fundamental right -- one of the few principles on which Vice President Gore and Speaker Gingrich would surely agree.184/

Close parallels may be found in all three of the essential jurisprudential elements when comparing media participation jurisprudence and school desegregation jurisprudence: (1) the goals; (2) the scope of its implementation, and (3) the enforcement duty of government. Each of these elements of media participation and school desegregation jurisprudence is discussed below.

184/ Access to the stream of mass communications has not yet been held to be a "fundamental" right. Cox v. Louisiana, 379 U.S. 536 (1965), although, like education, it is close to fundamental. Red Lion, 395 U.S. at 389. The near-fundamental nature of access to the stream of mass communications is evident from, e.g., Section 307(b) of the Communications Act, which requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same", and Section 331(a) of the Communications Act, which requires the Commission to allocate commercial VHF channels "in a manner which ensures that no less than one such channel shall be allocated to each State, if technically feasible."

It is inevitable that as we continue to evolve from an industrial to an information society, Congress or the Courts will declare that both education and access to the stream of mass communications are fundamental rights. We have already seen some of this legal evolution in Turner, 114 S.Ct. at 2445. In Turner, the Court applied intermediate scrutiny when it found that the cable must carry rules were not content-based. Those rules, e.g., specifically favor "noncommercial educational broadcasting." Id. at 2477 (quoting Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§534-535 (Supp. IV 1992); the language is in 47 U.S.C. 535(a)). The 1992 Cable Act states that one purpose for requiring cable carriage of local broadcasts is that "public television provides educational and informational programming" and local broadcast "provides public service programming that is responsive to the needs and interests of the local community." 47 U.S.C. §§521(a)(8)(A), (B) (1992).

However, even under the current state of the law, the Commission, as the expert agency and as the guardian of the limited and valuable broadcast spectrum resource, must recognize that access to the stream of communications is so close to fundamental that denial of such access violates the Due Process Clause of the 5th Amendment.

1. Goals. The primary goal of school desegregation jurisprudence is to promote equal protection and due process. Brown I, 347 U.S. at 492; Bolling, 347 U.S. at 501. Enhancing this goal is the pursuit of intellectual intercourse, a close analogue to the free flow of ideas promoted by the First Amendment, which fosters a student's intellectual, cultural and civic or political development.185/

The Media Participation Right flows from essentially the same set of rights. A child's intellectual, cultural and civic or political development, as well as her overall socialization derives at least as much from the enjoyment of media as it does from the enjoyment of education.186/

185/ Sweatt v. Painter, 339 U.S. 629 (1950) ("Sweatt") (holding that in order to educate a law student, a state must permit him to sit in a classroom and engage in dialogue with other law students of different backgrounds).

186/ See Children's Television Act Senate Report.

2. Scope of Enforcement. A school desegregation decree is macrosopically directed at school systems rather than at individual children.[187] Such a decree will seldom guarantee a child a place in any particular school.[188] However, a school desegregation decree does guarantee that the school system will be configured, to the extent possible, to remove the effects of de jure or de facto racial barriers in the allocation of pupils to schools, the expertise of the teachers they encounter, the quality of the school buildings they attend and the equipment they use, and the public budgets supporting their school careers.[189]

Compliance must be robust.[190] Compliance is the school system's responsibility, not the responsibility of the parents and students.[191]

187/ See Green v. County School Board of New Kent County, 391 U.S. 430 (1968) ("Green").

188/ Id. at 442.

189/ Id. at 437-38.

190/ "The only school desegregation plan that meets constitutional standards is one that works." U.S. v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir. 1966) (opinion by Judge John Minor Wisdom), aff'd en banc, 380 F.2d 385 (5th Cir. 1967), cert denied, 389 U.S. 840 (1967).

191/ See Green, 371 U.S. at 430 (rejecting "freedom of choice" plan which, on its face, transferred responsibility for desegregation from the school board to the parents and children).

Similarly, a rule implementing the Media Participation Right would seldom guarantee any individual broadcast professional a job,[192] nor would it guarantee any particular broadcast listener or viewer a choice of particular licensees of stations.[193] Instead, such a rule would, to the extent possible, mediate the ownership structure or employment policies of the industry so as to enhance the likelihood that members of communities with common and identifiable interests, such as minorities and women, will enjoy, to the greatest extent possible, the same opportunities to create, transmit and respond to content as is enjoyed by others.

Compliance must be robust.[194] Compliance is the broadcaster's responsibility, not the responsibility of the minority or female broadcast professional or consumer.[195]

192/ FCC/EEOC Agreement, 70 FCC2d at 2331-32.

193/ See Waters, 91 FCC2d at 1265.

194/ For example, it would be unacceptable for a broadcaster to restrict minorities and women to jobs as secretaries or janitors, where they have little chance to affect the creation and transmission of content. See Rust (HDO), 53 FCC2d at 355.

195/ The absence of minority or female applicants, or the alleged lack of assistance from referral sources, does not absolve a broadcaster of its obligation to take affirmative steps to recruit minorities and women. BBC, 556 F.2d at 63.

3. Duty to Enforce. School desegregation is compulsory rather than discretionary.[196] A government may not decline to desegregate its schools if it had any material involvement in promoting segregation.[197] However, if state action profoundly exacerbated school segregation, the government has an absolute duty to eliminate the present effects of its own actions.[198] Obviously, the remedial decree may not itself exacerbate de facto segregation.[199]

196/ See Fordice, 505 U.S. at 729 (holding that a state has an affirmative obligation to eliminate all vestiges of a previously segregated educational system; that obligation is not satisfied by mere adoption of race-neutral policies). The principle that remedial steps are compulsory, rather than discretionary, is well established in equal protection jurisprudence. See Louisiana v. U.S., 380 U.S. 145, 154 (1965) (declaring that a federal district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

197/ Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973) ("Keyes"). Justice Brennan's majority opinion in Keyes declared that proof of intentionally segregative school board actions as to each individual school was unnecessary because the effects of segregation on one school would inevitably spill over onto other schools. See n. 202 infra.

198/ Gilmore v. City of Montgomery, Alabama, 417 U.S. 456 (1974) (a dual school system perpetuated by state action is unlawful). See also U.S. v. Yonkers Board of Education, 624 F.Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988) (finding that municipality's construction of de facto segregated public housing with race-based siting rendered the municipality's supposedly race-neutral "neighborhood schools" policy inherently discriminatory).

199/ Swann v. Charlotte-Mecklenburg Board of Education, 334 F.Supp. 623 (1971) (finding that a supposedly remedial plan would have caused a return to de facto segregation).

Moreover, the government must enforce school desegregation decrees aggressively. Token[200/] or belated[201/] enforcement is impermissible.

Similarly, the FCC may not decline to enforce due process or equal protection rights in the media. To the greatest extent possible, the FCC must eliminate irrational and artificial barriers to the full integration of the media since it has had material involvement in erecting and sustaining those barriers.[202/] Thus, given that the FCC's actions dramatically assisted discriminators in irrationally and artificially maintaining barriers to integration, the Commission has an absolute duty to eliminate the

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200/ Fordice, 505 U.S. at 729 (holding that a state must eliminate all vestiges of previous segregation is not satisfied by mere adoption of race-neutral policies); Sweatt, 339 U.S. at 629 (allowing a law student to sit in a classroom without an opportunity to engage in dialogue with other students does not provide meaningful access to education).

201/ Brown v. Board of Education, 349 U.S. 294, 299 (1955) ("Brown II") (requiring desegregation "with all deliberate speed" so that children currently enrolled in school may benefit); Griffin, 377 U.S. at 234 (declaring that the time for mere "deliberate speed" has run out).

202/ Just as discrimination affecting one school invariably spills over and affects desegregation efforts at other schools (see Keyes, discussed at n. 197), discrimination at one broadcast station invariably spills over and affects minority and female opportunity at other stations -- such as those who would likely hire minorities and women who "graduate" from the discriminator to larger facilities as they continue their careers. Furthermore, as the NPRM itself recognized, the impact of EEO policy invariably affects ownership opportunities as well. Id. at 5166 ¶4.

present effects of its own actions.[203] Obviously, the remedial decree may not itself exacerbate de facto segregation.[204]

Moreover, the FCC must enforce the Media Participation Right aggressively.[205] Token enforcement,[206] or belated enforcement,[207] is impermissible.

203/ As we have seen, the Commission's discriminatory exercise of its licensing power brought about minorities' and women's underrepresentation in broadcast employment. See pp. 141-154 supra. The same Commission behavior also brought about minorities' and women's underrepresentation in broadcast ownership. See Comments of the Minority Media and Telecommunications Council in MM Docket Nos. 94-149 and 91-140 (Minority and Female Mass Media Ownership), filed May 17, 1995 (incorporated by reference herein) at 6-21; Comments of the Office of Communication of the United Church of Christ and the Minority Media and Telecommunications Council in GN Docket No. 96-113 (Market Entry Barriers), filed August 23, 1996 (incorporated by reference herein).

204/ For example, an attempt to substitute a vague and unenforceable obligation that broadcasters attend "job fairs" in place of its current requirement that broadcasters recruit minorities and women every time they have a job opening would not be a lawful component of a remedial decree. See pp. 208-211 infra.

205/ In protecting access to the media through its licensing power, the FCC's role is analogous to that of the Department of Education in denying federal funds to segregated school districts. In each case, the government is more than a traffic cop; in the case of media access, the FCC must provide continual supervision. NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976).

206/ See Beaumont, 854 F.2d at 505 (declaring that the FCC failed to adequately enforce the EEO Rule when it went through the motions of an investigation without following through on patently inconsistent statements of the licensee in the investigation).

207/ In the Market Entry Barriers proceeding, the Commission has issued a truly outstanding Notice of Inquiry. Market Entry Barriers. However, that Notice of Inquiry may have been issued too late, for minority ownership is already atrophying at warp speed thanks to the impact of the loss of the tax certificate policy and the Telecommunications Act's blessing of superduopolies. See pp. 77-80 supra.

[n. 207 continued on p. 171]

Thus, the Commission may not abandon or materially cut back on the protections afforded minorities and women under the EEO Rule.[208/] The abandonment of EEO enforcement will guarantee a resurgence of discrimination and the diminution of the already meager access to the stream of communications by minorities and women.[209/] See pp. 176-188 infra. Moreover, by (1) exercising its

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207/ [continued from p. 170]

In the two most significant broadcast spectrum management rulemaking proceedings, the Commission's proposals would even further decimate minority ownership. Two years after winning a 20-year battle with the NAACP for minority access to the Expanded Band, the FCC awarded the entire band to White incumbents. Its most recent draft allotment plan (released in December, 1995 and reviewed by MMTC) reveals that not even one minority owned incumbent licensee (and no newcomers) would receive a chance to upgrade to the Expanded Band. In the Advanced Television proceeding, the FCC has proposed to virtually guarantee every incumbent full power station an ATV channel, while not one channel would be reserved for newcomers (including minorities) and between 35% and 45% of the low power stations (15% of which are minority owned) will most likely be forced off the air. See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service (Sixth Further Notice of Proposed Rulemaking), FCC 96-317 (released August 14, 1996), ¶21 and ¶¶65-72. Thus, irrespective of what the Commission does in the Market Entry Barriers proceeding, minority ownership opportunities will rapidly disappear. Only through stronger EEO enforcement can the Commission stem the tide which is pushing minorities and women off the airwaves.

208/ At the very least, the FCC carries a heavy burden of persuasion to show that the artificial and irrational policies giving rise to minority and female underrepresention in the media have been eliminated. See Freeman v. Pitts, 112 S.Ct. 1430 (1992) (declaring that a municipality carries a considerable burden of persuasion in order to show that a school system has achieved "unitary" status in every respect, and that the effects of past de jure and de facto segregation have been eliminated).

209/ Author David Cole recounts that "[w]hen Archibald Cox stood up in the Supreme Court nearly two decades ago to defend the University of California's affirmative action plan in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the first thing he said was that absent racial preferences, higher education would revert to a privilege for whites only." "The End of Affirmative Action?" Legal Times, April 1, 1996, p. 18.

licensing and license renewal powers[210] to give broadcasters free access to billions of dollars worth of public spectrum without a clue whether they discriminate;[211] (2) by removing the only tools available to the public to discover that behavior,[212] and (3) by proposing in this proceeding to eliminate antidiscrimination

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210/ Having implemented these licensing policies, the FCC continues to ratify and perpetuate their impact every time it approves the assignment or transfer, or the renewal, of a broadcast station. Assignments and transfers are performed in such a way that the original owners of stations have virtually unfettered control over the selection of their successors. Since 1951, assignments and transfers of broadcast licenses have proceeded without consideration of competitors, and the application form for assignments and transfers is so simple that approval of station sales is virtually routine. See S. Rep. 44, 82nd Cong., 1st Sess. (January 25, 1951) and House Rpt. 1750, USCAN 2234 (1952) (repeal of the Avco Rule, which permitted applications to be filed which were mutually exclusive with assignment or transfer applications).

Thus, the stations originally licensed by the Commission enjoy absolute control over the selection of their successors. Station sales occur in secret, shepherded by a close-knit, unregulated, virtually all-White clan of brokers. The FCC expressly declined to intervene to correct this inherently discriminatory process, purely on the grounds that correction would impose an inconvenience on broadcasters. Public Notice of Intent to Sell Broadcast Station, 43 RR2d 1 (1978).

211/ The government, through deliberate actions and omissions, has prevented minorities from enjoying this extraordinarily important right. Furthermore, it deliberately and on the flimsiest of grounds adopted a plan which it knew would likely cause a resurgence of segregation -- a plan which was overturned in UCC III, 560 F.2d at 529.

212/ In 1978, the D.C. Circuit announced requirements that the Commission investigate obvious EEO violators, and allow members of the public an opportunity to participate in these Bilingual investigations. See Bilingual I, 595 F.2d at 630-634. Between 1981 and 1987, the Commission disregarded the requirements laid down in Bilingual II. The investigations undertaken since 1987 have each used the inherently feeble technique of written interrogatories. Moreover, the Commission has yet to follow the Court's 1988 requirement that it interview witnesses in appropriate cases. See Beaumont, 854 F.2d at 505. See pp. 214-320 infra (describing the need for much more thorough investigations of allegations of discrimination). Now the proposals in the NPRM would strip most broadcasters even of their susceptibility to a Bilingual investigation.

protection for thousands of minorities and women, on grounds so thin as to be irrational on their face,[213/] the Commission has violated and continues to violate the 5th Amendment Due Process rights of minorities and women. Instead of proposing to largely deregulate EEO compliance, the Commission must issue a decree which accepts the duty of aggressively bringing about the end of

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213/ In our discussion of whether NPRM's proposed cutbacks on EEO enforcement would comply with the "arbitrary and capricious" test in Section 706 of the Administrative Procedure Act, we documented the fact that there are no rational grounds to sustain a material cutback in EEO enforcement. See pp. 85-100 supra.

Furthermore, in considering whether the NPRM's proposed cutbacks in EEO enforcement would violate the Due Process Clause of the 5th Amendment, we must take an additional factor into account: whether the reasons given by the Commission for its proposed EEO cutbacks are so feeble that they manifest a "curious neutrality in favor of the licensee," UCC II, 425 F.2d at 547, and thus a curious neutrality against minorities and women. As shown above, such animus is not a necessary component of an equal protection claim. See p. 168 n. 197. However, such animus, if it exists, makes an equal protection claim all the more compelling. See p. 168 n. 198.

As a related matter, the Supreme Court recently addressed the question of whether a state's reasons for a statute aimed at denying the civil rights of members of an identifiable group because of their membership in that group are so feeble as to give rise to a finding of animus. In Romer v. Evans, 116 S.Ct. 1620 (1996) ("Romer"), the Court struck down a Colorado state constitutional provision (known as Amendment 2) which denied to a state or municipality the power to "enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." Id. at 1623-24. Colorado's constitution nullified legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment, and repealed and forbade all laws or policies providing specific protection for gays or lesbians from discrimination by the state government. Id. at 1623. The Court reviewed Amendment 2 under the rational basis test, finding that it failed even this conventional inquiry because it lacked a rational relationship to legitimate state interests. Id. at 1627.

[n. 213 continued on p. 174]

213/ [continued from p. 173]

The Romer Court held that "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation....its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests....Laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare...desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973))." Id. at 1627-28.

The Court took special aim at the feebleness of Colorado's rationale for Amendment 2 (e.g., that by not having to protect gay persons, municipalities would have more resources to use to protect other minorities) holding that "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." Id. at 1629.

Unlike Amendment 2, the proposals in the NPRM are worded so as not to openly mention their target -- minorities and women. However, the EEO Rule expressly refers to "race" and "sex", e.g., 47 CFR §§73.2080(a), (b)(4), (c)(1)(ii). The EEO Rule's recruitment requirement specifically requires each broadcaster to take steps to attract "minority and female applicants," 47 CFR §73.2080(c)(2), and to evaluate its employment profile and job turnover "against the availability of minorities and women in its recruitment area", 47 CFR §73.2080(c)(3). Thus, there is no doubt which "races" and which "sex" the NPRM is targeting. Indeed, not once has the FCC had cause to impose the EEO Rule to protect White males from discrimination or to correct the present effects of any governmentally-aided effort to discriminate against them. See n. 162 supra.

Moreover, unlike the reasons given by Colorado in support of Amendment 2, the FCC's reasons for removing EEO protections from minorities and women have already been rejected by a federal court. UCC III. While the NPRM seeks evidence of changes in the industry since UCC III which could be used to distinguish UCC III, the FCC -- the expert agency in the field -- cites not one such change. In a startling display of disinterest in the direction toward which any changes in the industry might actually have driven its analysis, the NPRM, adopted on the afternoon of February 8, 1996, did not even mention the Telecommunications Act, whose signing was attended by the commissioners that same morning. Even when our Petition for Reconsideration and Clarification of the NPRM raised this question, the Order, disposing of our Petition was silent on this critical issue.

[n. 213 continued on p. 175]

employment discrimination and its present effects in the broadcasting industry.214/

213/ [continued from p. 174]

Finally, the reasons the NPRM propounds to justify withdrawing discrimination protections from specifically identified groups are even more feeble than those offered up by the State of Colorado in defense of Amendment 2. As we have shown, none of the FCC's "streamlining" theories already rejected in UCC III, or its "reducing burdens" theory today, has even the slightest merit. See pp. 85-100 supra (discussing reasons rejected in UCC III) and pp. 101-116 supra (discussing "burdens" on nonminority broadcasters). Furthermore, as we show infra, the Commission knows that each and every case in which alleged discrimination has led to a hearing would not have arisen without evidence flowing from the very EEO programs, forms and records the FCC proposes to deregulate in this proceeding. See pp. 176-188 infra.

Thus, a reviewing court would have to conclude that the real basis for the NPRM, which proposes to "streamline" to the point of ineffectiveness a reasonably successful, non-quota based, non-judicially challenged EEO program, that minorities and women have fallen into political disfavor. As the Romer Court made clear, the disfavor in which a protected group is held does not constitute a sufficient governmental interest even to meet rational basis scrutiny.

214/ A final and fair question is whether this decree must involve the EEO Rule, or whether there is some other route by which the Media Participation Right enjoyed by minorities and women can be protected. The answer is that the decree must indeed involve the EEO Rule, for two reasons.

First, after deregulation, each licensee may now self-select whether to serve or disregard minorities or women. See pp. 80-82 supra. Thus, the FCC must now take even more aggressive steps to ensure that the broadcasting industry does not gravitate into a two-class system of "separate but equal" facilities, with high powered, wealthy facilities serving Whites, and low powered, economically failing facilities serving minorities. Such a system would be "inherently unequal." Brown I, 347 U.S. at 493.

Second, the Telecommunications Act has enfeebled structural regulation, see pp. 61-68 supra, and the tax certificate policy, distress sales, comparative hearings and the Mickey Leland Rule are each either dead or virtually dormant, see pp. 77-80 supra.

Thus, there is no other means of effectuating the Media Participation Right except the EEO Rule.

V. The Commission Will Be Unable To Enforce Its Nondiscrimination Policy If Recordkeeping And Reporting Requirements Are Eliminated For A Large Group Of Broadcasters

A. There is no basis for a "small station" or a "small market" exemption from meaningful EEO recordkeeping and reporting

1. Elimination of recordkeeping and reporting essential for effective enforcement will lead to noncompliance and undetectable discrimination

The NPRM proposes that EEO-exempted licensees would be permitted to file "only the first page of Form 395-B and Form 396-A, and the first two pages of Form 396." Id. at 5165 ¶23. Moreover, they would not be required to retain records documenting recruitment efforts, applicant flow by race and sex, hiring records and other personnel records relevant to the EEO Rule.215/

In proposing the elimination of EEO recordkeeping for what would likely be the majority of broadcasters,216/ the NPRM offers the assurance that "licensees and permittees of eligible stations would still be required to comply with our EEO Rule and policies" (fn. omitted). Id. at 5166 ¶23. This is hopelessly naive.

First, the elimination of EEO recordkeeping and reporting will leave broadcasters with little incentive to undertake the positive and voluntary steps required to remedy the present effects of past discrimination. See p. 111 supra (discussing the "free

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215/ As we have noted, most businesses maintain these records in the normal course. The NPRM is silent, however, on whether a business which maintains these records would have to produce them for the Commission on request, or whether it could destroy these records in anticipation of a petition to deny if the records were incriminating.

216/ See pp. 92-100 supra.

rider" problem).[217] Nor would broadcasters be left with much incentive to train and promote minorities and women to nontraditional and senior positions, an issue often raised by petitioners to deny albeit seldom reviewed by the Commission.[218] See pp. 253-256 infra.

Second, the elimination of EEO recordkeeping and reporting will make it impossible for the Commission and the public to know which broadcasters are violating Sections 2080(b) and (c) of the EEO Rule. Virtually all FCC affirmative action litigation originates with the very documents the NPRM proposes to "streamline" out of existence.[219]

217/ The Commission already knows how broadcasters behave when subject only to Title VII but not to systematic FCC EEO review. That was the regulatory playing field between 1964 and 1969, when the EEO Rule was adopted. See pp. 72-73 supra; see also Declaration of Henry Geller, Exhibit 3 hereto.

The Commission also knows how the industry will behave on this playing field because the unregulated media brokerage industry operates on that playing field now. Only three women and one minority are among the approximately 150 broadcast brokers. See pp. 73-74 supra.

218/ One commentator has observed that "[i]n the booming affirmative action years, from 1973 to 1982...companies devised programs to hire us but not to keep us or help us develop skills. When affirmative action ended, many of us were out of work because we weren't seen as valuable players." (emphasis in original). Andrea Davis Pinckney, Essence, March, 1994, quoted in Anita Doreen Diggs, Talking Drums (1995), p. 6.

219/ See, e.g., WHJB Corporation, 11 FCC Rcd 7262, 7267 ¶19 (1996) (basing decision on a "[r]eview of the licensee's renewal application and inquiry response"); Fidelity Television, Inc., 11 FCC Rcd 6766, 6768 ¶7 (1996) (basing decision on "[r]eview of the NHMC's [National Hispanic Media Coalition's] allegations, as well as the licensee's renewal application, opposition and inquiry response"); Community Communications, Inc., 11 FCC Rcd 5266, 5267 ¶8 (1996) (basing decision on a "[r]eview of the licensee's renewal application, inquiry response and opposition").

[n. 219 continued on p. 178]

Third, the elimination of EEO recordkeeping and reporting will cause many former discriminators to suffer a relapse, and will allow others to fall into the practice. EEO recordkeeping is a periodic, normative behavior which is easy to perform. See pp. 103-106 supra. As the Federal Glass Ceiling Commission has observed, the act of maintaining EEO records serves as a gentle, but constant reminder of the duty not to discriminate.220/ It is

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219/ [continued from p. 177]

Gaines, 10 FCC Rcd at 6589, provides a rare look at why many broadcasters elect not to comply with the affirmative action sections of the EEO Rule now. Gaines involves a radio station in Baltimore. In Gaines, which went to hearing because the renewal application was challenged by a mutually exclusive applicant, the station's EEO program listed historically Black Morgan State University as a referral source. Morgan State University enrolls 350 broadcasting majors. When the renewal application was tested in hearing, the former General Manager testified that the station had contacted the university on only three occasions -- each time by telephone. The Administrative Law Judge found that in most instances, "[no] minority specific organizations were contacted when there were job vacancies because, according to [the former General Manager] it would 'just slow things down.'" Id. at 6491 ¶21.

Without reporting and recordkeeping requirements, the likelihood that a broadcaster like the one in Gaines will be held accountable will diminish -- from slight to zero.

220/ According to Jonathan S. Leonard, "[t]he historical records shows that if affirmative action programs required of federal contractors are to be effective, government monitoring and sanctions are required....In fact, the majority of the CEOs interviewed stated that law enforcement had been useful in "keeping us aware" or "keeping it on the front burner," despite the inconvenience of "more paperwork downstairs." (emphasis in original). Leonard's paper, prepared for the Federal Glass Ceiling Commission, "demonstrates the weaknesses of past efforts to improve employment opportunities for minorities and women through voluntary action. When the threat of enforcement is not real, the contract compliance program ceases to have any demonstrable positive effect on minority and female employment." Jonathan S. Leonard, "Use of Enforcement Techniques in Eliminating the Glass Ceiling," Walter A. Hass School of Business, University of California, Berkeley, discussed in Glass Ceiling Environmental Scan, p. 30.

an especially well-tailored reminder, since the maintenance of records about specific persons serves as a constant reminder not to discriminate against those persons. Without that constant reminder, many broadcasters who no longer discriminate will drift back into the practice again. Some who never discriminated will begin to do so for the first time.

Fourth, as discussed below, the elimination of recordkeeping and reporting would make discrimination undiscoverable and unremediable. The reason is that affirmative remedial efforts simply do not happen without the requirements of recordkeeping and reporting, The Commission's review of those efforts is the only means by which discrimination, where it exists, can be uncovered. That is why the Department of Justice, reviewing numerous studies of discrimination, concluded that "in the absence of affirmative remedial efforts, federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period." Proposed Reforms to Affirmative Action in Federal Procurement, 61 FR 26042 (May 23, 1996). As articulated by Bernard Anderson, Assistant Secretary of Labor for Employment Standards, "[i]f you relieve them of the burden [sic] of applying the law, they won't do it."221/

In an ideal world, businesspeople subject to a federal regulatory obligation would check a box manifesting their compliance, and federal regulators could sleep soundly in the

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221/ Jonathan Kaufman, "How Workplaces May Look Without Affirmative Action," The Wall Street Journal, March 20, 1995, p. B-2.

knowledge that compliance is assured. That world does not exist, as the Commission's experience in the 1980's with financial certifications unequivocally demonstrates.222/

In 1981, the Commission began to permit broadcast construction permit applicants to check a box to certify their financial qualifications. Revision of Form 301, 50 RR2d 381 (1981). In words sounding remarkably similar to those used in the NPRM, the 1981 Commission said it was concerned that its financial documentation requirements might be "out of date, burdensome or superfluous." Revision of Form 301, 50 RR2d at 381 ¶2. The Commission realized that it was "conceivable that some applications will now be approved which otherwise would have been subjected to further inquiry." Id. at 382 ¶6. Nonetheless, the Commission was full of hope that because of its "'get tough' policy of not extending construction permits for applicants who are either financially unwilling or unable to construct," the new financial certification box-checking procedure "would not result in irreparable harm when balanced against the benefits accruing from expedited processing." Id.

After 1981, an alarming number of applicants falsely certified "Yes" in the belief that they would never be caught or

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222/ Engineering rule compliance can realistically be regulated by box-checking, since engineering is easily verifiable under quantatitive, bright line standards. But in no area of non-technical review has "self-certification" through box-checking ever proven effective, because some of these matters are subjective and thus subject to good faith differences of opinion over the degree and deliberateness of apparent noncompliance and whether there was an "intent to deceive." See, e.g., Georgia Public Telecommunications Commission, 7 FCC Rcd 2942, 2948 ¶32 (Rev. Bd. 1992).

held accountable. Many of those cases continued to clog the Commission's broadcast docket years later.[223/]

After having to conduct scores of false certification hearings costing millions of dollars, the Commission realized that the policy was being abused, and it instituted a program of random checks of financial certifications:

> after five years of experience with the financial certification requirement in lieu of documentation, it is clear that a number of broadcast construction permit applicants have certified their financial qualifications without any basis or justification. Such false certifications ...waste the resources of both the Commission and legitimately qualified applicants. As a consequence, the public may receive delayed service, substandard service, or no service at all [fn. omitted].

Certification of Financial Qualifications, 2 FCC Rcd 2122 (1987).

Two years later, the Commission realized at last that its box-checking policy was hopelessly naive, since even its random checking policy had failed to deter financial certification abuse:

223/ See, e.g., Mableton Broadcasting Company, Inc., 8 FCC Rcd 7609 (Rev. Bd. 1993); Central Florida Communications Group, Inc., 8 FCC Rcd 4128 (Rev. Bd. 1993); Sunshine Broadcasting, Inc., 6 FCC Rcd 5981 (Rev. Bd. 1991); Marc A. Albert, 6 FCC Rcd 13 (Rev. Bd. 1991).

> After a number of years of experience with this certification procedure, we recognized that it has led to an increase in applications filed by entities that were financially unqualified at the time of filing....To attempt to counter this abuse, we initiated a program of random checks of financial qualifications. Our use of random financial checks has succeeded in uncovering instances of what appear to be false financial certification, but it has not sufficiently deterred applicants from falsely certifying their financial qualifications. Once an applicant checks it is financially qualified, there is usually no basis for the staff or the ALJ to designate a financial issue, nor is there generally a basis for any other party to seek discovery on financial qualifications. Consequently, unless such an applicant mistakenly testifies about financial issues during the course of other discovery or other intrinsic evidence is presented, financial qualifications cannot be an issue at the hearing.

Revision of Applications for Construction Permit for Commercial Broadcast Stations, 4 FCC Rcd 3853, 3858-59 ¶¶40-41 (1989).

If EEO compliance reverted to little more than box-checking, the Commission would encounter far more false EEO certifiers than the false financial certifiers it encountered in the 1980's. First, unlike false financial certifiers, false EEO certifiers would almost never be set for hearing, if past experience is any guide. See pp. 10-11 supra. Thus, they would have less cause than false financial certifiers to be concerned about falling under the oversight of an adminstrative law judge. Second, unlike false financial certifiers, false EEO certifiers would not confront a battery of opposing counsel, armed with the resources and incentive to discover and litigate false certification. Third, unlike false financial certifiers (between 1987 and 1989), false EEO certifiers would not even face random checks (if the NPRM's silence on this point is any guide).

Consequently, a regime of EEO "self-certification" or box-checking would completely eviscerate the Commission's EEO enforcement program. Moreover, as the EEOC has pointed out, such a regime would guarantee that few citizen complaints would succeed in bringing EEO violations to the Commission's attention.224/ Without Form 396 and Form 395 data, citizen groups would have no rational basis to decide which applications to challenge and which ones not to challenge -- excepting the rare broadcaster unclever enough to check the box "No."225/ If there is some way other than reviewing an EEO program and annual employment reports to distinguish EEO compliers from possible EEO noncompliers, we cannot think of it. Furthermore, even if a "blind" challenge miraculously led to a Bilingual investigation, the absence of records would render that investigation impotent at uncovering discrimination.

Because discriminators are usually cunning and evasive, the Commission's recordkeeping and reporting requirements do not allow

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224/ "[D]iminishing or eliminating recordkeeping obligations may make legal actions relating to compliance with the broadcast EEO rule more difficult to bring and compromise a station's ability to defend itself in the event of such a legal challenge." EEOC Comments, p. 2.

225/ Even now, with Form 395 and Form 396 data, petitioners to deny can make out prima facie cases of possible discrimination against approximately 2% of broadcasters at renewal time. But without knowing how broadcasters recruit, or who they employed, where would a citizen group begin if it wishes to distinguish the EEO compliers from the discriminators? Even if Form 395 data were available and no Form 396 data were available, the citizen group would be forced to craft its allegations based purely on employment numbers, which do not always accurately mirror the genuineness of an EEO program. During slavery days, every plantation in antebellum Georgia had a majority Black staff, but that did not mean that these plantations were equal opportunity employers.

the Commission to identify all or even most discriminators.[226] But that is a reason to improve the reporting and recordkeeping requirements, not eliminate them.

226/ The existence of an EEO program on paper, backed up by records, is no guarantee that the broadcast applicant is not a discriminator. As Judge Robinson explained in his separate statement in Bilingual II:

> A broadcaster's decision to abide by the requirement that he devise [an affirmative action] plan is hardly conclusive proof that he has not intentionally discriminated in the past or is not planning to do so in the future; even hardcore racists are likely to comply superficially or grudgingly with Commission edicts once no alternative is in sight. The existence of an affirmative action program evidences good intentions only when on paper it is more than the rules demand or its implementation indicates a sincere desire to employ more minority-group workers, and not just to creep within the terms of the rules.

Bilingual II, 595 F.2d at 652 (Robinson, S., Dissenting in Part).

The D.C. Circuit has pointed out that "[d]iscrimination may be a subtle process which leaves little evidence in its wake." Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656, 659 (D.C. Cir. 1974) ("Bilingual I"). That is why the availability of evidence to test for possible discrimination is critical. As Judge Posner noted in Riordan v. Kempiners, 831 F.2d 690, 697-98 (7th Cir. 1987):

> Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it....A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries. See also Allen v. County of Montgomery, 788 F.2d 1485, 1488 (11th Cir. 1986) ("[a]ll relevant evidence is generally admisssible" because the "inherent difficulty of proving discrimination often necessitates the use of circumstantial evidence as the method of proof.")

The proof which in the past has led the Commission to infer possible discrimination has almost always come from broadcasters' renewal applications and the records supporting them. Table 7 shows the sources of the evidence which convinced the Commission or the Court that unlawful discrimination probably occurred in each of the thirteen renewal cases in which that inference has been drawn.

TABLE 7

EVIDENCE LEADING TO THE INFERENCE OF DISCRIMINATION IN RENEWAL CASES

Decision Specifying EEO Issue	Source of Evidence
1. King's Garden, Inc., 34 FCC2d 937 (1972) (decided on the pleadings and never designated for hearing)	Open admission in renewal application and other pleadings filed by licensee
2. Leflore Broadcasting Co., Inc., 46 FCC2d 980 (1974)	Midterm EEO complaint by citizen group on behalf of discrimination victims; incriminating statements and omissions in early renewal application
3. Rust Communications Group, Inc., 53 FCC2d 355 (1975)	Incriminating statement in renewal application
4. New Mexico Broadcasting Co., Inc., 54 FCC2d 126 (1975)	Allegations of petitioner to deny, unrebutted by opposition to petition
5. Walton Broadcasting, Inc., 54 FCC2d 665 (Rev. Bd. 1975)	Incriminating statement by applicant in hearing on unrelated issues
6. Federal Broadcasting System, Inc., 59 FCC2d 356 (1976)	Incriminating statements in renewal application and subsequent pleadings
7. Metroplex Communications of Florida, Inc., 96 FCC2d 1090 (1984)	Discrepancy between data on Form 395 and data in renewal application, discovered by petitioner to deny

TABLE 7 (continued)

Decision Specifying EEO Issue	Source of Evidence
8. Albany Radio, Inc., 97 FCC2d 519 (1984)	Discrepancy between data on Form 395 and data in renewal application, discovered by informal objectors
9. Catoctin Broadcasting of New York, Inc., FCC 85-155 (released May 7, 1985)	Opposition to Petition to Deny contained apparent misrepresentations which conflicted with witness' statements
10. Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) (never designated for hearing)	Conflicting statements by licensee in responses to Bilingual letters
11. WXBM-FM, Inc., 6 FCC Rcd 4782 (1991)	Discrepancy between data in renewal application and data in response to Bilingual letter
12. Dixie Broadcasting Co., 7 FCC Rcd 5638 (1992)	Discrepancy between data in renewal application and data in response to Bilingual letter
13. Bennett Gilbert Gaines, FCC 94M-531 (released September 19, 1994)	Conflicts between good samaritan's statements in motion to enlarge and renewal applicant's opposition pleading
14. The Lutheran Church/Missouri Synod, 9 FCC Rcd 914 (1994)	Incriminating statements in opposition to petition to deny and in responses to Bilingual letters.

Unfortunately, detailed EEO showings in renewal applications and supporting documentation -- which have always been essential to enforcement of the nondiscrimination section of the EEO Rule -- constitute exactly the documentation which would become unavailable to the public and the Commission if the NPRM's recordkeeping and reporting proposals are approved. As we have pointed out, virtually all EEO litigation originates with private intervenors. See p. 135 supra. Without EEO reporting and recordkeeping, these

organizations would be unable to determine which broadcasters are probably EEO violators and which are not. See pp. 135-137 supra. Thus, fewer discriminators will be caught, and, inevitably, more nondiscriminators will find themselves challenged in error. See pp. 138-139 supra.

Apart from documents flowing from the license renewal process, other sources of evidence of discrimination, such as individual complaints, are seldom available.227/ That is why the U.S. Civil Rights Commission advised the FCC in 1969 that a complaint-driven process is inherently unsuited to identifying discriminators.228/ Even when complaints or good samaritan witness' accounts are available, they usually appear only when a case is in process -- and a case in process must start somewhere. That starting point is found in the renewal applications and the records maintained by broadcasters and elicited by the Commission through a Bilingual investigation.

227/ Recall that individual discrimination complaints do not initiate FCC EEO hearings, owing to the NBC Policy. See pp. 67-68 n. 75 supra.

228/ "It is not enough that no one comes forward to complain of its noncompliance, for that may leave discriminatory practices undisturbed, much as all other complaint-oriented procedures for enforcing State and Federal FEP requirements have had only a minor impact upon the widespread discrimination the National Advisory Commission has found still exists...complaint-oriented procedures to enforce nondiscrimination requirements, for various reasons, do not work. They cannot, in light of two decades of experience, be expected to work." Comments of the U.S. Commission on Civil Rights, reported in Nondiscrimination - 1969, 18 FCC2d at 242.

It follows that if the NPRM's proposals are approved, the Commission will never be able to enforce the nondiscrimination section of the EEO Rule. Its posture will be that of a State Highway Patrol, forced by the legislature to announce to the motoring public that "the speed limit is 75, and of course we expect you to honor it. By the way, we won't be out watching."

Commissioner Ness was right when she declared that "[d]iscrimination cannot be tolerated in any form, substance, or manner, whether overt or covert." NPRM, 11 FCC Rcd at 5173 (Separate Statement of Commissioner Susan Ness). We know that every commissioner genuinely wishes to avoid any evisceration of Section 2080(a) of the EEO Rule. Since the NPRM's proposals would have the effect of rendering Section 2080(a) virtually unenforceable, the Commission should reject the NPRM's proposal to eliminate EEO recordkeeping and reporting requirements.

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