

the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. (1983); Broadcast Regulation and Station Ownership: Hearings on H. R. 6122 and H. R. 6134 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 2nd Sess. (1984). No legislation was passed. **[**55]**

n24 See Notice of Inquiry on Racial Ethnic or Gender Classifications, 1 F. C. C. Rcd 1315, 1319 (1986), as amended, 2 F. C. C. Rcd 2377 (1987).

n25 These bills recognized the link between minority ownership and diversity. In introducing S. 1095, for example, Senator Lautenberg explained that "[d]iversity of ownership does promote diversity of views. Minority . . . broadcasters serve a need that is not as well served as others. They address issues that others do not." 133 Cong. Rec. 9745 (1987); see also id., at 860 (H. R. 293); id., at 3300 (H. R. 1090); id., at 13742-13745 (S. 1277).

n26 See Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings on H. R. 2763 before a Subcommittee of the Senate Committee on Appropriations, 100th Cong., 1st Sess. (1987).

n27 See FCC Authorization: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 100th Cong., 1st Sess., 55 (1987); FCC and NTIA Authorizations: Hearings on H. R. 2472 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 130-131, 211-212 (1987). **[**56]**

n28 See Broadcasting Improvements Act of 1987: Hearings on S. 1277 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 100th Cong., 1st Sess., 51 (1987).

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[*578] Ultimately, Congress chose to employ its appropriations power to keep the FCC's minority ownership policies in place for fiscal year 1988. n29 See supra, at 560. The Report of the originating Committee on Appropriations explained: "The Congress has expressed its support for such policies **[***472]** in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences." S. Rep. No. 100-182, p. 76 (1987). The Committee recognized the continuity of congressional action in the field of minority ownership policies, noting that "[i]n approving a lottery system for the selection of certain broadcast licensees, Congress explicitly approved the use of preferences to promote minority and women ownership." Id., **[**57]** at 76-77.

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n29 Congress did not simply direct a "kind of mental standstill," Winter Park, 277 U.S. App. D. C., at 151, 873 F. 2d, at 364 (Williams, J., concurring in part dissenting in part), but rather in the appropriations legislation

expressed its unqualified support for the minority ownership policies and instructed the Commission in no uncertain terms that in Congress' view there was no need to study the topic further. Appropriations Acts, like any other laws, are binding because they are "passe[d] [by] both Houses and . . . signed by the President." *United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990); *id.*, at 401 (STEVENS, J., concurring in judgment). See also *United States v. Will*, 449 U.S. 200, 222 (1980); *United States v. Dickerson*, 310 U.S. 554, 555 (1940).

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Congress has twice extended the prohibition on the use of appropriated **[**58]** funds to modify or repeal minority ownership policies ⁿ³⁰ and has continued to focus upon the issue. For example, in the debate on the fiscal year 1989 legislation, Senator Hollings, chair of both the authorizing committee and the appropriations subcommittee for the FCC, presented to the Senate a summary of a June 1988 report prepared by the Congressional Research Service (CRS), entitled, **Minority ^[*579] Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?** The study, Senator Hollings reported, "clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." 134 Cong. Rec. 18982 (1988).

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ⁿ³⁰ See Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. 100-459, 102 Stat. 2216; Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, 103 Stat. 1020.

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As revealed by the historical evolution of current **[**59]** federal policy, both Congress and the Commission have concluded that the minority ownership programs are critical means of promoting broadcast diversity. We must give great weight to their joint determination.

C

The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority -oriented programming or to the expression of a discrete " minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled " minority programming" or that programming that might be described as " minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and

ethnically homogeneous group. The predictive judgment about the overall result [**60] of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice □ Powell's conclusion in *Bakke* that greater admission of minorities would

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contribute, on average, "to the 'robust exchange of ideas.'" 438 U.S., at 313. To be [***473] sure, there is no ironclad guarantee that each minority owner will contribute to diversity. But neither was there an [*580] assurance in *Bakke* that minority students would interact with nonminority students or that the particular minority students admitted would have typical or distinct "minority" viewpoints. See *id.*, at 312 (opinion of Powell, J.) (noting only that educational excellence is "widely believed to be promoted by a diverse student body") (emphasis added); *id.*, at 313, n. 48 ("In the nature of things, it is hard to know how, and when, and even if, this informal "learning through diversity" actually occurs") (citation omitted).

Although all station owners are guided to some extent by market demand in their programming decisions, Congress and the Commission have [**61] determined that there may be important differences between the broadcasting practices of minority owners and those of their nonminority counterparts. This judgment -- and the conclusion that there is a nexus between minority ownership and broadcasting diversity -- is corroborated by a host of empirical evidence. n31 Evidence [*581] suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities. "[M]inority ownership does appear to have specific impact on the presentation of minority images in local news," n32 inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities. n33 [***474] In addition, studies show that a minority owner is more

likely to employ minorities in managerial and other important roles [*582] where they can have an impact on station policies. n34 If the FCC's equal employment policies "ensure that . . . licensees' programming fairly reflects the tastes and viewpoints of minority groups," *NAACP v. FCC*, 425 U.S., at 670, n. 7, [**62] it is difficult to deny that minority-owned stations that follow such employment policies on their own will also contribute to diversity. While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves. The policies are thus a product of "analysis" rather than [*583] a "stereotyped reaction" based on "[h]abit." *Fullilove*, 448 U.S., at 534, n. 4 (STEVENS, J., dissenting) (citation omitted).

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n31 For example, the CRS analyzed data from some 8,720 FCC-licensed radio and television stations and found a strong correlation between minority ownership and diversity of programming. See CRS, *Minority Broadcast Station Ownership*

and Broadcast Programming: Is There a Nexus? (June 29, 1988). While only 20 percent of stations with no Afro-American ownership responded that they attempted to direct programming at Afro-American audiences, 65 percent of stations with Afro-American ownership reported that they did so. See *id.*, at 13. Only 10 percent of stations without Hispanic ownership stated that they targeted programming at Hispanic audiences, while 59 percent of stations with Hispanic owners said they did. See *id.*, at 13, 15. The CRS concluded: "[A]n argument can be made that FCC policies that enhanced minority . . . station ownership may have resulted in more minority and other audience targeted programming. To the degree that increasing minority programming

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across audience markets is considered adding to programming diversity, then, based on the FCC survey data, an argument can be made that the FCC preference policies contributed, in turn, to programming diversity." *Id.*, at cover page.

Other surveys support the FCC's determination that there is a nexus between ownership and programming. A University of Wisconsin study found that Afro-American-owned, Afro-American-oriented radio stations have more diverse playlists than white-owned, Afro-American-oriented stations. See J. Jeter, *A Comparative Analysis of the Programming Practices of Black-Owned Black-Oriented Radio Stations and White-Owned Black-Oriented Radio Stations* 130, 139 (1981) (University of Wisconsin-Madison). See also M. Spitzer, *Justifying Minority Preferences in Broadcasting*, California Institute of Technology Working Paper No. 718, pp. 19-29 (March 1990) (explaining why minority status of owner might affect programming behavior). [**63]

n32 Fife, *The Impact of Minority Ownership on Minority Images in Local TV News*, in *Communications: A Key to Economic and Political Change. Selected Proceedings from the 15th Annual Howard University Communications Conference* 113 (1986) (survey of four Standard Metropolitan Statistical Areas); see also M. Fife, *The Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study* 52 (June 1986) (report submitted to National Association of Broadcasters).

n33 For example, a University of Massachusetts at Boston survey of 3,000 local Boston news stories found a statistically significant difference in the treatment of events, depending on the race of ownership. See K. Johnson, *Media Images of Boston's Black Community* 16-29 (Jan. 28, 1987) (William Monroe Trotter Institute). A comparison between an Afro-American-owned television station and a white-owned station in Detroit concluded that "the overall mix of topic and location coverage between the two stations is statistically different, and with its higher use of blacks in newsmaker roles and its higher coverage of issues of racial significance, [the Afro-American-owned station's] content does represent a different perspective on news than [that of the white-owned station]." M. Fife, *The Impact of Minority Ownership On Broadcast Program Content: A Case Study of WGPR-TV's Local News Content*, Report to the National Association of Broadcasters, Office of Research and Planning 45 (Sept. 1979). See also R. Wolseley, *The Black Press*, U.S.A. 3-4, 11 (2d ed. 1990) (documenting importance of minority ownership). [**64]

n34 Afro-American-owned radio stations, for example, have hired Afro-Americans in top management and other important job categories at far higher rates than have white-owned stations, even those with Afro-American-oriented formats. The same has been true of Hispanic hiring at Hispanic-owned stations, compared to Anglo-owned stations with Spanish-language formats. See Honig, Relationships Among EEO, Program Service, and Minority Ownership in Broadcast Regulation, in Proceedings from the Tenth Annual Telecommunications Policy Research Conference 88-89 (O. Gandy, P. Espinoza, & J. Ordover eds. 1983). As of September 1986, half of the 14 Afro-American or Hispanic general managers at TV stations in the United States worked at minority-owned or controlled stations. See National Association of Broadcasters, Minority Broadcasting Facts 9-10, 55-57 (Sept. 1986). In 1981, 13 of the 15 Spanish-language radio stations in the United States owned by Hispanics also had a majority of Hispanics in management positions, while only a third of Anglo-owned Spanish-language stations had a majority of Hispanic

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managers, and 42 percent of the Anglo-owned Spanish-language stations had no Hispanic managers at all. See Schement & Singleton, The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio, 31 J. Communication 78, 80-81 (1981). See generally Johnson, supra, at 5 ("Many observers agree that the single largest reason for the networks' poor coverage of racial news is related to the racial makeup of the networks' own staffs"); Wimmer, supra n. 2, at 426-427 ("[M]inority-owned broadcast outlets tend to hire more minority employees. . . . A policy of minority ownership could, over time, lead to a growth in minority employment, which has been shown to produce minority-responsive programming") (footnotes omitted).

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Our cases demonstrate that the reasoning employed by the Commission and Congress is permissible. We have recognized, for example, that the fair-cross-section requirement of the Sixth Amendment forbids the exclusion of groups on the basis of [***475] such characteristics as race and gender from a jury venire because "[w]ithout that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition." *Holland v. Illinois*, 493 U.S. 474, 480-481 (1990). It is a small step from this logic to the conclusion that including minorities in the electromagnetic spectrum will be more likely to produce a "fair cross section" of diverse content. Cf. *Duren v. Missouri*, 439 U.S. 357, 358-359, 363-364 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 531-533 (1975). n35 In addition, many of our voting rights cases operate on the assumption that minorities have particular viewpoints and interests worthy of protection. We [**66] have held, for example, that in safeguarding the "effective exercise of the electoral franchise" by racial minorities, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 159 (1977) (plurality opinion), quoting *Beer v. United States*, 425 U.S. 130, 141 (1976), "[t]he permissible use of racial criteria is not confined to eliminating [*584] the effects of past discriminatory districting or

apportionment." 430 U.S., at 161. Rather, a State subject to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, may "deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5"; "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment." 430 U.S., at 161.

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n35 See also *Peters v. Kiff*, 407 U.S. 493, 503-504 (1972) (opinion of MARSHALL, J.) ("[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented").

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We find that the minority ownership policies are in other relevant respects substantially related to the goal of promoting broadcast diversity. First, the Commission adopted and Congress endorsed minority ownership preferences only after long study and painstaking consideration of all available alternatives. See *Fullilove*, 448 U.S., at 463-467 (opinion of Burger, C. J.); *id.*, at 511 (Powell, J., concurring). For many years, the FCC attempted to encourage diversity of programming content without consideration of the race of station owners. n36 When it [**476] first addressed the issue, in a 1946 [**585] report entitled *Public Service Responsibility of Broadcast Licensees* (Blue Book), the Commission stated that although licensees bore primary responsibility for program service, "[i]n issuing and in renewing the licenses of broadcast stations, the Commission [would] give particular consideration to four program service factors relevant to the public interest." *Id.*, at 55. n37 In 1960, the Commission altered course somewhat, announcing that "the principal ingredient of the licensee's obligation to operate his [**68] station in the public interest is the diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service." *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7295 (1960). Licensees were advised that they could meet this obligation in two ways: by canvassing members of the listening public who could receive the station's signal, and by meeting with "leaders in community life . . . and others who bespeak the interests which make up the community." *Id.*, at 7296.

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n36 The Commission has eschewed direct federal control over discrete programming decisions by radio and television stations. See, e. g., Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960) ("[W]hile the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear"). In order to ensure diversity by means of administrative decree, the Commission would have been required to familiarize itself with the needs of every community and to monitor the broadcast content of every station. Such a scheme likely would have presented insurmountable practical difficulties, in light of the thousands of broadcast outlets in the United States and the myriad local variations in audience tastes and interests. Even were such an ambitious policy of central planning feasible, it would have raised "serious First Amendment issues" if it denied a broadcaster the ability to "carry a particular program or to publish his own views," if it risked "government censorship of a particular program," or if it led to "the official government view dominating public broadcasting." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969); cf. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). The Commission, with the approval of this Court, has therefore "avoid[ed] unnecessary restrictions on licensee discretion" and has interpreted the Communications Act of 1934 as "seek[ing] to preserve journalistic discretion while promoting the interests of the listening public." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). [**69]

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n37 One factor was the extent to which a station carried programs unsponsored by commercial advertisers during hours "when the public is awake and listening." Blue Book 55-56. The Commission believed that this would expand diversity by permitting the broadcast of less popular programs that would appeal to particular tastes and interests in the listening audience that might otherwise go unserved. See *id.*, at 12. Second, the Commission called for local live programs to encourage local self-expression. See *id.*, at 56. Third, the Commission expected "program[ming] devoted to the discussion of public issues." *Ibid.* The final factor was the amount of advertising aired by the licensee. *Ibid.*

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By the late 1960's, it had become obvious that these efforts had failed to produce sufficient diversity in programming. The Kerner Commission, for example, warned that the various [*586] elements of the media "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 [**70] have not communicated -- a sense of Negro culture, thought, or history. . . . The world that television and newspapers offer to their black audience is almost totally white . . ." Report of the National Advisory Commission on Civil Disorders 210 (1968). In response, the Commission promulgated equal employment opportunity [***477] regulations, see *supra*, at 554-555, and formal "ascertainment" rules requiring a broadcaster as a condition

of license "to ascertain the problems, needs and interests of the residents of his community of license and other areas he undertakes to serve," and to specify "what broadcast matter he proposes to meet those problems, needs and interests." Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F. C. C. 2d 650, 682 (1971). n38 The Commission explained that although it recognized there was "no single answer for all stations," it expected each licensee to devote a "significant proportion" of a station's programming to community concerns. *Id.*, at 686 (citation omitted). n39 The Commission [*587] expressly included "minority and ethnic groups" as segments of the [*71] community that licensees were expected to consult. See, e. g., *Ascertainment of Community Problems by Broadcast Applicants*, 57 F. C. C. 2d 418, 419, 442 (1976); *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, 54 F. C. C. 2d 766, 767, 775, 776 (1975). The FCC held that a broadcaster's failure to ascertain and serve the needs of sizable minority groups in its service area was, in itself, a failure of licensee responsibility regardless of any intent to discriminate and was a sufficient ground for the nonrenewal of a license. See, e. g., *Chapman Radio and Television Co.*, 24 F. C. C. 2d 282, 286 (1970). The Commission observed that "[t]he problems of minorities must be taken into consideration by broadcasters in planning their program schedules to meet the needs and interests of the communities they are licensed to serve." *Time-Life Broadcast, Inc.*, 33 F. C. C. 2d 1081, 1093 (1972); see also *Mahoning Valley Broadcasting Corp.*, 39 F. C. C. 2d 52, 58 (1972); *WKBN Broadcasting Corp.*, 30 F. C. C. 2d 958, 970 (1971). [*72] Pursuant to this policy, for example, the Commission refused to renew licenses for eight educational stations in Alabama and denied an application for a construction permit for a ninth, all on the ground that the licensee "did not take the trouble to inform itself of the needs and interests of a minority group consisting of 30 percent of the population of the State of Alabama" and that such a failure was "fundamentally irreconcilable with the obligations which the Communications Act places upon those who receive authorizations to use the

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airwaves." *Alabama Educational Television Comm'n*, 50 F. C. C. 2d 461, [***478] 472, 473 (1975), citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The Commission's ascertainment policy was not static; in order to facilitate application of the ascertainment requirement, the Commission devised a community leader checklist consisting [*588] of 19 groups and institutions commonly found in local communities, see 57 F. C. C. 2d, at 418-419, and it continued to consider improvements to the ascertainment system. See, e. g., *Amendment of Primers on* [*73] *Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees*, 47 Radio Reg. 2d (P&F) 189 (1980).

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n38 The Commission also devised policies to guard against discrimination in programming. For example, it determined that "arbitrar[y] refus[al] to present members of an ethnic group, or their views" in programming, or refusal to present members of such groups "in integrated situations with members of other groups," would constitute a ground for license nonrenewal. *Citizens Communications Center*, 25 F. C. C. 2d 705, 707 (1970).

n39 In addition, the Commission developed nonentertainment guidelines, which called for broadcasters to devote a certain percentage of their programming to nonentertainment subjects such as news, public affairs, public service announcements, and other topics. See WNCN Listeners Guild, supra, at 598-599, n. 41; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F. C. C. 2d 1076, 1078 (1984) (hereinafter Deregulation of Television); Deregulation of Radio, 84 F. C. C. 2d 968, 975 (1981). Applicants proposing less than the guideline amounts of nonentertainment programming could not have their applications routinely processed by the Commission staff; rather, such applications were brought to the attention of the Commission itself.

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By 1978, however, the Commission had determined that even these efforts at influencing broadcast content were not effective means of generating adequate programming diversity. The FCC noted that "[w]hile the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." Minority Ownership Statement, 68 F. C. C. 2d, at 980 (footnotes omitted). As support, the Commission cited a report by the United States Commission on Civil Rights, which found that minorities "are underrepresented on network dramatic television programs and on the network news. When they do appear they are frequently seen in token or stereotyped roles." Window Dressing on the Set 3 (Aug. 1977). The Commission concluded that "despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that [**75] ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming." 68 F. C. C. 2d, at 981; see also Commission Policy Regarding Advancement of Minority Ownership in Broadcasting, 92 F. C. C. 2d 849, 850 (1982) ("[I]t became apparent that in order to broaden minority voices and spheres of influence over the airwaves, additional [**589] measures were necessary" beyond the equal employment and ascertainment rules).
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C. 2d 849, 850 (1982) ("[I]t became apparent that in order to broaden minority voices and spheres of influence over the airwaves, additional [**589] measures were necessary" beyond the equal employment and ascertainment rules).
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n40 The Commission recently eliminated its ascertainment policies for commercial radio and television stations, together with its nonentertainment programming guidelines. See Deregulation of Radio, supra, at 975-999, reconsideration denied, 87 F. C. C. 2d 797 (1981), rev'd on other grounds sub nom. Office of Communication of the United Church of Christ v. FCC, 228 U.S. App. D. C. 8, 707 F. 2d 1413 (1983); Deregulation of Television, supra, at 1096-1101, reconsideration denied, 104 F. C. C. 2d 358 (1986), remanded on other grounds sub nom. Action for Children's Television v. FCC, 261 U.S. App. D. C. 253, 821 F. 2d 741 (1987). The Commission found that the ascertainment rules

imposed significant burdens on licensees without producing corresponding benefits in terms of responsiveness to community issues. See 98 F. C. C. 2d, at 1098 ("Ascertainment procedures . . . were intended as a means of ensuring that licensees actively discovered the problems, needs and issues facing their communities Yet, we have no evidence that these procedures have had such an effect") (footnote omitted).

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In short, the Commission established minority ownership preferences only after long experience demonstrated that race-neutral means could not produce adequate [***479] broadcasting diversity. n41 The FCC did not act precipitately in devising the programs we uphold today; to the contrary, the Commission undertook thorough evaluations of its policies three times -- in 1960, 1971, and 1978 -- before adopting the minority ownership programs. n42 In endorsing the [***480] minority ownership [*590] preferences, Congress agreed with the Commission's assessment that race-neutral alternatives had failed to achieve the necessary programming diversity. n43

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n41 Although the Commission has concluded that "the growth of traditional broadcast facilities" and "the development of new electronic information technologies" have rendered "the fairness doctrine unnecessary," Report Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F. C. C. 2d 143, 197 (1985), the Commission has not made such a finding with respect to its minority ownership policies. To the contrary, the Commission has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its "regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 F. C. C. Rcd 2035, 2041, n. 56 (1988). [**77]

n42 JUSTICE O'CONNOR offers few race-neutral alternatives to the policies that the FCC has already employed and found wanting. She insists that "[t]he FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity." Post, at 622. But the Commission's efforts to use the ascertainment policy to determine the

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programming needs of each community and the comparative licensing procedure to provide licensees incentives to address their programming to these needs met with failure. A system of FCC-mandated "diverse" programming would have suffered the same fate, while introducing new problems as well. See n. 36, supra.

JUSTICE O'CONNOR's proposal that "[t]he FCC . . . evaluate applicants upon their ability to provide, and commitment to offer, whatever programming the FCC believes would reflect underrepresented viewpoints." post, at 623, similarly ignores the practical difficulties in determining the "underrepresented viewpoints" of each community. In addition, JUSTICE O'CONNOR's proposal is in

tension with her own view of equal protection. On the one hand, she criticizes the Commission for failing to develop specific definitions of "minority viewpoints" so that it might implement her suggestion. *Ibid.*; see also post, at 629 (noting that the FCC has declined to identify "any particular deficiency in the viewpoints contained in the broadcast spectrum") (emphasis added). On the other hand, she implies that any such effort would violate equal protection principles, which she interprets as prohibiting the FCC from "identifying what constitutes a 'Black viewpoint,' an 'Asian viewpoint,' an 'Arab viewpoint,' and so on [and] determining which viewpoints are underrepresented." Post, at 615. In this light, JUSTICE O'CONNOR should perceive as a virtue rather than a vice the FCC's decision to enhance broadcast diversity by means of the minority ownership policies rather than by defining a specific "Black" or "Asian" viewpoint.

JUSTICE O'CONNOR maintains that the FCC should have experimented with "[r]ace-neutral financial and informational measures," post, at 623, in order to promote minority ownership. This suggestion is so vague that it is difficult to evaluate. In any case, both Congress, see *supra*, at 574 (describing minority financing fund that would have accompanied lottery system), and the Commission considered steps to address directly financial and informational barriers to minority ownership. After the Minority Ownership Task Force identified the requirement that licensees demonstrate the availability of sufficient funds to construct and operate a station for one year, see *Ultravision Broadcasting Co.*, 1 F. C. C. 2d 544, 547 (1965), as an obstacle to minority ownership, see Task Force Report 11-12, that requirement was subsequently reduced to three months. See *Financial Qualifications Standards*, 72 F. C. C. 2d 784 (1979) (television applicants); *Financial Qualifications for Aural Applicants*, 69 F. C. C. 2d 407, 407-408 (1978) (radio applicants). In addition, the Commission noted that minority broadcasters are eligible for assistance from the Small Business Administration and other federal agencies. See Task Force Report 17-22. The Commission also disseminated information about potential minority buyers of broadcast properties. See, e. g., FCC EEO- Minority Enterprise Division, *Minority Ownership of Broadcast Facilities: A Report* 8-9 (Dec. 1979). Despite these race-neutral initiatives, the Commission concluded in 1982 that the "'dearth of minority ownership' in the telecommunications industry" remained a matter of "serious concern." *Commission Policy Regarding Advancement of Minority Ownership in Broadcasting*, 92 F. C. C. 2d 849, 852 (1982).

The Commission has continued to employ race-neutral means of promoting broadcast diversity. For example, it has worked to expand the number of broadcast outlets within workable technological limits, see, e. g., *Implementation of BC Docket No. 80-90 To Increase Availability of FM Broadcast*

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Assignments, 100 F. C. C. 2d 1332 (1985), to develop strict cross-ownership rules, see n. 16, *supra*, and to encourage issue-oriented programming by recognizing a licensee's obligation to present programming responsive to issues facing the community of license. See, e. g., *Deregulation of Television*, 104 F. C. C. 2d, at 359; *Deregulation of Radio*, 84 F. C. C. 2d, at 982-983. The Commission has nonetheless concluded that these efforts cannot substitute for

its minority ownership policies. See, e. g., *id.*, at 977. [**78]□

n43 Congress followed closely the Commission's efforts to increase programming diversity, see *supra*, at 572-579, including the development of the ascertainment policy. See, e. g., S. Rep. No. 93-1190, pp. 6-7 (1974); Broadcast License Renewal Act: Hearings on S. 16 et al. before the Subcommittee on Communications of the Senate Committee on Commerce, 93d Cong., 2d Sess., pt. 1, p. 63 (1974) (testimony of Sen. Scott); *id.*, at 65 (testimony of Rep. Brown). Congress heard testimony from the chief of the Commission's Mass Media Bureau that the ascertainment rules were "seriously flawed" because they "became highly ritualistic and created unproductive unseemly squabbling over administrative trivia." Broadcast Regulation and Station Ownership: Hearings on H. R. 6122 and H. R. 6134 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 2d Sess., 165 (1984). Other witnesses testified that the minority ownership policies were adopted "only after specific findings by the Commission that ascertainment policies, and equal opportunity rules fell far short of increasing minority participation in programming and ownership." Minority Ownership of Broadcast Stations: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong., 1st Sess., p. 157 (1989) (testimony of J. Clay Smith, Jr., National Bar Association). In enacting the lottery statute, Congress explained the "current comparative hearing process" had failed to produce adequate programming diversity and that "[t]he policy of encouraging diversity of information sources is best served . . . by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so." H. R. Conf. Rep. No. 97-765, p. 43 (1982). Only in this way would "the American public [gain] access to a wider diversity of information sources." *Id.*, at 45.

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[**79]

[*591] Moreover, the considered nature of the Commission's judgment in selecting the particular minority ownership policies at issue today is illustrated by the fact that the Commission [*592] has rejected other types of minority preferences. For example, the Commission has studied but refused to implement the more expansive alternative of setting aside certain frequencies for minority broadcasters. See *Nighttime Operations on Clear Channels*, 3 F. C. C. Rcd 3597, 3599-3600 (1988); *Deletion of AM Acceptance Criteria*, 102 F. C. C. 2d 548, 555-558 (1985); *Clear Channel Broadcasting*, 78 F. C. C. 2d 1345, reconsideration denied, 83 F. C. C. 2d 216, 218-219 (1980), *aff'd sub nom. Loyola University v. FCC*, 216 U.S. App. D. C. 403, 670 F. 2d 1222 (1982). In addition, in a ruling released the day after it adopted the comparative hearing credit and the distress sale preference, the FCC declined to adopt a plan to require 45-day advance public notice before a station could be sold, which had been advocated on the ground [*80] that it would ensure minorities a chance to bid on stations that might otherwise be sold to industry insiders

without ever coming on the market. See 43 Fed. Reg. 24560 (1978). n44 Soon

afterward, the [***481] Commission rejected [*593] other minority ownership proposals advanced by the Office of Telecommunications Policy and the Department of Commerce that sought to revise the FCC's time brokerage, multiple ownership, and other policies. n45

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n44 The proposal was withdrawn after vociferous opposition from broadcasters, who maintained that a notice requirement "would create a burden on stations by causing a significant delay in the time it presently takes to sell a station" and that it might require the disclosure of confidential financial information. 43 Fed. Reg. 24561 (1978).

n45 See Public Papers of the Presidents, supra n. 4, at 253; Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration, 69 F. C. C. 2d 1591, 1593 (1978). The petition advanced such proposals as a blanket exemption for minorities from certain then-existing Commission policies, such as a rule restricting assignments of stations by owners who had held their stations for less than three years, see 47 CFR @ 1.597 (1978); multiple ownership regulations that precluded an owner from holding more than one broadcast facility in a given service that overlapped with another's signal, see id., @@ 73.35, 73.240, and 73.636; and the "Top 50" policy, which required a showing of compelling public interest before the same owner was allowed to acquire a third VHF or fourth (either VHF or UHF) television station in the 50 largest television markets. The Commission rejected these proposals on the ground that while minorities might qualify for waivers on a case-by-case basis, a blanket exception for minorities "would be inappropriate." 69 F. C. C. 2d, at 1597.

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The minority ownership policies, furthermore, are aimed directly at the barriers that minorities face in entering the broadcasting industry. The Commission's task force identified as key factors hampering the growth of minority ownership a lack of adequate financing, paucity of information regarding license availability, and broadcast inexperience. See Task Force Report 8-29; Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, Final Report, Strategies for Advancing Minority Ownership Opportunities 25-30 (May 1982). The Commission assigned a preference to minority status in the comparative licensing proceeding, reasoning that such an enhancement might help to compensate for a dearth of broadcasting experience. Most license acquisitions, however, are by necessity purchases of existing stations, because only a limited number of new stations are available, and those are often in less desirable markets or on less profitable portions [*594] of spectrum, such as the UHF band. n46 Congress and the FCC therefore found a need for the minority distress sale policy, which helps to overcome the problem of inadequate access to capital by lowering [**82] the sale price and the problem of lack of information by providing existing licensees with an incentive to seek out minority buyers. The Commission's choice of minority ownership policies thus addressed the very factors it had isolated as being responsible for minority underrepresentation in the broadcast industry.

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n46 As of mid-1973, licenses for 66.6 percent of the commercial television stations -- and 91.4 percent of the VHF stations -- that existed in mid-1989 had already been awarded. Sixty-eight and one-half percent of the AM and FM radio station licenses authorized by the FCC as of mid-1989 had already been issued by mid-1973, including 85 percent of the AM stations. See Brief for Capital Cities/ABC, Inc., as Amicus Curiae in No. 89-453, p. 11, n. 19. See also n. 2, supra; Honig, The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 How. L. J. 859, 875, n. 87 (1984) (reporting 1980 statistics that Afro-Americans "tended to own the least desirable AM properties" -- those with the lowest power and highest frequencies, and hence those with the smallest areas of coverage).

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The minority ownership policies [***482] are "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or reenactment." Fullilove, 448 U.S., at 489 (opinion of Burger, C. J.) (footnote omitted). Although it has underscored emphatically its support for the minority ownership policies, Congress has manifested that support through a series of appropriations acts of finite duration, thereby ensuring future reevaluations of the need for the minority ownership program as the number of minority broadcasters increases. In addition, Congress has continued to hold hearings on the subject of minority ownership. n47 The FCC has noted with [*595] respect to the minority preferences contained in the lottery statute, 47 U. S. C. @ 309(i)(3)(A) (1982 ed.), that Congress instructed the Commission to "report annually on the effect of the preference system and whether it is serving the purposes intended. Congress will be able to further tailor the program based on that information, and may eliminate the preferences when appropriate." Amendment of Commission's [**84] Rules to Allow Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 93 F. C. C. 2d 952, 974 (1983). Furthermore, there is provision for administrative and judicial review of all Commission decisions, which guarantees both that the minority ownership policies are applied correctly in individual cases, n48 and that there will be frequent [*596] opportunities to revisit the merits of those policies. Congress and the Commission have adopted a policy of minority ownership not as an end in itself, but rather as a means of achieving greater programming diversity. Such a goal carries its own natural limit, for there will be no need for further [***483] minority preferences once sufficient diversity has been achieved. The FCC's plan, like the Harvard admissions program discussed in Bakke, contains the seed of its own termination. Cf. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 640 (1987) (agency's "express commitment to 'attain' a balanced work force" ensures that plan will be of limited duration).

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n47 See, e. g., *Minority Ownership of Broadcast Stations: Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989). See also *supra*, at

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578-579. [**85]

n48 As in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the FCC minority preferences are subject to "administrative scrutiny to identify and eliminate from participation" those applicants who are not bona fide. *Id.*, at 487-488. See *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to Comparative Renewal Process and to Prevention of Abuses of the Renewal Process*, 3 F. C. C. Rcd 5179 (1988). The FCC's Review Board, in supervising the comparative hearing process, seeks to detect sham integration credits claimed by all applicants, including minorities. See, e. g., *Silver Springs Communications*, 5 F. C. C. Rcd 469, 479 (1990); *Metroplex Communications, Inc.*, 4 F. C. C. Rcd 8149, 8149-8150, 8159-8160 (1989); *Northampton Media Associates*, 3 F. C. C. Rcd 5164, 5170-5171 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting*, 3 F. C. C. Rcd 3948, 3955 (Rev. Bd. 1988); *Mulkey*, 3 F. C. C. Rcd 590, 590-593 (Rev. Bd. 1988), modified, 4 F. C. C. Rcd 5520, 5520-5521 (1989); *Newton Television Limited*, 3 F. C. C. Rcd 553, 558-559, n. 2 (Rev. Bd. 1988); *Magdelene Gunden Partnership*, 3 F. C. C. Rcd 488, 488-489 (Rev. Bd. 1988); *Tulsa Broadcasting Group*, 2 F. C. C. Rcd 6124, 6129-6130 (Rev. Bd. 1987); *Pacific Television, Ltd.*, 2 F. C. C. Rcd 1101, 1102-1104 (Rev. Bd. 1987), review denied, 3 F. C. C. Rcd 1700 (1988); *Payne Communications, Inc.*, 1 F. C. C. Rcd 1052, 1054-1057 (Rev. Bd. 1986); *N. E. O. Broadcasting Co.*, 103 F. C. C. 2d 1031, 1033 (Rev. Bd. 1986); *Hispanic Owners, Inc.*, 99 F. C. C. 2d 1180, 1190-1191 (Rev. Bd. 1985); *KIST Corp.*, 99 F. C. C. 2d 173, 186-190 (Rev. Bd. 1984), *aff'd as modified*, 102 F. C. C. 2d 288, 292-293, and n. 11 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 255 U.S. App. D. C. 397, 801 F. 2d 1436 (1986).

As evidenced by respondent Shurberg's own unsuccessful attack on the credentials of Astroline, see 278 U.S. App. D. C., at 31, 876 F. 2d, at 906, the FCC also entertains challenges to the bona fide nature of distress sale participants. See 1982 Policy Statement, 92 F. C. C. 2d, at 855.

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Finally, we do not believe that the minority ownership policies at issue impose impermissible burdens on nonminorities. n49 Although the nonminority challengers in these cases concede that they have not suffered the loss of an already-awarded broadcast license, they claim that they have been handicapped in their ability to obtain one in the first instance. But just as we have determined that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy," *Wygant*, 476 U.S., at 280-281 (opinion of Powell, J.), we similarly find that a congressionally mandated, benign, [*597] race-conscious program that is substantially related to the achievement of an

important governmental interest is consistent with equal protection principles so long as it does not impose undue burdens on nonminorities. Cf. Fullilove, 448 U.S., at 484 (opinion of Burger, C. J.) ("It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure [**87] the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible") (citation omitted); id., at 521 (MARSHALL, J., concurring in judgment).

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n49 Minority broadcasters, both those who obtain their licenses by means of the minority ownership policies and those who do not, are not stigmatized as inferior by the Commission's programs. Audiences do not know a broadcaster's race and have no reason to speculate about how he or she obtained a license; each broadcaster is judged on the merits of his or her programming. Furthermore, minority licensees must satisfy otherwise applicable FCC qualifications requirements. Cf. Fullilove, supra, at 521 (MARSHALL, J., concurring in judgment).

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In the context of broadcasting licenses, the burden on nonminorities is slight. The FCC's responsibility is to grant licenses in the "public interest, convenience, or necessity," 47 U. S. C. @@ 307, 309 [**88] (1982 ed.), and the limited number of frequencies on the electromagnetic spectrum means that "[n]o one has a First Amendment right to a license." Red Lion, 395 U.S., at 389. Applicants have no settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership. Award of a preference in a comparative hearing or transfer of a station in a distress sale thus contravenes "no legitimate firmly rooted expectation[s]" of competing applicants. Johnson, supra, at 638.

Respondent Shurberg insists that because the minority distress sale policy operates to exclude nonminority firms completely from consideration in the transfer of certain stations, it is a greater burden than [***484] the comparative hearing preference for minorities, which is simply a "plus" factor considered together with other characteristics of the applicants. n50 Cf. Bakke, 438 U.S., at 317-318; Johnson, supra, [*598] at 638. We disagree that the distress sale policy imposes an undue burden on nonminorities. By its terms, the [**89] policy may be invoked at the Commission's discretion only with respect to a small fraction of broadcast licenses -- those designated for revocation or renewal hearings to examine basic qualification issues -- and only when the licensee chooses to sell out at a distress price rather than to go through with the [*599] hearing. The distress sale policy is not a quota or fixed quantity set-aside. Indeed, the nonminority firm exercises control over whether a distress sale will ever occur at all, because the policy operates only where the qualifications of an existing licensee to continue broadcasting have been designated for hearing and no other applications for the station in

question have been filed with the Commission at the time of the designation. See Clarification of Distress Sale Policy, 44 Radio Reg. 2d (P&F) 479 (1978). Thus, a nonminority can prevent the distress sale procedures from ever being invoked by filing a competing application in a timely manner. n51

.....-Footnotes-.....

n50 Petitioner Metro contends that, in practice, the minority enhancement credit is not part of a multifactor comparison of applicants but rather amounts to a *per se* preference for a minority applicant in a comparative licensing proceeding. But experience has shown that minority ownership does not guarantee that an applicant will prevail. See, e. g., Radio Jonesboro, Inc., 100 F. C. C. 2d 941, 945-946 (1985); Lamprecht, 99 F. C. C. 2d 1219, 1223 (Rev. Bd. 1984), review denied, 3 F. C. C. Rcd 2527 (1988), appeal pending.

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Lamprecht v. FCC, No. 88-1395 (CADC); Horne Industries, Inc., 98 F. C. C. 2d 601, 603 (1984); Vacationland Broadcasting Co., 97 F. C. C. 2d 485, 514-517 (Rev. Bd. 1984), modified, 58 Radio Reg. 2d (P&F) 439 (1985); Las Misiones de Bejar Television Co., 93 F. C. C. 2d 191, 195 (Rev. Bd. 1983), review denied, FCC 84-97 (May 16, 1984); Waters Broadcasting Corp., 88 F. C. C. 2d 1204, 1211-1212 (Rev. Bd. 1981).

In many cases cited by Metro, even when the minority applicant prevailed, the enhancement for minority status was not the dispositive factor in the Commission's decision to award the license. See, e. g., Silver Springs Communications, Inc., 5 F. C. C. Rcd 469, 479 (ALJ 1990); Richardson Broadcasting Group, 4 F. C. C. Rcd 7989, 7999 (ALJ 1989); Pueblo Radio Broadcasting Service, 4 F. C. C. Rcd 7802, 7812 (ALJ 1989); Poughkeepsie Broadcasting Limited Partnership, 4 F. C. C. Rcd 6543, 6551, and n. 4 (ALJ 1989); Barden, 4 F. C. C. Rcd 7043, 7045 (ALJ 1989); Perry Television, Inc., 4 F. C. C. Rcd 4603, 4618, 4620 (ALJ 1989); Corydon Broadcasting, Ltd., 4 F. C. C. Rcd 1537, 1539 (ALJ 1989), remanded, Order of Dec. 6, 1989 (Rev. Bd.); Breaux Bridge Broadcasters Limited Partnership, 4 F. C. C. Rcd 581, 585 (ALJ 1989); Key Broadcasting Corp., 3 F. C. C. Rcd 6587, 6600 (ALJ 1988); 62 Broadcasting, Inc., 3 F. C. C. Rcd 4429, 4450 (ALJ 1988), *aff'd*, 4 F. C. C. Rcd 1768, 1774 (Rev. Bd. 1989), review denied, 5 F. C. C. Rcd 830 (1990); Gali Communications, Inc., 2 F. C. C. Rcd 6967, 6994 (ALJ 1987); Bogner Newton Corp., 2 F. C. C. Rcd 4792, 4805 (ALJ 1987); Garcia, 2 F. C. C. Rcd 4166, 4168, n. 1 (ALJ 1987), *aff'd*, 3 F. C. C. Rcd 1065 (Rev. Bd.), review denied, 3 F. C. C. Rcd 4767 (1988); Magdalene Gunden Partnership, 2 F. C. C. Rcd 1223, 1238 (ALJ 1987), *aff'd*, 2 F. C. C. Rcd 5513 (Rev. Bd. 1987), reconsideration denied, 3 F. C. C. Rcd 488 (Rev. Bd.), review denied, 3 F. C. C. Rcd 7186 (1988); Tulsa Broadcasting Group, 2 F. C. C. Rcd 1149, 1162 (ALJ), *aff'd*, 2 F. C. C. Rcd 6124 (Rev. Bd. 1987), review denied, 3 F. C. C. Rcd 4541 (1988); Tomko, 2 F. C. C. Rcd 206, 209, n. 3 (ALJ 1987).
[**90]

n51 Faith Center also held broadcast licenses for three California stations. and in 1978, the FCC designated for a hearing Faith Center's renewal application for its San Bernadino station because of allegations of fraud in connection with over-the-air solicitation for funds and for failure to cooperate with an FCC

investigation. Although respondent Shurberg did not file a competing application prior to the Commission's decision to designate for hearing Faith Center's renewal application for its Hartford station, timely filed competing applications against two of Faith Center's California stations prevented their transfer under the distress sale policy. See Faith Center, Inc., 89 F. C. C. 2d 1034 (1982), and Faith Center, Inc., 90 F. C. C. 2d 519 (1982).

Of course, a competitor may be unable to foresee that the FCC might designate a license for a revocation or renewal hearing, and so might neglect to file a competing application in timely fashion. But it is precisely in such circumstances that the minority distress sale policy would least disrupt any of the competitor's settled expectations. From the competitor's perspective, it has been denied an opportunity only at a windfall; it expected the current licensee to continue broadcasting indefinitely and did not anticipate that the license would become available.

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[***485] In practice, distress sales have represented a tiny fraction -- less than 0.4 percent -- of all broadcast sales since 1979. See Brief for Federal Communications Commission in No. 89-700, p. 44. There have been only 38 distress sales since the policy was commenced in 1978. See A. Barrett, Federal Communications Commission, Minority Employment and Ownership in the Communications Market: What's Ahead in the 90's?, p. 7 (Address to the Bay Area Black [*600] Media Conference, San Francisco, April 21, 1990). This means that, on average, only about 0.20 percent of renewal applications filed each year have resulted in distress sales since the policy was commenced in 1978. See 34 FCC Ann. Rep. 33 (1988). n52 Nonminority firms are free to compete for the vast remainder of license opportunities available in a market that contains over 11,000 broadcast properties. Nonminorities can apply for a new station, buy an existing station, file a competing application against a renewal application of an existing station, or seek financial participation in enterprises that qualify for distress sale treatment. See Task Force Report 9-10. The burden on nonminority firms is at least [**92] as "relatively light" as that created by the program at issue in Fullilove, which set aside for minorities 10 percent of federal funds granted for local public works projects. 448 U.S., at 484 (opinion of Burger, C. J.); see also id., at 485, n. 72.

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n52 Even for troubled licensees, distress sales are relatively rare phenomena; most stations presented with the possibility of license revocation opt not to utilize the distress sale policy. Many seek and are granted special relief from the FCC enabling them to transfer the license to another concern as part of a negotiated settlement with the Commission. see Coalition for the Preservation of Hispanic Broadcasting v. FCC, 282 U.S. App. D. C. 200, 203-204, 893 F. 2d 1349, 1352-1353 (1990); bankrupt licensees can effect a sale for the benefit of innocent creditors under the "Second Thursday" doctrine. see Second

Thursday Corp., 22 F. C. C. 2d 515, 520-521 (1970), reconsideration granted, 25 F. C. C. 2d 112, 113-115 (1970); Northwestern Indiana Broadcasting Corp. (WLTH), 65 F. C. C. 2d 66, 70-71 (1977); and still others elect to defend their practices at hearing.

-----End Footnotes-----
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III

The Commission's minority ownership policies bear the imprimatur of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity. The judgment in No. 89-453 is affirmed, the judgment in [*601] No. 89-700 is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

CONCURBY: STEVENS

CONCUR: [***486]

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JUSTICE STEVENS, concurring.

Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. Ante, at 564-565. I endorse this focus on the future benefit, rather than the remedial justification, of such decisions. n1

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n1 See *Richmond v. J. A. Croson, Co.*, 488 U.S. 469, 511-513 (1989) (STEVENS, J., concurring in part and concurring in judgment); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 313-315 (1986) (STEVENS, J., dissenting).

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[**94]

I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Fullilove v. Klutznick*, 448 U.S. 448, 534-535 (1980) (dissenting opinion). The Court's opinion explains how both elements of that standard are satisfied. Specifically, the reason for the classification -- the recognized interest in broadcast diversity -- is clearly identified and does not imply any judgment concerning the abilities of owners of different races or the merits of different kinds of programming. Neither the favored nor the disfavored class is stigmatized in any way. n2 In addition, the Court demonstrates that this case

falls within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment. n3 The public interest in broadcast diversity [*602] -- like the interest in an integrated police force, n4 diversity in the composition of a public school faculty [**95] n5 or diversity in the student body of a professional school n6 -- is in my view unquestionably legitimate.

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n2 Cf. Croson, 488 U.S., at 516-517; Fullilove, 448 U.S., at 545, and n. 17.

n3 See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 452-454 (1985) (STEVENS, J., concurring) (in examining the "rational basis" for a classification, the "term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class"); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 497, n. 4 (1981) (STEVENS, J., dissenting) (discussing the level of scrutiny appropriate in equal protection cases).

n4 See *Wygant*, 476 U.S., at 314 (STEVENS, J., dissenting).

n5 See *id.*, at 315-316. See also JUSTICE O'CONNOR's opinion concurring in part and concurring in the judgment in *Wygant*, recognizing that the "goal of providing 'role models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.*, at 288, n. [**96]

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n6 See Justice Powell's opinion announcing the judgment in *Regents of University of California v. Bakke*, 438 U.S. 265, 311-319 (1978).

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Therefore, I join both the opinion and the judgment of the Court.

DISSENTBY: O'CONNOR; KENNEDY

DISSENT: JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

At the heart of the Constitution's guarantee of equal protection lies [***487] the simple command that the Government must treat citizens "as individuals, not 'as simply components of a racial, religious, sexual or national class.'" *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983). Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. To uphold the challenged programs, the Court departs from these fundamental principles [**97] and from our traditional requirement that

racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest. This departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution's equal protection guarantees extend equally to all citizens. [*603] The Court's application of a lessened equal protection standard to congressional actions finds no support in our cases or in the Constitution. I respectfully dissent.

I

As we recognized last Term, the Constitution requires that the Court apply a strict standard of scrutiny to evaluate racial classifications such as those contained in the challenged FCC distress sale and comparative licensing policies. See *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); see also *Bolling v. Sharpe*, 347 U.S. 497 (1954). "Strict scrutiny" requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest. The Court abandons this traditional safeguard against discrimination for a lower standard [**98] of review, and in practice applies a standard like that applicable to routine legislation. Yet the Government's different treatment of citizens according to race is no routine concern. This Court's precedents in no way justify the Court's marked departure from our traditional treatment of race classifications and its conclusion that different equal protection principles apply to these federal actions.

In both the challenged policies, the Federal Communications Commission (FCC) provides benefits to some members of our society and denies benefits to others based on race or ethnicity. Except in the narrowest of circumstances, the Constitution bars such racial classifications as a denial to particular individuals, of any race or ethnicity, of "the equal protection of the laws." U.S. Const., Amdt. 14, @ 1; cf. *Croson*, supra, at 493-494. The dangers of such classifications are clear. They endorse race-based reasoning and the

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conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict. See *Croson*, supra, at 493-494; *Korematsu v. United States*, 323 U.S. 214, 240 (1944) [**99] (Murphy, J., dissenting) (upholding treatment of individual based on inference from race is "to destroy the [*604] dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow"). Such policies may embody stereotypes that treat individuals as the product [***488] of their race, evaluating their thoughts and efforts -- their very worth as citizens -- according to a criterion barred to the Government by history and the Constitution. Accord, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-726 (1982). Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit. Cf. *Regents of University of California v. Bakke*, 438 U.S. 265, 358-362 (1978) (opinion of BRENNAN, J.). "Because racial characteristics so seldom provide a relevant

basis for disparate treatment, and because classifications [**100] based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate." Fullilove v. Klutznick, 448 U.S. 448, 533-535 (1980) (STEVENS, J., dissenting) (footnotes omitted).

The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications. In *Bolling v. Sharpe*, supra, the companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court held that equal protection principles embedded in the Fifth Amendment's Due Process Clause prohibited the Federal Government from maintaining racially segregated schools in the District of Columbia: "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*, at 500. Consistent with this view, the Court has repeatedly indicated that "the reach of the equal protection guarantee of the Fifth Amendment is [**101] coextensive with that of the Fourteenth." *United States v. [*605] Paradise*, 480 U.S. 149, 166, n. 16 (1987) (plurality opinion) (considering remedial race classification); *id.*, at 196 (O'CONNOR, J., dissenting); see also, e. g., *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975).

Nor does the congressional role in prolonging the FCC's policies justify any lower level of scrutiny. As with all instances of judicial review of federal legislation, the Court does not lightly set aside the considered judgment of a coordinate branch. Nonetheless, the respect due a coordinate branch yields neither less vigilance in defense of equal protection principles nor any corresponding diminution of the standard of review. In *Weinberger v. Wiesenfeld*, for example, the Court upheld a widower's equal protection challenge to a provision of the Social Security Act, found the assertedly benign congressional purpose to be illegitimate, and noted that "[t]his Court's approach to Fifth Amendment equal protection [**102] claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." 420 U.S., at 638, n. 2. The Court has not varied its standard of review when entertaining other [***489] equal protection challenges to congressional measures. See, e. g., *Heckler v. Mathews*, 465 U.S. 728 (1984); *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam); *Califano v. Goldfarb*,

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430 U.S. 199, 210-211 (1977) (traditional equal protection standard applies despite deference to congressional benefit determinations) (opinion of BRENNAN, J.); *Buckley v. Valeo*, supra, at 93; *Frontiero v. Richardson*, 411 U.S. 677, 684-691 (1973) (opinion of BRENNAN, J.). And *Bolling v. Sharpe*, supra, itself involved extensive congressional regulation of the segregated District of Columbia public schools.

Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its "unique remedial powers . . . under @ 5 of the [**103] Fourteenth Amendment," see *Croson*, supra, at 488 (opinion of O'CONNOR, J.), but this case does not implicate those powers. Section 5 empowers [*606] Congress to act respecting the States, and of course this case concerns

only the administration of federal programs by federal officials. Section 5 provides to Congress the "power to enforce, by appropriate legislation, the provisions of this article," which in part provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, @ 1. Reflecting the Fourteenth Amendment's "dramatic change in the balance between congressional and state power over matters of race," Croson, 488 U.S., at 490 (opinion of O'CONNOR, J.), that section provides to Congress a particular, structural role in the oversight of certain of the States' actions. See *id.*, at 488-491, 504; Hogan, *supra*, at 732 (@ 5 grants power to enforce Amendment "to secure . . . equal protection of the laws against State denial or invasion," quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); [**104] Fullilove, *supra*, at 476-478, 483-484.

The Court asserts that Fullilove supports its novel application of intermediate scrutiny to "benign" race conscious measures adopted by Congress. Ante, at 564. Three reasons defeat this claim. First, Fullilove concerned an exercise of Congress' powers under @ 5 of the Fourteenth Amendment. In Fullilove, the Court reviewed an act of Congress that had required States to set aside a percentage of federal construction funds for certain minority-owned businesses to remedy past discrimination in the award of construction contracts. Although the various opinions in Fullilove referred to several sources of congressional authority, the opinions make clear that it was @ 5 that led the Court to apply a different form of review to the challenged program. See, e.g., 448 U.S., at 483 (opinion of Burger, C. J., joined by WHITE, J., and Powell, J.) ("[I]n 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"); [**105] *id.*, at 508-510, 516 (Powell, J., [***490] concurring). [**607] Last Term, Croson resolved any doubt that might remain regarding this point. In Croson, we invalidated a local set-aside for minority contractors. We distinguished Fullilove, in which we upheld a similar set-aside enacted by Congress, on the ground that in Fullilove "Congress was exercising its powers under @ 5 of the Fourteenth Amendment." Croson, 488 U.S., at 504 (opinion of the Court); *id.*, at 490 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and WHITE, J.). Croson indicated that the decision in Fullilove turned on "the unique remedial powers of Congress under @ 5," *id.*, at 488 (opinion of O'CONNOR, J.), and that the latitude afforded Congress in identifying and redressing past discrimination rested on @ 5's "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.*, at 490. JUSTICE KENNEDY's concurrence in Croson likewise provides the majority with no support, for it questioned whether [**106] the Court should, as it had in Fullilove, afford any particular latitude even to

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measures undertaken pursuant to @ 5. See *id.*, at 518.

Second, Fullilove applies at most only to congressional measures that seek to remedy identified past discrimination. The Court upheld the challenged measures in Fullilove only because Congress had identified discrimination that had particularly affected the construction industry and had carefully constructed corresponding remedial measures. See Fullilove, 448 U.S., at 456-467, 480-489

(opinion of Burger, C. J.); *id.*, at 498-499 (Powell, J., concurring). Fullilove indicated that careful review was essential to ensure that Congress acted solely for remedial rather than other, illegitimate purposes. See *id.*, at 486-487 (opinion of Burger, C. J.); *id.*, at 498-499 (Powell, J., concurring). The FCC and Congress are clearly not acting for any remedial purpose, see *infra*, at 611-612, and the Court today expressly extends its standard to racial classifications that are not remedial [**107] in any sense. See *ante*, at 564-565. This case does not present "a considered decision of the Congress and the President," Fullilove, [*608] *supra*, at 473; see *infra*, at 628-629, nor does it present a remedial effort or exercise of @ 5 powers.

Finally, even if Fullilove applied outside a remedial exercise of Congress' @ 5 power, it would not support today's adoption of the intermediate standard of review proffered by JUSTICE MARSHALL, but rejected, in Fullilove. Under his suggested standard, the Government's use of racial classifications need only be "substantially related to achievement" of important governmental interests. *Ante*, at 565. Although the Court correctly observes that a majority did not apply strict scrutiny, six Members of the Court rejected intermediate scrutiny in favor of some more stringent form of review. Three Members of the Court applied strict scrutiny. See 448 U.S., at 496 (Powell, J., concurring) (challenged statute "employs a racial classification [***491] that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"); [**108] *id.*, at 498 ("means selected must be narrowly drawn"). *Id.*, at 523 (Stewart, J., joined by REHNQUIST, J., dissenting). Chief Justice Burger's opinion, joined by JUSTICE WHITE and Justice Powell, declined to adopt a particular standard of review but indicated that the Court must conduct "a most searching examination," Fullilove, 448 U.S., at 491, and that courts must ensure that "any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Id.*, at 480. JUSTICE STEVENS indicated that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.*, at 537-538 (dissenting opinion). Even JUSTICE MARSHALL's opinion concurring in the judgment, joined by JUSTICE BRENNAN and JUSTICE BLACKMUN, undermines the Court's course today: That opinion expressly drew its lower standard of review from the plurality opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), [**109] a case that did not involve congressional [*609] action, and stated that the appropriate standard of review for the congressional measure challenged in Fullilove "is the same as that under the Fourteenth Amendment." 448 U.S., at 517-518, n. 2 (internal quotation omitted). And, of course, Fullilove preceded our determination in *Croson* that strict scrutiny applies to preferences that favor members of minority groups, including challenges considered under the Fourteenth Amendment.

The guarantee of equal protection extends to each citizen, regardless of race: The Federal Government, like the States, may not "deny to any person

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within its jurisdiction the equal protection of the laws." As we observed only last Term in *Croson*, "[a]bsent searching judicial inquiry into the justification

for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Croson, 488 U.S., at 493 (opinion of O'CONNOR, J.); see also id., at 500, 494 [**110] ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

The Court's reliance on "benign racial classifications," ante, at 564, is particularly troubling. "Benign" racial classification is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right, see *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), securing to each individual an immunity from treatment predicated [***492] simply on membership in a particular racial or ethnic group. The Court's emphasis on "benign racial classifications" suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. Untethered to narrowly [*610] confined remedial notions, "benign" carries with it no independent meaning, but [**111] reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable. The Court provides no basis for determining when a racial classification fails to be "benevolent." By expressly distinguishing "benign" from remedial race-conscious measures, the Court leaves the distinct possibility that any racial measure found to be substantially related to an important governmental objective is also, by definition, "benign." See ante, at 564-565. Depending on the preference of the moment, those racial distinctions might be directed expressly or in practice at any racial or ethnic group. We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.

This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not. The standard of review establishes whether and when the Court and [**112] Constitution allow the Government to employ racial classifications. A lower standard signals that the Government may resort to racial distinctions more readily. The Court's departure from our cases is disturbing enough, but more disturbing still is the renewed toleration of racial classifications that its new standard of review embodies.

II

Our history reveals that the most blatant forms of discrimination have been visited upon some members of the racial and ethnic groups identified in the challenged programs. Many have lacked the opportunity to share in the Nation's wealth and to participate in its commercial enterprises. It is undisputed that minority participation in the broadcasting industry falls markedly below the demographic representation [*611] of those groups, see, e. g.,