERVENED IN THE MARKETPLACE TO FRUSTRATE MINORITY BROADCAST ENTREPRENEURSHIP

Not only can the FCC remedy the consequences of its ratification and rewarding of its licensees' discrimination, it must do so in light of its shocking history of official discriminatory actions. These were not omissions or innocent errors of judgment or accidents or detours or poorly informed mistakes. Rather, the damage the FCC did across three generations constituted a deliberate, conscious, and carefully woven scheme to facilitate the near shut-out of minority ownership we observe today in the nation's most influential industries.⁸³

The story of how government actors facilitated racial discrimination in broadcasting is not pretty. Today's absurdly low level of minority ownership is the fault of the FCC taking deliberate steps to distort the free marketplace. These were deliberate steps taken for decades. No legitimate regulatory purpose was served by denying licenses to African American and

⁸¹ See EEO Second R&O and Third NPRM, 17 FCC Rcd at 24021 ¶ 8 (stating "that its primary and assertedly sufficient goal in issuing the EEO rule was to prevent invidious discrimination.").

⁸² 47 U.S.C. §151 (1996), requires the FCC to "regulat[e]. . .so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service. . . .")

⁸³ To those who say "what about Oprah Winfrey and Cathy Hughes?" I say Oprah controls one of the nation's 800 cable channels. And, if Cathy were a White man she would be the Chairman of CBS, not the Chairwoman of the largest radio broadcast company serving the African American community, with less than ½ of 1% of the nation's radio stations. She would not have had to go to 31 banks in 1980 to get a loan to buy her first radio station. See Jenean Chun, *Cathy Hughes, Radio One: From Teen Mom To Media Mogul*, HUFFINGTON POST (Sept. 26, 2012), https://www.huffingtonpost.com/2012/08/17/catherine-hughes-radio-one_n_1798129.html.

Jewish American broadcasters because of their race or religion; or facilitating state universities' segregated broadcast education systems; or frustrating minority comparative hearing applicants; or licensing thousands of segregationists; or refusing to enforce the EEO rules, and much more. Who does such things, and why? Whose orders were they following?

This deliberate misconduct was a constitutional tort of the highest order, given the FCC's role as a public trustee of the nation's airwaves. Congress expressly tied this trusteeship to the assurance of nondiscrimination.⁸⁴ For their part, as subordinate trustees licensed by the FCC, broadcast station owners are given an exclusive opportunity to use and exploit a scarce and valuable public resource.⁸⁵ In exchange for this privilege, broadcasters must serve "the public interest, convenience and necessity" in operating their stations and in airing programming.⁸⁶ Because the spectrum is a scarce resource, the FCC was permitted to place "restraints on licensees in favor of others whose views should be expressed on this unique medium."⁸⁷

As early as 1943, the Supreme Court reaffirmed that the FCC's primary role in regulating the broadcast spectrum was to "secure the maximum benefits of radio to all the people of the United States."⁸⁸ The Court, however, recognized that the radio spectrum was not expansive enough to accommodate everyone. Accordingly, the FCC was authorized to limit who gained access to the spectrum.⁸⁹

⁸⁴ See 47 U.S.C. § 303(g) (1934), (expecting the Commission to provide for the "larger and more effective use of radio in the public interest."); 47 U.S.C. §151 (1934) (providing that the Commission was to ensure the delivery of wire and radio service "to all the people of the United States"); 47 U.S.C. § 151 (1996) (eliminating any doubt about who "all the people" are by adding the words "without discrimination on the basis of race, color, national origin, religion or sex" to Section 151.)

⁸⁵ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 367 (1969).

⁸⁶ Charles Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL L. REV. 1687, 1688 (1997).

⁸⁷ *Red Lion*, 395 U.S. at 388-89. No one doubts that the spectrum is finite, or that that many more entities wish to use it than can be accommodated, or that oligopoly rents inure to those occupying it. Indeed, by far the greatest portion of the appraised and sale value of most broadcast stations is the intangible value of the broadcast license.

⁸⁸ *NBC v. United States*, 319 U.S. 190, 217 (1943).

⁸⁹ *FCC v. NCCB*, 436 U.S. 775 (1978); *Red Lion*, 395 U.S. at 389-90.

Unfortunately, in exercising this power, the FCC discriminated or ratified and facilitated the discrimination of others. It thus denied minorities the enjoyment of their liberty interest in using the spectrum.

As the only body that controls access to the spectrum, the FCC's arbitrary actions depriving minorities of access to the spectrum stigmatized minorities and created a disability that is difficult to repair. That disability includes the right to speak in the public forum of broadcasting and the right to "work for a living in the common occupations of the community."⁹⁰ By validating the intentional discrimination of its licensees, the FCC engaged in the constitutionally impermissible deprivation of a liberty interest in violation of the Due Process Clause.⁹¹

A. The Government Outright Refused to Grant Licenses to Racial and Religious Minorities Because of Their Race and Religion

Let's begin in 1930, four years before the FCC was born. In that year, the African American owned Kansas City American newspaper applied to the Federal Radio Commission (FRC) for a license to operate a radio station.

The newspaper was the only applicant for the frequency. There were no engineering deficiencies in its application, and the newspaper was qualified in every respect. Further, the FRC never rejected license applications unless the applicant was a criminal, and the FRC always granted applications filed by newspapers.

Nonetheless, the FRC turned down the Kansas City American's application specifically

⁹⁰ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). The right to work is "the very essence of personal freedom and opportunity that was the purpose of the 14th Amendment to secure." *Id.* This personal freedom is also defined as a liberty interest: "the right...to engage in any of the common occupations of life, to acquire useful knowledge. [I]n a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad." *Id.*

⁹¹ *See Matthews v. Eldridge*, 424 U.S. 319 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970)

because the newspaper proposed to offer programming that would address the needs of the African American community. That was impermissible, the FRC maintained, because a radio station was expected to serve the “general population.”⁹²

Of course the FRC did not come right out and emblazon in a published opinion that it wasn’t going to give Black people a radio license because they were black. But a brief foray into legal archaeology discloses that the FRC’s “service to the general population” justification was nothing but a pretext for official discrimination.

At the same time that the FRC was refusing to grant a license to African Americans who wanted to serve African Americans, the FRC was not requiring other broadcasters to address the needs of African Americans—and they didn’t. Thus, what the FRC referred to as the “general population” – its euphemism for White Americans—received exclusive service from incumbent licensees, and at the same time White broadcasters were insulated from competitors who wanted to serve people of color.

It follows that people of color did not even receive the supposedly “separate but equal” service contemplated by the 1896 case *Plessy v. Ferguson*,⁹³ which was good law in 1930. At least in *Plessy* the African American train passenger arrived at his destination at the same time as the other passengers. By contrast, the FRC didn’t allow people of color onto that day’s information highway at all—neither as producers or as consumers of information.

But there is a dead giveaway that prejudice and not principle was driving federal radio licensing policy: only one other group besides African Americans was denied radio licenses on this “service to the general population” pretext. In a repulsive line of cases in the 1930s, the

⁹² See Louis G. Caldwell, *Principles Governing the Licensing of Broadcasting Stations*, 79 U. PA. L. REV. 133, 134 (1930) (citing *Great Lakes Broadcasting v. FRC*, 37 F.2d 993 (DC. Cir. 1930) as having affirmed an FRC decision denying an application for a station “to be used in the interests of colored listeners,” citing an article in *United States Daily*, February 17, 1930).

⁹³ *Plessy v. Ferguson*, 163 U.S. at 537 (1896).

newly-minted Federal Communications Commission denied three applications by the only applicants for their respective radio licenses because the applicants proposed to broadcast some of their schedules in “foreign languages”—code for Yiddish, the language commonly used by Jewish refugees who had escaped from Germany, Poland, and Russia. In *Voice of Detroit, Inc.*, the FCC held that “the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group. . .the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest.”⁹⁴

There appear to be no cases in which any other qualified applicants, except African Americans or Jewish Americans, were outright refused broadcasting licenses. The *Chicago*, *Brooklyn*, and *Voice of Detroit* line of cases met its end on December 7, 1941. Nonetheless, any minority entrepreneur would have been insane had she sought a license from a federal agency capable of issuing decisions like these. And certainly no competent investor or bank would have financed a minority broadcast entrepreneur, knowing that the entrepreneur would have to go before an FCC so hostile to equal opportunity that it would not give broadcast licenses to qualified Jewish people.

B. The FCC Conspired With State Governments to Award Licenses to Segregated Institutions and Prevent Minority Colleges and Universities From Securing Broadcast Licenses

For two generations and continuing to this day, the FCC has routinely assisted in state

⁹⁴ *Voice of Detroit, Inc.*, 6 FCC 363, 372-73 (1938); *see also* *Chi. Broad. Ass’n.*, 3 FCC 277, 280 (1936) and *Voice of Brooklyn*, 8 FCC 230, 248 (1940). FCC decisions like these must have been comforting to some of the notorious anti-Semites (and some Axis supporters) who played a leading role in radio broadcasting at the time. *See* ERIK BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES 1933-1953* 221-22 (1968), describing the “enormous” influence of the “Richards Stations,” WJR Detroit, WGAR Cleveland and KMPC Hollywood in the 1930s and 1940s, whose owner, George Richards, put Father Coughlin on the air. Richards was an obsessive anti-Semite who insisted repeatedly that his news departments slant the news to attack Jews.

governments' schemes to discriminate against Historically Black Colleges and Universities (HBCUs) in noncommercial radio and television service. By systematically awarding licenses to exclusively or overwhelmingly White state universities, and routinely renewing them without a thought given to whether the facilities are being used to perpetuate historical inequalities, the FCC has denied hundreds of thousands of minorities the opportunity to obtain the education, experience, exposure, and networking necessary for success in the broadcasting industry.

How effective was the FCC in ratifying state-sponsored segregation in public education? Research by MMTC has found that the 28 radio stations owned by HBCUs signed on in 1980 on the average; but the 29 radio stations owned by predominately White state colleges and universities in the same states signed on in 1970 on the average. In addition, the predominately White schools' radio stations' mean power level was 20% more than the Black schools' stations' mean power level. The White schools' mean tower height was almost two and a half times the Black schools' stations' mean tower height.⁹⁵

Documentation of HBCUs' late start in broadcasting may also be found in a 1999 book by Howard University communications professor William Barlow.⁹⁶ Barlow describes how only two HBCU stations signed on before 1969: ten-watt (and thus non-CPB (Corporation for

⁹⁵ Examples include KASU-FM, Arkansas State University, licensed in 1957, WUNC-FM, University of North Carolina, licensed in 1952, and KUT-FM, University of Texas, licensed in 1958. There were many others. A 1995 comparison by MMTC of 28 HBCUs stations and those belonging to the 29 predominantly White state colleges in the same states is quite dramatic. The White schools' stations average sign-on year was 1970; the HBCU's average sign-on year was 1980. The White schools' stations mean power level was 40.57 kw, 20% more than the HBCUs stations' mean power level of 33.8 kw. The White schools' mean HAAT was 671.4 feet, almost 2 1/2 times the HBCUs stations' mean HAAT of 273 feet. Thus, the HBCUs were given a late start, after which they received second-class broadcast facilities. For the most part, they still broadcast on these second-class facilities. The Arkansas licensing decision of 1957 is especially troubling inasmuch as 1957 was the year in which the State of Arkansas affirmatively refused to integrate Little Rock High School on the theory that a Supreme Court decision can be "nullified" by state law. This was so intolerable to the Court that all nine justices signed an opinion commanding the integration of the high school. *Cooper v. Aaron*, 358 U.S. 1 (1958); *see also* *Marbury v. Madison*, 1 Cranch 137 (1803). And to ensure that integration was carried out, President Eisenhower called out a unit he had deployed in World War II, the 101st Airborne. The FCC Commissioners of 1957 could not possibly have failed to notice these events when they issued Arkansas State University its license to operate KASU-FM.

⁹⁶ WILLIAM BARLOW, *VOICE OVER: THE MAKING OF BLACK RADIO 280* (1999).

Public Broadcasting) qualifying) WESU-FM at Central State University in Wilberforce, Ohio (1962) and KUCA-FM at the University of Central Arkansas (1966). During the 1960s and 1970s, 20 more Black college stations signed onto the air, but most of them “were low-budget and low-power operations that did not initially qualify for CPB’s radio grants and were funded by the colleges’ academic budgets.”⁹⁷

Thus, it was that the HBCUs got broadcast licenses ten years later than the other institutions operated by the same state governments; and when the HBCUs did get broadcast licenses, they were for vastly inferior facilities.

What is more, the FCC continues to this day to rubber stamp the license renewal applications of these state schools with their inferior facilities at the HBCUs. It does not lift a finger to require the state systems to equalize the technical attributes of the stations being used to educate students at these state-owned institutions.

In many states, minorities were barred by state law or custom from attending colleges and universities that operated their communities’ only FCC-licensed educational television and radio stations. Nonetheless, the FCC routinely provided, then routinely renewed broadcast licenses for these segregated educational institutions, guaranteeing that a generation of trained broadcast employees would be Whites only.

Nowhere is there a reported case in which the FCC inquired of any educational institution as to why minorities could not attend the school and enjoy the use of the school’s FCC-licensed broadcast station. Nor is there any record of the FCC even inquiring whether a state or its system of colleges had attempted even to provide ostensibly “separate but equal” facilities for minorities at its state-run HBCUs.⁹⁸

⁹⁷ *Id.*

⁹⁸ *Plessy*, 163 U.S. at 537 (1896). Before *Brown I* overruled *Plessy*, the Supreme Court had interpreted *Plessy* as

Thus, the FCC either deliberately afforded state segregation laws precedence over the nondiscrimination requirement of Section 151 of the Communications Act⁹⁹—a bizarre inversion of *Marbury v. Madison*—or it was acting on an astonishing misreading of the Communications Act as being in harmony with state segregation laws.

The FCC routinely renews the licenses of every educational broadcaster in the country without even asking whether its academic resources have been apportioned without discrimination by its parent licensee.¹⁰⁰ Thus, the FCC's complicity with state-sponsored discrimination in public broadcasting continues to this day.

C. The FCC Routinely Granted and Renewed Licenses of Intentional Discriminators, Thereby Making Possible Their Suppression of Minority Broadcast Participation

The FCC routinely granted, then renewed without investigation, the licenses of hundreds of radio and television stations owned by some of the most vicious segregationists in the nation—people who were never going to hire and train minorities, much less sell stations to them.

The FCC knew very well that it was regulating a segregated industry. FCC commissioners speak to state broadcast associations all the time. The commissioners could not have noticed that no minorities attended these meetings.¹⁰¹ Indeed, before and during the 1950s,

requiring states that provided separate facilities either to equalize them, or if that wasn't possible, to integrate them. *See, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that in order to educate a law student, a state must permit him to sit in a classroom and engage in dialogue with other law students of different backgrounds).

⁹⁹ 47 U.S.C. § 151 (providing that, even in its 1934 incarnation, the Commission was to ensure the delivery of wire and radio service “to *all* the people of the United States.” (emphasis added).

¹⁰⁰ In the higher education context, “even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State’s prior *de jure* segregation and that continues to foster segregation. The Equal Protection Clause is offended by ‘sophisticated as well as simple-minded modes of discrimination.’” *Lane v. Wilson*, 307 U.S. at 268 (1939). If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices” (emphasis in original). *Ayers v. Fordice*, 505 U.S. 717, 729 (1992).

¹⁰¹ The Commissioners must also have noticed, when visiting licensees’ facilities, that no minorities worked there. And they certainly must have noticed that the Commission’s own staff was all-White except at the secretarial and janitorial levels. That couldn’t have happened unless the regulated industry and the broadcast training schools were

the FCC continued to ignore even the most open and notorious discrimination. In 1956, almost every southern NBC affiliate refused to carry “The Nat King Cole Show”—forcing NBC to cancel the critically acclaimed program. Faced with this open and especially repugnant expression of race discrimination by dozens of its licensees, the FCC did nothing.¹⁰²

segregated, or unless the Commission itself discriminated in employment, or both. Of course the Commission had endured its own entanglements with segregationists, so it truly knew the character of the institutions it licensed. See ERIK BARNOUW, *supra* note 94, at 174-81, documenting how southern racists, particularly Congressmen Eugene Cox of Georgia and Martin Dies of Texas, tormented FCC Chairman James Lawrence Fly and his staff for years. Cox, “being from a state with a poll tax and race barriers, had repeatedly been sent to Congress by a handful of the adults in his district—in 1938, by 3.8 per cent. Cox and Dies, in coalition with conservative northern Republicans, “dominated the politics of the period, and, not unnaturally, had [their] impact on the broadcasting field.” *Id.* at 174.¹⁰² Actually, the FCC failed throughout nearly all of its history—not just the early years—to lift a finger to investigate or sanction intentional discriminators. The FCC could hardly have been unaware of how ironclad was the exclusion of minorities from broadcasting in the 1930s, 1940s and 1950s, nor could it not have known of the active role played by its leading licensees, CBS, and NBC. William Barlow explains:

As they rose to the pinnacle of power in the radio industry, both NBC and CBS followed what amounted to a Jim Crow policy with respect to the employment and portrayal of African Americans. Neither network hired blacks as announcers, broadcast journalists, or technicians, and certainly no blacks became producers or executives in the national operations. None of the network affiliates was Black owned, nor were any of the independent stations. During the 1930s, the few African Americans working in radio were the musicians, comics, and entertainers sporadically heard on the network airwaves. . . . The few African American actors and actresses hired by NBC and CBS were invariably cast in similarly stereotypical comedy roles, thus reinforcing the airwaves blackface legacy. . . . The public affairs shows on network radio routinely avoided racial issues and rarely included Black participants in their public forums.

These Jim Crow policies reflected the nation's troubled race relations and the particular needs of network broadcasting. Network policy makers understood that they could not gain mass appeal by upending social conventions or taking controversial stances, especially on race matters. Both networks adopted employment practices in line with the exclusionary membership policies of the three key labor unions involved in the entertainment side of the industry: the American Federation of Musicians (AFM), the American Federation of Radio Actors (AFRA), and the Radio Writers Guild (RWG). . . . The AFM was divided into segregated local unions, and almost all the musicians' jobs on network radio were controlled by the white locals. The other two unions admitted no Black members until the years of the second world war, and then only a token few. Thus, the unions in tandem with the networks systematically excluded African Americans from employment opportunities in the radio industry. . . .

The commercial sponsors of network programming hewed to a similar line. In general, sponsors were extremely reluctant to bankroll programs with African Americans in leading roles, fearing that their products would become Black identified and unappealing to White consumers. . . .

Finally, the emergence of Jim Crow on network radio owed something to explicit racial policies in the South. The networks' Southern affiliates, in line with the region's segregationist social order, refused to allow African Americans access to the airwaves and threatened to boycott any network programs that violated their color line. For the networks and their sponsors, who now depended on a national audience, the threat was a significant deterrent.

WILLIAM BARLOW, *supra* note 96, at 27-28. See also ERIK BARNOUW, *supra* note 94, at 91 (documenting how

One would think that the FCC's character policies would have required denying segregationists' broadcast applications while favoring those of integrationists. Incredibly, the exact reverse was true. In that 1955 case, the FCC held that segregationists have the character to be broadcast licensees. Then, in 1963, the FCC went even further and found that *integrationists lacked the character to be broadcast licensees*.

The 1955 decision, *Southland Television*,¹⁰³ arose in a television comparative licensing case. The FCC had to decide which of three applicants would be awarded, for free, a construction permit (later leading ministerially to a license), worth millions of dollars, for what would become the ABC affiliate in Shreveport, Louisiana.

One of the applicants, Southland Television, was headed by Don George, a movie theater operator. Louisiana law then governing movie theaters assumed that theaters had two stories, like the 19th century opera houses on which they were modeled. The law required the admission of all races to theaters so long as the theater owners restricted each story to members of a particular race.¹⁰⁴ —

Mr. George, who did not want African Americans to patronize his theaters at all, was hampered by the literal language of the Louisiana movie theater segregation law, which contemplated two-story theaters. To avoid this law, he built Louisiana's first one-story theaters and also operated Louisiana's only Whites-only drive-in theaters.¹⁰⁵ In this way he could

even the outstanding public affairs programs of 1930s and 1940s completely excluded African Americans). A discussion of the FCC's continued unresponsiveness to private discrimination in the period 1960-1980 can be found in Ivy Planning Group, *Whose Spectrum Is It Anyway? An Historical Study Of Market Entry Barriers, Discrimination And Changes In Broadcast And Wireless Licensing – 1950 To Present*, IVY PLANNING GRP. 91-101 (Dec. 12, 2000), [hereinafter *Market Entry Barriers*], https://transition.fcc.gov/opportunity/meb_study/historical_study.pdf.

¹⁰³ *Southland Television*, 10 RR 699, *recon. denied*, 20 FCC 159 (1955).

¹⁰⁴ The law was thought at the time to be "race-neutral" because the theater owners, rather than the state, decided which race was consigned to which floor of the theater. But every African American person over 60 remembers which floor of the theater was the "Black" floor.

¹⁰⁵ Other Louisiana drive-in theaters enforced segregation only within each automobile, to discourage

lawfully exclude all African American patronage.

A competitor for the construction permit, Shreveport Television, was the nation's first TV applicant known to include African American stockholders. Shreveport Television noted that Mr. George contemplated construction of a studio for live broadcasts. Therefore, in an unprecedented motion to enlarge the issues, Shreveport Television asked the FCC to disqualify Mr. George's company because, based on Mr. George's history of movie theater operations, he could be expected to deny African Americans the opportunity to sit in the studio audiences for live productions¹⁰⁶ at the television station.¹⁰⁷

The FCC was unmoved. It held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theaters and any evidence that "such admission would be legal under the laws of that state."¹⁰⁸ In doing so, the FCC showed that it regarded state segregation laws as harmonious with the Communications Act, having gone so far as to ratify a broadcast applicant's efforts to evade a state law that required theaters to admit theaters to African Americans even on a segregated basis.

Eight years later, in 1963, the FCC went even further, holding that practicing integration meant that a broadcaster did not have the character to be an FCC licensee. That decision was rendered in the case of *Broward County Broadcasting*,¹⁰⁹ which involved an AM station, WIXX, licensed to Oakland Park, Florida, a suburb of Ft. Lauderdale.

miscegenation.

¹⁰⁶ Since videotape was not invented until 1956, television broadcasts were done before live audiences, in studios set up to resemble miniature movie theaters.

¹⁰⁷ Filing a motion with the FCC in 1955 that alleged that a segregationist was inherently unqualified to be a broadcast licensee was a legal strategy decades ahead of its time. The author of that motion was Harry Plotkin, a name partner of Arent Fox Kintner Plotkin & Kahn. Mr. Plotkin, who passed away in 1999, was a mentor to the author of this article. God bless him.

¹⁰⁸ *Southland*, 10 RR at 750.

¹⁰⁹ *Broward County Broadcasting*, 1 RR2d 294 (1963).

The substantial African American population of Ft. Lauderdale received no black-oriented programming from any station. That gave WIXX's owners an idea: they decided to devote 17% of the station's broadcast day to black-oriented news, public affairs, and music.¹¹⁰

This programming did not go unnoticed by the government of the City of Oakland Park, which complained to the FCC that WIXX was offering a format the city did not need because "the Negro population to be catered to all resides beyond the corporate limits of Oakland Park."¹¹¹ The city government was fearful that African American professionals, once hired by WIXX to produce its programming, might choose to buy homes near their jobs.

The FCC is not permitted to regulate program content.¹¹² Nonetheless, the FCC threw WIXX into an exceedingly rare revocation hearing on the pretext that the station had changed its programming plans from the 100% "general audience" format originally proposed in its licensing application. The FCC had never before, nor since, threatened to revoke a license because of a change in programming plans.

Faced with the probable loss of its license, WIXX dropped its black-oriented programming. The FCC then quietly dropped the charges, proving that the FCC's real interest all along was the suppression of black-oriented programming and not the licensee's "character" at all.

Two cases, each decided in 1965, illustrate how the FCC protected segregationist broadcast applicants and licensees during the heat of the civil rights movement.

¹¹⁰ *Id.* at 296. The licensee's decision was entirely reasonable, coming right on the heels of the Commission's pronouncement that one of the fourteen elements of public service the Commission expected of broadcasters was service to minority groups. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960 Programming Statement)*, 20 RR 1901, 1913 (1960).

¹¹¹ *Broward County Broadcasting*, 1 RR2d 294 (1963).

¹¹² 47 U.S.C. § 326 (1934); *see also* *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

The first of these cases is *Columbus Broadcasting Company*,¹¹³ in which the FCC was faced with a radio licensee who had used his station “to incite to riot. . .or to prevent by unlawful means, the implementation of a court order” requiring the University of Mississippi to enroll James Meredith.¹¹⁴ After President Kennedy federalized the National Guard in anticipation of violence on Mr. Meredith's fourth attempt to enroll, the television and radio station owner took to the air personally to called upon listeners and viewers to go to Oxford and physically prevent Mr. Meredith’s enrollment. Predictably, a mob did show up, and there was a lot of bloodshed. The ensuing riot caused \$2,000,000 in damage, and two people (one of whom was a French journalist) were killed.

Nonetheless, the FCC merely “admonished” the licensee. The FCC’s inaction was especially startling given the unlikely source of the complaint: the Federal Bureau of Investigation.¹¹⁵ The FCC determined that an admonishment was adequate, ostensibly because this was a case of first expression. It reasoned that broadcasters might not have been aware of the fact that they weren’t supposed to use their broadcast licenses to incite riots.

The second 1965 case in which the FCC refused to protect the public from segregationists was *Lamar Life*, named after the life insurance company that owned WLBT-TV in Jackson, Mississippi.

Since signing on the air in 1953, WLBT broadcast only the White Citizens Council’s viewpoint on civil rights. WLBT went so far as to display a “Sorry, Cable Trouble” sign when NAACP General Counsel Thurgood Marshall was being interviewed on the CBS Evening

¹¹³ Fairness Doctrine Compliance Requirements, 40 FCC 631, 631 (1965).

¹¹⁴ *Id.* at 641 ¶16.

¹¹⁵ *Id.* at 642 ¶ 26. FBI Director J. Edgar Hoover was a virulent racist. See Chris Weigant, *The History of Rev. Dr. Martin Luther King Jr. and the F.B.I.*, HUFFINGTON POST (Jan. 20, 2014, 8:43 PM), https://www.huffingtonpost.com/chris-weigant/the-history-of-rev-dr-mar_b_4634141.html. The Columbus, MS matter was apparently the only civil rights investigation Hoover ever performed in his 48 years at the agency.

News with Douglas Edwards.

After the FCC received overwhelming evidence of racial discrimination in programming at WLBT,¹¹⁶ the FCC renewed its license anyway on the unsupported theory that WLBT might do a better job if given the chance. In fact the station owner was unrepentant, making it clear that it had no intention of doing anything differently.

Lamar Life became the famous *UCC I* case – *Office of Communication of the United Church of Christ v. FCC* (1966), in which the District of Columbia Circuit of the U.S. Court of Appeals ordered the FCC to hold a hearing on the license renewal, and also famously held that listeners and viewers had standing to challenge a broadcast license.¹¹⁷

After an overwhelmingly one-sided hearing, the FCC renewed WLBT-TV's license again. On appeal again, the Court ordered the FCC to deny WLBT's license renewal. The Court had never before taken such an extraordinary action, but this time it held the administrative record to be "beyond repair."¹¹⁸

Even after taking a beating in court in *UCC II*, the FCC continued to confer beachfront spectrum on vicious segregationists. In the 1971 Birmingham, Alabama UHF television comparative case,¹¹⁹ the FCC had before it several applicants seeking construction permits. One applicant, Alabama Television, had a 16.2% stockholder, John Jemison, who owned a

¹¹⁶ *Lamar Life Broad. Co.*, 38 FCC 1143 (1965).

¹¹⁷ *Office of Communication of the United Church of Christ v. FCC (UCC I)*, 359 F.2d 994 (D.C. Cir. 1966).

¹¹⁸ *See Lamar Life Insurance Co.*, 3 FCC2d 784 (1966) (accepting remand), ALJ decision reaffirming *Lamar Life*, 14 FCC2d 495 (ALJ 1967) (reaffirming, after hearing, the 1965 grant of renewal), affirmed, 14 FCC2d 431 (1968), reversed and vacated sub nom. *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 550 (D.C. Cir. 1969) (*UCC II*) (ordering the FCC to deny the renewal of the WLBT-TV license, and holding that the FCC had exhibited a "curious neutrality in favor of the licensee" and concluding that the record was "beyond repair." *Id.* at 551. *See A. Bush & M. Martin, The FCC's Minority Ownership Policies from Broadcasting to PCS*, 48 FEDERAL COMM. L. J. 423, 439-440 n. 94 (1996) (noting that evidence in the record showed that the Commission was aware that the licensee had "engaged in a variety of discriminatory programming activities, including the refusal to permit the broadcasting of any viewpoints contrary to the station's own segregationist ideology.") The authors cite *UCC II* as an example of FCC conduct which might fall short of *de jure* discrimination, but which had the same effect.

¹¹⁹ *Chapman Radio and Television Co.*, 24 FCC2d 282 (1971).

Birmingham cemetery. Jemison had participated in the cemetery's 1954 decision to continue its original 1906 policy of disallowing the burials there of African Americans' dead bodies.

This horrible policy came to light when the cemetery turned away the body of an African American Vietnam war hero who sacrificed his life rescuing other soldiers.

These facts would have shocked the FCC's conscience if it had a conscience. Instead, the FCC found "extenuating circumstances" in Alabama Television's claim that the cemetery would have been sued by White cemetery plot owners if this war hero's body had been lain to rest there.¹²⁰

Although the FCC ordered a hearing, it limited the issues to whether the applicant had covered up this scandal. The FCC avoided the more fundamental question of whether someone who would actually segregate the dead possessed the moral character to own a television station in the first place. Even the allegations of a cover-up were thrown out by the Hearing Examiner, who held that "in today's climate it is not at all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges."¹²¹

And now a footnote to the era of comparative hearings. As the broadcast spectrum became almost fully occupied, the FCC lost its ability to give away spectrum to minorities as a remedy for its own facilitation of discrimination in its giveaway of the spectrum. Consequently, without a hint of irony, the FCC began to focus on how to incentivize nonminority broadcasters to sell to minorities what nonminority broadcasters had been given for free.¹²² But in doing so, the FCC failed to seriously examine a modest 1978 proposal by Commissioner Hooks to apply a

¹²⁰ *Id.* at 284. This was ridiculous. Twenty-two years earlier, the Supreme Court had ruled that restrictive covenants governing cemetery plots were unenforceable. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Needless to say, the FCC had no business ratifying segregation of the dead.

¹²¹ *Chapman Radio and Television*, 21 RR2d 887, 895 (Kraushaar, Examiner, 1971).

¹²² *See* 1978 Minority Ownership Policy Statement, *supra* note 26.

measure of transparency to the “old boy” process by which minorities were almost entirely shut out of the broadcast station transactional market.¹²³

In the next section, we will see how the FCC administered a comparative hearing licensing system that stacked the deck so that minority applicants usually had little chance of winning the most valuable licenses.

D. The FCC Administered a Broadcast Licensing Scheme That Replicated the Effects of Past Discrimination and Rewarded Beneficiaries of Discrimination

Southland Television was one of the first of the great television comparative hearings, and *Chapman* was among the last. By 1990, virtually all of the television and radio spectrum in the United States had been given away; newly-available broadcast licenses are typically issued for sparsely populated rural areas.

In comparative hearings, or through grants of (rare) unopposed applications,¹²⁴ the FCC gave minority owned companies, for free, *two* out of about 1,700 full power television licenses. Consequently, the FCC presided over a 99.9% set-aside for White people in television station ownership.

Only about 100 minority owned applicants won construction permits for new radio facilities.¹²⁵ Thus, there was approximately a 98% set aside for White people in radio station ownership. How different a nation we would be if the FCC had drawn straws for spectrum instead.

¹²³ *Public Notice of Intent to Sell Broadcast Station*, 68 FCC2d 1753 n. 3 (1978) (rejecting a proposal that would have required sellers to market their stations publicly for 45 days in order to afford minorities notice and an opportunity to bid).

¹²⁴ In the dawn of the television era (1940s and early 1950s), a few television station licenses were granted to “singleton” applicants that drew no opponents. As shown earlier, minority applicants would have stood no chance at winning these licenses. *See supra* pp. 76-77.

¹²⁵ A handful were “singletons”—applications that drew no mutually exclusive applications. Typically, these singletons were for opportunities in sparsely populated rural communities.

Comparative hearings were mandated because mutually exclusive applicants for the same spectrum were entitled to a hearing to determine whose proposal would better serve the public interest.¹²⁶ These trial-type proceedings before FCC hearing examiners (later named “administrative law judges”) considered two levels of issues: (1) whether the applicants had the minimal “basic qualifications,” such as whether they had the engineering, financial, and character qualifications to be licensees;¹²⁷ and, if and only if they passed those tests, (2) which of the remaining applicants was the superior “comparative” applicant. The losing applicants then could petition for review to a now-defunct, three-member intermediate body, the Review Board, whose decisions could be appealed to the full Commission. The Commission’s decision, in turn, could be appealed to the U.S. Court of Appeals for the District of Columbia Circuit,¹²⁸ whose decision on remand could trigger yet another round of pleadings, decisions, and appeals. If there were a settlement among applicants surviving this gauntlet, the surviving applicant would have to pay off the withdrawing applicants, although the surviving applicant was then permitted to restructure her application to abandon whatever comparative attributes she might have relied upon to be in a position to prevail comparatively.¹²⁹ The entire process could take years and cost hundreds of thousands of dollars just in legal fees, thus preventing most minority entrepreneurs from participating.

¹²⁶ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945) (“We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other.”)

¹²⁷ A textbook example of a motion to enlarge designed to strike a death blow against an opponent was the motion filed in *Southland Television* seeking disqualification of Southland Television because of its behavior as a virulent segregationist. *See supra* pp. 71-73. Similar motions in comparative cases typically sought disqualification of competitors because they allegedly lacked the financial qualifications to be a licensee, or were “sham applicants” secretly controlled by persons other than the claimed control parties.

¹²⁸ *See* 47 U.S.C. §402(b) (2010) (venue for appeals of FCC adjudicative decisions lies exclusively in the U.S. Court of Appeals for the D.C. Circuit).

¹²⁹ Often the comparative attribute being abandoned at this point was control by the minority entrepreneur, since the (usually non-minority) investor would insist on claiming control in return for putting up the money to pay off the other applicants.

A few dozen minority controlled applicants did apply for licenses in comparative hearings, especially in the late 1980s. However, as an FCC study found in 2000, there was a lower probability for an application with any type of minority ownership winning a license than a nonminority application winning a license, when controlling for other relevant variables.¹³⁰ And as shown below, that finding is not a surprise.

The FCC-preferred comparative attributes could not have been more carefully designed to shut out minorities. The two most commonly invoked attributes were “past broadcast experience,” dating to 1936,¹³¹ and “past broadcast record,” dating to 1954.¹³² As the FCC well knew, virtually no minorities could have shown “past broadcast experience” because almost no broadcasters hired minorities; and virtually no minorities could have shown “past broadcast record” because the FCC wasn’t issuing any licenses to minorities.

All of the comparative criteria were memorialized in the *Policy Statement on Comparative Broadcast Hearings*,¹³³ or, as every broadcast practitioner knew it, the “1965 *Policy Statement*.” It contained not a word about minority ownership.

Antoinette Cook Bush and Marc S. Martin sum up how this licensing scheme worked:

[T]he agency granted radio licenses to exclusively non-minority applicants until 1956 and television licenses exclusively to nonminority applicants until 1973.

¹³⁰ KPMG LLP Economic Consulting Services, Study of the Broadcast Licensing Process, consisting of three parts: History of the Broadcast Licensing Process; Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC; and Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC (FCC, December 12, 2000) (hereafter “Broadcast Licensing Study”).

¹³¹ See William S. Thellman, 2 FCC 548 (1936) (denying application for new station license because, *inter alia*, the applicant and his proposed program director had no broadcast experience). Even as late as 1993, past broadcast experience was enough to swing the grant from a minority to a nonminority in a comparative case. See Great Lakes Broadcasting, Inc., 8 FCC Rcd 4007, 4010 (1993) (dissenting Statement of Commissioner Andrew Barrett); see also Edens Broadcasting, Inc., 8 FCC Rcd 4905, 4908 (1993) (Statement of Commissioner Andrew C. Barrett, Concurring in Part and Dissenting in Part) (questioning “how our minority ownership policies can continue to have some impact, where minorities constantly are penalized for a lack of broadcast or cable management level experience” (fn. omitted)).

¹³² See WJR, The Good Will Station, Inc., 9 RR 227 (1954) (awarding a comparative preference to an applicant that had operated a station in the community).

¹³³ Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393 (July 28, 1965) (*modified*, 2 FCC2d 667 (1966) [hereinafter *1965 Policy Statement*]).

Moreover, this disparity was further entrenched by the licensing methodology - comparative hearings - which favored applicants with experience in broadcasting. Few minorities had employment opportunities with broadcasting companies until the civil rights laws and cases concerning education, equal employment opportunities, fair housing, and voting rights in the mid-60s and early 70s—years after the valuable radio and full-power TV licenses had already been granted to nonminority applicants. Accordingly, the FCC’s comparative hearing procedure contained an inherent bias in favor of nonminorities until reforms were finally adopted in 1978 (fns. omitted; emphasis supplied).¹³⁴

Another impediment facing the few minority hearing applicants was the financial showing the FCC required in order to deem an applicant basically qualified. In 1965, in a case with the modernistic name *Ultravision*, the FCC announced that it would require applicants to have reasonable assurance of sufficient financing to underwrite construction and a full year of broadcast operation without revenue.¹³⁵ The *Ultravision* standard assumed that a broadcaster would not collect for the sale of a single spot for a year after signing onto the air—an absurd assumption for an expert agency to make. When the FCC repealed *Ultravision* in 1981, it found, with dry understatement, that *Ultravision* “conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses.”¹³⁶

Not until 1973 did minority ownership come to be considered a comparative factor, and

¹³⁴ Bush & Martin, *supra* note 118, at 439.

¹³⁵ *Ultravision Broad. Company*, 1 FCC2d 545, 547 (1965).

¹³⁶ Financial Qualifications Standards, 87 FCC2d 200, 201 (1981). Minorities were specifically disadvantaged by the *Ultravision* rule. Thanks to the aftereffects of slavery and serfdom, minorities did not possess large sums of inherited wealth, which was usually the financial source of choice for so speculative a venture as a new broadcast station. Even today, the racial wealth gap is staggering. In 2016, the median wealth of White households was 10 times the wealth of Black households at \$171,000 as compared to the wealth of Black households at \$17,100. See Rakesh Kochhar *et al.*, *How Wealth Inequality has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RESEARCH CTR. (Nov. 1, 2017), <http://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/>. Lacking inherited wealth, minorities were generally compelled to secure the “reasonable assurance” letters from financial institutions that were necessary to satisfy the FCC’s “basic qualifications” test in a comparative hearing. But thanks to the broadcast industry’s segregation—facilitated by the Commission itself—most minorities lacked broadcast experience, making it difficult to persuade financial institutions to provide “reasonable assurance” for a construction permit application.

that only happened because the D.C. Circuit commanded it.¹³⁷ In 1985, the FCC undermined the minority preference by adopting a “daytimer preference” of equal comparative weight to the minority preference, basing its decision on the bizarre and completely unsupported theory that operation of a station that signs off at sunset is somehow as predictive of public interest performance as ownership diversity.¹³⁸ What this meant is that if a daytime-only station owner applied for a new license and claimed preferences for “daytimer” status, past broadcast record and broadcast experience, a minority new entrant would lose a comparative hearing overwhelmingly.

Just one year later, in 1986, with no prior notice to the public, the FCC suspended entirely its consideration of minority ownership as a factor in comparative hearings.¹³⁹ In 1989, the policy was upheld in *Metro Broadcasting*,¹⁴⁰ but it was later rendered moot by virtue of the replacement of comparative hearings with auctions in 1993,¹⁴¹ and it was wooden staked by *Adarand* in 1995.¹⁴² Since 1995, no replacement to match the modest impact of the

¹³⁷ See *TV-9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert denied*, 418 U.S. 986 (1974) (holding that minority ownership must be a factor in broadcast licensing) (requiring modification of the *1965 Policy Statement* to include minority ownership as a comparative factor). A successful example of the application of the minority ownership policy is *Waters Broad. Co.*, 91 FCC2d 1260 (1982), *aff'd sub nom. West Michigan Broad. Co. v. FCC*, 735 F.2d 601, *cert denied*, 470 U.S. 1027 (1984). In this case, the Commission chose a minority non-local applicant over a local non-minority applicant for a new FM construction permit. At trial, the minority applicant, Nancy Waters, demonstrated a greater familiarity with the community than did the competing applicant. Mrs. Waters then built the radio station and ran it successfully—in an all-White community—for 18 years.

¹³⁸ Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments (Second Report and Order), 101 FCC2d 638, 647-49 (Implementation of Docket 80-90), recon. denied, 59 RR2d 1221 (1985), *aff'd sub nom. NBMC v. FCC*, 822 F.2d 277 (2d Cir. 1987). Commissioner Henry Rivera accurately characterized the weight of the daytimer preference—which incorporated a “substantial” local ownership credit—as so heavy that “it will be almost impossible for any newcomer—minority or non-minority—to prevail against a qualifying daytimer.” *Id.* at 653 (Dissenting Statement of Commissioner Henry M. Rivera).

¹³⁹ Reexamination of the Commission’s Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications (NOI), 1 FCC Rcd 1315 (adopted Dec. 17, 1986, issued Dec. 30, 1986) (also suspending the distress sale policy; *see supra* note 47) On Dec. 18, 1986, MMTc was founded for the purpose of getting this decision overturned.

¹⁴⁰ See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 547 (1990) (finding that the distress sale policy and the consideration of minority ownership in comparative hearings satisfied the then-applicable intermediate scrutiny standard. The government’s purpose was promoting diversity in programming.)

¹⁴¹ 47 U.S.C. § 309(j).

¹⁴² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 200 (1995).

comparative hearing policy has been created.

E. The FCC Repeatedly Failed to Correct Minorities' Poor Access to Quality Technical Facilities

Not only have minorities secured few facilities, those they did secure were usually technically inferior, such as high-band low power AMs and low-tower low power FMs.¹⁴³ Today, minorities continue to be burdened by inferior technical facilities—the inevitable consequence of the FCC policies that prevented minorities from participating in media ownership while nonminorities were allowed to feast on the finest frequency allotments available.¹⁴⁴

Nonetheless, during the years before the early 1990s, when the FCC was handing out its beachfront broadcast spectrum, it refused to do anything that might improve minority access to higher quality technical facilities. That wasn't supposed to have happened.

In its seminal 1975 *Garrett* decision, the D.C. Circuit instructed the FCC to consider the effects of its spectrum management policies on minority ownership.¹⁴⁵ For a short time after *Garrett*, the FCC issued a handful of decisions that followed the court's instructions.¹⁴⁶

¹⁴³ As explained in Market Entry Barriers, *supra* note 102, at 116:

[w]hether it was late market entry. . .insufficient funds for the purchase of larger market licenses, or the perception of brokers and sellers that small businesses, especially minority businesses, couldn't afford the more powerful signal stations, small, minority and women-owned businesses frequently ended up with inferior properties. . . we found this with minority- owned businesses more than any other demographic group.

¹⁴⁴ See Kofi Ofori, *Radio Local Market Consolidation and Minority Ownership* MMTC (March 2002), [hereinafter Consolidation and Minority Ownership] <https://ecfsapi.fcc.gov/file/6513084265.pdf> (finding that while there is no longer a racial disparity in AM stations' power levels, minority-owned AM stations still tend to occupy the less desirable higher frequency end of the band. Furthermore, minority-owned broadcasters are more likely than nonminority-owned broadcasters to own Class A FM stations).

¹⁴⁵ *Garrett v. FCC*, 513 F.2d 1056, 1063 (1975) (holding that in spectrum management cases, "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.")

¹⁴⁶ See *Atlas Communications, Inc.*, 61 FCC2d 995 (1976) (granting AM station nighttime coverage waiver to promote minority ownership); see also *Hagadone Capital Corp.*, 42 RR2d 632 (1978) (promoting minority ownership, Hawaiian AM station's nighttime authority petition was removed from the processing line and afforded expedited consideration). See *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC2d 1345, 1368-69

But in 1981, the FCC began acting as though *Garrett* had never been decided. When the FCC lacked reasons to ignore the impact of its spectrum management decisions on minority ownership, it simply disregarded the minority entrepreneurs or civil rights organizations' pleadings and said nothing at all. In Docket 80-90,¹⁴⁷ in the 9 kHz proceeding,¹⁴⁸ in the Domestic Clear Channel proceeding,¹⁴⁹ in the Foreign Clear Channels proceeding,¹⁵⁰ in the AM Expanded Band (1605-1705 kHz) proceeding,¹⁵¹ in the Satellite

(1980) (adding minority ownership as a criterion for acceptance of certain applications for new service on the domestic Class I-A Clear Channel AM frequencies, only to repeal them five years later in Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules (Report and Order), 102 FCC2d 548, 558 (1985) (Clear Channels Repeal), *recon denied*, 4 FCC Rcd 5218 (1989)).

¹⁴⁷ The Commission considered minority needs when it created 689 new FM authorizations in Docket 80-90. *See Modification of FM Broadcast Stations Rules to Increase the Availability of Commercial FM Broadcast Assignments (Report and Order)*, 94 FCC2d 152, 159 n. 10 (1983) [hereinafter *Modification of FM Rules*]. However, it refused to dedicate spectrum for minority ownership, preferring instead to rely on the comparative process. *Id.* at 179. Simultaneously, though, without a hint of irony, the Commission rigged the comparative process to neutralize minority ownership as a comparative criterion by creating the "daytimer preference" for Docket 80-90 FM proceedings. *See supra* pp. 81-82. One hand gave, the other took away.

¹⁴⁸ *9 kHz Channel Spacing for AM Broadcasting (Report and Order)*, 88 FCC2d 290, 314-16 (1981) (Commissioners Jones and Fogarty dissenting) (preferring minor cost savings to owners of 10 kHz per channel digital receivers in luxury automobiles to the creation of approximately 400 new AM stations urgently needed by minority broadcasters.)

¹⁴⁹ In *Clear Channels Repeal*, 102 FCC2d at 558, the Commission repealed the minority and noncommercial eligibility criteria in *Clear Channels*, holding that a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership. Only thirteen minority-owned stations had been created under this two-year old policy. *Id.* at 555.

¹⁵⁰ *Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Report and Order)*, 101 FCC2d 1, 6 (1985) [hereinafter "*Foreign Clear Channels*"], *recon. granted in part*, 103 FCC2d 532 (1986), *reversed in part*, *NBMC v. FCC*, 791 F.2d 1016, 1022-23 (2d Cir. 1986), *on remand*, *Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Further Notice of Proposed Rulemaking)*, 2 FCC Rcd 4884 (1987), *Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Second Report and Order)*, 3 FCC Rcd 3597, 3599-3600 ¶¶19-23 (1988) ("*Foreign Clear Channels Second R&O*"), *recon. denied*, 4 FCC Rcd 5102, 5103-5104 ¶¶16-20 (1989) (eliminating minority eligibility criteria on the Foreign Clears, on the theory that minorities can always apply to occupy other vacant spectrum.) Dissenting in *Foreign Clear Channels*, 101 FCC2d at 30-31, Commissioner Rivera charged that the Commission was

backing away from our commitment to encourage minority ownership and noncommercial use of [40 potential new stations] without any record basis for doing so. . . . The key to this riddle of the reversal without reasons is that Section 73.37(e) helps minorities (among others). For that reason, the majority is unwilling to continue the existence of this rule section. It is reluctant to explain its motivation for rejecting Section 73.37(e)(2) because it would have an insurmountable task justifying that decision when the problem of underrepresentation of minorities in the broadcast industry is so far from being resolved" (emphasis in original, fn. omitted).

¹⁵¹ In deciding to give all of the expanded band to incumbents and none to minority new entrants, the Commission was quite brazen in articulating its regulatory priorities: "reserving even one channel for [minority, female and educational broadcasters'] exclusive use would assure a 10% decrease in expanded band resources dedicated to

Digital Audio Radio proceeding,¹⁵² and in the digital audio proceeding,¹⁵³ the FCC refused to take steps to bridge the divide between White ownership and minority ownership, while prematurely repealing modest remedial measures. When the Commission refused to provide relief, it often pointed to the tax certificate, distress sale, and comparative hearing policies as alternate means to promote minority ownership,¹⁵⁴ but when these policies were repealed or

interference and congestion reduction.” Technical Assignment Criteria for the AM Broadcast Service (Report and Order), 6 FCC Rcd 6273, 6307 ¶111 (1991) (“Expanded Band Report and Order”), recon. granted in part and denied in part, 8 FCC Rcd 3250, 3254 ¶¶36-37 (1993) (“Expanded Band Reconsideration Order”) (subsequent history omitted) (permitting only incumbents to colonize the AM expanded band and refusing to adopt minority ownership incentives for occupancy of the band, even though minority ownership had been among the primary justifications for the band’s expansion in the Commission’s planning for the 1979 WARC and the U.S. delegation’s advocacy presented at the WARC, where the band was authorized.) In other words, in the Commission’s breathtaking, zero-sum-game thinking, *any* spectrum for diversity-promoting minority new entrants couldn’t be justified because that would mean less spectrum for the Commission’s preferred customers—the incumbent station owners.

¹⁵² Responding to *Rules and Policies for the Digital Audio Radio Satellite Service (Notice of Proposed Rulemaking)*, 11 FCC Rcd 1 (1995), MMTC urged the Commission to set aside channels to provide access to minority entrepreneurs. Comments of MMTC in IB Docket No. 95-91 and GEN Docket No. 90-357 (filed September 15, 1995). The Commission refused, holding that it had “relied on the representations of [the four] satellite DARS applicants that they will provide audio programming to audiences that may be unserved or underserved by currently available audio programming.” *Rules and Policies for the Digital Audio Radio Satellite Service (Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking)*, 12 FCC Rcd 5754, 5791 ¶90 (1997). Thus, nonminority entrepreneurs’ promise that they will offer minority-oriented formats trumped minority entrepreneurs’ own proven record of diverse programming. This paternalistic holding was a radical departure from the Commission’s historic commitment to minority ownership as a means of advancing diversity.

¹⁵³ Minority ownership was nowhere mentioned in *Establishment and Regulation of New Digital Audio Radio Services (Notice of Inquiry)*, 5 FCC Rcd 5237 (1990) (“DARS NOI”), even though the Notice focused on providing spectrum for incumbents and for public broadcasters and inquired into the need for structural ownership restrictions. *Id.* at 5238 ¶11 and 5239 ¶14. Responding to the DARS NOI, four national civil rights organizations filed extensive comments and reply comments, along with an extensive study detailing the level of minority demand for DAB facilities by market. Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed October 12, 1990); Reply Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed January 7, 1991). The Commission neglected to mention, much less rule on the civil rights organizations’ proposals or their demand study, or put the minority ownership issue out for comment in subsequent DAB proceedings. *Establishment and Regulation of New Digital Audio Radio Services (Notice of Proposed Rulemaking and Further Notice of Inquiry)*, 7 FCC Rcd 7776 (1992) (DAB NPRM). The *DAB NPRM* said nothing about minority ownership.

¹⁵⁴ See, e.g., *Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Memorandum Opinion and Order on Reconsideration)*, 4 FCC Rcd 5102, 5104 ¶19 (1989) (minorities “would continue to enjoy a preference or qualitative enhancement in any comparative hearing proceeding that arose as a result of the filing of a competing application for use of a foreign clear channel frequency to the extent minority ownership was integrated into the overall management of the station”); *Clear Channels Repeal*, 102 FCC2d 548, 558 (1985) (a “sounder approach” than eligibility criteria is to use distress sales and tax certificates to promote minority ownership). This refrain of reliance on the minority ownership policies also characterized Commission deregulatory initiatives outside of the spectrum management field. In *Deregulation of Radio (NPRM)*, 73 FCC2d 457 (1979), the Commission reassured the public that “[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry.” *Id.* at 482. When it adopted its ultimate rules in *Deregulation of Radio (Report and Order)*, 84 FCC2d 968 (1981), recon. granted in part, 87 FCC2d 797 (1981),

eviscerated, the FCC failed to reopen the spectrum management policies it had adopted in reliance on the continued vitality of the other minority ownership policies. After (approximately) 1990, with all of the beachfront spectrum gone, the FCC is left with only such remnants as FM translators or AM station site locations¹⁵⁵ to work with if it chooses to fix what it broke 30 years ago.

F. The FCC Failed to Prevent and Proscribe Employment Discrimination

Equal employment opportunity is the one area of civil rights jurisprudence where the FCC can honestly say that it did enjoy some golden years during which it made a difference. After adopting a nondiscrimination rule in 1968¹⁵⁶ and requiring broad recruitment by most broadcasters in 1969,¹⁵⁷ the FCC by 1977 had designated 14 evidentiary hearings on license renewal applications of broadcast stations.¹⁵⁸ Between 1971 and 1977, minority broadcast employment doubled.

The FCC has acknowledged that EEO enforcement deeply impacts the climate for

aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), the Commission held that “it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public.” *Id.* at 1036. But when the minority ownership programs and EEO rules subsequently were eviscerated or emasculated, the Commission did not reverse or reconsider radio deregulation – or any other rule or policy adopted in reliance on the vitality of minority ownership or EEO regulations.

¹⁵⁵ See Revitalization of the AM Radio Services, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, MB Docket No. 13-249, 30 FCC Rcd 12145, 12151 ¶12 (2015) (AM Revitalization First R&O) (considering minority ownership as a factor in managing applications by AM stations for translators).

¹⁵⁶ Nondiscrimination – 1968, 13 FCC Rcd at 776-77 (adopting the race and gender nondiscrimination portion of the EEO rule).

¹⁵⁷ Nondiscrimination – 1969, 18 FCC2d at 240, 245 (adopting the recruitment portions of the EEO rule).

¹⁵⁸ This author has often been highly critical of the FCC’s failure to take away even one broadcast station license for employment discrimination. But designation for hearing is a powerful deterrent to wrongdoing by other licensees because, historically, about half of those designated for hearing ultimately lose their licenses. Looking back on it, fourteen hearing designation orders (“HDOs”) is a monumental number. This miracle happened because of the civil rights prosecutorial zeal of FCC General Counsel (and later Commissioner, then Chairman) Richard E. Wiley and Commissioner Benjamin L. Hooks. Wiley, a Republican and Hooks, a Democrat, enjoyed a unique partnership that also led to the creation of the Minority Ownership Task Force in 1977, which developed the Tax Certificate Policy adopted by the Commission in 1978, shortly after Wiley and Hooks each left the Commission. See *supra* pp. 50-51. History ought to record these two gentlemen as among the greatest who ever served at the agency.

minority ownership.¹⁵⁹ Consequently, the 1970s boost in minority broadcast employment came just in time for the potential dramatic growth in minority ownership that would have been fueled by minority ownership policies in the last three decades if only the FCC had not weakened or abandoned them.¹⁶⁰

It was not to last. EEO enforcement came almost to a halt during the Reagan administration¹⁶¹ and did not resume until 1989, with the support of a new FCC Chairman, Dennis Patrick,¹⁶² and the endorsement of Congress in 1992.¹⁶³ Between 1980 and 1994, only

¹⁵⁹ See Streamlining Broadcast EEO Rules and Policies (NPRM), 11 FCC Rcd 5154 5167 ¶3 (1996) (“employment discrimination in the broadcast industry inhibits our efforts to diversify media ownership by impeding opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs”) (fn. omitted); Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788, 2790 n. 22 (1995) (“it is often the case in the mass media industry that station or system owners were once employees of that facility or of another facility. Thus, increasing minority employment in the mass media may ultimately contribute to increased minority ownership.”)

¹⁶⁰ See *supra* pp. 82-86.

¹⁶¹ This history is summarized in the Comments of Civil Rights Organizations in MM Docket Nos. 96-16 and 98-204 (Broadcast and Cable EEO), filed March 5, 1999, at 114-116. See also Market Entry Barriers at 100, quoting Rev. Everett Parker, Treasurer of MMTC and founder of the Office of Communication of the United Church of Christ (UCC):

[With] the first EEO rules, when EEO reports were turned in, the FCC didn't even open them. They threw them into boxes and took them into the library and stored them. . . They never [] examined [radio and television] stations in detail for their [EEO] performance even though they are supposed to. And you know, license renewal has always been a farce. . . the staff at the FCC certainly did not want to be bothered with these hundreds and hundreds of reports and analysis. . . In the end, since [UCC was] issuing [EEO] analyses every year we made a deal with the then chairman. . . [H]e and I made an agreement that [we] would do the analysis and would have the figures. And as long as he was Chair everything was just wonderful. But then, of course, the Reagan FCC came along and after that, you know, they just said they weren't going to enforce the EEO rules and the hiring and promoting of minorities and women went down again.

Henry Rivera, Chair Emeritus of MMTC and a Commissioner from 1981 to 1985, added that during his term on the FCC:

[O]ne of the things that happened that hurt a lot was the Commission's decision basically to stop enforcing its EEO policies. . . [the then Chairman] thought that this was a bad thing to do, that it was not appropriate for the government to be sticking its nose in enforcing broadcasters to hire minorities... That hurt a lot because [minority and women employees] are your farm team, basically. These are the folks that you look to in the future to get into ownership[.]

Id. at 100-101.

¹⁶² Conversation between the author and FCC Chairman Dennis Patrick (Spring 1989) in which Chairman Patrick acknowledged that while he was not entirely comfortable with the fact that the FCC had stewardship of broadcast employment, he believed that if a rule is on the FCC's books, it must be strictly enforced if the industry is to have any respect for the FCC's enforcement of any of its rules; and consequently, he would direct the staff to resume enforcement of the EEO rule.

five EEO cases were designated for hearing; none has been since.

In 1998¹⁶⁴ and again in 2001,¹⁶⁵ decisions of the D.C. Circuit invalidated portions of the EEO Rules, after which the FCC adopted weaker, but still potentially effective, sets of new rules.¹⁶⁶ Such rules were urgently necessary in light of evidence that employment discrimination in broadcasting remained quite pervasive,¹⁶⁷ and as broadcasters—emboldened by the two court decisions and the FCC’s inaction on EEO enforcement—began to take extraordinary steps to abandon even the simplest, most non-intrusive means of informing the

¹⁶³ In the Cable Television Consumer Protection and Competition Act of 1992, Congress barred the Commission from revising its then-existing EEO rules governing “television broadcast station licensees and permittees. . . .” Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified as amended at 47 U.S.C. §334(a)(1). Congress supported this requirement by finding, in §22(a) of the 1992 Act, that “despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant positions of management authority in the cable and broadcast industries. . . and rigorous enforcement of equal opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.” 106 Stat. at 1498.

¹⁶⁴ *Lutheran Church/Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.) (Lutheran Church), *petition for rehearing denied*, 154 F.3d 487 (Lutheran Church (en banc) *petition for rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). The Court focused on an FCC staff application processing “screen” under which the small FCC processing staff did not closely examine renewal applications of stations having diverse staffs on the theory that such stations could rationally be assumed to have implemented the broad recruitment programs that would naturally have produced diverse staffs. The only effect of the screen would have been that if a station had no minority employees, the staff would actually read the application to see if the licensee’s recruitment methods were, in fact, broad, as was required by the rules. If the recruitment methods were rule-compliant, the application would be granted unconditionally. Nonetheless, the Court in *Lutheran Church* held that the rules then in effect were unconstitutional because they “pressure - even if they do not explicitly direct or require - stations to make race-based hiring decisions.” *Lutheran Church (en banc)*, 154 F.2d at 491. The Court added to the confusion by stating that “[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated.” *Lutheran Church*, 141 F.3d at 351. The Court further clarified that it did not hold that a regulation “encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny.” *Lutheran Church (en banc)*, 154 F.2d at 492.

¹⁶⁵ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (2000). The core issue in *MD/DC/DE Broadcasters* was whether the Commission could require broadcasters to implement an outreach program that expands opportunities for minorities without disadvantaging nonminorities—a problem that is not insoluble. The Court drew a distinction between outreach whose impact was measured by the number of minorities who were recruited (which it regarded as a classification subject to strict scrutiny because the Court believed it could disadvantage nonminorities) and outreach methods that are broad but ultimately are not evaluated by what the Court regarded as their racial “outputs,” in the Court’s terminology. *Id.* at 19.

¹⁶⁶ In 2002, the Commission adopted new EEO rules responsive to MD/DC/DE Broadcasters, with enforcement driven by audits of recruitment efforts. Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018 (2002). Audits were to be conducted on 5% of employment units in a given year. *Id.* at 24066.

¹⁶⁷ According to the Radio Television News Directors Association (RTNDA), minority employment in radio news declined from 14.7% in 1995 to 6.4% in 2005. MMTc went behind the RTNDA’s figures and calculated that the representation of people of color in English language, non-urban radio is about two tenths of a percentage point (0.2%), approximately where it stood in 1950. See David Honig, *Why the FCC Avoids Broadcast Diversity Metrics*, MMTc 4 (Mar. 22, 2004), http://mmtconline.org/lp-pdf/DH_Fordham_Article.pdf. The FCC has done nothing to investigate this purge of minorities from radio journalism.

public that they welcomed job applications from minorities.¹⁶⁸

Unfortunately, the FCC has done virtually nothing to enforce its new rules, with forfeitures running at about 2% of the aggregate amounts of ten years previously.¹⁶⁹

The principal method by which broadcasters discriminate is by having a homogeneous staff recruit new staff members primarily through word of mouth. The FCC has repeatedly recognized that this practice, which targets mainly friends and family and tends to exclude minorities, thus replicating homogeneity across generations, may be discriminatory.¹⁷⁰ The FCC also well knows that discrimination is supposed to disqualify an applicant from holding a broadcast license.¹⁷¹

Nonetheless, the FCC has refused—without ever giving a reason—to obtain, from broadcasters that recruit primarily by word of mouth, data showing whether their workforces are

¹⁶⁸ MMTC visited the 34 accessible state broadcast association websites that had job postings, as well as the NASBA [National Alliance of State Broadcasters Associations] site. Of 837 listings on all 35 accessible sites, 348 (42%) did not contain the three-letter, formerly ubiquitous “EOE” notices. The author had reviewed thousands of broadcast station job notices from 1971-1988, and nearly every one had an “EOE” tag. Such tags were almost always certified by broadcasters in their EEO programs – truthfully or otherwise. Among minority and female job seekers in broadcasting, EOE tags on job postings were so commonplace that the *absence* of one was read as code for “this job is not for you.” See Reply Comments of EEO Supporters (48 National Organizations), MM Docket No. 98-204, pp 28-31.

¹⁶⁹ The FCC’s EEO enforcement program is a shell of its former self. MMTC examined all 300 of the Bureau’s 2003 and 2004 broadcast audits, and found that only 12% of the recruitment sources were minority-targeted while 36% of the job notices still did not contain an “EOE” tag. Yet, every one of the stations passed its audit anyway. Comparison of 2004-2007 EEO enforcement with 1994-1997 EEO enforcement revealed that

- 1994-1997: 251 cases decided; 86 of which resulted in forfeitures totaling \$2,149,000, or \$312,250 per year. Mean forfeiture per forfeiture decision was \$3,631.
- 2004-2007: 10 cases decided, eight of which resulted in forfeitures totaling \$97,000, or \$24,250 per year. Mean forfeiture per forfeiture decision was \$12,125.

¹⁷⁰ See *Jacor Broad. Corporation*, 12 FCC Rcd 7934, 7940 ¶14 (1997) (*Jacor*) (holding that over-reliance on word-of-mouth recruitment may “have the effect of discriminating against qualified minority groups or females”); *Walton Broadcasting, Inc. (KIKX, Tucson, AZ)* (Decision), 78 FCC2d 857, 875, *recon. denied*, 83 FCC2d 440 (1980) (*Walton*) (condemning “employment practices which discriminated against minority groups in recruitment and employment” including “word of mouth” referrals from a predominately White work force, which, while unintended, effectively discriminated against minority group employment”).

¹⁷¹ See, e.g., *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Notice of Proposed Rulemaking, 16 FCC Rcd at 22843, 22872 (2001) (Separate Statement of Chairman Michael K. Powell) (“If the public interest means anything at all, it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived.”)

homogeneous, even if this data is maintained *in camera*.¹⁷² This data is essential to any meaningful EEO enforcement program because it is necessary to establish one of the two elements of the offense: the maintenance of a homogeneous workplace through which recruitment of new employees may occur primarily by word of mouth.¹⁷³ This practice obviously is unknown to job applicants, but it would be readily discoverable by the FCC upon review of statistical information showing workplace demographics as well as reports on utilization of recruitment sources. Since proof of discrimination requires proof that the predominantly word of mouth recruitment was performed by a homogeneous staff, there can never be a successful prosecution for discrimination.

In 2010, MMTC asked the FCC to suspend its EEO enforcement policy and create a new, much stronger one in its place.¹⁷⁴ No action has been taken in response to that letter or in response to any of the pending proposals in the broadcast EEO docket. Difficult as it may be to

¹⁷² State broadcast associations falsely alleged that minority groups intended to seize upon raw employment profile numbers and file spurious license challenges accusing broadcasters of discrimination based solely on these data. The FCC firmly responded that it would reject such challenges without consideration. *See* Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies (R&O), 15 FCC Rcd 2329, 2389 ¶149 (2000) (subsequent history omitted). Indeed, it is well established that statistical data on race and ethnicity may be collected, regardless of a party's fear of misuse). *See* United States v. New Hampshire, 539 F.2d 277, 279-280 (1st Cir. 1976), *cert. denied*, 429 U.S. 1023 (1976). Nonetheless, the Commission has failed to make the Annual EEO Report, Form 395, available even to its own staff, even *in camera*, and even exclusively for enforcement purposes. *See* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Third R&O and Fourth NPRM), 19 FCC Rcd 9973, 9976 ¶9 (2004) (Third R&O) ("The Commission will not use the data in the reports to screen renewal applications or to assess compliance with our EEO regulations.") In the *Third R&O*, the Commission supplies no logical reason why it refuses to gather and use information that – in conjunction with recruitment information – would readily identify a licensee that is engaging in prohibited race or gender discrimination. *In camera* review of this data, which had been *openly* available from 1971-2001, would render this spurious allegation moot. Nonetheless, the Commission will not make this vital data available to its staff, even *in camera*, "to screen renewal applications or to assess compliance with our EEO regulations." Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Third R&O and Fourth NPRM), 19 FCC Rcd 9973, 9977 ¶9 (2004).

¹⁷³ *See supra* note 170.

¹⁷⁴ The letter stated, *inter alia*, that four cases "went unprosecuted because the stations' licenses had already been renewed, and two more cases went unprosecuted because the Commission missed its own statute of limitations." It concluded that "FCC EEO enforcement has no apparent mission, no focus, no data for evaluation, and no results except sanctioning the innocent while ignoring the guilty. Such a program only creates the false security that comes when the constable is on duty yet asleep." Letter to Hon. Julius Genachowski from David Honig, President, MMTC, June 9, 2010.

imagine, the docket has been awaiting a ruling for *fifteen years*.¹⁷⁵

IV. THE CASE FOR REMEDIATION

Those who have read this far without getting an upset stomach hopefully are convinced that something must be done. Whether it is done to promote diversity and contribute to democracy; or to promote competition and strengthen the U.S. economy; or to correct a massive historical wrong; or to prevent race discrimination in the future; or for all of these reasons, something must be done.

It should also be recognized that the FCC is not without a record of attempting some steps, and credit is due for the flashes of visionary leadership that made these steps possible. The 1978 adoption of the Tax Certificate Policy came about through a bipartisan multi-stakeholder process masterfully executed by Commissioner Hooks, Chairman Wiley, and his successor Chairman Charles Ferris. The attempt by Chairman William Kennard at delivering five *Adarand* studies that would have permitted the FCC to use race-conscious methods to promote minority ownership failed only because of its unfortunate timing in the immediate wake of *Bush v. Gore*¹⁷⁶ and the transition to a new administration that did not believe in this methodology. And Chairman Michael Powell, who *did* believe in maintaining EEO regulations even after two losses in the D.C. Circuit, was able to pull together a public hearing and a bipartisan consensus backed by industry stakeholders, resulting in the adoption of the new (albeit seldom enforced) EEO regulations that are on the books today. These efforts may have been insufficient, but they required vision and courage. They deserve recognition and respect.

¹⁷⁵ See MMTTC, Petition for Clarification, or in the Alternative, for Partial Reconsideration, MB Docket 98-204 (filed February 6, 2003 in response to the *EEO Second R&O and Third NPRM*). It has been fully pled since 2004.

¹⁷⁶ *Bush v. Gore*, 531 U.S. 98 (2000), was handed down on December 12, 2000. The *Adarand* Studies also had their debut in an FCC public hearing on December 12, 2000 attended by Chairman Kennard and Democratic Commissioners Susan Ness and Gloria Tristani. The Republican Commissioners, Michael Powell and Harold Furchtgott-Roth did not attend the hearing. The administration changed hands on January 20, 2001.

It should also be understood that whatever steps are taken in the short run cannot be race-conscious. Even assuming that some of the interests in advancing minority ownership would survive strict scrutiny, the FCC has not attempted all reasonable race-neutral steps—a necessary predicate to attempting race-conscious steps.¹⁷⁷ Indeed, the Third Circuit of the U.S. Court of Appeals has had to remind the FCC *twice* of its duty to consider non-controversial, race-neutral proposals that civil rights organizations placed before it in a media structural ownership proceeding.¹⁷⁸

Finally, much of the FCC's failure can be attributed to deficiencies in process and prioritization. Too often, with high visibility items like net neutrality on the agency's agenda, minority entrepreneurship is always "the issue that can wait until next Thursday." Even highly effective, unopposed, race-neutral, cost-free proposals can be ignored by an agency that is not focused on minority entrepreneurship. In August 2016, four former FCC chairs wrote an

¹⁷⁷ As Justice O'Connor wrote for the plurality in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989):

the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.

Concurring in the judgment, Justice Scalia wrote that

[a] State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race. . . . Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks.

Id. at 528. See *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 706 (2007) (Kennedy, J.) (suggesting that a school district may pursue its diversity goals without race-based classifications through such methods as "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance and other statistics by race.")

¹⁷⁸ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 421 n. 59 (3d Cir. 2004) (Prometheus I) and *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 n. 11 (3d Cir. 2016) (Prometheus III).

unprecedented letter asking Chairman Tom Wheeler to support an unopposed proposal extending the highly successful cable procurement rule to broadcasting. The text of this letter is set out in the margin.¹⁷⁹ Not only was the proposal ignored, the letter went unanswered.

Thus we must consider two questions: (1) what are the most logical and reasonable initiatives the FCC could undertake right now? And (2) what is the best process for bringing those initiatives across the finish line?

¹⁷⁹ August 5, 2016

Hon. Tom Wheeler
Chairman
Federal Communications Commission
445 12th St. SW
Washington, D.C. 20554

Dear Mr. Chairman:

We are pleased to offer our enthusiastic support for the extension of the Cable Procurement Rule to all communications technologies.

Under the Rule, which dates to the 1992 Cable Act, cable and satellite operators annually inform the Commission on the steps they take to provide equal procurement opportunities to minority and women suppliers. In this way, operators consciously ensure that when they lay fiber, float a bond, establish a call center or arrange for fleet maintenance, diverse suppliers will be made aware of the opportunity and have an opportunity to bid.

Recognizing that communications technologies' business environments are converging into a unified ecosystem, you have promoted the principle of platform neutrality. Following your lead, fifty-seven national organizations support extension of the Cable Procurement Rule across all technologies. The affected industries – including the Title I information services that the proposal would reach through a request for voluntary reporting or a referral to GAO for data gathering – have exhibited statesmanship by lodging no oppositions to this proposal.

During our chairmanships, we each worked to facilitate the meaningful entry of minority and women owned companies into the industry in ownership roles. This proposal would help dramatically by opening up opportunities for business relationships that are generally a predicate to ownership.

On the national stage, the extension of equal procurement opportunity to industries constituting one-sixth of the economy would be an enormous civil rights achievement during your Chairmanship.

Sincerely,

Reed Hundt, Chairman, November 1993 - November 1997
William E. Kennard, Chairman, November 1997 - January 2001
Michael J. Copps, Acting Chairman, January 2009 - June 2009
Julius Genachoswki, Chairman, June 2009 - May 2013

First, process.

The logical starting point for process is to use the procedural tool Congress has conferred on the agency for just such an occasion. That tool is Section 257 of the 1996 Telecommunications Act, the “market entry barriers” provision, through which Congress expects the FCC to produce a triennial report on the steps it has taken to eliminate any identified market entry barriers facing small businesses and businesses owned by women and minorities. Section 257(b) of the 1996 Telecommunications Act, codified at 47 U.S.C. §257(b) (1996), establishes a “National Policy” under which the FCC shall promote “diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.” Congress also expects the FCC to report, every three years, on “any regulations prescribed to eliminate barriers within its jurisdiction. . . .” 47 U.S.C. §257(c). It was pursuant to Section 257 that the 2000 *Adarand* Studies were produced. The next triennial Section 257 report is due December 31, 2018. All of the Section 257 reports except those due in 1997 and 2000 have been late—some of them years late—and most of them contained little of substance.¹⁸⁰

¹⁸⁰ A weakness in Section 257 is that it does is mandate that a report be issued – not that policy be created or implemented. *See Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010). In another sign of the low regard the Commission sometimes has exhibited for its Section 257 obligations, the Commission neglected to call for public comment on the 2000 *Adarand* Studies until 2004, by which time the (late 1990’s) data in these studies was mostly stale. *See Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies, Public Notice*, 19 FCC Rcd 10491 (MB 2004). Yet another sign of the agency’s low regard for its Section 257 obligations is the manner by which it produced very low-cost, low-impact Section 257 studies in 2007, all of which found that there was insufficient data with which to draw meaningful conclusions. Furthermore, one study performed for the FCC pursuant to Section 257 theorized that initiatives to advance minority ownership are impediments to competition, and that curing minorities’ poor access to capital is solvable only through “either chang[ing] the aggregate distribution of wealth or otherwise increas[ing] access to capital markets.” *Id.* at 10. Arie Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises*, FCC (June 2007), https://transition.fcc.gov/mb/docs/peer_review/prstudy7a.pdf. Further, it is well established that unlocking excluded groups’ underutilized entrepreneurial, management and creative talent, and bringing new energy and capital to the transactional table, are demand-generating and competition-promoting, and that the Commission itself plays a dominant role in the generation or withholding of access to capital in broadcasting through such agency decisions as where a station’s transmitter can be sited, whether a licensee faces competitors who can take advantage of the structural rules, and whether a licensee can monetize its subchannels or secure access to a translator *See supra* pp.

The Section 257 reports have not been the only indicia of low prioritization and delay when it comes to minority ownership. It is fair to say that ever since November 12, 1973, when the one-day-old National Black Media Coalition (NBMC) brought dozens of activists across the nation to the FCC to deliver 62 rulemaking proposals, the FCC's reaction has been "not invented here and not going anywhere." It took the FCC three years to reject all 62 rulemaking proposals. Dissenting as to 31 of the rulings, Commissioner (and future NAACP CEO) Benjamin Hooks was highly critical of the FCC's long delay.¹⁸¹ Yet, four decades later, a three-year delay would look like warp speed. In 2004 and again in 2016, the Third Circuit of the U.S. Court of Appeals had to remind the FCC of its duty to consider non-controversial, race-neutral minority ownership proposals, some of them pending well over a decade.¹⁸² A proposal for a media incubator, first offered by the National Association of Black Owned Broadcasters (NABOB) in 1990, was pending in seven dockets for 28 years.¹⁸³ If the subject were environmental protection, gun control, or monetary policy, a 28-year delay would be scandalous. Yet, for civil rights at the FCC, it is the norm.

For a solution, we must look first to Section 257, which was drafted with the promotion of minority ownership in mind.¹⁸⁴ Thus, Section 257 analysis has often been a key linchpin of

82-86.

¹⁸¹ See *Rules and Policies to Facilitate Public Participation and Reregulation of the Various Communications Industries in the Public Interest*, Memorandum Opinion and Order, 61 FCC2d 1112 (1976) and *Citizens Communications Center*, Memorandum Opinion and Order, 61 FCC2d 1120 (1976).

¹⁸² See *Prometheus I*, 373 F.3d at 421 n. 59 and *Prometheus III*, 824 F.3d at 50 n. 11.

¹⁸³ See *infra* pp. 101-02.

¹⁸⁴ Congresswoman Cardiss Collins, a sponsor of Section 257, offered this interpretation of the Section:

[W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely under represented in the telecommunications field. . . . Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

142 CONG. REC. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

FCC rulemaking decisions on issues that directly impact minority participation in the industries it regulates—including equal employment opportunity and minority ownership, as well as structural regulation of such critical industries as television and wireless telephony. In the right hands, a Summit of stakeholders convened under Section 257 could be a powerful instrument of reform.

The FCC's misconduct was so vast in scope, so long lasting, and had such an enormous impact that it can only be put to rest through a comprehensive Summit—a gathering of all affected parties, including regulators, legislators, broadcasters, investors, entrepreneurs, lenders, brokers, communications lawyers, and scholars.¹⁸⁵ There are several models for convening that address profound historical wrongs in a manner that is redemptive but not punitive; honest and raw but not vituperative; solution-driven but not unrealistic.¹⁸⁶

The purpose of the Summit would be to hear from industry leaders, entrepreneurs, lenders, investors, and brokers on how minority ownership can be advanced. While civil rights organizations have suggested numerous paradigms for promoting minority ownership, the FCC should hear from others on the question of which minority ownership initiatives would be well received. History teaches that minority ownership policies are unlikely to succeed without the full support of the affected industries. Every one of the successful minority ownership policies was fashioned as a win-win by providing incentives for nonminority broadcasters to invest in or sell stations to minorities. The FCC will need to draw upon—and ask for—the enormous creativity and

¹⁸⁵ The last time the Commission held a hearing on minority ownership was December 12, 2000, when it considered the five *Adarand* Studies. Thus, for 18 years there has been no thorough public examination by the Commission of how and why minorities have been excluded from broadcast ownership. The last civil rights hearing the FCC held took place June 24, 2002—16 years ago—on equal employment opportunity, with a host of witnesses from the broadcasting industry.

¹⁸⁶ Following the fall of the apartheid in S. Africa, the Truth and Reconciliation Commission helped victims of human rights violations reconcile their troubled past and compile an objective record of the impact apartheid had on South African society. See *Desmond Tutu (South Africa)*, THE FORGIVENESS PROJECT, (Mar. 29, 2010), <http://theforgivenessproject.com/stories/desmond-tutu-south-africa/>.

goodwill of the affected industries. At the Summit, the FCC can hear, at one time and in one place, the full range of historical perspectives, legal and economic analysis, research findings, and creative proposals. It could also hear the life testimony of minority broadcast pioneers, including many who helped craft the original minority ownership policies, while we are still blessed with their presence and wisdom.

Here are seven specific initiatives a Summit could take up:

1. Restoration of a Version of the Tax Certificate Policy

The Tax Certificate Policy, in effect from 1978-1995, quintupled minority broadcast ownership and drew no public opposition. Yet, in 1995, the program fell victim a whispering campaign among conservative legislators who were being told that the program assisted broadcast station owners who, as members of minority groups, could be counted on to editorialize against them.¹⁸⁷

Since 1995, several attempts have been made at drafting replacement legislation. Bills have been introduced by Senators John McCain and Robert Menendez, and by Congressmen Charles Rangel and Bobby Rush. None of these bills have been afforded a hearing in the House Ways and Means Committee, where tax legislation must begin.

Still, the effort should not be abandoned. A model revised bill (as re-cast to include telecommunications and to cap deal size and annual aggregate tax impact) has no public opposition.¹⁸⁸ Eventually, perhaps, it may find its way into the Tax Code.

¹⁸⁷ This was absurd for two reasons. First, many minority-owned broadcasters were politically conservative or apolitical. Second, unlike their colleagues in the newspaper industry, very few broadcasters of any race editorialized—then or now. Of course the leaders of the campaign to kill the program knew this. Their whisper campaign was code for their actual goal, which they knew better than to even whisper.

¹⁸⁸ The program received praise from respondents in the 2000 Historical Study, from a 2008 General Accounting Office study of media ownership (*GAO Media Ownership Study*), *supra* note 27 at 5 (citing as a barrier to entry “the repeal of the tax certificate program—which allowed for the deferral of capital gains taxes on the sale of broadcast and other media outlets and, thereby, provided financial incentives for incumbents to sell stations to minorities.”). The Program has also received regular endorsements from the Commission’s legislative recommendations to

2. Tax Relief for the Donation of a Station to a Nonprofit Training Facility

Another tax incentive program would be the creation of a tax credit to encourage companies to donate broadcast stations to nonprofit institutions whose missions include training women and disadvantaged new entrants to make the transition between broadcast management and ownership.

Presently, a donor to such an institution receives a tax deduction, but often (especially if the station being donated has little revenue) that is not a sufficient incentive to donate. A tax credit would allow many small, “mom and pop” broadcasters to exit the industry with dignity, in a manner that allows them to receive fair market value for their life’s work, while seeing their station repurposed to train the next generation of broadcasters.¹⁸⁹

3. Elimination of Market Entry Barriers That Restrict Access to Capital, Spectrum, and Opportunity

A host of market entry barriers continue to restrict minority owners’ and entrepreneurs’ access to capital, spectrum, and opportunity. Some of these are well known, and could be the topic of discussion and action at a Summit:

- *Lifting restrictions on upgrading inferior signals.* As has been noted, minority broadcasters typically got into the business late and thus must try to compete armed with weak facilities such as lower-power AM or FM stations, daytime-only AM stations, or tower sites that are located some distance from the center city.¹⁹⁰ A number of engineering reform proposals have been advanced to ameliorate these

Congress. *See, e.g.*, Section 257 Triennial Report to Congress, Identifying and Eliminating, Market Entry Barriers, For Entrepreneurs and Other, Small Businesses, 26 FCC Rcd 2909, 2965 ¶155 (2011).

¹⁸⁹ Eligible organizations could consist of categories of institutions that are defined in a manner that the courts have affirmed to be defined by their missions and are thus considered race-neutral, including Historically Black Colleges and Universities (HBCU), Native American-Serving Institutions (NASIs), Asian American and Native American Pacific Islander-Serving Institutions, Hispanic-Serving Institutions (HSIs), and 501(c)(3) or 501(a) tax-exempt organizations that provide broadcast training and broadcast station management for women and economically and socially disadvantaged persons who have traditionally been underrepresented in the broadcast industry. *See* U.S. v. Fordice, 505 U.S. 717, 749 (1992) (Thomas, J., concurring) (a State may “operate a diverse assortment of institutions— including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another.”)

¹⁹⁰ *See supra* pp. 82-86.

conditions, such as repeal of the “rural radio” policies,¹⁹¹ which prevents broadcasters from moving their station into a large city where most of their audiences are located.

- *Deregulating FM translator program origination.* AM stations are disproportionately owned by minorities.¹⁹² On October 23, 2015, the FCC opened FM translator windows for AM stations.¹⁹³ It also authorized the Media Bureau to work with the Wireless Telecommunications Bureau to open new FM translator application auction windows, starting in 2017.¹⁹⁴ Presently, an AM station owning an FM translator must use the translator only to rebroadcast the AM station’s programming.¹⁹⁵ The translator cannot be used to transmit programming in another language or to serve another unmet need in the market. Translator program origination might help contribute diversity to the airwaves and would disproportionately benefit minority broadcasters.
- *Engaging federal financial regulatory bodies to address capital access.* According to the GAO, lack of access to capital remains the greatest barrier to the participation of minorities in the broadcast industry.¹⁹⁶ In its research regarding access to capital, the GAO cited two issues attendant to the lack of access to capital to buy media assets:

(1) “Since stations generally do not advertise their properties for sale, individuals and companies looking to purchase a station must have cash on hand. Prospective buyers cannot wait for an announced sale and then acquire financing. This is a challenge for minority and women broadcasters, who often lack information on upcoming station sales and generally have fewer financial resources; and

(2) Sellers are deterred from working with buyers who lack capital since any equity remaining in the station would be considered [an] attributable interest under FCC’s rules.” To cure this, stakeholders should come together and undertake to bring into being:

- *A business planning center*, affiliated with an institution such as an HBCU, that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing, and pursue acquisitions.
- *Entrepreneurial training programs*, modeled after the National Association of Broadcasters (NAB) Foundation’s Leadership

¹⁹¹ See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket 09-52, 26 FCC Rcd 2556, 2567 ¶20 (2011), *recon. denied*, 27 FCC Rcd 12829 (2012).

¹⁹² See FCC Advisory Committee on Diversity for Communications in the Digital Age, Recommendation for FCC Consideration of Nine Means of Diversifying Ownership in the Commercial FM Radio Band (92.1 – 107.9 MHz) (June 11, 2004).

¹⁹³ See AM Revitalization First R&O, *supra* note 155.

¹⁹⁴ *Id.*

¹⁹⁵ 47 C.F.R. §74.1231(b). See, e.g., TEA-VISZ, Inc. (MO&O and NAL), DA 17-1169, 32 FCC Rcd. 10204, (rel. December 5, 2017).

¹⁹⁶ See GAO Media Ownership Study, *supra* note 27, at 24-25.

Training Program, to help minorities and women, already experienced in broadcast management, learn the skills required for ownership.

- *Large lines of credit* upon which socially and economically disadvantaged businesses (SDBs) could draw upon to finance broadcast ventures. Such a line of credit could be assembled with the cooperation of a syndicate of minority banks.
- *Financial investments in SDBs*, or funds that support them, structured to include mentoring by senior executives and professionals wishing to convey their knowledge and experience to subsequent generations.

4. Consideration of the Impact of Consolidation on Minority Ownership

Structural rule changes can offer immediate benefits to companies poised to take advantage of them, while competitively disadvantaging others. Throughout the history of broadcasting, minority broadcasters have almost never bumped up against the limits that govern how many television or radio stations a company can own in a market or nationwide. When those limits are lifted, competing companies benefit, and capital flows to them and away from companies unable to take advantage of consolidation.

Consolidation also inevitably triggers a wave of mergers and acquisitions (M&A) that generate spinoffs of stations from markets where the merging parties have “overlap” stations whose combination would violate the rules. The merging companies then conduct “private auctions” of the properties being spun off. While many companies conducting these private auctions make a genuine effort to reach out to potential minority buyers, few minorities are in a position to outbid the large, cash-rich companies that own other stations in the same market as the spinoff stations.

Ownership consolidation inexorably occurs, and small broadcasters lack the political clout to stop it. There are, however, some steps the FCC could take to limit its adverse impact on minority ownership:

- *Phased and monitored implementation of deregulation.* The FCC could arrange for new rules to take effect in a series of logical stages, with large markets first, for example. Before and during each stage, the FCC would measure diversity, competition, localism, and minority ownership levels; and each deregulatory stage would take effect only if each of these measurements shows that the factor being measured is healthy. This procedure would ensure that those lacking quick access to capital (particularly minorities) will have sufficient time to reconfigure themselves in order to compete effectively in the new regulatory environment. Further, the FCC could avoid, as best it can, the damage that would result if deregulation is effectuated too rapidly, only to prove to have been an irreversible mistake.
- *Broad outreach attendant to M&A divestitures.* The FCC should expect M&A spinoff station sellers to conduct broad and timely outreach to minority and other new entrants when they offer stations for sale. This outreach should be part of the public interest showings that typically accompany broadcast merger applications filed with the FCC.
- *Encouragement of voluntary initiatives.* The industry-founded Quetzal/J.P. Morgan Fund was created in 1999 upon the initiative of FCC Chairman Kennard and through the efforts of executives and counsel for Clear Channel Communications (now iHeart Media) and Infinity Broadcasting (later CBS Radio) as well as this author. The Fund operated for ten years before it was closed. It was not created in exchange for deregulation, so it was reasonable for the FCC to take the effort into account in evaluating the need and prospects for deregulation.

5. Establish an Incubator Program

The Media Incubator concept is that a licensee could receive a permanent waiver to exceed one of the local or national station ownership limits, or other benefits, if the licensee makes possible the creation of an independent new voice. This opportunity to improve the diversity of voices broadcasting has been pending in seven dockets for 27 years.

NABOB President James Winston created the concept in 1990 while serving on FCC Chairman Alfred Sikes' Minority Ownership Task Force. Chairman Alfred Sikes had the concept put out for comment in a notice of proposed rulemaking, which was issued in 1992 by a unanimous vote of the five commissioners.¹⁹⁷ Subsequently, the concept was considered in seven successive FCC dockets but was never adopted.

¹⁹⁷ Revision of Radio Rules and Policies, MM Docket 91-140, *Reconsideration*, 7 FCC Rcd 6387, 6391-92 ¶21-25 (1992).

In 2017, the FCC tasked its Advisory Committee on Diversity and Digital Empowerment (ACDDE) with the responsibility of responding to 57 questions going to the definition of an eligible entity, the avoidance of sham structures, and the benefits to the incubated and incubating entities. On August 3, 2018, the FCC issued a Report and Order that created an incubator program and adopted most of the ACDDE's recommendations.¹⁹⁸

6. Restore Meaningful Broadcast EEO Enforcement

Four critical reforms (one of which was made shortly before this article went to press) are needed now to restore FCC EEO enforcement to health.

- *Transparency for Annual Employment Reports.* As we have seen, the FCC has all of the tools available to conduct a meaningful EEO enforcement program. It knows, from broadcasters' license renewal applications and intensive audits of 5% of them every year, whether they recruit primarily by word-of-mouth; and it has, at its disposal, data showing whether that word-of-mouth recruitment takes place from homogeneous workplaces, an inherently discriminatory practice.¹⁹⁹ Yet, for reasons unknown, the FCC chooses not to examine this data, even *in camera*, thereby preventing itself from ever being able to bring a discrimination case, while also ensuring that those innocent of discrimination are wrongly sanctioned.²⁰⁰ Correcting this irrational self-imposed limitation on EEO data access is by far the most urgent reform needed in FCC EEO enforcement.
- *Place the audit program on steroids:* conduct far more numerous and thorough audits, conduct some of the audits with on-site review of hard-copy documentation, and revise

¹⁹⁸ See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (Order on Reconsideration and NPRM), 32 FCC Rcd 9802, 9857-64 (2017). At its March 27, 2018 meeting, the ACDDE unanimously adopted an incubator proposal under which, *inter alia*, an incubating company would receive a deferral of certain capital gains taxes after it invests in and assists an incubated company in establishing itself in the industry. See Comments of the Federal Communications Commission's Advisory Committee on Diversity and Digital Empowerment: A Proposal for an Incubator Program (Filing Details), FCC, <https://www.fcc.gov/ecfs/filing/1040125142431>. The FCC's Report and Order did not contemplate a tax relief model; instead, it is premised upon the award of waivers of the local multiple ownership rules to companies that established incubation programs. See Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Service (Report and Order), 2018 WL 3738329, (rel. August 3, 2018). MMTC and NABOB have sought judicial review of the FCC's apparent authorization of waivers in the largest markets in recognition of incubation in certain small markets. MMTC and NABOB v. FCC and USA, Petition for Review, No. 18-1263 (D.C. Cir., filed September 27, 2018).

¹⁹⁹ See *supra* p. 89 and n. 170, .

²⁰⁰ Focusing on word-of-mouth recruitment alone means that the Commission has issued large forfeitures to diverse broadcasters whose use of word-of-mouth recruitment was not an EEO violation at all. Asking a diverse staff to refer employees from among their friends and family may not be the most efficient way to find new employees, but it is not discriminatory. It is no wonder that many pro-civil rights and minority-owned broadcasters, sympathetic to EEO enforcement, do not have a high regard for the FCC's EEO enforcement regime.

the audit instrument so that it uncovers discriminatory applicant screening at the points of recruitment, interviewing, and selection.²⁰¹

- *Ensure that the Office of General Counsel tracks EEO cases* to ensure that the FCC never again misses a statute of limitations or renews a license while an EEO audit is underway.
- *Relocate the EEO Staff to the Enforcement Bureau.* On remand from *Prometheus III*, the FCC determined that EEO enforcement would more effectively and efficiently be performed by the Enforcement Bureau,²⁰² the logical venue for an enforcement program.

7. Extend EEO Enforcement Across All Media, Telecom, and Internet Industries

Platform neutrality and the elimination of silos should lead naturally to EEO enforcement across all media and telecom industries, including “edge” firms the FCC classifies as Title I information services.²⁰³ Many of these firms, including most of the largest ones, maintain very low levels of African American, Latino, and female employment, as well as limited Asian American managerial employment—far below those of comparable broadcast and telecom firms.²⁰⁴

While minorities and women are earning degrees in in the technology sector, they still struggle to find jobs. As of 2014, Whites held at least 50% higher levels of representation over Blacks, Hispanics, and Asian Americans in technology job classifications ranging from

²⁰¹ The EEO staff (one-third the size of the staff 30 years ago) is absurdly small relative to the responsibilities assigned to it. Fortunately, the EEO staff is dedicated and highly competent.

²⁰² See 2014 Quadrennial Review, MB Docket No. 14-50, Second Report and Order, 31 FCC Rcd 9864, 10008 ¶333 (2016) (on remand from *Prometheus III*, 824 F.3d at 33, 50 n. 11 (3d Cir. 2016) (acknowledging that “enforcement of the Media Bureau Equal Employment Opportunity rules, which is presently handled by the Media Bureau, might be more appropriate as a function of the Enforcement Bureau, given the Enforcement Bureau’s existing mission and expertise in the enforcement of the Commission’s regulations” and directing several bureaus and offices “to discuss the feasibility, implications, and logistics of shifting the enforcement of the Media Bureau Equal Employment Opportunity rules from the Media Bureau to the Enforcement Bureau”). On July 3, 2018 - the 50th anniversary of the EEO rules – the FCC approved this recommendation. See *FCC Press Statement, Chairman Pai Statement on Proposal to Improve the FCC’s Enforcement of Equal Employment Opportunity Rules*, (rel. July 3, 2018).

²⁰³ See David Honig, *How Replacing Silos with Functional Organization Would Advance Civil Rights*, 3 PENN. J. LAW AND PUB. AFFAIRS 88 (2018).

²⁰⁴ See *MMTC Letter to Hon. Tom Wheeler re: Diversity and EEO in the Tech Sector*, MMTC (Sept. 16, 2014), <http://mmtconline.org/wp-content/uploads/2014/09/MMTC-Tech-EEO-Ltr-091614.pdf> (providing statistics on workforce by gender and ethnicity for eight major edge firms, and requesting Commission intervention).

technicians to top executives.²⁰⁵ Women are also severely underrepresented in the tech field as compared to men.²⁰⁶

Under the public interest standard, the FCC has a duty to promote a diverse workforce and prevent discrimination in the industries it directly regulates. Due to industry convergence, the employment pools of regulated industries (*i.e.*, broadcasting, wireline, and wireless) overlap the employment pools of unregulated industries (*i.e.*, chip manufacturing, search, and information aggregation).

Currently the EEO policies of the FCC primarily examine recruitment.²⁰⁷ The FCC does not meaningfully consider the workplace environment and its ability to create job advancement. However, in its focus on recruitment the agency implicitly recognizes the importance of a diverse pool from which employers can recruit. That pool becomes more dilute when high-tech industry employers do not hire and train diverse candidates who enter and often rejoin the pool throughout their careers.

Although the FCC lacks direct regulatory authority over high-tech industry EEO, the agency is not powerless to develop information regarding employment discrimination in the high-tech industries. In particular, the agency has the authority under Section 403 of the Communications Act to institute an inquiry into any matter “concerning which any question may arise under any of the provisions of the Act. . . .”²⁰⁸ Further, Section 257 requires the FCC to submit reports regarding barriers to market entry.²⁰⁹ The collection of data regarding EEO policies is critical to Section 257 reports because discriminatory employment policies can create

²⁰⁵ See EEOC, *Diversity in High Tech*, EEOC, at 20, Table 3 (May 2016).

²⁰⁶ *Id.* at 21, Figure 8.

²⁰⁷ 47 C.F.R. §73.2080(b) and (c).

²⁰⁸ 47 U.S.C. §403. The Communications Act contains a provision tailor-made for such a proceeding: 47 U.S.C. §403. Under this provision, the FCC can open an inquiry on its own motion on any matter that can arise under Title 47. See, e.g., *Stahlman v. F.C.C.*, 126 F.2d 124, 128 (D.C. Cir. 1942).

²⁰⁹ 47 U.S.C. §257.

barriers for those trying to enter the workforce.

As the expert agency, with almost 50 years of experience in broadcast and cable EEO regulation, the FCC is well positioned to highlight best practices for recruitment and training in the high tech industries. The FCC's Advisory Committee on Diversity for Communications in the Digital Age prepared just such recommendations for the regulated industries in 2004.²¹⁰

The FCC may be able to persuade its sister regulatory or legislative bodies, to do more. Since the FCC lacks direct EEO enforcement authority over information services, the FCC could ask the Department of Labor and the EEOC to take steps to ensure that these firms' EEO policies are brought up to FCC media EEO standards. As the expert agency, the FCC should back up its requests to the Department of Labor and the EEOC with a factual record,²¹¹ and the record should emphasize the impact on the FCC's ability to do the job Congress has assigned to the FCC in assuring that equal employment opportunity is observed by companies in FCC-regulated industries.²¹²

V. CONCLUSION

This article has set out the methods by which a federal agency spent the better part of three generations systematically excluding people of color from access to the publicly-owned resource that is the key to influence democracy and first class citizenship: the broadcast radiofrequency spectrum. It is not an exaggeration to conclude that the FCC has deliberately acted for three generations as a gatekeeper to institutionalize Jim Crow stewardship of the nation's airwaves. Nor is it an exaggeration to conclude that the FCC, a highly expert agency,

²¹⁰ See FCC Advisory Committee on Diversity for Communications in the Digital Age, Best of the Best Report (November 18, 2004).

²¹¹ As sister agencies with overlapping missions, the FCC and the EEOC have had a successful joint information and litigation-sharing agreement for 40 years. See Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission (R&O), 70 FCC2d 2320 (1978).

²¹² See *supra* p. 42 and n.163.

almost always knew what it was doing or made sure it didn't know; always should have known and usually didn't care. And some of this past is not yet in the past.

Had this resource been apportioned through a random lottery, rather than through a gatekeeper, think of how different—and how much better—America would be. If we had enjoyed diverse media ownership in the 1940s, we would never have had to undergo the 1950s.

The FCC has a lot going for it. It is armed with the congressional mandate, the research findings, and the administrative tools to cure minority media exclusion. Now it must exercise its moral authority, hold a Summit, and accept responsibility. And fix it.