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Constitutionality of Affirmative Action Regulations Imposed Under the Cable Communications Policy Act of 1984

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COMMENT

CONSTITUTIONALITY OF AFFIRMATIVE ACTION REGULATIONS IMPOSED UNDER THE CABLE COMMUNICATIONS POLICY ACT OF 1984

The Federal Communications Commission (FCC or Commission) began regulating broadcast industry employment practices in 1968, when it announced that operating licenses would no longer be granted to stations practicing deliberate employment discrimination.\(^1\) Although there was no express statutory basis for this action, the Commission relied on the broad mandate of the Communications Act of 1934,\(^2\) empowering the FCC to protect the public interest, and the wide discretion the courts had afforded to the FCC to pursue that statutory mandate.\(^3\) The Department of Justice supported the FCC's assertion of authority, contending that expanded minority employment in the broadcast industry could provide a forceful impetus for social change because of the broadcast media's "enormous impact" on American life.\(^4\)

In the years that have followed, the FCC has required broadcasters to submit annual employment forms and has used "processing guidelines" to evaluate the affirmative action efforts of licensees. Under these guidelines,

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3. See FCC v. RCA Communications Inc., 346 U.S. 86, 90, 98 (1953) (although the FCC may take market factors into consideration, it is free to ignore the policies favoring competition underlying the federal antitrust laws if to do so would be in the public interest, convenience and necessity); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940) (Communications Act of 1934 leaves to the FCC the determination of questions of procedure in ascertaining the public interest, including the scope of inquiry and other questions).

4. See infra note 31 and accompanying text.
broadcast stations with five to ten employees are expected to employ women and minorities at an overall rate of at least fifty percent of work force availability, but need reach only twenty-five percent of that level among upper level workers. The guidelines have been defended by the FCC on several occasions and have been cited in federal court decisions by judges who, while noting the existence of the FCC's equal employment opportunity rules, have not addressed directly the merits of using the processing guidelines.

The FCC began overseeing cable industry employment practices in 1972. Regulation was premised on the notions that multichannel capacity provided great potential for minority-sensitive programming and that operators unwilling to provide equal opportunity employment would be less responsive to special interest needs. Twelve years later, the Cable Communications Policy Act of 1984 (Cable Act) established guidelines for regulating the cable industry and amended the Communications Act of 1934 to provide an express statutory authority for the Commission's affirmative action efforts with respect to cable companies.

Ironically, while the 1984 Cable Act provided express statutory authority for the Commission's affirmative action policy, it has revived debate over the constitutionality of the FCC's equal employment rules and enforcement efforts. The Cable Act contains a broad requirement for an annual certification process and periodic inspections, but leaves the FCC substantial discretion to determine the contours of cable industry equal employment opportunity (EEO) regulation. The legislative history of the Cable Act shows, however, that Congress purposely deleted a section of the proposed bill that would have allowed the FCC to employ processing guidelines to the cable industry modeled after those applied to the broadcast industry. For that reason, it is not surprising that the most controversial aspect of the

6. Id.
7. See infra notes 57-59, 62-64, 225, 232-35 and accompanying text.
9. Id.
11. See infra note 113 and accompanying text.
12. See infra notes 91-98 and accompanying text.
FCC's proposed affirmative action regulations for cable operators was the agency's plan to use "existing processing guidelines" to analyze hiring and promotional practices by race, ethnicity, and sex. Despite objections, the FCC's final regulations included an equal employment compliance monitoring plan that employs numerical quotas. The Department of Justice has denounced FCC regulations as "race-conscious" and claimed that they exceed the FCC's authority under the 1984 Cable Act and violate the equal protection clause of the Constitution.

This Comment will discuss the FCC's authority to issue these regulations in view of the legislative history of the 1984 Cable Act. The statutory authority of the Commission to impose the controversial regulations will be examined. This Comment also will examine the constitutionality of the FCC's cable EEO regulations in view of the Supreme Court's recent affirmative action decisions. The analysis will discuss the tenuous constitutional grounds upon which the affirmative action requirements imposed on broadcasters rest and the efforts to place minority ownership preferences on firmer footing. Finally, it will examine the practical problems inherent in efforts to impose affirmative action requirements on cable entities. The Comment will conclude that the FCC's regulation of the employment practices of cable operators is beyond the scope of the Cable Act and violates the equal protection clause of the Fourteenth Amendment.

I. DEVELOPMENT OF FCC AFFIRMATIVE ACTION POLICY

A. FCC Regulation of Employment Practices: The Programming Nexus

FCC programming scrutiny began after viewers of WLBT-TV in Jackson, Mississippi, accused the station of refusing to present viewpoints other than those held by segregationists, thus denying any exposure to integrationist perspectives. The first complaint, filed in 1955 by the NAACP, claimed that WLBT-TV deliberately cut off a network program about race relation-
ships—on which NAACP General Counsel Thurgood Marshall appeared—by flashing on viewers’ screens a sign reading: “Sorry, Cable Trouble.” 17

Two years later, civil rights activists filed another complaint after WLBT broadcast a program urging the maintenance of racial segregation and then refused requests for time to present opposing viewpoints. 18 In the years that followed, numerous complaints were filed alleging that WLBT was violating FCC programming requirements by failing to provide for the needs of minority citizens, who comprised nearly forty-five percent of the service area population. 19

Violent reaction to integration efforts at the University of Mississippi during the fall of 1962 prompted the FCC to investigate the programming policies of several Mississippi broadcasters, including WLBT. 20

In the midst of that inquiry, petitioners, including the Office of Communication of the United Church of Christ filed the first license renewal challenge based on discrimination, charging that WLBT-TV's programming was racially prejudiced. 21 Despite the statutory requirement mandating a license renewal hearing when “a substantial and material question of fact” is raised, 22 the Commission—after acknowledging the seriousness of the charges—renewed WLBT’s license without a hearing. 23 It based that decision, in part, on a finding that the petitioners lacked standing because they would not suffer economic injury as a result of renewal of WLBT’s license. 24

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded for a hearing after finding that all listeners claiming specific injury had standing to file petitions to deny a license. 25 The circuit court also found that “a history of programming misconduct of the kind alleged would preclude, as a matter of law, the required finding that

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18. Id.
19. Id. at 1146-53. For an explanation of the FCC's programming requirements during this period, *see* Report and Statement of Policy, Commission en banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) (requiring a licensee to “make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests”); *see also* National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (upholding FCC regulations providing that no license would be granted to stations with network contracts preventing them from developing programs to serve the needs of the local community).
20. See *Lamar*, 38 F.C.C. at 1144.
21. Id. at 1148.
23. *Lamar*, 38 F.C.C. at 1153-54. The Commission limited the renewal to one year, however, rather than the customary three, and imposed conditions requiring that the licensee meet with local civil rights leaders and stop discriminatory programming. Id.
24. Id. at 1153 n.14, 1155.
renewal of the license would serve the public interest.” On remand, the Commission granted a three-year renewal of WLBT-TV's license, after concluding that the station had served adequately the public interest. Upon reargument, the District of Columbia Circuit, declaring that “the administrative conduct reflected in [the] record [of the WLBT-TV renewal hearings] is beyond repair,” declined to remand the case again and instead ordered the agency to revoke WLBT's license. The significance of the circuit court's holding lies not only in its holding that audience members have standing to challenge renewals, but also in its conclusion that license revocation is appropriate if all major groups comprising the listening or viewing audience are not served.

It was against this backdrop of action against discrimination in programming that civil rights activists urged FCC scrutiny of broadcast employment practices. The concerns of civil rights activists were corroborated by the widely read Report of the National Advisory Commission on Civil Disorders, which contended that a predominately white media staff would be unable to ascertain minority audience programming needs. Additionally, the Department of Justice advocated FCC regulation of broadcast employment practices. The FCC, however, declined to declare employment discrimina-

26. Id. at 1007.
27. In re Application of Lamar Life Broadcasting Co., 14 F.C.C.2d 431, 437-38 (1968). On remand, the FCC, adopting the decision of a hearing examiner, shifted the burden of proof to the petitioner, which was asked to prove WLBT-TV had not served the minority viewing audience. Id. at 432-33. It also allowed the licensee to focus on programming developed after the challenged renewal period. Id. at 432. See also In re Applications of Rust Communications Group, Inc., 73 F.C.C.2d 39, 42 (1979) (FCC stated it would no longer permit a licensee's post-term employment upgrade to mitigate a seriously deficient license-term EEO record.).
28. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C. Cir. 1969) (Upon reargument before the United States Court of Appeals for the District of Columbia Circuit, the court held that licensees bear the burden of demonstrating operation in the public interest.).
29. KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1966) [hereinafter cited as KERNER REPORT].
30. The FCC noted the Kerner Report finding that
[The media] ... have not communicated to the majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of living in the ghetto. They have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of—and thus have not communicated—a sense of Negro culture, thought or history.
13 F.C.C.2d at 774 (quoting KERNER REPORT, supra note 29, at 210).
31. In a letter to the FCC, the Department of Justice stated:
Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal
tion a widespread problem within the broadcast industry.\textsuperscript{32}

The pressures applied by civil rights activists, however, prompted the FCC to issue its 1968 statement on nondiscrimination,\textsuperscript{33} in which the Commission proposed to proceed on a complaint basis, limiting its review to determining if a licensee had violated a state or federal employment law, rather than adopting the nondiscrimination rule urged by the United Church of Christ.\textsuperscript{34} Nevertheless, it did undertake a rulemaking process to examine the issue further.\textsuperscript{35} Several parties filed comments contending that the FCC did not have regulatory power over employment practices because Congress had delegated that responsibility to the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964.\textsuperscript{36}

One year later, the FCC adopted rules providing for nondiscrimination in employment on the basis of race, color, religion, or national origin.\textsuperscript{37} The

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\textsuperscript{32} The opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries. For these reasons I consider adoption of the proposed rule, or one embodying the same principles, a positive step which your Commission appears to have ample authority to take.


\textsuperscript{34} \textit{Id.} at 766. The 1968 statement responded to a petition filed by the Office of Communications, the Board of Homeland Ministries and the Committee for Racial Justice Now of the United Church of Christ seeking FCC promulgation of the following rule:

\begin{quote}
No license shall be granted to any station which engages in discrimination in employment practices on the basis of race, color, religion, or national origin. Evidence of compliance with this section shall be furnished with each application for a license and annually during the term of each license upon prescribed forms.
\end{quote}

\textit{Id.} (quoting the petition filed by Office of Communication of the United Church of Christ).

\textsuperscript{35} \textit{Id.} at 768, 772.

\textsuperscript{36} The Commission sought comment on whether licensees should be required to make a showing of compliance with nondiscrimination policy and whether they should be required to post equal employment opportunity notices. \textit{Id.} at 773.


\textsuperscript{38} \textit{Id.} Although the FCC's initial statements concentrated on provision of equal employment opportunities for blacks, its first regulations were designed to require scrutiny of employment of blacks, orientals, American Indians and those with Spanish surnames. \textit{Id.} at 243. Later, the Commission expanded its rules to prohibit discrimination against women. \textit{Report and Order, In re Petition for Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices}, 23 F.C.C.2d 430, 431 (1970) [hereinafter cited as 1970 Report and Order]. Two years later, it began requiring that licensees submit statistical data for women employees. \textit{Report and Order, In re Amendment of Part VI of FCC Forms and Adding the Equal Employment Program Filing Requirements to Commission Rules}, 32 F.C.C.2d 708, 709 (1971) (requiring that EEO programs filed by renewal, transfer, and con-
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Commission asserted that the Communications Act provided clear authority for the action and that monitoring of the broadcast industry by the Equal Employment Opportunity Commission (EEOC) would insulate too many stations from examination. Compliance standards remained vague, however, especially in light of the Commission's statement "that a licensee need not prepare an equal employment opportunity program where the particular minority groups concerned are represented in the area in such insignificant numbers that a program would not be meaningful."

The following year, the Commission adopted rules requiring most applicants and licensees to file annual employment reports and written EEO programs. It also announced that the agency would use statistics to monitor EEO compliance. The FCC acknowledged low turnover rates at small stations, however, and said it expected the depth and detail of EEO programs "to vary not only with the racial makeup of the community and area, but also with the size of the station." Both the National Association of Broadcasters (NAB) and the American Broadcasting Company sought clarification of the terms "area" and "insignificant number of minority members" used in the Commission's rules, but the Commission declined, stating: "Since the licensee has the continuing responsibility to know and serve the

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38. 1969 Report and Order, 18 F.C.C.2d at 241 (citing NBC v. United States, 319 U.S. 190 (1943) (regulatory powers of the FCC not limited to the engineering and technical aspects of communications, but also include the power to regulate the business practices of broadcast stations and networks)). FCC obligations in this area might even stretch beyond the mandate of the Communications Act, the agency said, noting: "a substantial case has been made that because of the relationship of the Government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity." Id. at 241 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state lease of public property must comply with the proscriptions of the fourteenth amendment as though they were binding covenants written into the agreement itself)).

39. 1969 Report and Order, 18 F.C.C.2d at 241. At the time, title VII was applicable only to employment units with 25 or more workers. Thus, EEOC jurisdiction would have extended to approximately 80% of all television stations but only to approximately 10% of all radio stations. 1968 Rulemaking, 13 F.C.C.2d at 767-68.

40. 1969 Rulemaking, 16 F.C.C.2d at 244 n.13.

41. 1970 Report and Order, 23 F.C.C.2d at 430. The rule applied to employers with five or more full-time workers. Id. at 436.

42. Id. at 431-32. The Commission said statistical data for any given year may not necessarily demonstrate the existence of discriminatory employment practices at a particular station. Such data would be used, however, "to show industry employment patterns and to raise appropriate questions as to the causes of such patterns." Id. at 430.

43. Id. at 433.
tastes, needs and desires of his community and area, the licensee is in the
best position to know the minority population in his service area and to re-
spond accordingly." Therefore, the Commission concluded, it was not ap-
propriate for the FCC to provide the requested definitions.45

Until 1972, the FCC monitored compliance with its EEO rules on a case-
by-case basis, and typically determined that a poor statistical showing rela-
tive to work force availability was insufficient to require the evidentiary hear-
ingsought by petitioners to deny license renewals.46 Then, in 1972, the FCC
formulated processing guidelines to be used in compliance reviews that ex-
amineredenewal applications to determine if remedial measures were neces-
sary to increase staff representation of women and minorities.47 The 1972

44. Id. at 434. In 1973, the FCC decided that Standard Metropolitan Statistical Measure
(SMSA) labor force statistics would demonstrate labor pool availability better than similar
data for the city of licensee. Memorandum Opinion and Order, In re Letter to Rev. Everett C.
Parker, Director, Office of Communication, United Church of Christ, 44 F.C.C.2d 647, 652
(1973). Subsequently, the Commission stated that a licensee utilizing an area other than
SMSA must provide substantial justification for that decision. Memorandum Opinion and
SMSA is a geographic area that consists of a central city, the county in which it is located,
and contiguous counties with a high degree of economic and social integration with the central
Reg. 40,836, 40,842 n.27 (1985) (citing Office of Management and Budget, Metropolitan Sta-
tistical Areas 1983). Beginning in 1983, the Office of Management and Budget changed the
reporting unit designation from SMSA to MSA (Metropolitan Statistical Area). The two areas
are equivalent. See id.


46. See, e.g., Time-Life Broadcast, Inc. 33 F.C.C.2d 1050, 1058-59 (1972) (FCC found
statistics indicating a staff including only 2.5% Mexican employees in San Diego, where 18%
of the population was Hispanic, was insufficient to show noncompliance, after concluding,
"[t]he best evidence of . . . discrimination or noncompliance would be specific examples of
persons who were discriminated against by the licensee. . ."); In re Application of Universal
Communications Corp., 27 F.C.C.2d 1022, 1028 (1971) (FCC found data indicating staff was
only 13% black despite the large minority population in Mobile, Alabama, insufficient evi-
dence to require a hearing, explaining, "[t]he Commission does not require employment of
minority members in direct proportion to that minority group's proportional strength in the
community . . . but does require that licensees make every effort to eliminate racial considera-
tions from influencing hiring and promotional practices."); Memorandum Opinion and Order,
indicating the number of blacks employed by the licensee, without citing particular instances
discrimination or describing a conscious policy of exclusion, is not sufficient to require an
evidentiary exploration.").

47. See In re Renewals of Broadcast Licenses for Arkansas, Louisiana and Mississippi,
1973, 42 F.C.C.2d 3, 49-68 (Johnson, Comm'r, dissenting) (analyzing the development of the
1972 guidelines and the impact of FCC equal employment efforts) [hereinafter cited as 1973
Renewals]; see also Memorandum Opinion and Order, In re Equal Employment Opportunity
Processing Guideline Modifications for Broadcast Renewal Applicants, 79 F.C.C.2d 922, 929
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guidelines' standards devised by the FCC were lenient, however, such that only stations with at least ten full-time workers that either employed no women or minority workers, or had a declining number of women or minority workers, were subject to scrutiny. That same year, the United States Court of Appeals for the District of Columbia Circuit added a significant new component to be considered while evaluating the processing guidelines. In Stone v. FCC, the plaintiffs, contending that a station had enacted employment practices that were unfair to blacks, argued that statistics showing a low minority rate relative to work force availability demonstrated a prima facie case of employment discrimination and urged the Commission to reject license renewal. The court rejected a challenge to the FCC's decision to renew the license, but explained that its decision did not mean that "statistical evidence of an extremely low rate of minority employment will never constitute a prima facie showing of discrimination, or 'pattern of substantial failure to accord equal employment opportunities.' The court then found that the station's employment of seven percent blacks was within the "zone of reasonableness" for the metropolitan area, given the station's recruitment efforts. The FCC quickly adopted the "zone of reasonableness" test, which necessitated an analysis not of raw numbers, but of parity, that is, it compared a station's employment record with labor force availability in a large geographic area.

During this period, a number of petitions to deny were filed, contending that a station's license should not be renewed because women and minorities

48. FCC Commissioner Nicholas Johnson, in reviewing an EEO study of radio and television stations seeking license renewals in Pennsylvania and Delaware, noted that the 1972 standards were particularly lax in light of the fact that "all commissioners agree that no station should have its license revoked because of a statistical analysis of its employment record." In re Equal Employment Opportunity Inquiry, 36 F.C.C.2d 515, 517 (1972) (Johnson, Comm'r, concurring in part and dissenting in part). Commissioner Johnson urged the Commission to adopt a more stringent compliance standard. Id. at 517-19. Commissioner Johnson later said that the FCC's EEO regulations left the Commission "open to the charge that it is quietly searching . . . for some course of action that would mollify critics without adversely affecting its 'business as usual' rubber stamping of renewals." 1973 Renewals, 42 F.C.C.2d at 51 (footnote omitted).


50. 466 F.2d 316 (D.C. Cir. 1972).

51. Id. at 320, 329-30.

52. Id. at 332. Uncontroverted evidence in Stone showed a 7% black employment rate by a TV station in Washington, D.C., where about 70% of the population is black. The evidence also showed, however, that the minority population of the entire Washington, D.C. metropolitan area was only 24% black. Id.

53. Id.

54. Id. at 329-30.

were underrepresented or underemployed. In evaluating underrepresentation claims, both the FCC and the courts held that the percentage of minority or female employees need not correspond directly to labor force availability.\textsuperscript{56} In fact, the United States Court of Appeals for the District of Columbia Circuit found that the FCC need not conduct a renewal hearing unless it were presented with "substantial and specific" allegations, such as evidence of actual discriminatory conduct.\textsuperscript{57} Similarly, complaints concerning underutilization were rejected if it was shown that minorities and women were employed in other than menial positions, particularly if the licensees were able to show that they had a strong EEO program.\textsuperscript{58} The decisions stressed, however, that the "zone of reasonableness" test used to analyze equal employment efforts is not static,\textsuperscript{59} that the lax compliance standard found in the 1972 guideline\textsuperscript{60} was not permanent, and that agency expectations would rise after stations had operated for a period of time under an EEO plan.\textsuperscript{61}

During the mid-1970's, the Supreme Court heard a case raising the same issues, although in a different context, that critics of FCC affirmative action efforts had posed. In this case involving the Federal Power Commission's attempts to monitor the employment practices of regulatees, the Court held that the public interest mandate of the Federal Power Commission (FPC) did not authorize the agency to oversee employment activities.\textsuperscript{62} Therefore, the Court held, discriminatory practices could be considered only to the extent such conduct was related directly to the agency's particular statutory responsibilities.\textsuperscript{63} However, the Court noted:

\textsuperscript{56} See, e.g., Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974); Westinghouse Broadcasting Co., 48 F.C.C.2d 1123 (1974).
\textsuperscript{57} Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 629 (D.C. Cir. 1978).
\textsuperscript{59} See, e.g., Bilingual Bicultural Coalition of Mass Media, Inc. v. FCC, 492 F.2d 656, 659 (1974).
\textsuperscript{60} See supra note 48 and accompanying text.
\textsuperscript{61} See Memorandum Opinion and Order, In re Application of Mission Central Co., 54 F.C.C.2d 581 (1975), aff'd, 83 F.C.C.2d 330 (1980). The Commission stated that the zone of reasonableness is a dynamic concept, which contracts as licensees are given time in which to implement [the Commission's] antidiscrimination rules and policy [and that therefore], a percentage of minority employment that once was held to fall within a zone of reasonableness, in light of the licensee's affirmative action program, might not still be contained in a contracted zone of reasonableness as interpreted three years later.
\textsuperscript{62} Id. at 586.
The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees. These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups.  

Although dicta, the statement has been quoted often by the FCC in defense of its affirmative action efforts.  

In 1976, following that decision, the FCC adopted a model EEO plan, noting its precept was the programming nexus between equal employment regulations and the public interest.  

The Commission conceded that its authority to regulate employment practices was grounded exclusively on a finding of a nexus between station personnel and programming sensitive to the tastes and viewpoints of minority groups.  

Abandoning the broad terms of its 1968 policy statement, the Commission stated, "[w]e do not contend that this agency has a sweeping mandate to further the national policy against discrimination," and assured licensees that explanations about poor EEO performances would be considered carefully. Further, the FCC raised the ceiling below which it was not necessary to file affirmative action plans from five to ten full-time employees. This heightened review threshold was subsequently rejected by a federal court, which found it arbitrary and capricious.  

The following year, the FCC announced a more stringent processing standard for analyzing EEO compliance that incorporated the "zone of reasonableness" test by establishing numerical parameters for monitoring compliance. Three years later, the FCC again revised the EEO processing

64. Id. at 670 n.7 (citations omitted).  
66. Id.  
67. Id. The Commission acknowledged that the "public interest" mandate of a federal regulatory agency is "not a broad license to promote the general welfare, and that such a mandate takes on specific content and meaning only when one carefully examines the purposes for which the agency was established." Id.  
68. See id. at 248.  
70. Memorandum Opinion and Order, In re Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, 79 F.C.C.2d 922 (1980) [hereinafter cited as 1980 Guideline Modifications]. Under the 1977 guidelines, the FCC examined employment units that failed to achieve 50% parity overall with local labor force availability of minorities and women and 25% parity in the upper four job categories. Id. at 930. FCC reporting forms use job categories determined by the Office of Management and Budget.
guidelines, this time providing for stricter scrutiny of employment records by raising the parity requirement, that is, the comparison of respective percentages in the relevant workforce with the percentage of minority or women employees at a particular station, to fifty percent of workforce availability for upper level workers at large stations. The Commission did not, however, set forth a policy rationale for its action.

The National Association of Broadcasters responded with a petition for reconsideration, contending that the guidelines were unfair and unwarranted, and constituted a quota system. In denying the NAB's petition, the FCC detailed the purpose of the statistical measure:

We reiterate that [the processing guideline] is not a quota, and that an employment profile which does not pass through the guideline screening only triggers a staff-level EEO program review. The lower guideline figure for smaller stations also is the basis of a prima facie showing that the smaller licensee's employment of women and minorities is within a "zone of reasonableness." The use of a lower figure in this context recognizes both the unique situa-

Those categories are: (a) officials and managers; (b) professionals; (c) technicians; (d) sales persons; (e) office and clerical personnel; (f) skilled craft persons; (g) semiskilled operatives; (h) unskilled laborers; and (i) service workers. As a result of the 1977 processing guidelines, about 60% of all station EEO programs were reviewed for compliance. Of these, about 80% were cleared for further renewal processing without imposition of EEO-related sanctions. Id. at 924.

71. EEO Processing Guidelines Changed for Broadcast Renewal Applicants, 46 Rad. Reg. 2d (P & F) 1693 (1980). Under the 1980 processing guidelines, which govern FCC compliance review currently,

(1) stations with less than five full-time employees continue to be exempt from having a written EEO program; (2) stations with five to ten full-time employees have their EEO programs reviewed if minority groups and/or women are not employed on their full-time staffs at a ratio of 50% of their workforce availability overall and 25% in the upper-four Form 395 job categories; (3) stations with 11 or more full-time employees will have their EEO programs reviewed if minority groups and/or women are not employed full time at a ratio of 50% of their availability in the workforce overall and 50% in the upper-four job categories; and (4) all stations with 50 or more full-time employees will have their EEO programs reviewed.

Id.


73. See 1980 Guideline Modifications, 79 F.C.C.2d at 922-23. The NAB made three major arguments in favor of reconsideration. It contended the guidelines were (1) "substantive requirements which were improperly adopted without the benefit of the 'notice and comment' rulemaking procedures required by the Administrative Procedure Act; (2) "discriminatory, unfair, and unrealistic,' in part because they [did not] properly take into consideration the actual workforce availability of women and minorities in the top four FCC Form 395 job categories"; and (3) "unwarranted" because they ignored "the broadcast industry's EEO-related good faith efforts." Id.
tion of small stations in hiring and retaining employees and the Commission's cognizance of the limits of statistical tests as applied to the smaller worksite.\textsuperscript{74}

Thus, according to the Commission, the guidelines are intended only to identify those stations most likely to have violated the substantive rules.\textsuperscript{75} If a station's statistical record falls outside the "zone of reasonableness," the Commission conducts a more thorough investigation of the station's actual recruitment and hiring practices.\textsuperscript{76} In rare cases, the Commission has ordered an evidentiary hearing to consider a station's explanation for a poor

\textsuperscript{74} Id. at 931.

\textsuperscript{75} In recent years, the FCC has taken steps beyond equal employment regulations to broaden minority influence over the airwaves. Working in tandem with Congress, the FCC has devised structures through which minority ownership may be increased. \textit{See} Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975); TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973); Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978); WPIX, Inc., 68 F.C.C.2d 381, 410-12 (1978); Communications Amendments Act of 1982, \textit{supra} note 75, at 97-259, 96 Stat. 1087, 1094-95 (\textit{codified at} 47 U.S.C. §§ 309(i)(A), 309(i)(C)(ii) (1982) (requiring that minority ownership program be incorporated into any lottery scheme developed by the FCC as means for choosing among mutually exclusive applicants); H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40-41, 43-46 (1982) \textit{reprinted in} 1982 U.S. Code Cong. & Ad. News 2237, 2261 (endorsing minority ownership program and explaining new statutory requirement that, if comparative hearing scheme is replaced with a lottery, minority ownership program be incorporated into any future lottery scheme).

Specifically, the Commission has devised two programs to increase minority ownership. First, the tax certificate program, authorized under 26 U.S.C. § 1071 (1982), enables the seller of a broadcast station to defer the gain realized upon a sale, by either (1) treating it as an involuntary conversion, under 26 U.S.C. § 1033 (1982), with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of property that can be depreciated under 26 U.S.C. § 1071 (1982), or both.

Second, the distress sale policy allows a broadcaster whose licenses have been designated for a revocation hearing, prior to commencement of the hearing, to sell his station to a minority-owned or controlled entity for 75% of its fair market value. A broadcaster whose license has been designated for hearing ordinarily would be prohibited from selling, assigning, or otherwise disposing of his interest unless the issues were resolved in his favor. Bartell Broadcasting of Florida, Inc., 45 Rad. Reg. 2d (P & F) 1329, 1331 (1979).

Congress passed the minority preference legislation after finding "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Conf. Rep. No. 765, \textit{supra} note 75, at 43, \textit{reprinted in} 1982 U.S. Code Cong. & Ad. News at 2287. The conference report had noted that a December 1981 survey by the National Association of Broadcasters revealed that of the 8,748 commercial broadcast stations in the United States, less than 2% were minority owned and that of the 1,386 noncommercial stations only slightly more than 2% were minority owned. \textit{Id.} 1982 U.S. Code Cong. & Ad. News at 2287.

Additionally, the Commission has revised its clear channel rules to enable preferential treatment to minority owned AM stations. Report and Order, \textit{In re} Clear Channel Broadcasting in the AM Broadcasting Band, 75 F.C.C.2d 1345, \textit{recons.} 83 F.C.C.2d 216 (1980), \textit{aff'd sub nom.} Loyola University v. FCC, 670 F.2d 1222 (D.C. Cir. 1982).

\textsuperscript{76} 1980 Guideline Modifications, 79 F.C.C.2d at 931.
minority employment record. Typically, however, when a station falls outside the “zone,” the FCC orders the licensee to submit detailed reports documenting its affirmative action efforts.

B. Expansion of Affirmative Action Regulation To Include the Cable Industry

Noting that the multichannel capacity of cable television provided an unique opportunity for minority expression, the FCC adopted rules in 1972 requiring that cable operators file affirmative action programs and annual employment data. Two years later, an FCC study of cable company employment records found that minorities and women were represented disproportionately in the lesser skilled and lower paying jobs and were not hired in numbers commensurate with availability. The results, the Commission stated, demonstrated that cable EEO programs were not sufficiently active and affirmative. To rectify that, the FCC proposed to use “goals and timetables” to monitor EEO compliance.

Cable companies responded by asserting that the FCC lacked jurisdiction under either NAACP v. Federal Power Commission or under any reasonable construction of the FCC’s “ancillary” authority to regulate cable industry employment practices. The FCC disagreed, finding ample authority to require cable systems with five or more full-time workers to file an EEO program. The Commission also created a presumption that Standard Metropolitan Statistical Measure (SMSA) data provided the relevant touchstone.

77. See, e.g., New Mexico Broadcasting Co., Inc., 54 F.C.C.2d 126 (1975).
81. Id. at 620.
82. Id. at 625-26.
83. See supra notes 62-64 and accompanying text.
84. See United States v. Midwest Video Corp., 406 U.S. 649 (1972) (FCC authority to require that cable systems originate programming and to make available facilities for local production and programming derives from its ancillary jurisdiction); United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (upholding the FCC’s authority over cable systems insofar as it was reasonably ancillary to the regulation of television broadcasting).
for determining whether a station was meeting its affirmative action obligations. It did, however, allow operators the opportunity to redefine the local labor pool area where appropriate.

Congress addressed many of the problematic issues concerning cable transmission in the 1984 Cable Act, which established guidelines for regulation of cable ownership, channel usage, franchising, rates, and service. It also imposed EEO requirements including an annual compliance certification process and periodic FCC investigation of cable employment practices. The Cable Act's EEO rules cut a wide swath; under section 634(a),

86. The FCC acknowledged that there is no single definition of “local labor pool" and suggested that each system must be examined in the context of its own circumstances and location. Id. at 1342. It noted, however, the language from the Notice of Proposed Rulemaking stating:

[W]here a system is situated in a Standard Metropolitan Statistical Area (SMSA), we would consider the SMSA to be the local labor pool area for purposes of the availability survey. We also noted that where this was not the case, city or county-based figures would suffice, and indicated appropriate sources for this data.

87. Id. at 1335 n.25.

88. Section 634(c) of the Cable Act defines the scope of the EEO rules. The Act also sets forth five EEO steps an entity must undertake:

(1) define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;

(3) communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, age, or sex, and solicit their recruitment assistance on a continuing basis;

(4) conduct a continuing program to exclude every form of prejudice or discrimination based on race, color, religion, national origin, age, or sex, from its personnel policies and practices and working conditions; and

(5) conduct a continuing review of job structure and employment practices and adopt a positive recruitment, training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all its organizational units, occupations, and levels of responsibility.


Section 634(d)(2) of the Cable Act commands the FCC to devise rules requiring that each cable entity:

(A) disseminate its equal opportunity program to job applicants, employees, and those with whom it regularly does business;

(B) use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever jobs are available in its operation;

(C) evaluate its employment profile and job turnover against the availability of minorities and women in its franchise area;
they apply to "any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system." The controversial EEO provisions did not appear in the first draft of the bill, which the Senate passed in June 1983. The House Committee on Energy and Commerce filed a report in August 1984, however, recommending passage of a cable bill including provisions modeled after the FCC's existing EEO regulations and processing guidelines. The House report suggested use of a statistical parity standard even stricter than that imposed on broadcasters. However, House committee members insisted that the standard was not a quota system. For cable companies with five to ten full-time workers, the standard required a parity level of fifty percent of the local minority labor force standard. For companies with more than ten full-time workers, the parity quota was raised to sixty percent. Additionally, special standards were set for the top four job categories. The House report illustrated how the parity requirement was to operate and recommended a $200-a-day penalty for violation as well as possible license
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On October 1, 1984, the House approved H.R. 4103 and sent it to the Senate.

In October 1984, a House and Senate conference committee convened to draft a final version of the bill. The bill did not move forward, however, until the House agreed to a compromise amendment introduced by Senator Hatch which specifically deleted the provision for use of numerical parity. It was only after this language, which the Senate believed suggested use of a quota system, was deleted that the bill was passed and signed into law by the President on Oct. 30, 1984.

The Department of Justice contends that the FCC should be able to assure compliance with EEO requirements based on submission of affirmative action plans by cable entities without resorting to a numerical parity standard. In a letter to the FCC, William Bradford Reynolds, Assistant Attorney General for the Civil Rights Division of the Department of Justice, said:

While the 1984 Act authorizes the Commission to collect certain statistical data for its review, the changes made to section 634(e) evince a clear Congressional intent that a numerical parity standard is not to be used to judge compliance.

Furthermore, there is no authority in the 1984 Act to justify imposition of employment goals and timetables. Congress' objection to the use of numerical parity standards militates, a fortiori, against vesting such authority in the Commission. Moreover, we believe that race or gender-preferential employment policies undertaken or compelled by public authorities, including the use of employment 'goals' in favor of nonvictims of discrimination and at the expense of innocent third parties, violate the Constitution's equal protection requirement.

In a Notice of Proposed Rulemaking, the FCC set forth plans for regulating EEO compliance in the cable industry. It proposed requiring cable workers that would have to be women would be 20 percent (50 percent of 40 percent).

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95. Id. at 91-92, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4728-29.

96. S. 66 was amended to conform to H.R. 4103, passed in lieu thereof, and returned to the Senate. 130 CONG. REC. H10,427 (daily ed. Oct. 1, 1984).


operators to file annual employment reports, which would be checked for EEO compliance, and if approved, a certificate of compliance would issue. The most controversial proposal in the Notice was the announced intention to apply "existing processing guidelines" to annual evaluation forms. The Department of Justice responded by charging that the processing guidelines constituted a quota system, favoring nonvictims of discrimination at the expense of innocent third parties. Similarly, the United States Commission on Civil Rights stated that the proposed rules represented "an impermissible construction of the [Cable] Act in view of Congress' deletion from an earlier version of the Act of parity language nearly identical to the language which you proposed by reference [to the existing broadcast processing guidelines] to adopt." Similarly, the Office of Management and Budget stated that much of the information collection suggested in the Notice was beyond the scope of the 1984 Cable Act. A number of groups representing women and minorities, however, filed comments in support of the proposed cable EEO rules.

Reaction to the Notice among members of Congress was mixed. Senator Orrin G. Hatch, Chairman of the Senate Labor and Human Resources Committee, complained:

\[\text{[N]umerical standards have little in common with the language of the Cable Act. As passed, the Act makes no reference to the use of arbitrary, across-the-board numerical tests. In fact, specific language was deleted from the Act during its consideration by Con-}\]

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102. \textit{Id.} at 11,194.
103. In a letter to the FCC, William Bradford Reynolds, head of the Department of Justice's Civil Rights Division, asserted:
\[\text{[B]ecause these documents contemplate that the commission may 1) use numerical parity standards to gauge EEO compliance, and 2) require cable entities to establish employment goals and timetables in certain circumstances, we believe the proposed rule exceeds the authority given the Commission under the 1984 Act. Congress did not intend that the Commission use a numerical standard to evaluate disparities between the minority/female composition of a cable entity's workforce and the composition of the relevant area labor market. . . . Furthermore, there is no authority in the 1984 Act to justify imposition of employment goals and timetables. . . . Moreover, we believe that race or gender—preferential employment policies undertaken or compelled by public authorities, including the use of employment "goals" in favor of nonvictims of discrimination and at the expense of innocent third parties, violate the Constitution's equal protection requirement.}\]

\textit{See supra} note 15.
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No justification has been provided by the Commission to warrant requiring the use of arbitrary standards . . . .

Senator Hatch also stated that the use of numerical standards constitutes bad public policy "because they ultimately frustrate the very objectives they are designed to achieve [and although] the tests allegedly are designed to promote the development of a nondiscriminatory workplace, they instead encourage race-conscious employment decisions." He also chastised the FCC for failing to provide an explanation as to why it chose to ignore specific statutory language concerning the use of relevant labor market data for each job category.

. . . [S]ince the primary standard to be met is fifty percent of general labor force participation rates, no consideration is given to the actual number of skilled individuals available for the position in question. Consequently, the test may be impossible to meet for the highly skilled positions, while, for other categories, it may be a rigid ceiling on minority employment opportunities.

Furthermore, Senator Hatch objected to the FCC's proposed rules because they provided:

no explanation as to why cable operators should be treated differently than other entities regulated by the federal government. No reason is given as to why the Commission feels it necessary to utilize a standard contrary to other federal affirmative action regulations, such as those administered by the Office of Federal Contract Compliance Programs.

Not surprisingly, Representatives Timothy E. Wirth, John D. Dingell, and Mickey Leland reacted more favorably to the bill. Their interpretation of the statute and the effect that the compromise amendment had on it differed significantly from that of Senator Hatch. In a letter to the FCC Chairman Mark Fowler, they stated:

Some parties offering comments to this proceeding have argued that since the compromise EEO provision enacted did not include certain House passed provisions which contained numerical percentages, this evidenced a legislative intent to prohibit the use of

106. Letter from Senator Orrin G. Hatch, Chairman, Committee on Labor and Human Resources to Mark Fowler, Chairman, Federal Communications Commission (June 28, 1985).
107. Id.
108. Id. (emphasis in original).
109. Id.
numerical processing guidelines by the FCC in carrying out its EEO functions. We want to make clear this is not the case.

Although differences of opinion exist as to whether the FCC's current processing guidelines are adequate as a means of achieving affirmative action goals, we wish to stress that there was no intention on the part of the Congress to disturb the present use of the FCC's processing guidelines as an objective administrative tool in monitoring EEO compliance.

In fact, all Congressional parties involved with the drafting of this section of the Cable Act understood and anticipated that the legislation adopted would permit the Commission to continue to utilize processing guidelines in monitoring cable industry EEO compliance.111

In conclusion, these congressmen stated their belief that the FCC's EEO regulations were permissible under the Cable Act.

In the Report and Order112 adopted during September 1985, the Commission slightly modified the certification process.113 Although the language of the Cable Act specifically states that compliance is to be assessed in light of availability of minorities and women in the franchise area labor force, the Report and Order uses SMSA data114 in which the operator's employment office is located, as a point of comparison.115 If the employment office is not located in an MSA, the county in which it is located will be used.116 Headquarters units will be allowed to use national labor force statistics for the top four categories and local data for the lower four categories.117 In order for

111. Id.
113. In an effort to address the paperwork burden imposed by the certification in a manner acceptable to the Office of Management and Budget, the FCC modified the reporting format to conform with the Equal Employment Opportunity Commission's (EEOC's) forms. Id. at 40,841. The Report and Order also eliminated the separate reporting form for part-time workers, id. at 40,841 n.24, but maintained the requirement that cable entities enter the number of employees in each job category, by sex, race, or national origin. Id. at 40,841. It also called for annual certification based on satisfactory completion of a modified Form 395A, which asks for information about hires and promotions and for a list of minority recruitment sources contacted by the cable operators over a twelve-month period. Id. at 40,844. Then every five years, in lieu of Form 395A, cable entities would be required to submit a Supplemental Investigation Sheet, including an employee list describing each worker's primary duties and responsibilities and breaking down personnel decisions by sex, race, and national origin. Id. at 40,849-50, 40,861.
114. The Census Department now uses the term MSA to refer to areas previously designated as SMSAs. See supra note 44.
115. 50 Fed. Reg. at 40,843.
116. Id.
117. Id. For an explanation of the categories, see supra note 70.
an operator to use demographic data other than MSA statistics, he must make a showing including information such as

(a) the distance of the employment unit from areas of minority concentration in the MSA is great; (b) commuting from those areas to the cable unit is difficult (such difficulties will usually be based on distance but may also be based on other factors such as lack of transportation); or (c) that recruitment efforts directed at the MSA minority labor force have been fruitless. 118

The Report and Order also requires cable entities to submit data detailing hiring, promotion and recruitment decisions by categories. The Commission claims collection of this data is mandated by section 634(d)(2)(6) of the 1984 Cable Act, requiring the Commission to analyze "efforts to recruit, hire, promote, and use the services of minorities and women."119

To comply with the congressional directive that the FCC conduct investigations every five years, the agency plans to conduct a trend analysis using annual statistical employment reports.120 Commenters including the American Legal Foundation, the Department of Justice, and the Commission on Civil Rights have asserted that the method the FCC has selected for evaluating EEO compliance is unconstitutional.121 In response, the FCC stated, "the arguments raised . . . rest essentially on the premise that the Commission's use of processing guidelines is a quota system, [however, these] guide-

118. 50 Fed. Reg. at 40,843. To support its decision to allow a deviation from use of SMSA data, the FCC cited past precedent, comparing Renewals of Indiana, Kentucky and Tennessee Broadcast Stations (WHIN/WWKX, Gallatin, TN.), 54 Rad. Reg. 2d (P & F) 1473, 1484 (1983), with Media-Com, Inc. (WDBN-FM), 55 Rad. Reg. 2d (P & F) 1291, 1294 (1984). In the first case the FCC declined to allow use of alternative data because no showing had been made relative to the licensee's efforts in Nashville, while in the second case, WDBN-FM made a substantial documented showing that indicated the distance from areas of minority concentration to the station was a mitigating factor. See also Letter from Glenn A. Wolfe, Chief, Equal Employment Opportunity Branch, Mass Media Bureau, EEOC, to Jerry Haines, Esq., dated April 3, 1984 (station in Port Huron, Michigan, may use St. Clair County data rather than Detroit PMSA). In each of these cases, however, the applicant had to overcome a strong presumption that SMSA data was the appropriate reference point.


120. Specific complaints of discrimination will still be filed initially with the EEOC. In 1978, the Commission resolved some of the questions concerning the overlap of authority between the FCC and the EEOC after the two agencies entered into a memorandum of understanding regarding the exchange of information and the disposition of complaints filed by licensees. Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission, 70 F.C.C.2d 2320 (1978). That memorandum of understanding with the EEOC is being amended to provide for orderly filing of discrimination complaints against cable companies. 50 Fed. Reg. at 40,862, Appendix D.

121. See supra notes 15, 104 and accompanying text. Comments from the American Legal Foundation, Docket No. 85-61, at 3-7 (filed June 19, 1985).
lines are clearly not intended to be used for any such purpose." The constitutionality of the processing guidelines must be evaluated in consideration of federal case law governing administrative agency discretion and affirmative action efforts.

C. The Delegation Issue: Do the Affirmative Action Regulations for the Cable Industry Exceed the FCC's Statutory Authority?

Before judging the validity of equal employment opportunity regulations promulgated pursuant to the Cable Communications Policy Act of 1984, the threshold question of whether the Commission exceeded its statutory authority must be resolved. This threshold issue must be examined in view of the deletion of language in the Cable Act calling for a numerical parity system. If the FCC is determined to have exceeded its statutory authority in issuing those regulations, a court could invalidate them on that ground, without reaching the equal protection argument. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court held:

> When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

The silence of the Cable Act on the use of employment quotas means that a reviewing court would have to answer the second question posed by the Supreme Court: Whether the FCC’s EEO regulations are based on a permissible construction of the statute.

In an earlier case, the Supreme Court addressed the question of statutory construction where language had been deleted. In *Pennsylvania Railroad Co. v. International Coal Mining Co.*, it stated, "[t]he fact that [a] provi-

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123. See supra notes 97-98 and accompanying text.
125. Id. at 2781-82 (footnotes omitted).
126. 230 U.S. 184 (1913).
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... was omitted from [an] Act, as finally ... passed, is not only significant, but ... conclusive” against a claim that language elsewhere in the same Act “means the same thing as the omitted clause.”

More recently, the Supreme Court held that deletion of a provision from legislation prior to passage “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.”

Additionally, the Supreme Court has ruled repeatedly that an agency may not expand enforcement of its regulations beyond the limits set by Congress. Traditionally, the FCC has been granted broad authority to act in the “public interest.” However, the Supreme Court has found that Congress did not intend the Communications Act “to transfer [Congress’] legislative power to the unbounded discretion of the regulatory body.” This is a variation of the delegation doctrine, which enables Congress to delegate powers to agencies only after setting standards to guide their determination. An agency’s authority to enact and enforce regulations, therefore, is limited by the “obligation to honor the clear meaning of [the] statute, as revealed by its language, purpose, and history.” Recently, the United States Court of Appeals for the District of Columbia Circuit found that “[a]pplication of the plain meaning rule [of statutory interpretation] does not preclude considera-

127. Id. at 198-99. See also Carey v. Donohue, 240 U.S. 430, 436-37 (1916) (declining to interpret a statute as including language Congress refused to include before passage).


129. See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979) (for a regulation to have the force of law it must be the product of a congressional grant of legislative authority).

130. See supra note 2 and accompanying text. See also FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) (The public interest standard is not inflexible, but is susceptible to “the rapidly fluctuating factors characteristic of the evolution of broadcasting and [to] the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.”).

131. FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953). Although the FCC can, as part of its public interest standard, take economic factors into consideration, it is free to ignore the policies favoring competition that serve as the foundation of the Sherman and Clayton Acts if to do so would be in the public interest, convenience and necessity. Id. at 90. See also National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) (finding the public interest standard is “not to be interpreted as setting up a standard so indefinite as to confer an unlimited power” (quoting Federal Radio Commission v. Nelson Brothers Co., 289 U.S. 266, 285 (1933))).

132. In its entire history, the Supreme Court has struck down only two statutes on the ground of improper delegation of power. K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 3.2, at 151 (1978). See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (declaring § 9(c) of the National Industrial Recovery Act, 48 Stat. 195, 200 (1933), to be an unconstitutional delegation of authority from Congress to the President); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Congress not permitted by the Constitution to abdicate the essential legislative functions with which it is vested).

tion of persuasive legislative history” regarding the statute’s meaning. Should the FCC’s action be challenged in court, the Commission would have to show its decision was supported by “substantial evidence.” The court then would conduct a “searching and careful” analysis to determine if the FCC’s action was rational and based on consideration of relevant factors.

Recently, the validity of FCC regulations imposed to govern award of special preferences for racial and ethnic minorities through the use of weighed lotteries has been subject to such review. In 1983, the FCC announced that all pending applications in the low power television and television translator service would be subject to a lottery and that race and diversity would be awarded a fixed relative preference of two to one. Critics of weighed lotteries, including FCC Chairman Mark S. Fowler, contend that this race-conscious policy violates the equal protection clause of the Constitution because there have been no findings of discrimination in the broadcast industry, the preference system is not narrowly tailored to reflect the extent of past discrimination, and the EEO regulation is not subject to continuing


135. Under § 706(2)(E) of the Administrative Procedure Act, an agency’s findings and conclusions made pursuant to formal rulemaking procedures, such as that used in the Equal Employment Opportunity proceeding, must be supported by “substantial evidence.” 5 U.S.C. § 706(2)(E) (1982).

136. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971). The standard for judicial review is determined largely by § 706 of the Administrative Procedure Act, which requires a reviewing court to strike “agency action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706 (1982). Under this standard of review, agency action is presumptively valid, and a reviewing court may not substitute its judgment for that of the agency, so long as a rational basis exists for the agency action. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc) (citations and footnotes omitted). See also New York State Comm’n on Cable Television v. FCC, 669 F.2d 58, 62-63 (2d Cir. 1982) (FCC was not arbitrary and capricious in finding that regulation by a state commission of master antenna television systems affected interstate commerce); American Radio Relay League, Inc. v. FCC, 617 F.2d 875, 879 (D.C. Cir. 1980) (upholding FCC rules prohibiting manufacture and sale of certain amplifiers capable of use by citizens band operators because they were “neither arbitrary, capricious, irrational nor unreasonable”).

137. Congress has approved development of a random lottery system as an alternative to costly and time consuming comparative hearings. In so doing, it has expressly sanctioned incorporation of significant minority preferences into the system, without regard to the size or existence of a minority population in the community of license. Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. §§ 309(i)(3)(A), (C)(iii) (1982).

138. Only applicants whose owners control no other media of mass communications are entitled to the 2-to-1 preference; those controlling one, two, or three media outlets are entitled to a 1.5-to-1 preference. Second Report and Order, 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, 93 F.C.C.2d 952, 953 (1983).
In an August 1985 case challenging the validity of granting comparative advantage to female applicants, the United States Court of Appeals for the District of Columbia Circuit struck down the FCC's female preference system. The court found that in adopting the female preference system, the FCC exceeded its statutory authority; therefore, it did not reach the constitutional question raised. In a far-reaching opinion, Judge Tamm, writing for the majority, attacked not only the female but also the minority lottery preference system. The court concluded, however, that minority preferences stand on firmer footing than a female merit system because there has been no clear congressional endorsement of the FCC's female preference policy. Moreover, the court found it unreasonable to believe that granting a preference to women will increase programming diversity since women “transcend ethnic, religious, and other cultural barriers.” The Commission has declined to appeal the decision.

139. Id. at 1017-18 (1983) (separate statement of Fowler, Comm'r).
140. Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985).
141. Id. at 1193. The Supreme Court has applied a “strict scrutiny” analysis only to classifications based on race or national origin. See, e.g., Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978). In contrast, the Supreme Court has applied a lower degree of scrutiny to classifications based on gender. See Craig v. Boren, 429 U.S. 190, 197-99 (1976), Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion). In part, the reason for application of the strict scrutiny standard is historic. The fourteenth amendment was adopted in part to end racial discrimination. See Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1872). A similar attempt to end discrimination against women through passage of the equal rights amendment failed. H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).
142. In dicta, Judge Tamm wrote:

The minority preference rests on the assumptions that first, membership in an ethnic minority causes members of that minority to have distinct tastes and perspectives and, second, that these differences will consciously or unconsciously be reflected in distinctive editorial and entertainment programming. . . . [I]t is questionable whether a black station owner would program soul rather than classical music or that he would manifest a distinctively “black” editorial viewpoint. Indeed, to make such an assumption concerning an individual's tastes and viewpoints would seem to us mere indulgence in the most simplistic kind of ethnic stereotyping.

With respect to the second assumption, one would think that station owners—motivated primarily by the desire to turn a profit—would be more influenced in their programming decisions by the tastes, interests, and perspectives of the listening audience than by those tastes and perspectives perhaps attributable to their ethnic backgrounds.

770 F.2d at 1198.
143. Id. at 1196 n.4.
144. Id. at 1199.
D. Bakke, Fullilove and Stotts: The Equal Protection Backdrop

As previously stated, the Justice Department has taken the position that use of broadcast processing guidelines to evaluate cable industry EEO efforts is unconstitutional. It contends that the processing guidelines constitute a quota system that arbitrarily diminishes the chances that white workers will be hired for jobs for which they are the best qualified candidate.\(^{145}\)

This contention must be examined in view of the Supreme Court's constitutional analysis of discrimination during the past decade and the standards it has set for evaluating the propriety of preferential systems. In particular, the decisions in *Regents of the University of California v. Bakke*,\(^{146}\) *Fullilove v. Klutznick*,\(^{147}\) and *Firefighters Local Union No. 1784 v. Stotts*,\(^{148}\) have provided guidance as to the standards that must be met to create a constitutionally valid affirmative action program.\(^{149}\)

In *Bakke*, the Supreme Court considered for the first time the merits of a party's contention that a governmental remedial program providing a racial preference violates the equal protection clause of the fourteenth amendment.\(^{150}\) In that case, a closely divided Supreme Court struck down an affirmative action plan that denied a white applicant an opportunity for admission to medical school solely because of his race. The plan reserved sixteen of the one hundred places available in the first-year class at the Medical School of the University of California at Davis for minority candidates.\(^{151}\) This "quota" allowed blacks and other minorities to be admitted to the school with paper credentials, such as undergraduate grades and board scores, lower than those of the white plaintiff who was denied admission.\(^{152}\)

The California Supreme Court, in a six-to-one decision, found that the Davis affirmative action plan violated the equal protection clause and prohibited the university from utilizing a race-conscious admissions plan. The court noted that the case ordinarily would be remanded for further consider-

\(^{145}\) See supra note 15 and accompanying text.

\(^{146}\) 438 U.S. 265 (1978).

\(^{147}\) 448 U.S. 448 (1980).


\(^{151}\) *Bakke*, 438 U.S. at 275.

\(^{152}\) Id. at 275 & n.4, 279 n.12.
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ation of the remedy because Bakke's showing of an equal protection violation shifted the burden to the university to demonstrate that he would not have been admitted even without the special admissions program.\textsuperscript{153} The California Supreme Court stated, however, that on appeal the university conceded it could not meet that burden, and, consequently, the court ordered that Bakke be admitted to the medical school.\textsuperscript{154} The university then appealed both parts of the decision.

The Supreme Court, in \textit{Bakke}, produced two five-to-four decisions, each supported by a majority comprised of different Justices. Justice Powell, the only Justice participating in both majorities,\textsuperscript{155} affirmed the California Supreme Court's decision insofar as it ordered Bakke's admission and invalidated the special admissions program.\textsuperscript{156} A different group of Justices, however, reversed the judgment prohibiting Davis from considering race as a factor in its admissions decisions.\textsuperscript{157}

Before addressing the constitutional questions raised by the case, the Court examined the basic statutory issues revolving around the meaning of the command in title VI of the Civil Rights Act of 1964 that "[n]o person . . . shall, on the ground of race, . . . be subjected to discrimination under any program . . . receiving Federal financial assistance."\textsuperscript{158} Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger took the position that the Davis program violated title VI, which they read to impose an absolute ban on consideration of race in the admission process.\textsuperscript{159} Accordingly, they concluded, it was unnecessary to decide the constitutionality of the Davis system because title VI barred educational institutions receiving federal funds from discriminating on the basis of race.\textsuperscript{160}

The five other justices found that title VI's prohibition against discrimina-

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\item \textsuperscript{153} Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 63-64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976).
\item \textsuperscript{154} 18 Cal. 3d at 63-64, 553 P.2d at 1172, 132 Cal. Rptr. at 700.
\item \textsuperscript{155} Justice Powell joined Chief Justice Burger and Justices Rehnquist, Stevens and Stewart to invalidate the Davis special admissions program and ordered Bakke admitted to the school. He also joined a second group composed of Justices Brennan, White, Marshall and Blackmun to hold that race may be a consideration in a constitutionally accepted admissions program.
\item \textsuperscript{156} 438 U.S. at 320 (Powell, J.).
\item \textsuperscript{157} \textit{Id.} at 320 (Powell, J.), 379 (Brennan, White, Marshall & Blackmun, JJ.).
\item \textsuperscript{158} Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1982)). Title VI prohibits discrimination based on race, color, or national origin in federally assisted programs. \textit{Id.} Notably, the university acknowledged that it receives federal financial assistance. 438 U.S. at 412. Title VI does not specifically bar employment discrimination based on sex, but some federal agencies have barred such discrimination in their regulations.
\item \textsuperscript{159} Bakke, 438 U.S. at 412-21.
\item \textsuperscript{160} \textit{Id.}\
\end{itemize}
tion is no broader than the equal protection clause. Justices Brennan, White, Marshall, and Blackmun found that title VI was designed to eliminate federal funding for programs in which minorities are disadvantaged in violation of the equal protection clause. Justice Powell was the only justice to reach the constitutional issue, but he joined the Stevens group in its conclusion that the Davis program was unlawful. This interpretation of the scope of title VI then required the Court to look beyond the statutory analysis and examine how the equal protection clause applied to the case.

Although five justices agreed that the case involved application of the equal protection clause, they did not agree on the level of constitutional scrutiny required. Justice Powell concluded racial classifications are "inherently suspect and thus call for the most exacting judicial examination." Under his strict scrutiny test, he found remedies fixing minority preferences that harmed one group to the benefit of another to be permissible only where there have been "judicial, legislative, or administrative findings" of specific instances of discrimination. Additionally, he found that remedial action should be subject to "continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." In conclusion, the Bakke decision held that a racial quota will not win judicial support if it is not based on specific findings of past racial discrimination, if the minorities receiving the benefit were not themselves victimized by specific discriminatory action, and if identifiable whites who did not themselves contribute to the discriminatory policy are seriously harmed. The Davis plan failed all three tests. Justice Powell stated his belief, however, that an admissions program similar to that used at Harvard University would pass constitutional muster if it used race as one factor in achieving diversity among students, so long as it was not the sole criteria.

Justices Brennan, White, Marshall, and Blackmun agreed with Justice Powell that affirmative action programs are permissible under the fourteenth amendment. Justice White also agreed with Justice Powell that affirma-

161. Id. at 341-50 (Brennan, White, Marshall & Blackmun, JJ.). Justice White wrote separately to explain his view that a private cause of action does not exist under title VI. Id. at 379-87.
162. Id. at 289-320 (Powell, J.).
163. Id. at 291.
164. Id. at 307. Justice Powell found that "[w]ithout such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." Id. at 308-09.
165. Id. at 308.
166. Id. at 316-18.
167. Id. at 325-26 (Brennan, White, Marshall & Blackmun, JJ.).
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Two years later, in \textit{Fullilove}, a closely divided Supreme Court upheld the "set aside" requirement of the Public Works Employment Act of 1977,\textsuperscript{172} requiring ten percent of federal funds granted for local public works projects be used to procure the services of "minority business enterprises."\textsuperscript{173} As in \textit{Bakke}, the Supreme Court in \textit{Fullilove} produced a highly fragmented judgment. Three varying views emerged among those justices voting to uphold the statute.\textsuperscript{174} Chief Justice Burger, who wrote the lead opinion concurred in by Justices White and Powell, indicated that a two-part test had to be satisfied before the race-conscious program could be found valid.\textsuperscript{175} First, the Court must find the objectives of the legislation within the powers of Congress.\textsuperscript{176} In this regard, Chief Justice Burger found the set aside requirement within the scope of Congress' spending power.\textsuperscript{177} He also found that

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  \item Chief Justice Burger declared that Congress need not proceed in a wholly "color-blind" fashion when acting to ensure that expenditures under the Public Works Act of 1977 did not perpetuate racial discrimination in the construction industry. \textit{Id.} at 482, 475-76. Justice Powell, in a separate concurrence, voted to uphold the Public Works Act because Congress had the authority to remedy discriminatory practices, had made sufficient findings of fact, and had employed a narrowly drawn means to accomplish its goal. \textit{Id.} at 495-517. Justices Marshall, Brennan, and Blackmun, using the same equal protection test they employed in \textit{Bakke}, found that the set-aside scheme was constitutional because it was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination." \textit{Id.} at 521.
  \item Justice Burger found the set aside requirement within the scope of Congress' spending power.
\end{itemize}

\textsuperscript{168.} \textit{Id.} at 387 n.7 (White, J.).
\textsuperscript{169.} \textit{Id.} at 359 (Brennan, White, Marshall & Blackmun, JJ.) (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)). This intermediate level of scrutiny has been employed by the Court in sex discrimination cases. \textit{See, e.g.,} Craig v. Boren, 429 U.S. 190, 197 (1976).
\textsuperscript{170.} \textit{Id.} at 362, 366, 369-71 (Brennan, White, Marshall, & Blackmun, JJ.).
\textsuperscript{171.} \textit{Id.} at 421 (Burger, C.J., Rehnquist, Stevens, & Stewart, JJ.).
\textsuperscript{173.} \textit{Fullilove}, 448 U.S. at 490-92.
\textsuperscript{174.} Chief Justice Burger declared that Congress need not proceed in a wholly "color-blind" fashion when acting to ensure that expenditures under the Public Works Act of 1977 did not perpetuate racial discrimination in the construction industry. \textit{Id.} at 482, 475-76. Justice Powell, in a separate concurrence, voted to uphold the Public Works Act because Congress had the authority to remedy discriminatory practices, had made sufficient findings of fact, and had employed a narrowly drawn means to accomplish its goal. \textit{Id.} at 495-517. Justices Marshall, Brennan, and Blackmun, using the same equal protection test they employed in \textit{Bakke}, found that the set-aside scheme was constitutional because it was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination." \textit{Id.} at 521.
\textsuperscript{175.} \textit{Id.} at 473.
\textsuperscript{176.} \textit{Id.}
\textsuperscript{177.} \textit{Id.} at 475.
Congress had a rational basis for concluding that if uncorrected, subcontracting practices would make it difficult for minorities to enter into public contracts, and would thereby perpetuate the effects of prior discrimination. Therefore, he found that Congress could regulate such remedial activity under the commerce clause of the Constitution without showing that prime contractors were guilty of actual violations of antidiscrimination laws.

Second, the Chief Justice stated that the court must determine whether the use of ethnic and racial criteria was a constitutionally permissible means of achieving congressional objectives. Burger concluded that the use of racial and ethnic classifications are permissible when Congress is exercising its authority to enforce equal protection guarantees. He was not troubled by the effect the set-aside might have on nonminority firms because the program was limited in duration and the remedy was narrowly tailored to cure the defects of past discrimination. He declined, however, to adopt either a strict or intermediate scrutiny standard, stating only that any preference based on race "must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees."

Justice Powell's concurrence reiterated his view that strict scrutiny is the proper standard of review for affirmative action programs. This approach, stating that the racial classification must be a necessary means of advancing a compelling governmental interest, requires both specific findings of past discrimination and a narrowly drawn remedy that is "equitable and reasonably necessary to the redress of identified discrimination."

Both Chief Justice Burger and Justice Powell emphasized that the statute

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178. Id. at 477-78.
179. U.S. Const. art. I § 8, cl. 3.
180. Fullilove, 448 U.S. at 473.
181. Id. at 490-91.
182. Id. at 484. Chief Justice Burger noted that the administrative scheme provided a mechanism by which nonminority firms could seek a waiver or exemption from the Public Works Act if their best efforts at compliance with this legislation were unsuccessful. Id. at 487-88.
183. Id. at 491-92. Interestingly, Justice White, who joined Justices Brennan, Blackmun, and Marshall in Bakke, joined Chief Justice Burger in Fullilove. It is unclear whether this indicates a shift in his view on the requirements of the equal protection clause.
184. Id. at 496.
185. Id.
186. Id. at 498, 510. Justice Powell also outlined five factors to consider in determining whether a race-conscious remedy satisfies the strict scrutiny test: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the number of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (4) the availability of waiver provisions; and (5) the effect of the remedy on third parties. Id. at 510-14.
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in *Fullilove* was based on congressional findings and for that reason should be judged with deference. Their statements suggested that the constitutionally acceptable means of redressing past discrimination vary with the intent of the Congress.\(^{187}\)

In their concurrence, Justices Marshall, Brennan, and Blackmun stated their belief that an intermediate standard of review, requiring that the use of benign racial classifications be "substantially related" to an "important and articulated" government purpose, was appropriate.\(^{188}\) Based on that standard, they found that the minority set-aside plan was permissible after finding it was substantially related to the compelling congressional objective.\(^{189}\) In both *Bakke* and *Fullilove*, they argued that strict scrutiny was applicable only when an ethnic or racial classification stigmatizes a race and not when it only disadvantages a class, such as whites, lacking the "traditional indicia of suspectness."\(^{190}\)

Justice Stewart, joined by Justice Rehnquist, dissented, articulating again the view that the Constitution should be color-blind, tolerating no classes among citizens.\(^{191}\) No preferences should be awarded, they said, unless ordered by the court for the "sole purpose . . . [of eradicating] the actual effects of illegal race discrimination."\(^{192}\) Justice Stevens filed a separate dissenting opinion challenging the imprecise manner in which Congress granted preferential rights in response to minimally articulated findings of actual discrimination.\(^{193}\)

In *Firefighters Local Union v. Stotts*,\(^{194}\) Earl Stotts, a black Memphis

\(^{187}\) Chief Justice Burger said:

HERE WE DEAL . . . NOT WITH THE LIMITED REMEDIAL POWERS OF A FEDERAL COURT, FOR EXAMPLE, BUT WITH THE BROAD REMEDIAL POWERS OF CONGRESS. IT IS FUNDAMENTAL THAT IN NO ORGAN OF GOVERNMENT, STATE OR FEDERAL, DOES THERE REPOSE A MORE COMPREHENSIVE REMEDIAL POWER THAN IN THE CONGRESS, EXPRESSLY CHARGED BY THE CONSTITUTION WITH COMPETENCE AND AUTHORITY TO ENFORCE EQUAL PROTECTION GUARANTEES.

*Id.* at 483; see also *id.* at 515-16 & n.14 (Powell, J., concurring).

\(^{188}\) 448 U.S. at 521.

\(^{189}\) *Id.*

\(^{190}\) *Id.* at 518 (quoting *Bakke*, 438 U.S. at 357). This position seems based on the view that the effects of discrimination against minorities, especially Blacks, is so pervasive that remedial efforts are required to achieve equality.

\(^{191}\) *Id.* at 522-23.

\(^{192}\) *Id.* at 528.

\(^{193}\) See *id.* at 539-41. Justice Stevens rejected the view that racial classifications are absolutely prohibited. *Id.* at 548. Instead, he wrote, the courts must examine "the procedural character of the decisionmaking process" to determine the validity of a classification. *Id.* at 551. In this case, Justice Stevens found that Congress had failed not only to identify the characteristics of minority business enterprises, but also to show that the preference system was narrowly tailored to a legitimate objective. *Id.* at 548-54.

firefighter filed a class action suit in federal district court charging that fire department and city officials were engaging in a pattern or practice of making hiring and promotion decisions on the basis of race, in violation of title VII of the Civil Rights Act of 1964. That suit was consolidated with an action filed by Mr. Jones, also a black member of the fire department, who claimed he had been denied a promotion on racial grounds. In 1980, the district court approved a consent decree designed to settle these cases by adopting a long-term goal of increasing the proportion of minority representation in numerous job classifications. The city expressly stated, however, that by signing the decree, it did not admit to the allegations contained in the complaints.

In 1981, faced with projected budget deficits, the city announced that layoffs of nonessential personnel would be conducted under the traditional “last hired, first fired” seniority system. The district court, however, enjoined use of the seniority system. Although the court explicitly found that the system was not adopted with an intent to discriminate, it nevertheless would have issued the injunction on the grounds that the system had a racially discriminatory effect. A modified layoff plan was designed under court order and, as a result, white workers with more seniority than their black co-workers were laid off, although the otherwise applicable seniority system would have called for the layoff of black employees. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, finding the injunction to be a valid means of either enforcing or modifying the decree, despite its effect on those with vested rights under the city’s seniority system. It reached that conclusion despite its holding that the district court had erroneously determined that the city’s seniority system was not bona fide.

The Supreme Court reversed. Justice White, writing for the majority in a six-three decision, found that the injunction was improper either as an enforcement of the original consent decree or as a modification of the decree. Initially, the majority found that the district court had exceeded its

195. Id. at 2581.
196. Id.
197. Id.
198. Id. at 2581-82.
199. Id. at 2582.
200. Id.
201. 679 F.2d 541, 563-64 (6th Cir. 1982).
202. Id. at 551 n.6, 565-66.
203. Justice White was joined by Chief Justice Burger and Justices Powell and Rehnquist. Justice O’Connor filed a separate concurrence. 104 S. Ct. at 2590-94. Justice Stevens con-
authority by enjoining the city's use of the seniority system. The Court stated that examination of the plain terms of the decree, which was silent on the issue of layoffs and demotions, revealed the fallacy of the claim that the city merely was enforcing the 1980 consent decree. Additionally, the Court found that because title VII protects seniority systems, the district court had erred in presuming that the parties to the decree had intended to alter the "last hired, first fired" system absent an explicit expression to that effect. Moreover, the Court noted, neither the union nor the white workers were parties to the suit when the consent decree was signed and, therefore, could not have consented to that change.

Next, the Court found the order could not have been upheld as a valid modification of the decree because it conflicted with two provisions of title VII. First, the Court found that the modified decree was in conflict with the seniority protection provision found in section 703(h) of the Act. Under that section, a white worker with seniority under a contractually established seniority system cannot be displaced absent either a finding that the system was adopted with a discriminatory intent or a determination that a proven victim of discrimination was entitled to a make-whole remedy. Noting that the district court had found that the layoffs were not motivated by an intent to discriminate and that none of the beneficiaries of the modified decree were proven victims of past discrimination, the Court found that the alternative layoff system violated title VII. Second, the Court found that the modified consent decree also conflicted with section 706(g) of title VII, which states that the court can award competitive seniority only when the beneficiary is an actual victim of illegal discrimination. By limiting judi-

204. Id. at 2585-86.
205. Id. at 2586.
206. Id.
207. Id.
208. Id. at 2587 & n.9. The Court relied on Systems Fed'n No. 91 v. Wright, 364 U.S. 642 (1961), to support its ruling that a district court cannot modify a title VII consent decree over the objection of one of the parties, if the resulting decree conflicts with the statute underlying the consent decree. Id. In Systems Fed'n, the Court held that when the term of a decree conflicts with the statute under which it was entered due to a change in the law, the decree should be modified despite the objection of the parties bound by the order. 364 U.S. at 651.
210. Stotts, 104 U.S. at 2587 n.9, 2588 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)).
211. Id. at 2588-90.
212. Id. Section 706(g), which provides for title VII remedies, states in part:
cial authority to order make-whole relief to those cases where actual victim status can be demonstrated, the Court seems to have expanded the standard of proof required in cases examining seniority and merit systems under section 703(h) and to have applied it to all discrimination cases brought under section 706(g).

Justice Blackmun, joined by Justices Brennan and Marshall in a vigorous dissent, was critical of the level of judicial review, contending that the majority analyzed the lower court's action as if it were a decision on the merits, rather than a preliminary injunction. In so doing, Blackmun contended, the majority prematurely concluded that the plaintiffs had failed to prove that the city had violated its duty to act in good faith and that the layoffs undermined the decree.

The dissent also strongly disagreed with the finding that the modified decree violated title VII; Blackmun asserted that if black firefighters had prevailed on their class-action claim of pattern-or-practice discrimination, they would have been entitled to race-conscious affirmative relief without proof of actual victim status. If the firefighters had prevailed on the merits, Blackmun stated, they would have been entitled to reinstatement, backpay, "or any other equitable relief as the Court deem[ed] appropriate."

In light of the diversity of views among Supreme Court members—and in the absence of a clear statement on what are and are not permissible affirmative action efforts, it is difficult to articulate a precise methodology for evaluating the validity of affirmative action programs. However, Bakke, Fullilove, and Stotts suggest a three-part analysis to address the concerns confronting the Court. First, there must have been adequate findings that discrimination existed in the subject industry to ensure the agency is not merely advancing the interests of one racial or ethnic group interest over another. Second, a remedial program must be narrowly tailored to remedy the effects of past

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a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of § 704(a) of this title.


213. See supra notes 209, 212; see also Leading Cases of the 1983 Term, 98 HARV. L. REV. 87, 272 (1984) (noting that the Court's expanded proof standard was extensively reported in the popular press because of its potential impact on all court-ordered affirmative action programs).

214. Stotts, 104 S. Ct. at 2595-600 (Blackmun, Brennan, Marshall, JJ., dissenting.).

215. Id. at 2603-04.

216. Id. at 2605-07.

217. Id. at 2605 (quoting 42 U.S.C. § 2000e-5(g) (1982)).

218. See supra notes 164, 178, 186-87, 193 and accompanying text.
discrimination without excluding innocent groups or depriving individuals of vested rights. 219 Third, the program must be subject to continuing reas-

essment to assure that it will cause the least possible harm to innocent third parties in the short-run and that it will not continue in duration beyond the point needed to redress the effects of past discrimination. 220

II. THE CONSTITUTIONALITY OF THE FCC'S USE OF EXISTING PROCESSING GUIDELINES TO MONITOR EEO COMPLIANCE IN THE CABLE INDUSTRY

The Department of Justice has claimed that using "existing processing guidelines" to monitor EEO compliance in the cable industry is both uncon-

stitutional and beyond the scope of the agency's authority. 221 Although the Department of Justice directed its comments at proposed cable industry rules, its assertion suggests that applying processing guidelines to broadcast industry data also may be invalid. Central to the Department of Justice's current approach to employment discrimination litigation 222 is a belief that nonvictims of discrimination are not entitled to preferential treatment. 223 The Department of Justice, however, supports affirmative action to provide recruiting and training programs for interested qualified minorities designed to draw more diverse applicants into a pool from which color-blind selections are made. 224

Although the title VII standard is not identical to that applied by the FCC, 225 the legislative history of title VII supports the Department of Jus-

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219. See supra notes 182, 186, 213 and accompanying text.
220. See supra notes 165, 182, 186 and accompanying text.
221. See supra note 15 and accompanying text.
222. Under the Reagan Administration, the Department of Justice has departed radically from past civil rights enforcement efforts. For example, it no longer enters into consent decrees to ensure title VII compliance. In contrast, between 1972 and 1983, the Department of Justice sued and obtained verdicts under title VII against 106 state and local government employers; of those, 93, or 88% were settled by consent decrees. Schwartzchild, Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 DUKE L.J. 887, 894 nn.41-42.

223. UNITED STATES DEPARTMENT OF JUSTICE, LEGAL ACTIVITIES: 1984-1985 19 ("The Employment Litigation Section . . . does not use preferential selection requirements that confer an undeserved benefit on nonvictims of discrimination . . . "), quoted in Schwartzchild, supra note 222, at 896 n.53.

224. See Schwartzchild, supra note 222, at 896 n.53.
225. This difference in standards required by title VII and by the FCC's EEO programs is best reflected by the analysis of employment data. The United States Court of Appeals for the District of Columbia Circuit has found that in evaluating claims of employment discrimination under title VII, "where specialized skills are legitimately required for employment, the proper comparison is between the composition of the [employer's] workforce and the qualified population." De Medina v. Reinhardt, 686 F.2d 997, 1003 (D.C. Cir. 1982), quoting Davis v.
tice's view that Congress never intended to allow such far-reaching intrusion into the employment marketplace as practiced by the FCC. 226 Clearly, Congress has expressed concern about the possible use of remedial preferences to the detriment of more qualified nonminority citizens. 227 To alleviate congressional concern that reverse discrimination may be fostered by title VII, Congress passed an amendment that prohibited quotas by providing: "Nothing contained in [title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or group on

Califano, 613 F.2d 957, 963 (D.C. Cir. 1979) (as amended Feb. 14, 1980); see also Valentino v. United States Postal Service, 674 F.2d 56, 68 (D.C. Cir. 1982).

However, the same court recently set forth several reasons why the FCC need not limit its analysis of employment data to a comparison between worksite demographics and the number of qualified workers available in an area. National Black Media Coalition v. FCC, 775 F.2d 342, 348 (D.C. Cir. 1985). First, the court found, title VII is antidiscrimination legislation, while the FCC's EEO policy is an affirmative action program. Id. (citing 13 F.C.C.2d at 773-75). Additionally, the FCC has expressly rejected petitions seeking reconsideration of its guidelines to take into account only the "qualified" labor force. Id. (citing 79 F.C.C.2d at 928-32, 60 F.C.C.2d at 232). The court, however, did note that the FCC has ample authority to change its policies to create a different mechanism for evaluating employment statistics. Further, the court noted, that since statistics, according to the Commission, are to be used only to trigger closer review, the FCC is entitled to take the qualified/nonqualified distinction into account in evaluating the "zone of reasonableness." Id. (citing EEO Processing Guidelines, 79 F.C.C.2d at 932).

226. As initially introduced in the House, the Civil Rights Act of 1964 included no compulsory provision directed at private employment discrimination. Later, it was amended to include title VII, which aimed to eliminate "discrimination in employment based on race, color, religion, or national origin." H.R. REP. No. 914, 88th Cong., 1st Sess. 26, reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401.

227. Opponents of title VII noted in a minority report that the word "discrimination"—strangely—was absent from the bill and expressed fear that, if the measure passed, an employer "may be forced to hire according to race, to 'racially balance' those who work for him in every job classification or be in violation of Federal law." H.R. REP. No. 914, supra note 226, at 69, reprinted in 1964 U.S. CODE CONG. & AD. NEWS at 2438 (emphasis in original). After passage by the House, the measure invoked protracted Senate debate. Opposition centered on fears the House bill would impose a federally administered system of racial quotas. See, e.g., 110 CONG. REC. 7776 (1968) ("Ultimately, I think the effect of the bill would be to compel an employer in a given community to hire a given percentage of every nationality or ethnic background in the community.") (remarks of Sen. Tower). To allay those fears, the bill's floor managers submitted an interpretative memorandum declaring that deliberate attempts by employers to maintain racial balance would violate title VII. That memorandum stated in part:

There is no requirement in title VII that an employer maintain a racial balance in his workforce. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.

account of "a racial imbalance in the employer's work force. Thus, while Congress specifically has authorized the use of affirmative action to encourage employers to hire and train minority workers in an effort to remedy past discrimination, it has limited that broad grant by forbidding the use of racial quotas.

The Department of Justice also finds support in Stotts for its objection to hiring and promotion tools utilizing percentages, which it reads to support the Administration's view that title VII prohibits remedial racial quotas and authorizes relief only to actual victims of illegal discrimination. However, since Stotts, several federal courts reviewing affirmative action cases have disagreed. Although the scope of permissible affirmative action remedies remains unclear, the Department of Justice appears to be correct in its assessment that Stotts may preclude affirmative action programs like those mandated by the FCC and enforced through sanctions imposed upon companies failing to reach the parity levels provided for in the existing processing guidelines.

However, the FCC steadfastly has insisted that those guidelines are merely an administrative tool, not a quota system. In the past, it has defended the constitutionality of the guidelines and now asserts that the validity of the cable EEO rules rests on the same firm foundation. The validity of the guidelines, FCC attorneys assert, is supported by the fact that they have been applied with the knowledge and tacit consent of federal courts.


229. See Deveraux v. Geary, 765 F.2d 268, 271-75 (1st Cir. 1985). In that case, a federal district court took exception to the Justice Department's sweeping interpretation of Stotts in a case brought by white police officers challenging the continuing validity of a consent decree entered in a case alleging employment discrimination on the basis of race. In dismissing the case, the court found that title VII law was not so substantially changed by Stotts as to invalidate an existing consent decree which was designed to remedy alleged discriminatory practices by establishing an annual minority hiring objective. See also EEOC v. Local 638, 753 F.2d 1172, 1185-86 (2d Cir. 1985); Kromnick v. School Dist., 739 F.2d 894, 909-12 (3d Cir. 1984); Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1158 (6th Cir. 1984), cert. granted, 105 S. Ct. 2015 (1985).

230. The Supreme Court is expected to clarify its position on affirmative action when it decides Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (1984), cert. granted, 105 S. Ct. 2015 (1985). The Court granted certiorari in order to examine whether the Constitution allows use of racial preferences in teacher layoffs conducted by a public employer. Arguments Before the Court: Schools and Colleges, 54 U.S.L.W. 3339 (Nov. 19, 1985). In Wygant, there were no findings of past discrimination and the preferences layoff formula stated that at no time would a greater percentage of minority personnel be laid off than the percentage of minority employees at the time the collective bargaining agreement was struck between the teachers association and the school board. 746 F.2d at 1154.

since 1972.232

The Commission reads Bakke to provide express authority for affirmative action programs.233 In a 1978 analysis of the significance of that decision, the General Counsel for the FCC noted the language in NAACP v. Federal Power Commission suggesting that the Commission’s broad EEO rules were permissible under the Communications Act.234 The FCC’s analysis also stressed an important difference between the Davis admissions program and the FCC’s EEO rules: unlike the quota used in Bakke, the Commission’s rules do not require any licensee to establish fixed hiring quotas for minorities. Instead, the General Counsel asserted, the statistical analysis employed by the FCC is merely “an administrative tool to identify licensees whose EEO programs may be deficient.”235

The FCC’s position is that the guidelines, as applied to broadcasters, provide a narrowly tailored solution to the well-known problem of discrimination in the broadcasting industry.236 The FCC’s guidelines do not automatically result in awarding employment to any candidate who is not otherwise qualified. They simply suggest that the licensee should consider race as a factor in arriving at employment decisions. Moreover, the guidelines do not ask that the licensee replicate the percentage of minority availability in the workforce, only that he aim to achieve one-half of that level.

However, the additional data required by the cable EEO rules dramatically increases the pressure on employers to base hiring and promotion decisions primarily on race because they call for a far more detailed categorization of hiring and promotion decisions by race and ethnicity.237 In addition to the paperwork burden the regulations impose, they also increase the risk that employers will base hiring and promotion decisions solely on race in an effort to please federal inspectors.

Under the three-part test that appears to have emerged from the Supreme Court’s most recent affirmative action cases,238 an analysis of the validity of the FCC’s employment regulations must begin by determining whether there have been adequate congressional or administrative findings of industry discrimination. The FCC has contended that agency involvement in the monitoring of employment practices stemmed from administrative findings that

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233. 44 Rad. Reg. 2d (P & F) 907 (1978) (opinion of the FCC General Counsel that Bakke casts no doubt on the validity of the Commission’s equal opportunity policies and rules).
234. See supra notes 62-64 and accompanying text.
235. 44 Rad. Reg. 2d (P & F) at 909.
236. See supra notes 16-23, 29-30 and accompanying text.
237. See supra note 113 and accompanying text.
238. See supra text accompanying notes 218-20.
the broadcast media had ignored certain minorities. Therefore, the FCC contends there are no significant constitutional problems with its use of statistical analysis to compare labor force availability with the composition of a broadcaster’s or cable operator’s work force.

Despite the FCC’s assertion to the contrary, however, there have been no FCC or congressional findings of illegal, industry-wide employment discrimination in either the broadcast or cable industries—an obstacle that proved fatal to the Commission’s female preference system in Steele. The 1968 Notice of Proposed Rulemaking, which the FCC General Counsel claims provided the needed findings, addressed only unmet programming and education needs, and then only indirectly by quoting the Kerner Report. Although the Jackson, Mississippi case provided an ample record for finding a pattern of discrimination, it must be recalled that the Commission held that licensee was acting in the public interest.

Even those scant administrative findings, however, are absent to justify FCC involvement in the cable employment practices. The FCC based its 1972 decision to extend affirmative action requirements to cable companies not on findings of discrimination but instead on the view that cable systems operate much like broadcasters and should be subject to the same employment rules. Further, the legislative history of the Cable Act does not include findings of employment discrimination in the cable industry. Bakke makes clear that evidence of past discrimination in society at large is insufficient to justify the imposition of an affirmative action program.

Statistics suggest that the FCC’s equal employment efforts have lessened the problems of underrepresentation and underutilization of women and mi-

239. 44 Rad. Reg. 2d (P & F) at 909.
241. See supra notes 140-42 and accompanying text.
242. See supra note 29-30 and accompanying text.
243. See supra note 27 and accompanying text.
244. 34 F.C.C.2d at 190-91.
orities in the broadcast industry.\textsuperscript{246} Similarly, EEO monitoring may have encouraged employment of minorities and women in the cable industry.\textsuperscript{247} However, there is ample evidence to suggest Form 395 has encouraged employers to reclassify jobs, placing almost eighty percent of all broadcast workers in the upper four categories, to achieve higher rankings, but has done little to change the racial composition of the broadcast industry labor force.\textsuperscript{248} Deceptive classification of this sort will be worsened by cable EEO rules requiring submission of detailed, categorical information on personnel decisions.

Under the second prong of the Supreme Court's test for valid affirmative action programs, it must be determined whether the FCC program is narrowly tailored to remedy the effects of past discrimination without excluding innocent groups or depriving individuals of vested rights. The FCC regulations reflect an effort to meet this standard although they arguably go beyond the scope of the Act by suggesting that the "relevant labor pool" is the SMSA.\textsuperscript{249} Although the Act specifically states that the licensee is to "evaluate its employment profile and job turnover against the availability of minorities and women in its franchise area,"\textsuperscript{250} the Report and Order states that a cable entity's employment data will be gauged against the availability of women and minorities in the SMSA, unless the company can show that would be inappropriate.\textsuperscript{251}

While the SMSA generally provides a convenient estimate of a broadcast station's service area in many instances, it bears little resemblance to a cable entity's franchise area. Additionally, the programming nexus that provides the underpinning for FCC employment regulation cuts differently in cable employment regulation, suggesting that local workers would be more in tune with viewer programming needs than commuting workers. Also, cable systems are common in rural areas needing a wired system to provide reception and in areas where turnover rates may be low and recruitment of highly qualified women and minorities difficult.\textsuperscript{252} Comments filed by the National Cable Television Association (NCTA) also provide good examples of the


\textsuperscript{249} 50 Fed. Reg. at 40,843; see also supra notes 86, 118 and accompanying text.

\textsuperscript{250} Cable Act, § 634(d)(2), 47 U.S.C.A. § 554(c) (West Supp. 1985).

\textsuperscript{251} See supra notes 114-18 and accompanying text.

\textsuperscript{252} See 10 Cablevision 62 (Sept. 24, 1984) (most cable entities are located in small municipalities or rural areas).
problems inherent in using SMSA data to assess EEO compliance.\textsuperscript{253} NCTA cites as an example a cable operator that serves four unincorporated communities in Northern Los Angeles County. The franchise area is located within the Los Angeles-Long Beach, California SMSA, but is located two commuting hours from Los Angeles, where minority concentration is high. No public transportation runs between the city and the unincorporated areas. The NCTA noted that, according to the 1980 census data, 42.4\% of those living within the SMSA were minority members while only 8.8\% of the labor force in Northern Los Angeles County were minority members.\textsuperscript{254} It also noted the vast geographic areas many SMSAs encompass, including the Minneapolis-St. Paul SMSA, which spans 4,609 square miles and the Atlanta SMSA, which covers 4,342 square miles.\textsuperscript{255} The Report and Order is a significant improvement over the notice proposal, however, because it allows headquarters units of cable entities to distinguish between the "relevant labor area" for entry level positions, for which there may be an adequate number of local qualified applicants, and highly technical positions for which firms could be expected to recruit nationally.

The third prong of the Supreme Court's affirmative action analysis requires that valid programs be subject to continuing reassessment to assure that they will cause the least possible harm to innocent third parties in the short run and will not continue in duration beyond the point needed to redress the effects of past discrimination. In this regard, the FCC fails to meet the standard because its program is neither temporary nor does it assure that EEO monitoring will do the least possible harm to innocent persons disadvantaged by it. Instead, the agency has responded to the success of broadcasters in encouraging minority employment by raising the level of employment of women and minorities that is expected. It then has applied that heightened standard to the cable industry. Both the broadcast and cable EEO regulations are different from affirmative action programs upheld by federal courts in the past in that they do not provide for oversight and they are of unlimited duration. The program challenged in \textit{Fullilove} was of limited duration. Therefore, there was no need for continuing oversight.\textsuperscript{256} Similarly, in \textit{United Steel Workers of America v. Weber},\textsuperscript{257} the Court upheld an affirmative action plan after taking judicial notice of discrimination

\begin{itemize}
\item \textsuperscript{253} See Comments of the National Cable Television Ass'n, FCC Docket 85-61 (filed June 19, 1985).
\item \textsuperscript{254} Id. at 19.
\item \textsuperscript{255} Id. at 19 n.37 (citing BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, 1980 CENSUS).
\item \textsuperscript{256} See supra note 182 and accompanying text.
\item \textsuperscript{257} 443 U.S. 193 (1979).
\end{itemize}
against blacks in labor crafts, noting that "[t]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection . . . will end as soon as the percentage of black skilled craft workers . . . approximates the percentage of blacks in the local labor force."258 In the absence of an oversight mechanism to limit duration of the EEO program, the cable regulations fail the third prong of the Court's affirmative action test.

In addition to the failure of the cable employment regulations to meet the requirements of a valid affirmative action program, it is unclear what real impact they will have on the industry. As James C. McKinney, chief of the FCC's Mass Media Bureau, has said, the result that a refusal to certify would have on a cable entity remains uncertain.259 "There is an expectation that failure to receive certification will have an impact outside of the federal arena," he said.260 The Commission assumes that knowledge of noncompliance will be considered carefully by local franchising authorities, and that noncompliance will have an impact on a cable operator's ability to sell its system. Additionally, sanctions might be available, but would require a notice and hearing procedure. If, following a hearing, a cable operator was found substantially not in compliance with FCC rules, the Commission might put the operator's license at risk and subject the entity to a $200-a-day forfeiture.261 However, McKinney said, there is not a direct connection between failure to receive certification and a federal penalty.262 The tenuous connection between FCC enforcement efforts and direct impact on local entities probably means that those cable entities committed to following the spirit of federal antidiscrimination law will do so out of conviction, not fear.

III. CONCLUSION

The equal employment opportunity regulations implemented by the FCC are beyond the scope of the 1984 Cable Communications Act because they impose a numerical standard on the evaluation of cable company hiring and promotion efforts despite a legislative history that makes clear that this was not the intent of Congress. Moreover, the regulations are not constitutionally sound under the three-part test that emerges from Bakke, Fullilove, and Stotts. First, the regulations are flawed because they are not supported by

258. Id. at 198 n.1, 208-09.
260. Id.
262. See McKinney, supra note 259.
congressional or administrative findings of wide-spread discrimination problems within the cable industry. Second, the FCC's EEO program is not narrowly tailored to remedy the effects of past discrimination without excluding innocent groups or depriving individuals of vested rights. The regulations can be expected to result in reporting distortions by encouraging the same sort of reclassifications of lower level workers that occur in the broadcast industry—clerical workers will be given inflated titles to satisfy federal inspectors without corresponding increases in pay or responsibilities. It is less clear whether the enforcement efforts of the Commission will force rural and suburban cable systems to gauge parity levels by considering large minority populations in the nearest central city. Ironically, marginally employed white workers—those eligible for lower paying jobs that would be filled by residents living near a station absent government interference—probably will bear the brunt of the FCC's statistical inquiry. Lastly, the regulations are flawed because they are not subject to continuing reassessment to assure that they cause the least possible harm to innocent third parties and to continue beyond the time needed to redress the effects of past discrimination.

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