The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard

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I. INTRODUCTION

In the United States of America, broadcast television substantially shapes society, society’s perception of itself, and society’s definitions of culture. Television is so much a part of life in this country that, like breathing, its impact is rarely recognized. Television is society at its least critical:

[T]elevision has achieved the status of “myth[,]” . . . [i]t is a way of understanding the world that is not problematic, that we are not fully conscious of, that seems, in a word, natural. A myth is a way of thinking so deeply embedded in our consciousness that it is invisible. This is now the way of television. . . . We do not doubt the reality of what we see on television, are largely unaware of the special angle of vision it affords. . . . [T]elevision has gradually become our culture. This means, among other things, that we rarely talk about television, only about what is on television—that is, about its content.2

We have ceased to question the role of television in shaping our society, and have come to accept as true, the view of the world given us on television.3 This vision, though, is a heavily-skewed one. It is the product of, and reflects the values and views of, the dominant culture in this country.4

The technology of broadcast television allows only an extremely limited number of stations to use the airwaves in a given geographical region, so access to the airwaves is regulated.5 And because of the extent of television's

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3. “[T]he world as given to us through television seems natural, not bizarre.” Postman, supra note 2, at 79.
5. A basic premise of this Article is that the scarcity of available frequencies for commercial broadcasting, combined with the vital role of broadcasting in American society, require government regulation. A small, but significant group of scholars believe that government regulation of the airwaves is unnecessary, and that a free-market regulation of broadcasting is a superior solution. New technologies may, one day, eradicate the scarcity problem that plagues the airwaves; however, I disagree with those who maintain that at present, scarcity is not an issue. A number of scholars have advanced such a position, including Ronald Coase.
effect on the composition of our culture, its regulation raises special concerns.

Television regulation has failed to serve all segments of U.S. society. Minority voices need to be heard and allowed to influence the majority culture.\(^6\) The public interest\(^7\) requires this.

Despite a congressional directive to license stations in the "public interest,"\(^8\) neither the Federal Communications Commission ("FCC" or "Commission"), which presents policies implementing that directive, nor the judicial opinions scrutinizing those policies, reflects an understanding of the importance to the majority of this country of hearing minority voices. The meaning of public interest is not static; it reflects progressive social changes and needs. The FCC and courts must recognize this as well.

This Article discusses the need for minority voices to be heard by those who comprise the majority culture, and advocates increased minority access to broadcast-television station ownership. Part II of this Article explores the meaning of "public interest" today. First, it examines how majority-controlled television programming has neglected to meaningfully include minority culture. This part next argues that minority views and ideas, in order to be understood, must first be considered and included in the aggregate by the majority culture. Part II also discusses the processes by which minority voices may gradually gain recognition in the majority community. Finally,

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See, e.g., Ronald H. Coase, The Federal Communications Commission, 2 J. L. & ECON. 1 (1959) (stating that broadcasting resources are neither scarce nor limited). For the perspective of Mark Fowler, former Chairman of the Federal Communications Commission ("FCC"), see Mark S. Fowler & Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221 (1982) (arguing that using spectrum scarcity to justify public-interest license awards has "serious logical and empirical infirmities"). While on the bench, Judge Robert Bork also stated that spectrum scarcity did not justify regulation of broadcast and not print, Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508-09 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987). Professor Matthew Spitzer has maintained such a position based on economic analysis. See Matthew L. Spitzer, Controlling the Content of Print and Broadcast, 58 S. Cal. L. Rev. 1349, 1358-64 (1985). Spitzer argues that scarcity fails as a rationale for the regulation of broadcasting and not print, and therefore argues for a free market for broadcasting. Each of the arguments in favor of a free market assumes technological advances we have not yet made. In reality, broadcast-television spectrum scarcity presently exists.

Although radio and cable television also must be regulated due to scarcity concerns, the technical state of those media permit a greater number of stations to cover given geographical regions. Thus, they present a less acute scarcity problem than does broadcast television.

6. By "majority culture," I mean the dominant culture in the United States, not worldwide. The terms "majority" and "minority" refer not only to numbers but also to the relative status of members of these groups in the United States.

7. For a definition of what I consider to serve the public interest, see infra part II.

it examines the barriers to creating majority acceptance of minority voices, and suggests methods through which the barriers may be eroded.

Part III of this Article considers the sources of the FCC’s authority to regulate in the “public interest.” This part discusses various regulations promulgated by the FCC and analyzes the Commission’s criteria for evaluating whether the “public interest” standard has been met.

Part IV of this Article considers the roles of the courts and Congress in defining the “public interest.” It examines the United States Supreme Court’s decision in Metro Broadcasting, Inc. v. FCC,9 and the United States Court of Appeals for the District of Columbia Circuit’s subsequent holding in Lamprecht v. FCC.10 This part contends that these two cases have established an inappropriate standard against which FCC preferences for minorities and women in the ownership and licensing of broadcast stations must be measured. This part also questions the judicial establishment of a requirement that the nexus between a problem identified by Congress, and its resolution, be empirically demonstrable.

Finally, this Article concludes that the Metro Broadcasting and Lamprecht decisions, taken together, have placed the determination of the FCC’s “public interest” standard in the hands of the courts. The power to determine the public good should be returned to Congress—an open, representative, and elected body.

II. PUBLIC INTEREST

As an immigrant nation, the United States is frequently referred to as a “melting pot” society into which each arriving immigrant is absorbed.11 But this term carries an often unarticulated subtext: the essential nature of what is in the “pot” will not change as a result of any addition because arriving immigrants must assimilate before being absorbed into the American culture.12 It is a premise of this Article that the public interest is only served

12. The commonly misunderstood meaning of the term “melting pot” deviates from its plain meaning and from its original usage. This deviation is a crystallization of the problem posed by this Article. Webster’s defines “melting pot” as: “2. a country, place, or area in which immigrants of various nationalities and races are assimilated.” Webster’s New World Dictionary 845 (3d College ed. 1988). The common misunderstanding of the term “melting pot” may well derive from the unarticulated subtext: you may enter our society and become one of us, but first you must become one of us. It is misleading to label our country a “melting pot” if, in fact, each immigrant must first alter his essential nature before being allowed to integrate into society. A further unspoken message may be that we do not allow certain groups to ever enter the pot. No amount of effort to assimilate will ever be enough for those groups. See, e.g., Israel Zangwill, The Melting Pot 33 (Arno Press Inc. reprint 1975) (1909). It is no accident that Zangwill referred to “all the races of Europe . . . melting
when the opinions of all of the public are solicited. For this country to be a melting pot, for the majority culture to benefit, for the minority cultures to have a voice in our society, each culture or idea that is added to the pot must be able to transform that which it joins in the pot.

A. Television: The Blue Light Through Which We See the World

Television is so much a part of our lives that we do not even see, let alone question, the extent of its domination of our society. This section examines the impact of television on our society. It also discusses the effect that the depiction of minorities on television has on the majority culture. Finally, other areas in which the majority culture has been affected by minority voices are examined.

1. TV: Screening U.S. From Reality

The majority culture permeates television to the near exclusion of minority voices.13 Of the very limited prime-time television fare featuring

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"Although for the past two decades minorities have constituted at least one-fifth of the United States population, during this time relatively few members of minority groups have held broadcast licenses. . . . [I]n 1978, minorities owned less than 1 percent of the Nation's radio and television stations . . . [I]n 1986, they owned just 2.1 percent of the more than 11,000 radio and television stations in the United States. Moreover, these statistics fail to reflect the fact that, as late entrants who often have been able to obtain only the less valuable stations, many minority broadcasters serve geographically limited markets with relatively small audiences.

Id. at 553-54 (citations omitted).
blacks, most of it is extremely homogenized entertainment. One television critic, John O'Connor, has noted that blacks are depicted on television as "the people who get busted the most on all those police 'reality' shows. The diversity of the black community, the social and political ferment within that community, is reflected only occasionally. Both white and black viewers end up shortchanged." The exceptions to this rule revolve around shows set safely in the past, where the creators of the show not only have the temporal distance to absolve themselves, and the audience, of responsibility for the discrimination, but the added reassurance that things are much better today.
The unspoken and self-congratulatory message is that the members of today’s audience are responsible for the improvement.\textsuperscript{18}

Almost without exception, minorities depicted on prime-time commercial television are the majority’s impression of what a minority either is or ought to be like.\textsuperscript{19} That this characterization exists is no great surprise. The television-station owners and executives, who are in charge of producing, buying and distributing programming, are overwhelmingly members of the majority.\textsuperscript{20} That the television industry is a closed circle is apparent. Television shapes the majority culture’s views of minorities and the majority’s view of minorities predominates on television. The only way to break out of this circle is by minority entry into broadcasting.

The minorities depicted on prime-time shows are not realistic. This criticism is as easily leveled against the majority characters on television. Because it is entertainment, prime-time television is unreal. Everyone is beautiful and most shows have happy endings. While screens full of beautiful, rich people cause genuine self-image problems,\textsuperscript{21} the imposition of a

\textsuperscript{18} For example, \textit{Separate But Equal} gives the distinct impression that things are much better now. An example drawn from the day-time schedule is the \textit{Donahue} Martin Luther King, Jr. birthday show where toothless Ku Klux Klan members crudely voiced their opinions only to be rebutted by a respectable, mostly-white studio audience’s platitude about loving one’s neighbor. \textit{Donahue: Martin Luther King, Jr.: 25 Years Later} (NBC television broadcast, Apr. 4, 1988).

\textsuperscript{19} The implications of this have been examined thoroughly elsewhere. Attributions of motive vary. Some critics believe the paucity of minorities in meaningful roles on television is an instrument of social control to support the existing social order. See, e.g., Cedric C. Clark, \textit{Television and Social Controls: Some Observations on the Portrayal of Ethnic Minorities}, \textit{8 Television Q.} 18 (1969); Henry Taylor & Carol Dozier, \textit{Television Violence, African-Americans and Social Control 1950-1976}, 14 J. Black Stud. 107 (1983). Others suggest this is simply a function of the fact that programmers are, by and large, members of the majority community whose audience image is a subconscious projection of their own middle- and upper-class status. GANS, \textit{supra} note 13.

One particularly egregious example of such shows was the short-lived \textit{Tequila and Bonnetti}, a CBS prime-time detective series. The lead of the show, Bonnetti, is a tough New York cop whose black partner was gunned down in Brooklyn. Distraught, he relocated to Southern California, where he was assigned a canine partner, who was his former partner, who has been reincarnated as a French mastiff. The dog is preoccupied with sex, talks jive and calls his partner "homeboy."

\textsuperscript{20} Wimmer, \textit{supra} note 15, at 340 n.52. As \textit{N.Y. Times} television critic, John J. O’Connor wrote about the fairy-tale depiction of race relations put forth by David Jacobs, the white creator of \textit{Homefront}, an ABC drama which features a black family: "Race relations seem to unfold in a never-never land in which the local factory boss, a bigot and union-basher, plots privately with his black chauffeur as to how to best handle their touchy wives. Yeah, sure, Mr. Jacobs." O’Connor, \textit{supra} note 16, at H36.

\textsuperscript{21} See, e.g., Lena Williams, \textit{Woman’s Image in a Mirror: Who Defines What She Sees?}, \textit{N.Y. Times}, Feb. 6, 1992, at A1 (tracing women’s lack of self-esteem to the unrealistic portrayal of women in the media and the failure of "real" women to measure up to that image); NAOMI WOLF, \textit{THE BEAUTY MYTH} (1991) (positing that society’s unrealistic portrayal of women, as perpetrated by the media, is a political weapon to keep women down); GLORIA
majoritarian view of beauty on minorities, for whom it is impossible to reach that standard, poses a different problem with far-reaching consequences. For minorities, the difference is not one of degree, but of kind.22

Because the majority culture does not know much about the minority culture, and is influenced by a distorted vision presented by television, that distorted vision of the minority culture is the one that prevails among society's majority.23 In some ways the most distorted vision we get of minorities on television is neither from the super-successful characters, such as the Huxtables on *The Cosby Show*,24 nor from the scrappy, living day-to-day-in-the-projects programming like that in *Good Times*. Rather, the more disturbing distortions come from those shows where "the black" on the show lives among whites without any recognition of his or her racial difference.25

STEINEM, REVOLUTION FROM WITHIN 227 (1992). Steinem contrasts her own public image as "a thin, pretty, blondish woman" with the image she had of herself as a "plump brunette from Toledo" and the difficulty reconciling the two. Steinem's case is particularly interesting as her feelings of low self-esteem were generated not just from society's portrayal of women in general, but of her specifically. STEINEM, supra, at 227.

22. Toni Morrison's novel, *The Bluest Eye*, explores the mythology in which all standards of beauty in this country, i.e., blue eyes, blonde hair, and a creamy complexion, are completely unattainable to black women. TONI MORRISON, THE BLUEST EYE (1970).


24. *The Cosby Show*'s lack of controversy has caused much controversy. The Huxtable family breaks through the stereotypes of black families: both parents are present and are professionals in control of the household; the children are clean cut and offer less trouble than did Bud on *Father Knows Best*. But the world offered up by Cosby: is founded on assumptions of complete racial harmony and total integration. . . . [O]n eighties television this idyllic conceit becomes little more than a monstrous blocking mechanism. The characters seem incapable of imagining (much less experiencing) racial adversity—even in a comic context. Black identity is reduced to a visual style, a fashion statement.

Yet you can't help but wonder what would happen if the Cosby kids were to wander beyond the confines of their plush prison of a home. Theo, for instance, would most likely encounter whites who would see not a nice, well-mannered teenager, but simply a black adolescent male—an object of almost instinctive white fear and hatred. And what would happen when Vanessa tried to hail a taxi, only to be ignored by cabbies fearful of ending up in a black neighborhood?


25. Although *The Cosby Show* contains elements of this, and Bill Cosby's comedy has long been "founded on a frank refusal to deal with racial difference—a refusal that whites found utterly charming," the show features an almost exclusively black cast. Id. Thus the full absurdity of the situation is not revealed as startlingly as it is in shows like Benson.

Consider Benson. There, the title character is a butler-turned-state-budget director who is the voice of reason among an otherwise white cast of bumbling, who possess varying redeeming qualities. While the sit-com occasionally dealt explicitly with race, it is the absence of the day-to-day recognition of race that rings so false. For a variation on this theme, consider the sit-coms *Webster* and *Diff'rent Strokes*. Both of these shows feature a sit-com standard: a very small black child (or children as in the case of *Diff'rent Strokes*) living with a well-off white family. Again, although these shows occasionally deal with racial issues in an explicit fashion,
The silence with which the issues of race are dealt on these shows is particularly problematic. A minority living in a majority world is constantly made conscious of race.\textsuperscript{26} Dealing with racial issues in a few, isolated "theme" shows does nothing to address the myriad of mundane ways race affects the life of a minority living in the majority world.

Television presents minorities with a distorted vision of themselves, and of the majority community.\textsuperscript{27} However, in keeping with the focus of this Article, the licensing of broadcast-television stations in the public interest—it is the effect of this distorted depiction of minorities on the majority community that is at issue here. The false depiction of minorities on television goes virtually unchecked. For many majority Americans, the only time a minority enters their house is on television. Until the majority culture learns about the minority culture, it is unlikely that the myriad "invisible" falsifications will ever be recognized and corrected.\textsuperscript{28}

2. Ideas, Old Gossip, Oddments of All Things\textsuperscript{29}

In a recent law review article, Professor Paulette Caldwell provides a good example of the difficulties inherent in attempting to bring minority concerns to the attention of the majority community.\textsuperscript{30} Caldwell reflects upon those issues are ignored in nine episodes out of ten. Despite this pretense that race doesn't matter in the life of a black child living with a white family (particularly in a Park Avenue duplex as was the case in \textit{Diff'rent Strokes}), the very premise of the show is that race does matter. Why else would the show feature a black child living with a white family?

While the "black-child-living-with-white-family" construct is something of a sit-com staple, television has never featured any white children living with black families. Such a construct would be as unthinkably threatening today as integrated schools were 40 years ago. See, e.g., Philip Elman & Norman Silber, \textit{The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History}, 100 \textit{Harv. L. Rev.} 817, 825 (1987) (giving the reaction of former Solicitor General Perlman to the \textit{Brown v. Board of Education} case: "You can't have little black boys sitting next to little white girls. The country isn't ready for that").


Minorities . . . live in a world dominated by race. We experience racial treatment every day of our lives. We are bathed in it. A high percentage of our social interaction is tinged by it. And, when we meet with others of color, we trade stories of racial treatment and how our friends are dealing with it. Race is a recurring reality of our lives.\textsuperscript{27}

\textit{Id.} at 407-08.

27. Minorities have greater exposure to information about the majority culture through avenues other than television. In part due to the disparity in numbers between minority and majority groups and in part due to the economic and political disparity between the groups, it is far more difficult for minorities to avoid contact with members of the majority community than vice versa.


implications of Rogers v. American Airlines,\textsuperscript{31} in which a federal district court upheld the categorical exclusion of braided hairstyles in the workplace. She notes that “[h]air seems to be such a little thing. Yet it is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory its grounding, and test its legitimacy.”\textsuperscript{32} As Caldwell describes the personal connections she, as a black woman, has to her hair and hair style, and the reactions of white and male colleagues, it is clear that hairstyle is not “a little thing” at all. Rather, it is critical not only to the way she sees herself, but also to the way others see her and to the way she perceives that others see her.

Hair poses an easy case for misunderstanding. In addition to the meaning attached to it by black women, hair has a distinct meaning in the majority culture. But within the majority culture, the association is largely a frivolous one: a concern over vanity. Contrast the meaning hair has for many in the majority culture with the meaning it has for many black women: self definition and a constant reminder of your inescapable difference from the majority culture.\textsuperscript{33}

Each of these two groups has a specific, and very different association with hair. If a member of the majority group is presented with a case concerning hair regulation, he may assume that his association with hair is the only association involved, and decide that the complaint is a trivial one motivated by concerns familiar to him (hair = vanity) rather than the concerns of the minority group (hair = self-definition).

Where people have no pre-existing associations with terms, no assumptions are made regarding those terms. Contrast the situation described above, where groups have different associations with a term, with the situation where the majority member has no association to the term. In the latter context, the majority member may try to give content to what, to him, are essentially unoccupied words—words with dictionary meanings but no personal associations. To find the content, the majority member may be compelled to seek out the minority group’s association. In such a situation there is no displacement of associations, rather expansion and learning of new ideas.

But until the majority community learns the importance of “a little thing” like a hair regulation, it likely will continue to impose a “neutral” regulation, which, colored by majority assumptions, may screen out minority concerns. Our legal system gives power to certain people, drawn largely from the majority community, to promulgate, interpret and enforce laws and regulations.

\textsuperscript{32} Caldwell, supra note 28, at 370.
\textsuperscript{33} See generally Caldwell, supra note 28.
The efficacy of checks on whether those charged with exercising law-making authority have done so in a non-discriminatory fashion, depend on a full understanding of what might be discriminatory to the affected community.

If the majority community can come to understand the meaning of hair to the minority community, it can incorporate that understanding into its definition of discriminatory behavior. Although an understanding of the specific importance of hair may not come initially, or at all, when pieced together, specific instances of cultural differences may, in the aggregate, lead to the recognition of cultural differences. Some people, particularly lawyers, are trained to recognize patterns. Most lawyers cannot predict what a line of cases stands for by viewing only one case in isolation. Several related cases must be laid out before a recognizable pattern emerges. Likewise, minority concerns must be viewed together in order to be understood.

Decisions about discrimination often rest on unspoken cultural assumptions—not only about the group facing discrimination, but about the values of the majority culture as well. These assumptions must be articulated before they can be recognized and rectified.

34. See infra text accompanying notes 38-57.
35. See infra part IV.
37. See, e.g., Edward de Grazia, I'm Just Going to Feed Adolphe, 3 Cardozo Stud. in L. & Literature 127, 145-46 (1991). In reviewing the liberation of literature from governmental censorship, de Grazia discusses the attitudes and ignorance of members of the Supreme Court toward the books which gave rise to obscenity charges. The following quotation is from a transcript of a discussion de Grazia had with Paul Bender, who clerked for Justice Frankfurter:

The case involved what seemed to me to be a highly innocuous book, no pictures, . . . a few dirty words. . . . I teased [Frankfurter] . . . about it. . . . [W]hy didn't he just . . . say: "Come on, you can't ban this book!"

"What do you mean?" Frankfurter said.

"What's wrong with this book?"

"It's horrible filthy junk!"

"You don't know what you are talking about. It's nothing at all."

"No, no," he replied. "That's horrible stuff!"

"Mr. Justice, you want to come with me to the street corner or the nearest drugstore. I will go in there and buy you ten books on open sale that have equal contents. If you don't believe me, ask Margy, my wife, she'll tell you!"

So he said: "What? She's seen that book?"

. . .

He was apoplectic about the fact that an innocent young woman like my wife should see this, and I was telling him that he just didn't have the slightest idea of what the sexual content of fiction was. He said: "I never read fiction. I don't have the time to read fiction."

"Well, before you make judgments about this stuff why don't you give it a try?"
The schism separating the majority and minority communities in the United States sometimes seems so vast that constructing a bridge across it is unimaginable. The schism is comprised of misunderstanding, fear and a strong preference, on the part of the majority community, for the status quo.

B. On Creating Taste and Working Up an Appetite

Our country has recently begun to listen to, understand, and incorporate voices from outside the mainstream of society. Previously, we insisted on the absorption of minority cultures into the majority culture before the outside voices were to be heard. The pre-assimilation assimilation requirement is often dressed up as an argument in favor of objective standards. While objective standards do have merit, the objectivity of the majority community’s standards is questionable. An examination of how preferences or tastes are created helps to explain how standards are developed. The standards by which society measures the excellence of a thing, idea or person are, in large part, dictated by its craving for certain tastes. Appreciation of excellence is learned and developed.

1. Fear and Misunderstanding

Two barriers must be overcome before new tastes can be developed. The first barrier is fear. As D.H. Lawrence described:

It is hard to hear a new voice, as hard as it is to listen to an unknown language. We just don’t listen. . . .

Why?—Out of fear. The world fears a new experience more than it fears anything. Because a new experience displaces so many old

Id. Bender, the law clerk, was an active participant in the culture of the day; Frankfurter was entirely removed from it. Is Justice Frankfurter in a position to pass on the obscenity of a book, where the definition of obscenity is as contextual as it is?

38. One example of the fairly recent incorporation of other cultures into mainstream American culture can be seen in the world of condiments. On March 11, 1992, the New York Times ran a front page article announcing that “[s]alsa toppled ketchup from the condiment throne last year, signaling the rise of ethnic foods in the American diet.” Condimental Drift, N.Y. TIMES, Mar. 11, 1992, at A1. Salsa’s eclipse of ketchup was attributed in part to American consumers being “open to novelty in ways that no other group has ever been.” Molly O’Neill, New Mainstream: Hot Dogs, Apple Pie and Salsa, N.Y. TIMES, Mar. 11, 1992, at C1. The article noted that “[y]ou’re not going to find Hispanics at Taco Bell. You’ll find Hispanics and other second-generation ethnics eating cheeseburgers at McDonald’s.” Id. Another news story reporting on the rise of salsa noted that “[o]nly five years ago, ketchup was outselling Mexican sauces by $200 million.” Life: U.S. Pours on the Hot Stuff, ATLANTA J. & CONST., Feb. 21, 1992, at H3.

39. See generally SCHLESINGER, supra note 11.

40. See, e.g., id. at 53 (“While a black scholar . . . has a clear responsibility to join in improving the society in which he lives, he must understand the difference between hard-hitting advocacy on the one hand and the highest standards of scholarship on the other.’’” (quoting Professor John Hope Franklin)).
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experiences. And it is like trying to use muscles that have perhaps never been used, or that have been going stiff for ages. It hurts horribly.

The world doesn't fear a new idea. It can pigeon-hole any idea. But it can't pigeon-hole a real new experience. It can only dodge. The world is a great dodger. . . .

New voices instill far more fear than new ideas because a novel voice may force a reinterpretation of all old ideas and color the perception of all new ideas. Consider, for example, the difficulty some minority legal scholars have had in breaking into the canon of legal scholarship. Much of the scholarship by minority legal academics has been non-traditional in form and, as such, slow to be accepted by majority scholars as falling within the ambit of legal authority. In large measure, the non-traditional form of these pieces has manifested itself by the injection of distinctly personal experiences into legal analysis. Legal arguments are presented with a different voice. "$T$hese authors. . . have framed their arguments in very personal and unconventional terms. Dean [Derrick] Bell has turned into a novelist, whereas part of the cogency of both Professor [Patricia] Williams' and Professor [Charles] Lawrence's arguments stems from the unconventional beginning


42. Obviously, this does not fully explain the difficulties minorities have had in being accepted into the legal canon. As there are fewer minority law faculty members than non-minority faculty members, in the aggregate, minorities produce less scholarship than non-minorities. In fact, only 7.6 percent of all full-time law faculty are members of minority groups. John H. Kennedy, The Law School Tenure Line, Boston Globe, Apr. 27, 1990, at 1 (reporting an Association of American Law Schools survey).

Professor Leslie Espinoza argues that many of the scholarly articles by minorities in the 1970s were never incorporated into the debate on affirmative action because they:

were published in the Black Law Journal, which is not carried by either LEXIS or Westlaw. The scholars who wrote these articles were not invited to present their work at the more prestigious symposia on affirmative action. . . . They did not trade reprints with scholars in the inner circle because they were not a part of it.


In rebutting the assertion made by Professor Randall Kennedy in his controversial article, Randall L. Kennedy, Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745 (1989), that these articles, 1) didn't exist and 2) if they did they were not worthy of citation, Espinoza points out that there is another explanation for the absence of citations to these articles authored by minorities in the works of majority scholars. She suggests that the habits of majority scholars might lead them to "cite the most conveniently found, prestigiously placed, familiar, and similar works. Subtle barriers create a cycle of exclusion." Id. at 1881.

Further, many minority members of law faculties made their marks through litigation rather than theoretical expositions. Jerome M. Culp, Toward a Black Legal Scholarship, 1991 Duke L.J. 39, 50 (1991) (stating that "Black legal scholars . . . were constantly drawn away from developing . . . a legal scholarship by the pull to participate in the struggle of Black Americans for 'equal justice under the law' ").
or structure of their arguments." In the works of these scholars, new and not-so-new ideas are presented through the recounting of very personal experiences. Those personal experiences are very new to those who have never had them. A common reaction to an alien experience is to reject it as unimaginable. Denial is a frequently employed defense to a new experience that would otherwise force the re-thinking of a life. New experiences and new voices force reconsideration of the status quo.

But a single idea, expressed in a familiar voice can be catalogued within an existing perspective. The fear barrier can be overcome. As Lawrence suggests, we are already equipped with the ability to listen to new voices. He speaks of "trying to use muscles that have perhaps never been used, or that have been going stiff for ages." Those muscles exist but have simply not been called upon to function for a long time. Thus, he describes the process of learning to listen to new voices as one that stretches us, but not beyond our nascent capabilities.

Even if fear of the new or strange is conquered, significant communication problems remain. The second barrier, perhaps an outgrowth of the fear of

43. Culp, supra note 42, at 95.

(reduced to their essence, Williams's positions on most legal controversies echo the works of many other scholars. Although her solutions to legal problems are not purely original, Williams's interpretative approach brings to these arguments a complexity of meaning and a space for the reader's own involvement in imagining alternative solutions that is unique to more literary genres of writing.

Id. at 782. The reviewer goes on to conclude that Williams' choice of storytelling and her deliberate invitations to the reader to interpret and fill in the interstices of her writing with the reader's experience offers "a new outlook on old problems." Id. at 784. Some part of the text must be familiar to the reader in order for the reader to understand the author. The telling of stories about "old problems" may bring the "old problems" into a newer light if the stories are familiar or "ring true" to the reader.

45. Professor Richard Delgado tells the following story:

Recently, a law professor at an eminent school where I gave a talk mentioned in the discussion period that he had asked a Hispanic student for an example of how racism affected her. She said that few people held doors open for her. The region in which the school is located has a tradition of courtesy; people open doors for each other. The professor, who was white, was surprised and skeptical of the student's assertions. . . .

Delgado, supra note 26, at 409.

In teaching Andrea Dworkin's short story, bertha schneiders existential edge, which recounts the life story of a victim of domestic violence, several students invariably reject the story as "false" or "wrong." For many of my students, the experiences suffered by bertha schneider are inconceivable and therefore, the story she tells, and her reactions to the domestic violence are unacceptable as true. Andrea Dworkin, bertha schneiders existential edge, in THE NEW WOMANS BROKEN HEART 6-11 (1986).

46. Lawrence, supra note 41, at 122.
new voices, is misunderstanding. Different cultures have different standards of beauty and different definitions of truth, all of which are culturally determined:

[T]he concept of truth is intimately linked to the biases of forms of expression. Truth does not, and never has, come unadorned. It must appear in its proper clothing or it is not acknowledged, which is a way of saying that the “truth” is a kind of cultural prejudice. Each culture conceives of it as being most authentically expressed in certain symbolic forms that another culture may regard as trivial or irrelevant.47

When a truth is adorned by the trappings of an alien culture, the majority culture may misunderstand the message because of the trappings. Subsequently, the truth is never reached as a result of the trappings.

The selection of a medium to convey ideas is culturally determined. This is illustrated, quite literally, by the use of different languages around the world. For example, to someone only slightly schooled in French, the use of proper French grammar is a nuance that is virtually meaningless. Not so to a fluent French-speaker. Not only is proper grammar noticed, but such a nuance may negatively alter the fluent French-speaker's assessment of the content of the message. The wrapping, as well as the content, are examined. Sometimes ignorance prevents one from passing by the wrapping to the content, as is the case with someone who knows no French. Sometimes ignorance prevents one from totally unwrapping the message (as is the case with the person with only a marginal command of French). However, sometimes a cultural nuance is flat-out misunderstood and, much to the shock of the sender of the message, the recipient is infuriated. The situation becomes increasingly problematic when the misunderstanding is not recognized. In such an instance, the parties may proceed as though the meaning was clearly calculated to offend.48 To avoid such a situation, the parties must learn more about each other.

Another kind of misunderstanding derives from overly-zealous attempts to understand. Professors Trina Grillo and Stephanie Wildman explore the problem of the “analogizer”—someone who “believes that her situation is

47. Postman, supra note 2, at 22, 23.
48. See, e.g., People v. Poddar, 103 Cal. Rptr. 84 (Ct. App. 1972), rev'd on other grounds, 518 P.2d 342 (Cal. 1974). The Appellant, a University of California at Berkeley student from India of the Harijan caste (the untouchables) killed a fellow student by the name of Tanya Tarasoff. Id. at 86. He thought a romantic relationship had formed because they had kissed on New Year's Eve; she, an American eighteen-year-old assumed nothing of the sort. Appellant's counsel sought to introduce the testimony of an anthropologist as to the cultural strain he was under in conducting male-female relationships. The court did not allow the testimony. Id. at 88.
the same as another’s.” Analogies may lead to false understanding because the analogizer has skimmed past the difference between herself and the other person. For example, there is a strong tendency to analogize sexism to racism. However, simply because sexism is understood, that does not necessarily mean that the nuances of racism have been perceived. Thus, the analogy of sexism to racism leads to marginalization and obscuring of racism. An explicit recognition of differences is critical to understanding differences as well as similarities between the minority and majority communities in this country.

The art of analogizing is critical to the legal process. It is how lawyers and judges distinguish cases. But analogizing in the dark may be rife with pitfalls. “The decision to liken one instance to another, or to distinguish them, turns on a judgment of what differences and similarities are most significant to the moral beliefs at stake.” In order to analogize properly, a judge must be able to recognize all of the moral beliefs at stake. An ability to recognize the values of others is learned and developed, not innate.

2. Repetition: Reducing Taste to a Heartbeat

If one who is unfamiliar and unschooled looks at the work of someone with an alien perspective, she sees everything from her own perspective. This individual’s point of view necessarily includes values drawn from, and honed on, things with which the individual is familiar. When examining foreign work, one tends to measure and judge it by the standards of the

50. Id. at 399.
51. ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 258 (1975); see supra text accompanying notes 33-37.
52. There has been a good deal written about the lack of perspective in history. See, e.g., Kenneth S. Lynn, Speaking for Whitman, in THE AIR-LINE TO SEATTLE: STUDIES IN LITERARY AND HISTORICAL WRITING ABOUT AMERICA 34 (1983). Lynn’s essays are full of notes “correcting” accounts marred by the telling of history through contemporary lenses. His thesis is that historical perspective is easily forgotten when we cannot think in the way that the subject of our discourse thinks. It is difficult to shake the cloak of today when writing about yesterday. It is only by immersing ourselves in the past that we can see how life was in the past.

Although many of our professional judges and critics are able to understand societal changes over time by gaining historical perspectives, they are unable to transcend their personal cultural experiences. Our Judges have not been raised in a multi-cultural fashion and hence, have difficulty evaluating and valuing the virtues or the vices of diversity. Their interpretation of the “other” is informed, in large part, by its otherness and subsequently they approach such things as strange or foreign (and therefore “wrong”).
familiar work. The more familiar the foreign work becomes, the more readily it is incorporated into one's value system. Eventually, what was once unfamiliar becomes customary and new work is measured against it.

If one is repeatedly exposed to the same work, she is inclined to have a disproportionately great opinion of the work and its place in history. She will compare all else to the work. Consider the following quotation from Kenneth Lynn:

The influence of Adventures of Huckleberry Finn on American culture has been enormous. Consider Hemingway's tribute: "All modern American literature comes from one book by Mark Twain called Huckleberry Finn." The main reason, however, why this book has come to play such a major role in our cultural life is that students repeatedly run into it in the course of their formal education. They read it, usually for the first time, in a high school English class. Then they read it again during their freshman year in college, in a general education course entitled something like "The Hero in Western Thought." If, as sophomores, they elect to take the survey course in American literature, they unquestionably will be asked to read it once more.

Standards of taste may be created by repetition, particularly in foras that command attention. Broadcast television plays a uniquely influential role in American society. People watch a mind-boggling number of hours of television a day, and often fail to distinguish between it and reality. However,

53. Law reviews, for example, are ranked hierarchically, largely based on the number of citations to them by the Supreme Court and other law review articles. The more frequently an article or a law review is cited, the higher up in the hierarchy it is ranked. The higher up it is ranked, the better authority it is. The better the authority, the more frequent the citations to it. Thus, it is a wholly circular exercise. See, e.g., Chicago-Kent Law Review Faculty Scholarship Survey, 65 CHI.-KENT L. REV. 195 (1989).

This does not suggest that there is no basis for a hierarchy. I believe such excellence can be determined, but some of the traditional methods for making such judgements should be questioned. My call for the majority gaining access to minority voices involves redefining standards which recognize excellence in ways other than those exclusively recognized by the majority culture.

54. Kenneth S. Lynn, Welcome Back From the Raft, Huck Honey!, in THE AIR-LINE TO SEATTLE, supra note 52, at 40.

55. See, e.g., JOSEPH GOEBBELS, THE EARLY GOEBBELS DIARIES (Helmut Heiber, ed. & Oliver Watson, trans., 1962) (asserting that if you repeat a lie often enough people will believe it).

Happily, there are exceptions to that rule. Some ideas, things and people are deemed "bad" by society and no amount of exposure will make the public crave them. Simple exposure is not always enough. Some things to which we are repeatedly exposed are simply, and by any standard, bad. In the marketing context, the Edsel stands out. Similarly, some ideas, things and people are "good" and regardless of the amount of exposure, their innate quality makes them "classics."

56. See generally POSTMAN, supra note 2.
at present, broadcast television offers little by way of minority voices. And so it fails to serve the public interest in greater understanding within society.

Exposing the majority culture to objects, people or ideas, which it would otherwise reject because of their novelty or strangeness, will create familiarity with such objects, people or ideas. This exposure and resultant familiarity will lessen fears and promote understanding. Some amount of strife will continue, and some will even be aggravated by increased exposure. Nevertheless, exposing the majority culture to diverse minority viewpoints will alter the majority's focus and decrease both its inclination to automatically reject, or the likelihood of its misunderstanding, new and seemingly strange ideas. Instead, minority perspectives will be incorporated into the very values and judgments that inform the majority culture's taste. This incorporation, in turn, will lead the majority culture to desire what was once frightening and/or misunderstood. In order for these changes in majority-culture thinking to occur, it is essential that the Federal Communications Commission, which is charged with regulating television in the public interest, do so in a manner that is consistent with these fear-breaking, knowledge-creating, taste-making ideals.

III. THE REGULATION OF BROADCASTING: DETERMINING THE PUBLIC INTEREST THE FCC WAY

Television did not develop into a watchable and commercial medium until the mid-1920s. Even then, it was technically crude. Notwithstanding this poor quality, the promise of television created a "mad scramble to get on the air;" the lack of regulation led to "a broadcast of bedlam.

This bedlam required, at a minimum, regulation of frequencies so stations would not broadcast over one another. Although the infant industry had been regulated first by the Radio and Wireless Act of 1912 and then by the Radio Act of 1927, neither statute provided for the increasing complexity and demand of the broadcasting industry. In response, Congress passed

57. See supra text accompanying notes 13-28.
58. In 1927, television pictures had 48-line definition. The standard in the United States today is 525 lines. Outside of the U.S., the standard number of lines is 625. High Definition Television, which is technically feasible, offers 1125-line definition. As the number of lines increases, so does the clarity of the picture. So, even setting aside the nagging question of whether there is anything worth watching on television, a problem which continues to plague us today, actually watching television in 1927 was irritating because of the constant flickering and the crude, blurred images. ROBERT H. STERN, THE FEDERAL COMMUNICATIONS COMMISSION AND TELEVISION 46 (1979).
60. The early, experimental years of television were regulated by a succession of Acts which were extremely limited in scope. Radio Act of 1912, Ch. 287, 37 Stat. 302 (repealed...
the Communications Act of 1934, creating the Federal Communications Commission, an independent agency comprised of five commissioners, and delegated to it the power to regulate broadcasting for "public convenience, interest or necessity." The Communications Act of 1934, which still governs broadcasting today, is a clear example of Congress perceiving the need for regulation but not yet recognizing the substantive contours of such regulation.

The breadth of this grant of power—to regulate "in the public interest"—is vast, but it has withstood judicial challenge. In FCC v. Pottsville Broadcasting Co., Justice Frankfurter found the "public interest" touchstone to be as:

concrete as the complicated factors for judgment in such a field of delegated authority permit[,] it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked . . .

1927) and the Radio Act of 1927, Ch. 169, 44 Stat. 1162 (repealed 1934). The Radio Act of 1912 established call letters for government radio stations, assigned frequencies and required that radio operators obtain licenses from the Secretary of Commerce and Labor. The Radio Act of 1927 established the Federal RadioCommission ("FRC") to oversee broadcasting, § 3, 44 Stat. at 1162. The FRC was empowered by the statute to assign wave-lengths to licensees based on "public convenience, interest, or necessity" and designate the power and location of transmitters. § 4, 44 Stat. at 1163.

FM radio had recently been "invented," but it was not yet available. And television, despite the experimental transmission in 1927, had retreated to the laboratories at the time of the passage of the Communications Act of 1934. STERN, supra note 58, at 135.


Arguments over interpretation of how much authority Congress delegated to the FCC to regulate broadcasting in "the public interest," 47 U.S.C. §§ 151, 301, 303, 307, 309 (1982 ed.), continue to this day. Some contend that this country does not have a strong taste for government regulation and that "the chief public responsibility of a broadcaster in the eyes of Congress was to avoid interfering electrically with another broadcaster." DAVID POTTER, The Historical Perspective, in THE MEANING OF COMMERCIAL TELEVISION 58 (Stanely T. Donner, ed., 1966).

Others find the charge to license in "the public interest" to be a broad delegation of power, which gives the FCC the right to mandate everything from technical to programming standards. This second group recognizes that the Congress had no way of knowing what television would become when it passed the Communications Act of 1934, and acknowledges the expertise of an agency in determining matters within its special area of expertise, particularly in a world with changing technology. See, e.g., Pottsville Broadcasting, 309 U.S. at 138.

63. 309 U.S. 134 (1940).
were explicitly and by implication left to the Commission’s own devising.\footnote{Id. at 138.}

The significance of the \textit{Pottsville} decision is that the FCC, a presidially-appointed independent agency,\footnote{The five FCC Commissioners serve for five-year terms. They are appointed by the President with the advice and consent of the Senate. No more than three of the five commissioners may be members of the same political party. 47 U.S.C. §§ 154(a), (b)(5) (1991).} has been given the difficult charge of defining the public interest as it relates to broadcasting. It is clear that since the \textit{Pottsville} decision, the Commission’s definitions have failed to account for the importance of presenting minority voices to the majority.\footnote{See infra text accompanying notes 90-142.} Similarly, it is manifest that the content given to the “public interest” standard by the FCC and the courts has failed to keep pace with congressional findings about the importance of minority voices to the majority.\footnote{See infra part IV.}

Some of this neglect or oversight\footnote{These terms—neglect and oversight—may underststate the problem. Making a case for “agency capture” is not difficult with respect to the FCC. From its earliest decisions concerning the adoption of uniform technical standards (RCA’s were chosen much to the disappointment of entrepreneurs that had developed different standards) to the history of television-station license renewals (every single license up for renewal has been granted) to the recent “relaxation” of the Financial Interest and Syndication Rules (they are toothless now), the FCC has, historically, strongly favored the industry “players.” See generally \textit{Stern}, supra note 58.} of minority voices is inherent in the nature of an administrative agency, which, unlike a legislative body, is not accountable to voters. Voter accountability ensures greater responsiveness to changing demographic patterns and minority concerns than is found in administrative agencies.\footnote{The Voting Rights Act of 1965, 42 U.S.C. § 1971 (1976), serves as an emblematic effort by Congress to end disenfranchisement of minorities in this country. See also Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding the Act as a legitimate exercise of power under the Fifteenth Amendment).}

From this perspective, the FCC is ill-equipped to provide a complete definition of the “public interest.”\footnote{As noted, infra text accompanying notes 78-102, the FCC must cope with competing values in defining the contours of its charge to regulate in the public interest. This is not to suggest that the FCC should consider the addition of minority voices to the spectrum to be the single or even paramount concern in determining the public interest. Rather, the FCC should recognize the importance of adding minority voices as a vital aspect of the public interest that may be given consideration in consonance with other values, such as the First Amendment, which combine to inform a definition of the public interest.} The FCC’s characteristics—it is a non-
elected presidentially-appointed body—stands in the way of its recognition of minority concerns or voices, so even when it attempts diversification of the airwaves in the "public interest," it fails. 71 Furthermore, its historic composition—commissioners have primarily been drawn from the majority group—exacerbates its inability to effectively diversify the airwaves. 72 Reduced to essentials: The FCC is comprised of members of the majority group. Members of the majority group are unlikely to be able to recognize minority concerns and be influenced by them until the barriers of fear and misunderstanding are broken down and an appetite for new ideas has been whetted. Until that day, it remains unlikely that FCC commissioners will recognize the need to regulate according to a definition of the "public interest" that includes the entire public.

Contrast the FCC with the Congress. The House of Representatives is subject to frequent elections from 435 single-member districts. 73 It is populated by a number of minority members and a larger number of non-minority members dependent on minority votes for reelection. 74 Of course, any given committee may be underrepresentative of these interests, but compared to the insulation of the FCC, Congress, even in committee form, is structured to be more responsive to minority concerns. 75

71. For a discussion of various regulations designed to diversify the air waves, see infra text accompanying notes 104-13.

72. There have been few FCC Commissioners and Hearing Examiners drawn from minority groups. Most notably, former-NAACP president, Benjamin L. Hooks was appointed to the FCC by President Nixon. However, such appointments are the exception rather than the rule. Since the FCC's inception, there have been only three black persons—Andrew C. Barrett, Tyrone Brown and Benjamin L. Hooks—and only two persons of Hispanic origin—Patricia Diaz Dennis and Henry M. Rivera—to serve as FCC Commissioners. See Andrew Barrett Confirmed As FCC Commissioner, JET, June 18, 1990, at 38; FCC EEO Conference: Women Gaining in Broadcast and Cable to Detriment of Minority Males, COMM. DAILY, Jan. 24, 1989, at 4; Renee E. Warren, Blacks See Hope In New FCC Appointment, BLACK ENTERPRISE, Feb. 1990, at 32.

73. The Senate, with its 100 members each serving six-year terms, tends to be less representative than the House. Indeed, 1992 saw the first election of a black female U.S. Senator. Nevertheless, as elected officials, members of the Senate are accountable to their voters.

74. The spate of legislation introduced by Congress to diversify voices in broadcasting may be a result of this structural difference. See, e.g., DONALD E. LIVELY, MODERN COMMUNICATIONS LAW 401 (1991) (discussing Congress' attempt to enact the Fairness Doctrine into law—vetoed by lame-duck President Reagan—and the FCC's subsequent disavowal of Fairness Doctrine); see also Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1989) (prohibiting FCC re-examination of its preference policies based on race, ethnicity or gender). But see Notice of Inquiry on Racial, Ethnic, or Gender Classifications, 1 FCC Rcd. 1315 (1986), modified, 2 FCC Rcd. 2377 (1987) (soliciting comments on race-neutral alternatives to preference policies).

75. Of course, some committees are more powerful than others. See generally ABNER MIKVA & ERIC LANE, THE LEGISLATIVE PROCESS (forthcoming, 1993).
The potential for lack of representativeness on a congressional committee, and Congress' attendant accountability as demonstrated during the Thomas-Hill hearings, offers a good illustration of the fundamental difference between elected and appointed officials working in small groups. Initially, the Judiciary Committee, comprised entirely of white males, failed to take seriously Professor Hill's statements about Clarence Thomas. However, when the statements were leaked to the press and to those to whom the Committee Members were accountable, the Committee took action. In some skewed sense, the re-opening of the Thomas hearings is an example of the accountability of Congress at work even in small committee groups. Certainly, the accountability of these men to their constituents played a role in the re-opening of the hearings. And just as certainly, the racial and gender make-up of the Judiciary Committee played a role in its initial failure to consider seriously Professor Hill's statements. Without public pressure and the accountability of elected office, the members of that Committee may not have even known what they were overlooking. The same problems inhere in the FCC determining what is in the "public interest." The FCC is a small group and lacks the accountability controls placed upon elected officials.

A. The Scope of the FCC's Power to Determine the Public Interest

The public interest in diversifying the airwaves comes from the perception of broadcasting as a powerful medium that gives its speakers great access to the public. Further, the public interest requirement is born of the recognition that the public benefits from a robust and healthy marketplace of ideas, and that a healthy marketplace will not come about unless diverse perspec-

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77. For example, Senator Biden's claim that he did not pursue Professor Hill's statement because she had indicated that she did not want this to be public is a good illustration of majority-group stereotyping displacing the ability to receive information from a member of a minority group. Senator Biden may have assumed that this was about sex, not harassment or character. So when Professor Hill requested that the matter be kept private, he may have displaced her desires and values with his assumption that women do not want to talk about sex in public. Newspaper reports indicate that Hill initially requested confidentiality but agreed to the use of her name four days before the first set of hearings began. Id.
78. See, e.g., Richard E. Wiley, Federal Regulation of Network Practices, in Network Television and the Public Interest 107 (Michael Botein & David M. Rice, eds., 1980) (answering questions about why so much government attention is paid to the broadcast television industry by noting "television's presumed power as a medium of entertainment and information, and . . . many people's belief that this power is unduly concentrated in the three networks"); see also Oscar G. Chase, Broadcast Regulation and the First Amendment, in Network Television and the Public Interest, supra, at 137 ("A major goal of government regulation has been diversity of programming—the notion that the airwaves should not be the exclusive personal podiums of the licensees but should be used to bring a wide range of ideas and experiences from many sources to the American people.").
The FCC has implemented a variety of regulations to accomplish the goal of diversifying the airwaves. However, each attempt to add diversity invariably brings the regulation into conflict with other aspects of the "public interest."

This section discusses the various regulations promulgated by the FCC in the interest of diversifying broadcasting and the courts' interpretations of them. The inability of the FCC and courts to identify the very minority voices the FCC regulations direct them to seek out, has led to a failure to achieve diversity with respect to minorities.

1. Establishing the Power

The Supreme Court thwarted initial attempts to expand the meaning of regulation in the "public interest." In FCC v. Sanders Brothers Radio Station, the Court decided that the 1934 Communications Act did not permit the FCC to give weight to the economic impact on an existing licensee in its determination of whether to award a new license.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed.

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.

While Sanders Brothers articulated the position that the FCC grants licenses to serve the public, and not to protect the licensee's business interests, the case also placed explicit limits on the FCC's authority to regulate in the public interest. The Court stated that "the Act does not assay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy." The Court drew its narrow reading of the FCC's authority from the history of the 1934 Communications Act, noting that "[t]he fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license."

80. See, e.g., Licensing regulations, multiple ownership rules, minority distress sale policies, discussed infra text accompanying notes 89-135.
81. 309 U.S. 470 (1940).
82. Id. at 475.
83. Id.
84. Id. at 474.
Two years later, in *National Broadcasting Co. v. United States*, the Supreme Court reconsidered its position and declared:

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication . . . . [T]he Act does not restrict the Commission merely to the supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them.

The Court reasoned that because the FCC had to supervise traffic over the air when faced with competing applications for the same frequency, it had to choose among them. This was to be done by reference to "[t]he touchstone provided by Congress[,] . . . the 'public interest, convenience, or necessity,' . . . a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.'" Since *National Broadcasting Co.*, the authority of the FCC has steadily expanded.

Once the Court established that the "public interest" rubric authorized the FCC to do more than play traffic cop in the air, the next step was to determine the shape the power would take. Early on, the FCC, courts and Congress indicated a concern that voices heard, and images seen, through broadcasting be diverse.

**B. Regulation of Ownership**

The principal means of regulating broadcasting is through ownership of stations. First Amendment values prevent extensive regulation of program content. This section explores those controls on ownership and licensing

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85. 319 U.S. 190 (1943).
86. *Id.* at 215-16.
87. *Id.* at 216 (quoting *Pottsville Broadcasting*, 309 U.S. at 138).
88. Although the "public interest" standard is applied to the regulation of all aspects of broadcasting—from technical standards to the determination of locations for new stations,—this Article does not cover those aspects of the FCC's regulation in the "public interest."
89. Spectrum scarcity naturally clashes with the First Amendment: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). Although the First Amendment is given less weight in broadcasting than in print media, it still prevents the FCC from becoming overly-involved in content regulation. See generally *Lively*, *supra* note 74. Further, the recent Supreme Court decision in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (striking down St. Paul's Bias-Motivated Crime Ordinance as violative of First Amendment), indicates the Court's increasingly protective posture towards First Amendment values; see also Communications Act of 1934, 47 U.S.C. § 326 (1988) (providing in relevant part, that "[n]othing in this chapter shall . . . give the Commission the power of censorship over . . . any radio station, and no regulation . . . shall be promulgated by the Commission which shall interfere with the right of free speech").
of broadcast stations, which are designed to diversify the airwaves. The various regulations on ownership and licensing range from subtle and minor controls, which have little effect, to more intrusive and dramatic controls with absolute effects.

Regulations governing diversification of control of the mass media are designed to guard against the feared formation of a natural monopoly, and to expand the number of voices with access to the airwaves. Multiple Ownership Rules limit the number of television stations owned by any one entity to twelve. Further limits are placed on television ownership in the event that the total audience reach of the stations exceeds 25 percent of the United States. However, if “at least two of the stations in which [group owners] hold cognizable interests are minority controlled,” then “group owners of television and radio stations . . . [may] utilize a maximum numerical cap of 14 stations.” Minority control is defined as “more than 50 percent owned by one or more members of a minority group.”

90. Concern over the monopolistic tendencies that were developing alongside the new technology pre-dated television. Ever since the early 1920’s, when Congress had first begun to interest itself seriously in the affairs of radio, some legislators had manifested considerable concern over the concentration of economic power in the radio industry. This concern was markedly evident in the long series of hearings and debates preceding the passage of the Radio Act of 1927.

Stern, supra note 58, at 60 n.35.


91. As to the goal of diversifying viewpoints through diversification of ownership, see, e.g., Committee for Community Access v. FCC, 737 F.2d 74, 79 (D.C. Cir. 1984) (“[T]he operating presumption has long been that as diversity of ownership increases, diversity of viewpoints expands. This criterion thus allows the FCC to assess the likelihood that a broadcaster will present diverse views, without having to assay the actual diversity of the views themselves.”).

92. In re Amendment of § 73.3555 of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report & Order, 100 F.C.C.2d 74 (1985) [hereinafter 1984 Multiple Ownership Rules]. These limits on the number of stations that any one entity may own have steadily evolved since the 1940s. The first Rules limited ownership to three stations of each media type, then, for a long time, owners were limited to seven of each media type. Multiple Ownership Rules, 18 F.C.C. 288 (1953). However, the limits placed by the rules are presumptive and may be waived if the “public interest” so requires. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

95. 100 F.C.C.2d 74, para. 45 (1985).
groups are defined as "Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander." 97

Although this exception to the Multiple Ownership Rules' twelve-station limit is designed to encourage minority joint-ventures with majority owners, it fails to achieve its purpose. The rule, as written, contemplates no distinctions between these designated minority groups. In theory, diversity may be achieved by adding only one minority group's voice. In addition, although the rules specify the percentage of minority ownership, there are no guards against "sham" minority ownership. 98

Furthermore, one can argue about whether the fifty-percent controlling interest, even if legitimate, guarantees the addition of a minority voice to the airwaves. The majority group must listen to and incorporate minority voices, which it has failed to do in the past because of its inability or unwillingness to let minorities speak on their own, without interference. 99 If the minority owner has but a fifty-percent controlling interest in a station, 100

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97. Id. at § 73.3555(d)(3)(iv).
98. See infra text and notes at 113-14.
99. See supra part II.
100. On this point, the Congressional Research Service ("CRS") analysis of the FCC's statistical data with respect to programming aimed at minority groups by various station ownership groups is somewhat instructive. CONGRESSIONAL RESEARCH SERVICE REPORT, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? (June 29, 1988) [hereinafter CRS REPORT]. The CRS Report indicates that the greater the percentage of a given minority group's ownership of a station, the greater the percentage of programming targeted at that minority group. For example, 65 percent of all broadcast stations with over one percent black ownership, broadcast black programming. The CRS Report breaks down the black ownership into two categories: Stations with between 1 and 50 percent black ownership and those with 51 percent black ownership or more. Sixty percent of all stations with 1-50 percent black ownership broadcast black programming. Of those stations with 51 percent or more black ownership, 79 percent broadcast black programming. The statistics are similar with respect to Hispanics. For stations with 1-50 percent hispanic ownership, 53 percent broadcast hispanic programming, whereas of those stations with 51 percent or more hispanic ownership, 74 percent broadcast hispanic programming. With respect to asian/pacific programming, contrast the broadcasting practices of the stations with 1-50 percent asian/pacific ownership: they broadcast 14 percent asian/pacific programming, whereas the stations with 51 percent or more asian/pacific ownership, broadcast 25 percent asian/pacific programming. In the american indian/native alaskan ownership groups, of those stations with 1-50 percent american indian/native alaskan ownership, 23 percent of the programming is american indian/native alaskan programming; in contrast, of those stations with 51 percent or greater american indian/native alaskan ownership, 46 percent of the programming is categorized as american indian/native alaskan ownership. CRS REPORT, Figures 5A, 6A, 7A, 8A.

The CRS Report includes commercial and non-commercial radio and television stations and does not break down ownership groups into sufficiently precise groups to be truly helpful. The Report does, however, paint a broad picture of the effect of ownership on programming. Because the figures within the ownership categories are not sufficiently refined, the CRS Report cannot be used to predict whether raising the 50-percent minority-ownership level to, say 75 or 100 percent, would make a difference in programs aired. As most of the stations surveyed were commercial, at some point, the owners' responsiveness to its audience may suggest trim-
experience suggests that the minority will be the one adapting to the majority discourse rather than the other way around.101

The Multiple Ownership Rules may be an effective way to prevent concentration of media power. However, they are not an effective way to encourage minority voices to enter into the majority's world. Preventing monopolies and aggregations of power is not the same as "promot[ing] diversification of ownership in order to maximize diversification of . . . viewpoints."102

1. Diversifying When "They All Look Alike"

Under the Multiple Ownership Rules, a minority controlling-interest comprised of any combination of the designated minority groups 103 will satisfy the exception and permit the ownership of up to two additional stations in each category. But members of the diverse minority groups the FCC has identified—Blacks, Hispanics, 104 American Indians, Alaska Natives and Pacific Islanders—are likely to share but one thing in common: disenfranchisement. Yet even with respect to disenfranchisement, the history of these groups is radically different. To members of the majority culture who lack knowledge of minority groups, their history, and their culture, minority groups are interchangeable and so any combination of these groups may form a block to represent "the minority perspective." This policy is flawed because there is no single minority perspective that intelligently crosses over all of these groups.105 The view of minority groups as interchangeable is as pervasive in this country as it is oppressive.106

101. Michel Foucault argues that the discourse of power, that is, the voice of the majority, is so ingrained in our consciousness that it is impossible for anyone to be free of it. "But I wish to know how the reflexivity of the subject and the discourse of truth are linked—'How can the subject tell the truth about itself?'—and I think that relations of power existing themselves upon one another constitute one of the determin[ants] . . . ." MICHEL FOUCAULT, POLITICS, PHILOSOPHY, CULTURE 39 (Lawrence D. Kritzman, ed. & Alan Sheridan et al., trans., 1988).


103. See supra notes 97-98 and accompanying text.


105. The controlling minority interest may be from one such group, in which case this argument is not relevant to that specific case. The observation stands, however, as an indication of the FCC's view of minorities and as a possible means of adding minority voices to the broadcast air waves.

106. For example, essentialist critiques of Feminist Theory abound. Professor Angela Harris, among others, has written about "[t]he need for multiple consciousness in feminist movement . . . . Since the beginning of the feminist movement in the United States, black women have been arguing that their experience calls into question the notion of a unitary 'women's
The oppression which arises from aggregating these disparate groups manifests itself in different and subtle ways. By obscuring those characteristics that cause an individual to identify himself or herself as a member of a minority group, a message is sent that those essential qualities are irrelevant. This message is defeating. It is confusing to have one's essence discarded, particularly when it has been identified as a distinctive characteristic. The resulting dilemma (minorities are considered different by virtue of possessing certain characteristics distinct from the majority populations; nevertheless, those characteristics are treated as irrelevant) has an effect beyond debilitating and confusing individual members of a minority group. Once the distinguishing differences between members of the identified minority groups have been disregarded as irrelevant and the differences are ignored, the very purpose of the endeavor—to ensure diversity by adding different voices—is lost.

Attention given to, and improvement in, the representation of one particular minority group, diverts attention from other minority groups that may not have fared as well.¹⁰⁷ For example, although the FCC has identified Blacks, Hispanics, American Indians, Alaska Natives and Pacific Islanders as groups that are under-represented in the ownership of broadcast stations, the degree of under-representation varies among these groups.¹⁰⁸ Improvement in any one group may give the false impression of improvement in all groups.

Generalizing and grouping people in this fashion is always, even on a superficial level, absurd and easily deconstructed.¹⁰⁹ In creating an exception experience." Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 586 (1990); see also ADRIENNE RICH, Disloyal to Civilization: Feminism, Racism, Gynephobia, in ON LIES, SECRETS AND SILENCE 275, 279-80 (1979) (discussing the racial separation of feminists).

¹⁰⁷. See Grillo & Wildman, supra note 49, at 398 and accompanying text (discussing the "analogizer problem").

¹⁰⁸. Of 8720 responses to an FCC survey sent to 11,000 radio and television stations in the United States, 86.7% had no minority owners at all and 96.5% of the stations were owned at least 50% by non-minorities.

Of the stations with at least one percent minority ownership, 7.6% had black owners; 3.4% had hispanic owners; 1.2% had asian/pacific owners and 1.2% had american indian or alaska native owners. As the Multiple Ownership Rules exception only applies where the minority ownership exceeds 50%, the following statistics are more accurate: 1.9% of all 8720 responding stations were at least 50% owned by Blacks; one percent were at least 50% owned by Hispanics; 0.2% were at least 50% owned by Asians or Pacific Islanders and 0.4% were at least 50% owned by American Indians or Native Alaskans.

The discrepancy between stations with at least one percent black owners and stations with at least one percent hispanic or asian/pacific or american indian/alaska native owners is dramatic. Of the minority groups, Blacks are represented in far greater numbers. CRS REPORT, supra note 100, at 23-27.

¹⁰⁹. On an experiential level, the absurdity of superficial categorizations of people may be easier for those who are not minorities to understand than for minorities. White Americans constitute the majority in the United States, and many of them who take their race as a
to the Multiple Ownership Rules, the FCC sought to include within the scope of the exception those persons falling within the general categories of under-represented people. The categories identified by the FCC are broad, and certain people within each category are bound to bear only a superficial resemblance to others within that category.\footnote{110} When the categories are further collapsed to include all Blacks, Hispanics, Asian/Pacific Islanders and Native Americans and Native Alaskans, their precision is further eroded. The less faithful the category is to its original precepts, the more difficult it is to employ to achieve the goal of diversity.\footnote{111} Diversity has some meaning beyond the addition of any minority voice, regardless of which minority that voice comes from. That the FCC and Congress recognize that ensuring diversity requires attention to each discrete under-represented minority group is borne out by the list detailing which under-represented minority groups qualify for the Multiple Ownership Rules exception. However, the dereliction of the FCC and Congress to follow through on that vision of diversity is manifested in the failure to maintain a distinction among the very groups

\footnote{“given” do not pause to think about it. Because they consider their race to be the norm, it has no distinguishing qualities and so, they identify themselves by religion, gender, economic status, sexual- or political-preference. When all Whites, male and female, of assorted religions, economic status, and with various sexual and political preferences, are lumped together on the basis of race alone, those identifying distinctions remain known to the individual but are ignored by the grouping. To the individual, the race-based categorization may seem absurdly broad. Many people of color in the United States are constantly made conscious of their race, and so groupings which are race-based and ignore other characteristics, such as gender, religion, economic status and/or politics, may seem less absurd to them. This is because many people of color never lose sight of race as an identifying characteristic. See supra text accompanying note 26; see also T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 COLUM. L. REV. 1060, 1066 (1991).}

\footnote{110. There is a substantial and growing body of literature discussing the internal consonance of such categories. See, e.g., Harris, supra note 106, at 588-89 (arguing that race and gender intersect to distinguish, for example, white feminists from black feminists); Randall L. Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745, 1802-03 (1989) (denying the existence of a “black point of view” or a “black voice”).}

\footnote{111. The easiest and most efficient way to achieve diversity is through an absolute quota system. However, in the United States, quotas are viewed as being unduly restrictive and as infringing on cherished values, and have therefore been rejected. Moreover, it has not been terribly successful in countries where it has been employed. See generally MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (1984) (studying India’s use of quotas).}

With respect to the FCC's ethnic-preference policy, Judge Tamm and then-Judge Scalia of the United States Court of Appeals for the District of Columbia Circuit questioned whether a broadcast-station owner with ancestors from Italy "would primarily program Italian operas or would eschew Wagner in favor of Verdi." Steele v. FCC, 770 F.2d 1192, 1198 (D.C. Cir. 1985). This question turns on two presumed truths: (1) that a station owner's heritage will determine the owner's interests, and (2) that a station owner will indulge his or her own tastes and ignore the tastes of the members of the relevant programming audience. See id.
identified. Failure to recognize and account for this fact may lead to the addition of one new voice, while the voices of the many remaining underrepresented groups remain unheard.

2. Creating Real Incentives, Preventing False Cures

The structure of encouraging minority ownership through partnerships invites abuse. "Sham" ownership has many faces, but typically it involves a partnership where the female or minority partner-in-ownership has no real connection to the enterprise, other than to help obtain the license. The applicant who has not been designated as a minority has a strong incentive to find minority partners to enable it to acquire more stations. "Sham" minority ownership through such partnerships has not gone unnoted. Once the license is granted, however, it is difficult to verify whether the minority or female owner is actually contributing to the station management. Despite

112. The FCC, Congress and the courts have made various statements demonstrating that each of these institutions has forgotten that diversity means more than merely adding minority voices. For example, in Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992), a majority of the D.C. Circuit found unconstitutional the FCC's gender-preference for women who will own all or part of a station in which they will also work. The majority found the nexus between station ownership by women and any increase in "women's programming" to be insubstantial. Id. at 398. In his dissent, Chief Judge Mikva pointed out that:

Congress did not emphasize the idea of "women's" or "minority" or any other "targeted" programming when it endorsed the FCC's gender preference. Congress's repeated statements on the subject show that it thought increased female ownership would promote the broader (and less controversial) goal of increasing programming diversity in general. My colleagues... focus only on the narrower goal of increasing women's or minority programming.

Id. at 408 (Mikva, C.J., dissenting).

Chief Judge Mikva found support for the preference in the CRS Report, noting that stations owned by women are more likely to program not only "women's programming," but also various categories of "minority programming." Id. at 412-13; see infra part IV.B. (discussing Lamprecht and the implications of its evidentiary requirements.)

113. See, e.g., Akosua B. Evans, Are Minority Preferences Necessary? Another Look at the Broadcasting Industry, 8 YALE L. & POL'Y REV. 380, 410 (1990) (arguing that sham transactions typically involve situations where the minority owner makes no substantive equity contribution and intends to sell his or her interest once the FCC awards the station; thus, because there is never any sustained minority ownership, such policy preferences are a sham); Mary Tabor, Note, Encouraging "those who would speak out with fresh voice" Through the Federal Communications Commission's Minority Ownership Policies, 76 IOWA L. REV. 609 (1991) (describing the FCC's evolving views on minority preference and the courts' reactions to FCC policy); Bending the Rules: Investors Use Blacks as Fronts to Obtain Broadcasting Licenses, WALL ST. J., Dec. 11, 1987, at 1 (reporting that "[w]hites often quickly buy out the minority partners or write contracts that undermine their clout"); Compassion, Reagan-Style, 193 NEW REPUBLIC, Oct. 21, 1985, at 4 (contesting that minority preference policies have resulted in the proliferation of black fronts for white broadcasters).

114. An incentive exists for the non-minority owner to share station responsibility with the minority owner. Both have ownership of the station, and therefore both should carry the attendant responsibilities. However, FCC records are replete with sales of "controlling inter-
the problems with sham ownership, the solution is not to do away with minority preferences. Rather, stringent screening at the application level and continued monitoring of station management would guard against sham ownership while serving the goal of diversifying broadcasting.

3. On Honesty and Faithfulness

Underlying the Multiple Ownership Rules are the twin goals “to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest.” The FCC's decisions, however, appear to only realize the latter goal.

When the Multiple Ownership Rules expanded limits on ownership from seven to twelve stations, Commissioner Fowler, writing for the majority, asserted that “it has not before been suggested that the Rule of Sevens does, or was intended to, play a vital role in the development of minority ownership or of minority-oriented programming.” This statement prompted Commissioner Rivera to remind the majority of the FCC's historical commitment to the “considerable public value in policies which promote national interests” to minorities for substantially-below-market prices with the understanding that the minority partner is not to participate in the station's affairs, or with the understanding that the minority partner will sell his or her share back to the white majority owner after the FCC grants the license to the applicants in a comparative hearing. See, e.g., Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988) (involving a minority owner who purchased his interest at substantially-below-market price and did not have an opportunity for input into station's affairs); In re Application For Constr. Permit, Initial Decision, 5 FCC Rcd. 469, paras. 93-95 (1990) (ruling by A.L.J. Joseph Stirmer) (disallowing integration credit where two white-male limited-partners solicited an unknown black female to be a general partner holding 25% interest, and where the black female “did nothing but follow the lead of the limited partners and acquiesced in their decisions in all . . . matters”); In Re Applications of Metroplex Communications, Inc. (WHYI-FM), Decision, 4 FCC Rcd. 8149, paras. 51, 54 (1989) (holding that the limited partnership structure of the applicant was a sham where the general partner, a female, held only four percent of the equity interest, had never known any of the limited partners who owned the other 96% interest, and had been recruited by the limited partners in order to receive integration credit in the comparative hearings), aff'd and modified by Memorandum Opinion & Order, 5 FCC Rcd. 5610, paras. 23-26 (1990); In Re Applications of Newton TV Ltd., Decision, 3 FCC Rcd. 553, para. 3, n.2 (1988) (noting without formally ruling that the applicant presented a “prototypical sham 'limited' partnership applica[tion],” and that “the foremost victims of such sham applications are the legitimate and bona fide minority and female applicants”), aff'd and modified by Memorandum Opinion & Order, 4 FCC Rcd. 2561, paras. 7-9 (1988), aff'd and modified by Memorandum Opinion & Order, 5 FCC Rcd. 2755, para. 1 (1990).


116. 1984 Multiple Ownership Rules, supra note 92, para. 87, at 46. The “Rule of Sevens” limited any one owner of broadcast properties to seven each of AM, FM and TV stations. Id. para. 2, at 18.
media ownership diversity”117 and that “a small ‘new voice’ may do more to further the First Amendment than a loud or large ‘old voice.’”118

In a literalist sense, the majority is correct that the Multiple Ownership Rules were not specifically designed to facilitate minority-group entry into the broadcast market. However, one of the two stated goals of the Rules is to diversify voices, which, as interpreted by the United States Court of Appeals for the District of Columbia Circuit, means that the Multiple Ownership Rules work towards diversity through the addition of minority voices to the airwaves.119 The FCC’s selective reading of the “original intent” of the Rules is encompassed within a problem discussed earlier in this Article: the displacement of the minority group understanding of a term with the majority understanding of that term.120 In the present context, the displaced term is “minority.”

When the Multiple Ownership Rules were first promulgated in 1953, the term “minorities” was not a reference to under-represented racial or ethnic groups or women. Rather, it referred to those members of the viewing public with less-than popular taste. Consider what H. Gifford Irion, an FCC hearing examiner, had to say about “minority” programming in 1959:

When we think of “the public” we necessarily include minorities whose needs, interests and tastes may be both reasonable and laudable. Obviously there is less temptation for the broadcaster to expend time and money on providing programs for minority tastes, but any sound evaluation of the public interest must take them into account. Thus the Commission itself has emphasized the need for a certain amount of free time in order to publicize admittedly worthwhile community organizations and activities. These include well-known nonprofit groups, such as the Red Cross, and also such causes as the promotion of traffic safety, fire prevention, registration for voting, etc. Implicit in all of this is the belief that a broadcaster must not merely cater to existing tastes and interests but must make at

117. Id. at 71-72 (Rivera, Comm’r, dissenting in part and concurring in part).
118. Id. (quoting Committee for Community Access v. FCC, 737 F.2d 74 (D.C. Cir. 1984)).
119. See, e.g., TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1974), cert. denied, 419 U.S. 986 (1974). In holding that “when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded,” the Court of Appeals for the D.C. Circuit referenced the FCC’s 1953 Multiple Ownership Rules: “Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest.” Id. at 938 n.30 (quoting the 1953 Multiple Ownership Rules, supra note 115, para. 10, at 291); accord In re Amendment of Sections 73.35, 73.240 and 73.636 of the Comm’n Rules Relating to Multiple Ownership, First Report & Order, 22 F.C.C.2d 306, para. 3, at 307 (1970) (stating that one objective of the Multiple Ownership Rules was to promote diversification).
120. See supra notes 30-37 and accompanying text.
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least a modest effort toward improving and widening them. Gilbert Seldes, a noted critic of radio and television art forms has urged that the audience must be created; it is not a ready-made component of the population but is rather an incipient body of tastes awaiting to be quickened by the broadcaster's initiative.\(^{121}\)

Irion's perspective at once illustrates the problem discussed in Part II of this Article and provides the solution. Programs expressing “minority” perspectives are defined exclusively in traditional majority terms as programming that enlightens viewers about civic duties. However, Irion recognized that the broadcaster has both the responsibility and the ability to affect the majority viewer's taste. Tastes for different programs are created by the broadcaster who has a “public interest” mandate to broadcast programs that will infuse the majority culture with minority perspectives.\(^{122}\) By creating “taste” for minority shows, the majority will one day crave “public interest” programs.

However, the old meaning of the term “minority” does not help the FCC escape its obligation to diversify viewpoints by including under-represented racial or ethnic groups or women. The Communications Act of 1934,\(^{123}\) and the FCC's subsequent guidelines for implementing the Act,\(^{124}\) contemplate interpretation of the Act's goals to reflect current understandings of its terms.\(^{125}\) When the Communications Act was enacted, Congress understood that the substantive contours of the Act were not yet known and left them to be filled in as the medium developed.\(^{126}\) The FCC thawed a 1950s understanding of how to diversify viewpoints, and used that definition in its 1984 Report and Order regarding Multiple Ownership Rules. In so doing, the Commission used rhetoric that gave the appearance of working to achieve that constant goal of the FCC: maximizing the diversification of viewpoints. However, in using a definition that was frozen in time for nearly forty years, the FCC was not actually maximizing the diversification of viewpoints, as we understand that term today, and thus the FCC was not fulfilling its mandate from Congress.\(^{127}\)

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122. See discussion supra part II.B.2.
124. See generally Johnson, supra note 79 (discussing FCC guidelines governing new technologies).
125. See FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940) (stating that the term “public interest . . . serves as a supple instrument for the exercise of discretion” by the FCC); see also supra notes 64-65 and accompanying text.
126. See POTTER, supra note 62; see also text accompanying notes 81-83.
127. This is not to suggest that the 1953 understanding of the terms be ignored. Rather, the definition should be a current understanding, which includes both the 1953 understanding as well as a more contemporary meaning of diversification of viewpoints over the air.
Indeed, after a short section dealing with the impact of the proposed changes of the Multiple Ownership Rules on minority programming, the Commission's Report and Order devoted a significant amount of space to the diversification of program services. However, this section of the Report and Order is almost exclusively devoted to a discussion of how an expansion of the station ownership limits will improve programming because network owners have superior local news programs. Without stating so explicitly, it is clear that the FCC is defining programming in the "public interest" as "public interest programming." Such a definition encompasses programming that is "good for you" in the sense that local community affairs programming about road conditions is good for you. The Report and Order approvingly cites the number of health and economic reporters on staff at the network news shows to illustrate how programming will improve under the relaxation of the Multiple Ownership Rules.

The concerns that Commissioner Fowler sought to allay by this treatment of "diversification of program and service viewpoints" are not the same as the ones raised in this Article. Nor do they parallel the concerns expressed by the FCC or the courts in creating and approving the Multiple Ownership Rules. This is yet another example of the majority and minority communities having different associations with the same term. For Commissioner Fowler, and a majority of the FCC Commissioners, diversification of program and service viewpoints may be achieved through interlarding Red Cross Public Service Announcements between episodes of Roseanne and the local news.

For a discussion on the increasing disposition of the FCC and the courts to disregard congressional findings, see infra part IV.B.

128. 1984 Multiple Ownership Rules, supra note 92, paras. 87-96.
129. Id., paras. 24-63.
130. Id., paras. 44-59, at 31-37.
131. See infra text accompanying note 135 (defining public interest as being synonymous with Public Service Announcements for the Red Cross). This Article does not suggest that "programming in the public interest" should not also include traditional "good-for-you" public interest shows about local or community affairs. Rather, it seeks to expand the meaning of "public interest" programming to include programming that will include minority voices.
132. 1984 Multiple Ownership Rules, supra note 92, para. 49, at 33.
133. 1953 Multiple Ownership Rules, supra note 115.
134. See supra note 33 and accompanying text (discussing different majority and minority interpretations of the same term).
135. The representation of minority viewpoints in news programming is not addressed specifically by this Article. Extensive writings have been published about the failure of the television news to address minority concerns. See, e.g., National Advisory Comm'n on Civil Disorders, Report 201-14 (1968).
C. Licensing in the Public Interest

The FCC awards licenses for broadcast television stations to those applicants who best meet a series of criteria designed to provide "the best practicable service to the public" and maximize "diffusion of control of the media of mass communications."136 The FCC licensing policy is a two-step process. First, the Broadcast Bureau of the FCC selects those applicants who are at least minimally-qualified from the pool of all applicants.137 If only one applicant is found to be qualified, then the awarding of a license is an easy task. However, in most cases, several applicants are qualified and the second step—designation of applicants for a comparative hearing—is invoked. At the comparative hearing, the FCC assigns credits and demerits to the applicants based on the degree to which they meet the criteria enumerated in the FCC's Policy Statement of Comparative Broadcast Hearings.138 The applicant with the most credits is awarded the license.139

The criteria listed in the FCC's Policy Statement are: diversification of control of the media of mass communications; full-time participation in station operation by owners; proposed program service; past broadcast record; efficient use of frequency; character and other factors.140 Since 1965, when the Policy Statement of Comparative Broadcast Hearings was first issued, Congress, the FCC and the courts have added, deleted and added again race as a criterion that enhances an applicant's chance of being awarded the license,141 and although gender is not presently a factor that generates a pref-

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137. Applicants must meet legal, financial, technical and moral statutory requirements. These requirements include: U.S. citizenship of both the applicant and its shareholders; necessary financial resources to run the station; appropriate technical equipment; and an absence of immoral behavior. Communications Act of 1934, 47 U.S.C. §§ 308(b), 310(b) (1988). In addition, applications are screened by the FCC for "public interest" criteria, such as proposed program services, and concentration of control of mass media. See id. § 309(a); see also Robert A. Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 STAN. L. REV. 1, 17-24 (1971) (discussing public-interest issues involved in FCC licensing procedures).
139. The number of applicants in the Comparative Hearing pool generally ranges from three to six. Matthew L. Spitzer, Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts, 88 YALE L.J. 717, 745-46 n.163 (1979).
140. 1965 Policy Statement, supra note 136, at 393 passim.
141. See discussion infra part IV. The Court of Appeals for the D.C. Circuit added race and ethnicity to the list of factors which might enhance an applicant's chances to get a license after the FCC held such factors were impermissible considerations. TV 9, Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974). Following the TV9 decision, two subsequent cases held that the Communications Act's public interest mandate effectively requires enhancement of minority applicants. See West Mich. Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985); Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975). The FCC responded to these decisions by adopting a distress-sale policy,
erence for applicants, it has been at various times over the past fifteen years. Despite the different fates suffered by the race- and gender-based preferences, they were born of the same notion: diversity.

IV. DETERMINING THE PUBLIC INTEREST: WHO DECIDES?

Over the years, Congress, the FCC and the courts have devised a number of ways to diversify voices in broadcasting. Some schemes give explicit preferences to minorities and women, while others are designed to force station owners to be more responsive to minority concerns in the licensed communities. All of the plans, however, recognize the importance of diversity to the public at large and are consistent with the FCC's charge to license broadcast stations in the public interest. This section discusses the roles of Congress, the FCC and the courts in creating and upholding those schemes.


142. The FCC first awarded the gender-based preference to women in In Re Applications for Const. Permits (Gainsville, Fla.), Memorandum Opinion & Order, 70 F.C.C.2d 143, para. 11, at 149 (1978) (ruling by Review Board). The Court of Appeals for the D.C. Circuit struck the policy down in Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1986). The D.C. Circuit re-heard the case en banc and vacated the prior decision. Steele v. FCC, 806 F.2d 1126 (D.C. Cir. 1987) (en banc). The FCC then began to re-examine its race- and gender-based preferences, believing them to be unconstitutional and contrary to the Communications Act of 1934. See Reexamination of Racial, Ethnic or Gender Classifications, supra note 141. Congress then directed the FCC to reinstate the race- and gender-based preferences. Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987); see also supra note 141 (discussing Congress' continued efforts through such riders).

The final chapter in the history of gender-based preferences was handed down in June 1992. The Court of Appeals for the D.C. Circuit found unconstitutional the FCC's award of enhancement credits to women. Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992). The majority opinion, authored by then-Judge Thomas, was sharply criticized by Chief Judge Mikva. See id. at 404-15 (Mikva, C.J., dissenting).
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The FCC believed that the link between the race of the licensee and program diversity could be forged only by a demonstration of the minority owner's planned participation in station affairs. In *TV 9, Inc. v. FCC*, an activist United States Court of Appeals for the District of Columbia Circuit found that a demonstrated nexus was not necessary in the face of a "[r]easonable expectation" that the minority station ownership would enhance the program diversity. Since the *TV 9* decision, the reasonableness of that expectation has been the central point around which debate and litigation has revolved. The United States Supreme Court settled some of that controversy in *Metro Broadcasting, Inc. v. FCC*, which found that the FCC's policies of awarding enhancement credits for minorities in comparative broadcasting proceedings for new licenses and in minority "distress sale" situations did not violate the Equal Protection Clause of the United States Constitution.

143. "[The] Communications Act, like the Constitution, is color blind. What the Communications Act demands is service to the public in the programming of the station and that factor alone must control the licensing processes, not the race, color or creed of an applicant." In *Re Applications for Constr. Permit of Mid-Florida TV Corp. (Orlando, Fla.), Initial Decision*, 33 F.C.C.2d 34, para. 872 (1970) (ruling by Hearing Examiner Herbert Sharfman) (quoting from Mid-Florida TV Corp. 's proposed conclusions, para. 64) [hereinafter *Initial Decision*], aff'd and modified by *Decision*, 33 F.C.C.2d 1, para. 29 (1972), rev'd sub nom. *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974).


145. *TV 9*, 495 F.2d at 938; see also *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975) (describing *TV 9* as standing for the proposition that black ownership and participation will bring about program diversity).

146. The majority opinion, written by Justice Brennan, was joined by Justices White, Marshall, Blackmun and Stevens. Justices Brennan and Marshall are no longer on the Court, rendering *Metro Broadcasting's* future uncertain. The seats occupied by Justices Brennan and Marshall have been filled by Justices Souter and Thomas. While Justice Souter's position is difficult to predict with certainty, Justice Thomas' opinion in *Lamprecht v. FCC*, see infra text accompanying notes 149-51 (discussing the *Lamprecht* case), gives a rather clear indication that he would overturn the *Metro Broadcasting* decision. Although Justice Thomas faced questioning about the *Metro Broadcasting* decision during his confirmation hearings, and various reports confirm that he had already authored the
The debate has been reopened and enlarged by the D.C. Circuit's decision in *Lamprecht v. FCC*. In *Lamprecht*, then-Judge Thomas, writing for the majority, found unconstitutional a similar FCC policy preference for women. The majority's rationale was that no nexus between female ownership and "women's programming" was demonstrated. This section explores the data which Congress gathered to make its laws, as well as the requirement of proof of the nexus between station ownership and programming.

*Lamprecht* majority opinion, which distinctly disapproves of *Metro Broadcasting*, he never actually responded to the questions Senator Specter (R-Pa.) put to him:

Sen. Arlen Specter: Judge Thomas, there were two major cases decided relatively recently on the equal-protection clause—*Metro* v. Federal Communications Commission, which was congressional action, and *Richmond v. Croson*, which was a city council action—and my question to you is, in applying the equal-protection clause, does it make any difference whether the legislative enactment comes from the Congress, as opposed to a city council?

Judge Clarence Thomas: Senator, I think that *Metro Broadcasting*, of course, used the equal-protection analysis, but it was a Fifth Amendment case. The Court has made a distinction in *Croson*, as well as in *Metro*, that when the race- or gender-based policy (I think race-based policy in these cases) was as a result of Congress' effort, the level of scrutiny is lower than it is if it is on a policy that is developed by a state or local government.

Specter: Well, the Fifth Amendment due-process clause, of course, picks up the equal-protection clause of the 14th Amendment . . .

Thomas: That's right.

Specter: . . . so the analysis would be the same as the equal protection.

Thomas: That's right.

Specter: So you would accord greater strength or latitude to a congressional enactment, as opposed to a city council enactment?

Thomas: That's right, that is under existing case law, that's the approach.

Specter: Let me cut through quite a lot of discussion with, again, a very direct question. Without getting into the undergirdings of the opinion in *Metro Broadcasting*, would you agree with this succinct statement from Justice [John Paul] Stevens' concurring opinion, at the very start, in *Metro*: "Today, the Court squarely rejects the proposition that a government decision that rests on a racial classification is never permissible, except as a remedy for a past wrong."

Thomas: That's the state of the law.

Specter: You agree with that state of the law?

Thomas: I have no reason to disagree with it.


149. 958 F.2d 382 (D.C. Cir. 1992). *Lamprecht* was cited in a recent D.C. Circuit opinion for the proposition that empirical support is required to prove that "the means chosen are 'substantially related' to achieving 'important' governmental objectives." Federal Election Comm'n v. International Funding Inst., Inc., 969 F.2d 1110, 1120-21 (D.C. Cir. 1992) (Randolph, J., concurring), _cert. denied_, 113 S. Ct. 605 (1992).

150. 958 F.2d at 382.

151. _Id._
A. Metro Broadcasting v. FCC

In Metro Broadcasting, Inc. v. FCC, the Supreme Court considered the constitutionality of two FCC policies designed to increase minority broadcast-station ownership: the minority "distress sale" program and the awarding of tax incentive certificates to minorities in comparative broadcast license proceedings. The Court imposed and found the requirement of a nexus between ownership of broadcast stations by minorities and the programming broadcast over those stations.

1. Congressional Factfinding

The Metro Broadcasting Court stated that the fact that the FCC policies at issue had been "specifically approved—indeed, mandated—by Congress" was "of overriding significance." Congress, as opposed to the Judiciary, has as "its broader mission [the duty] to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." The FCC's 1978 Policy Statement announcing these two policies—minority distress sales and minority enhancement credits in comparative license proceedings—was issued after some fifteen years of studies conducted

153. See In re Minority Ownership of Broadcast Facilities, Policy Statement, 68 F.C.C.2d 979, 983 (1978) [hereinafter 1978 Policy Statement]. The "distress sale" policy allows a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for a hearing, to assign the license to an FCC-approved minority enterprise. The sale price must not exceed seventy-five percent of the fair market value. Because of the low sale price, purchase is attractive to minority enterprises. The policy is also attractive to the seller: Broadcast station licenses are rarely designated for revocation hearings in the absence of a serious violation of an FCC policy. If a station goes to the hearing and loses, it has no license to sell. Thus, the opportunity to sell, even at the discounted price, is attractive. See generally Philip H. Lebowitz, Comment, FCC Minority Distress Sale Policy: Public Interest v. The Public's Interest, 1981 Wis. L. Rev. 365 (1981) (discussing the FCC's minority distress-sale policy).
154. See 1978 Policy Statement, supra note 153, at 983. The FCC Policy Statement on Minority Ownership announced that "minority ownership and participation in management would be considered in a comparative hearing as a 'plus' to be weighed together with all other relevant factors. The 'plus' is awarded only to the extent that a minority owner actively participates in the day-to-day management of the station." Metro Broadcasting, 497 U.S. at 557.
155. For a review of the long history of congressional action and studies of minorities in broadcasting that preceded the enactment of the FCC's Statement of Policy on Minority Ownership of Broadcasting Facilities, see Brief of the United States Senate As Amicus Curiae in Support of Respondents at 5-20, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (No. 89-543).
156. Metro Broadcasting, 497 U.S. at 563.
157. Id. at 572. The "expertise that Congress acquires in the consideration and enactment of earlier legislation" is to be accorded deference in its conclusions with respect to the empirical data which establish the nexus.
158. 68 F.C.C.2d 979 (1978).
by Congress and various interest groups. From 1978 through 1986, Congress debated, but failed to pass, several proposals designed to enhance minority ownership. In 1986, the FCC began to reconsider the constitu-

159. See generally National Advisory Comm’n on Civil Disorders, Report (1968) (finding that an essentially “all-white” media had failed to communicate to white audiences an understanding of black culture, thought and history; finding further that the media had failed to communicate to black audiences since it portrayed blacks from a white perspective; and noting that increasing the number of minorities employed in the industry could correct the situation); see also Broadcast License Renewal: Hearings on H.R. 5546 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess., pts. 1&2 (1973); Broadcast License Renewal Act: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, 93d Cong., 2d Sess., pts. 1&2 (1974).

In 1973 and 1974, committees in the House and in the Senate held extensive hearings on proposals to extend the broadcast license period from three to five years and to modify the comparative-hearing process. During the course of those hearings, organizations representing the interests of minorities testified that policies that reduced opportunities for individuals to challenge existing licensees would perpetuate the status quo which excluded minorities. United States Comm’n on Civil Rights, Window Dressing on the Set: Women and Minorities in Television (1977) (reporting to the President and Congress regarding the inadequate portrayal of women and minorities in television).

Studies exploring the subject of women and minorities in television have continued unabated. See, e.g., United States Comm’n on Civil Rights, Window Dressing on the Set: An Update (1979) (updating the President and Congress on the continuing inadequate portrayal of women and minorities in television; Federal Communications Comm’n Minority Ownership Task Force, Report on Minority Ownership in Broadcasting (1978) (reporting that minority ownership policies were justified to increase diversity in viewpoints and to remedy effects of past discrimination), see also CRS Report, supra note 100 (analyzing data the FCC collected during its preference-policy inquiry). The report “clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves.” 134 Cong. Rec. S10021 (daily ed. July 27, 1988) (statement of Sen. Hollings).

160. In 1978, Congress considered a major proposal to deregulate the broadcasting industry. The Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978). The proposed Communications Act of 1978 would have, inter alia, replaced comparative hearings with a lottery; and created a fund for loans to minorities who sought to buy stations. Such legislation was not enacted that year.

Nonetheless, in 1979, the House proposed the Communications Act of 1979, which would have provided that any minority applicant for a license not previously assigned would be counted twice in the pool from which lottery winners were chosen. Staff of the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess., The Communications Act of 1979: Section-by-Section Analysis 39-41 (Comm. Print 1979).

tionality of its policies giving preferences to minorities and women.\textsuperscript{161} Pending an outcome of its reconsideration, the FCC suspended those policies.\textsuperscript{162} In 1987, Congress conducted hearings on appropriations to the FCC, including its allocation of funds to study the suspended policies.\textsuperscript{163} While the FCC continued to study its policies, Congress enacted, and the President signed into law, the Continuing Appropriations Act for Fiscal Year 1988.\textsuperscript{164} The Act appropriated money to the FCC on the condition that none of the funds would be used to examine or alter current FCC policies regarding minority and female ownership of broadcasting licenses.\textsuperscript{165}

rules to govern the use of a lottery. See \textit{In re Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, Second Report & Order, 93 F.C.C.2d 952, para. 61, at 974 (1983)}.

In 1983, the Senate passed a comprehensive broadcast deregulation bill which would have eliminated comparative procedures for license renewals. S. 55, 98th Cong., 1st Sess. (1983). The legislation was not enacted. See \textit{40 CONGRESSIONAL QUARTERLY, ALMANAC: 98TH CONGRESS, 2D SESSION . . . 1984, 286 (1985)}.

\textsuperscript{161} The Commission's actions grew out of a D.C. Circuit case, \textit{Steele v. FCC}, 770 F.2d 1192 (D.C. Cir.), \textit{vacated}, 806 F.2d 1126 (D.C. Cir. 1985) (en banc), which challenged the constitutionality of the FCC's preference for female applicants. In \textit{Steele}, the court held that although preference policies were valid with respect to minorities, the FCC lacked the authority to grant like credit to females. \textit{See id.} at 1192. The opinion was vacated by the D.C. Circuit \textit{en banc} and scheduled for rehearing. 806 F.2d at 1126. Before the rehearing, the FCC requested that the case be remanded to the FCC so that it might reconsider its policies. The FCC then began to reconsider its distress-sale policy as well as its policy giving enhancement tax credits for minority ownership in the comparative-license proceedings.

\textsuperscript{162} \textit{See Reexamination of Racial, Ethnic or Gender Classifications, supra} note 141.

In response to the FCC's suspension of its policies, a number of bills proposing the codification of the minority-ownership policy were introduced in Congress. \textit{See S. 1277, 100th Cong., 1st Sess. (1987); S. 1095, 100th Cong., 1st Sess. (1987); H.R. 1090, 100th Cong., 1st Sess. (1987); H.R. 293, 100th Cong., 1st Sess. (1987)}). Nevertheless, no permanent codification of the policy took place.

\textsuperscript{163} \textit{Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations, 100th Cong., 1st Sess. 17-18 (1987) (statement of Sen. Lautenberg) (questioning the FCC's dissatisfaction with its policy when Congress and courts had approved it). A number of bills were proposed in Congress to codify the suspended FCC policies. See supra note 162 (citing proposed legislation).}


\textsuperscript{165} Specifically, the Act provided:

That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities and Mid-Florida Television Corp. which were effective prior to September 12, 1986, other than to close [\textit{Steele v. FCC}] with a reinstatement of prior policy and a lifting of suspension of any sales, licenses,
The Appropriations Acts for fiscal years 1989 and 1990 included similar provisions.\textsuperscript{166} The Report of the Senate Committee on Appropriations rationalized that "promoting diversity of ownership of broadcast properties satisfies important public policy goals" and that "[d]iversity of ownership results in diversity of programming and improved service to minority and women audiences."\textsuperscript{167}

Although the 1988 Appropriations Act's restrictions effectively precluded the FCC from persisting in the study of its policies and the status of minorities in broadcasting,\textsuperscript{168} Congress continued its investigation of the matter.\textsuperscript{169} In June 1988, the Congressional Research Service concluded its study, \textit{Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?}, and found that a nexus did exist.\textsuperscript{170}

In sum, Congress studied the issue thoroughly. And it found that minorities and women were under-represented in broadcasting as station owners and employees, and as a result, were under-served as viewers. Further,
Congress found that the underrepresentation of women and minorities affected the entire viewing audience, not just minorities and women.\textsuperscript{171}

2. Standard of Review

Programs involving race- or gender-based classifications implicate the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{172} Accordingly, courts examine such programs with heightened scrutiny.\textsuperscript{173} In \textit{Metro Broadcasting}, Justice Brennan, writing for the majority, pieced together the fractured opinions in \textit{Fullilove v. Klutznick},\textsuperscript{174} and announced a new test for

\textsuperscript{171} See H.R. CONF. REP. No. 765, 97th Cong., 2d Sess. 45 (1982) ("[T]he American public will benefit by having access to a wider diversity of information sources."); see also Minority Ownership of Broadcast Stations: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 1st Sess. 66 (1989) (testimony of Roderick K. Porter, Deputy Chief, Mass Media Bureau of the FCC) ("[T]he FCC's minority policies are based on our conclusion that the entire broadcast audience, regardless of its racial composition will benefit . . . .")

\textsuperscript{172} U.S. CONST. amend. XIV, § 1, cl. 2 ("[N]or shall any State . . . deny to any person . . . within its jurisdiction the equal protection of the laws."). The Fourteenth Amendment's Equal Protection Clause applies to the federal government, as well as the states, through the Fifth Amendment's Due Process Clause. Bolling v. Sharpe, 347 U.S. 497 (1954).

\textsuperscript{173} The Equal Protection Clause of the Fourteenth Amendment essentially directs that all persons similarly situated should be treated alike. Plyler v. Doe, 457 U.S. 202, 216 (1982). There are three standards that courts use in determining the validity of certain classifications used in federal or state legislation, or other official action, under the Equal Protection Clause.

The traditional, and most commonly used standard is the "rational basis" test. Rational basis scrutiny:

permits the States a wide scope of discretion in enacting laws which affect some groups differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.


The next level of scrutiny is known as the "intermediate" test. It has typically been applied to gender-based classifications, but was adopted in \textit{Metro Broadcasting} for benign racial-classifications as well. See infra text accompanying notes 174-77. Under intermediate scrutiny, a classification "must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

The final point on the continuum of review is "strict scrutiny," which is typically applied when the government classifies by race, alienage or national origin. See Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . . For these reasons . . . these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.


\textsuperscript{174} 448 U.S. 448 (1980).
congressionally-mandated "benign race-conscious measures." These race-conscious measures "are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."

The Metro Broadcasting majority found the fostering of programming diversity to be an "important governmental objective." Although Justice O'Connor disagreed with that finding, her dissenting opinion centered around the level of scrutiny used. Justice O'Connor urged that the appropriate standard of review is "compelling interest," a standard that has never been met by any program seeking to remedy past discrimination. Justice O'Connor proposed that strict scrutiny is the appropriate standard of review of any race-based classification. "The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."

3. The Requirement of Traditionally-Acceptable Proof

Despite all of the congressional studies and fact-finding, the Court in Metro Broadcasting was careful to recognize the fragility of the link between ownership of stations and programming broadcast over those stations. The majority in Metro Broadcasting rode a fine line between the impermissible stereotyping of minorities and the permissible making of a broad prediction about the behavior of minorities. The Court wrote that:

Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. . . . The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in Bakke that greater

175. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990). In defining "benign race-conscious measures," the Court added that such measures are constitutionally permissible, "even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination." Id. at 564-65.
176. Id. at 565.
177. Id. at 567. The programming diversity derives from the FCC's charter to license in "the public interest." See supra part II.
178. Justice O'Connor challenged the majority decision, stating that "[t]he remedial interest may support race classifications because that interest is necessarily related to past discrimination; yet the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior." Id. at 615 (O'Connor, J., dissenting).
179. Id.
180. Id.
181. Id. at 612.
admission of minorities would contribute, on average, "to the 'robust exchange of ideas.'"\(^\text{182}\)

Characterizing its judgment as "predictive" is a safe way for the Court to say that it is approving Congress' social experiment. The dissent in \textit{Metro Broadcasting}, however, appeared to interpret the majority opinion's upholding the preference as a finding (which they don't see) of a single voice emanating from stereotypes. Both Justice O'Connor's dissent in \textit{Metro Broadcasting}, and the majority opinion in \textit{Lamprecht},\(^\text{183}\) indicate that certain members of the Supreme Court are not inclined to allow Congress to engage in "social experiments." In her dissent, Justice O'Connor admonishes that:

Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think . . . . The Court's application of a lessened equal protection standard to congressional actions finds no support in our cases or in the Constitution.\(^\text{184}\)

Upholding a "social experiment" planned by Congress is neither as dangerous, nor as sinister, as the dissent makes it appear. This is largely true because the scope of the term "experiment" and the operation of Congress are inherently opposite. The nature of the legislative branch's cumbersome and deliberative processes serves as a check against feared social experiments.\(^\text{185}\) The size of Congress also serves as a check against its being captured by interest groups.\(^\text{186}\) The very inefficiency of a national legislature

\(^{182}\) Id. at 579 (quoting University of Cal. Regents v. Bakke, 438 U.S. 265, 313 (1978)).

\(^{183}\) Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992); \textit{see infra} part IV.B.

\(^{184}\) \textit{Metro Broadcasting}, 497 U.S. at 602-03 (O'Connor, J., dissenting).


\(^{186}\) As Justice Scalia has noted:

\[\text{[The] distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory. . . . To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. As James Madison observed in support of the proposed Constitution's enhancement of national powers:}\]

\[\text{The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and}\]
and its processes serve as checks against factions being able to advance or enact new or experimental legislation. The selection of a standard of scrutiny must be made in the context of an understanding of Congress' structural limitations.

B. Deference to Congressional Factfinding: Lamprecht v. FCC

A similar appreciation of the paucity of structural limitations on the judiciary is needed, for that is the branch that applies the relevant standard of scrutiny to the policies at issue. This section leaves behind the question of what standard of review governs and considers judicial deference to congressional findings of fact, specifically in Lamprecht v. FCC. In Lamprecht v. FCC, the United States Court of Appeals for the District of Columbia Circuit did not hold preferences for women in the ownership and licensing of broadcast stations unconstitutional. Rather, it found that—absent a showing of a nexus between the preference granted to women broadcast-owners who will actively participate in the station, and the programming on that station—such a preference violates the Equal Protection Clause.

The standard of review announced in Metro Broadcasting also applies to the FCC's preference for women. Because Metro Broadcasting held that the diversification of viewpoints over the airwaves is an important governmental objective, the only issue open for the Lamprecht court to decide was whether the FCC's policy, which grants preferences to women, was...
“substantially related” to that legitimate and important governmental objective.

In making a legislative determination in favor of such a preference, Congress and the FCC relied on studies showing that broadcast stations owned by women aired more women’s and minority programming than stations owned by men. Although other studies were conducted, the Lamprecht majority relied exclusively on the Congressional Research Service study, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? The study indicates that the nexus exists with respect to women as well as minorities. Specifically, the study found:

The analysis showed that while the share of all stations in which members of minority groups hold an ownership interest is relatively small, the groups of stations that do have minority owners have a greater proportion of their stations programming for their own minority audience, and to a lesser extent, to their targeted audiences than do stations with no minority owners. Stations with women owners follow the same general pattern. However, their share of the total industry is greater than it is for minority owners, and they do not program to their own audience (women) as much as minority-owned stations program to theirs. . . . Based on these findings, there is a strong indication that minority and women station ownership results in a greater degree of minority programming.

Despite the study’s explicit statement, then-Judge Thomas concluded that the study “does answer its own question, at least with respect to women. The answer it gives is ‘no.’”

The Lamprecht majority’s refusal to defer to Congress’ findings of fact is of interest for two reasons. The first reason relates to the majority’s broad misstatement of the findings of fact before it, even in the face of a Supreme Court opinion holding otherwise on strikingly similar facts. In itself, this is a troubling, but fairly pedestrian occurrence. Then-Judge Thomas is not the first judge to gloss over legislative fact-finding. In Lochner v. New York, Justice Harlan expressed concern over the willingness of some of his colleagues to discard the findings of the New York State legislature, stating “[W]e [cannot] assume that [the] legislature acted without due deliberation,
or that it did not determine this question upon the fullest attainable information, and for the common good."\(^{200}\)

Then-Judge Thomas' rejection of the congressional findings as insignificant is disturbing. More troubling, however, is the message the majority opinion is sending to Congress: there is no way to prove the existence of the nexus. Then-Judge Thomas bemoaned the lack of "data" demonstrating the nexus. Then, forced to confront the data, he stated that:

\[
\text{[t]}\text{he data in } \text{Minority Programming} \text{ fail to establish any statistically meaningful link between ownership by women and programming of any particular kind. The study, in short, highlights the hazards associated with government endeavors like this one. As Justice Brennan has written for the Court, "proving broad sociological proposition by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."}^{201}
\]

In essence, then-Judge Thomas' opinion reveals that while he will accept statistical data as evidence of the nexus between female ownership and programming, he will not accept statistical data as evidence of a broad sociological proposition. Of course, as both then-Judge Thomas and Justice Brennan recognize, it is difficult to quantify certain issues statistically. However, that does not mean these statistically unquantifiable problems and solutions do not exist. Nor does it mean they do not exist in a very real and meaningful way. For it is the unquantifiable, somewhat unarticulable interests that make up the public good, and that is Congress' domain. The judiciary is best suited to determine the more concrete and describable violation of individual rights.

\textit{Lamprecht} accomplished what \textit{Lochner} did not, and it did so in the context of fact-finding by Congress, not a state legislature.\(^{202}\) A new standard was announced in \textit{Lamprecht}, and it is that Congress must empirically establish the link connecting its legislation with the problem sought to be cured by the legislation.\(^{203}\) In the \textit{Lamprecht} case, the nexus between the

\(^{200}\) Id. at 73 (Harlan, J., dissenting).

\(^{201}\) \textit{Lamprecht}, 958 F.2d at 398 (quoting \textit{Craig v. Boren}, 429 U.S. 190, 204 (1976)).

\(^{202}\) See supra text accompanying notes 185-86 (discussing the greater deference accorded Congress as opposed to a state legislature).

\(^{203}\) Indeed, \textit{Lamprecht} has already been cited for this proposition. \textit{See Federal Election Comm'n v. International Funding Inst.}, 969 F.2d 1110 (D.C. Cir. 1992).

The government must prove that the means chosen are "substantially related" to achieving "important" governmental objectives. Without empirical support, the provision will not survive. That is the point of now-Justice Thomas' opinion for this court in \textit{Lamprecht v. FCC} . . . .

The majority's opinion does not convince me that the proviso limiting 2 U.S.C. § 438(a)(4) could survive such stringent analysis. A last-minute floor amendment passed with limited discussion, the proviso was not supported by any legislative fac-
problem that Congress identified, and ordered the FCC to address, is not one that is demonstrable by any amount or any kind of data.204

Requiring that proof of a nexus between ownership of a station by a minority and programming on that station be made empirically is absurd. The very identification of the problem—minority voices are not heard by the majority culture—is too subtle to fit into traditional doctrine. So much silence has passed through so many generations, and that silence has defined the way the majority culture perceives, identifies and solves problems plaguing the public interest. That a nexus between minority station ownership and minority programming is demonstrated or not is meaningless without a sense of what minority voices sound like.

In the absence of a parallel universe in which minority voices have been consistently listened to, it is impossible to present absolute evidence showing a nexus between minority ownership and program content. Society does not yet know what minority programming might look like without the influence of decades of majority culture. Any “proof” of such a nexus put forth today may or may not be the product of false consciousness.205 Although some preliminary conclusions about the existence of such a nexus may be drawn from the years of studies conducted, they are of no legal value unless the legal system is altered to accommodate them.

This section has traced the arguments presented by the majorities and the dissents in the two seminal judicial opinions in this area: Metro Broadcasting v. FCC and Lamprecht v. FCC. These decisions fail to accord serious consideration to the public-interest touchstone under which the licensing of broadcast stations is statutorily mandated. Rather, these cases focus on whether the award of a broadcast station license to a minority or a woman unconstitutionally infringes on the rights of the non-minority or man who has not received the license. This error stems from viewing racial discrimi-
nation as a contractual problem, involving only the named parties to the matter, rather than as a problem affecting all of society. The arguments put forth by the dissent and majority in *Metro Broadcasting v. FCC* and *Lamprecht v. FCC*, respectively, are misguided in requiring that something that cannot be shown in traditional terms be shown in traditional terms. Underlying *Metro Broadcasting* and *Lamprecht*, is a battle over which branch, the judiciary or Congress, is the appropriate body to determine what is in the public interest. This is an old debate, long resolved in favor of Congress. However, the *Lamprecht* majority and the *Metro Broadcasting* dissent give it new relevance by constructively rejecting Congress as the appropriate body to determine the public interest and expressly rejecting Congress as the appropriate body to ascertain how to determine the public interest.

V. CONCLUSION

The showing of a nexus through terms traditionally employed by the Supreme Court is presently impossible. The poet, Adrienne Rich, has described the problem well:

this is the oppressor's language

206. *See* ARISTOTLE, NICOMACHEAN ETHICS 122-128 (Terence Irwin, trans., 1985). Aristotle distinguished between distributive justice, required “in the distribution of honours or wealth or anything else that can be divided among members of a community who share in a political system; for here it is possible for one member to have a share equal or unequal to another’s,” *id.* at 122, and rectificatory justice, encompassing inequality arising out of contracts, torts and criminal behavior. *Id.* at 122, 125-28. *Metro Broadcasting* and *Lamprecht*, like most reverse discrimination cases, essentially arose over a disagreement over the characterization of the justice to be effected. *See also* Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 527-28 (1990).


208. Since *Griswold v. Connecticut*, 381 U.S. 479 (1965), which established the “right to privacy,” certain members of the judiciary and conservative commentators have said that they cannot see what lies in the penumbras of the “specific guarantees in the Bill of Rights . . . that help give them life and substance.” *Id.* at 484. Clearly that is the case, for these members of the judiciary have been ignoring the rights that huddle in the shadows of the enumerated rights for twenty-five years since *Griswold*, just as they were ignored for the one hundred years before *Griswold*. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding governmental exclusion of citizens of Japanese ancestry from their homes). The job of determining those rights that lie in the shadows should be given to an institution capable of detecting those shapes lurking in the shadows, not to an institution that has declared, and proven, itself to be legally blind.
yet I need it to talk to you.\textsuperscript{209}

The vocabulary of the Court does not permit an adequate description of either the problem of minority voices not being heard on television or of the rationale for a solution to that problem. The Court's majority members are not trained to understand or hear what is outside of their ken of experience or language. The problem of minorities not being heard by the majority culture exists. And it is demonstrable, but not within the prevailing word-stock of the current judiciary.

Trying to tell the doctor where it hurts like the Algerian who walked from his village, burning his whole body a cloud of pain and there are no words for this except himself\textsuperscript{210}

The Algerian presenting only himself is viewed by the \textit{Metro Broadcasting} dissenters and the \textit{Lamprecht} majority as failing to make his case. A requirement that one offer \textit{more} than oneself, to prove data that has no meaning, is senseless. What more than oneself can one offer?

Although it is not always the case, in this instance, there is a body that has diagnosed the illness and offered a cure. Congress has acknowledged a nexus between minority station-ownership and a greater degree of minority programming.\textsuperscript{211} By flatly disregarding Congress’ findings, the \textit{Lamprecht} majority has effectively displaced Congress’ findings with its own assertions that no such nexus exists.\textsuperscript{212} The decision thus removes the power to determine the “public good” from an open, representative body and vests it in a non-elected, non-representative body.

In a democratic system of government, judgments about the public good must be made through the deliberative political process. \textit{Lamprecht} is not about the protection of an individual right—no one has a right to own a broadcast station.\textsuperscript{213} Rather, the decision concerns the regulation of broad-


\textsuperscript{210} Adrienne Rich, \textit{Our Whole Life}, in \textit{The Fact of a Doorframe}, supra note 209, at 133.

\textsuperscript{211} See supra text accompanying notes 196-97.


\textsuperscript{213} In FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), the Court found that: The policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license...
cast-station ownership in the public interest. Where individual rights are not at risk, a court may not dictate its preference for what constitutes the public interest. Doing so elevates personal whimsy over majority will. 214

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Id. at 475.

214. The Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).