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Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue

by

PATRICIA M. WORTHY

* See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 616 (1990). In dissent, Justice O'Connor concluded that the Federal Communications Commission (FCC or Commission) could adopt "limited measures to increase the number of competing licensees and to encourage licensees to present varied views on issues of public concern." Id. However, the FCC's authority to ensure diversity of viewpoint did not establish an interest sufficient to withstand equal protection scrutiny. Id. at 616. Instead, O'Connor found that the FCC's interest in providing diversity of broadcast programming and the regulatory policies it had implemented to achieve this goal continues to be an "unsettled First Amendment issue." Id.

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The author wishes to thank Davida Grant and Mildred Bailey for their assistance in researching the topics for this Article. Appreciation is due as well to Dean Henry Ramsey, Jr., for his continued encouragement and support.

This article primarily focuses upon the harms inflicted on African-American children by the use of racial stereotyping in television programming. The emphasis, however, is not intended to suggest that negative stereotypical images in television broadcasting are limited solely to African-Americans.

This article proceeds from the premise that racism and racial discrimination are inherently evil and offend the basic social and political principles of a democratic society. In addition to the United States Constitution's guarantee of "equal protection of the laws," U.S. CONST. amend. XIV, § 1, numerous federal and state statutes have been enacted that prohibit racial discrimination in such areas as employment, voting rights, housing, and public accommodation. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994). I concur with David Kretzmer's definition of the terms "racism," "discrimination," and "racial prejudice." The word "racism," he explains, is "the theory or idea that there is a causal link between inherited physical traits and certain traits of personality, intellect, or culture and combined with it, the notion that some races are inherently superior to others." David Kretzmer, Freedom of Speech and Racism, 8 CARDozo L. REV. 445, 451-52 (1987). He distinguishes "racism," a philosophy or belief, from "discrimination," a practice or form of behavior. Id. at 452. "Racial prejudice," he argues, is a "psychological phenomenon . . . consist[ing] of negative attitudes directed in blanket fashion toward people belonging to groups defined by reference to color, race, or ethnic or national origins." Id. at 452-53.
Table of Contents

I. A Historical Perspective of Broadcast Regulation and the Quest to Achieve “Diversity” .............................. 518
   A. Early Broadcast Regulation ........................................ 518
   B. The Regulatory Quest for “Diversity of Viewpoint” ...................... 520

II. The Impact of Racial Stereotyping and the Ineffectiveness of Current Regulatory Policy .......................... 531
   A. The Sociological Findings of the Effects of Televised Racial Stereotyping ........................................ 533
   B. The Deficiencies of Existing Regulatory Policy ...................... 537

III. A Race-Neutral Regulatory Approach: The Unsettled First Amendment Issue ........................................ 539
   A. First Amendment Jurisprudence .................................... 540
   B. Broadcast Regulation: A First Amendment Anomaly .............. 543
   C. First Amendment Implications of Regulating Racial Stereotyping on Television .................................... 548
      1. Televised Racial Stereotyping: Protected or Unprotected Speech? ......................................................... 548
      3. Regulating Televised Racial Stereotyping: A Compelling State Interest ...................................................... 560
   D. Proposed Alternative Regulatory Approaches ..................... 562

IV. Conclusion ..................................................................... 566
Introduction

Racial dissention and divisiveness has been and continues to be one of the most destructive and debilitating aspects of our society. In *The Souls of Black Folk*, W.E.B. DuBois predicted this conundrum at the beginning of this century when he observed that: “the problem of the Twentieth Century is the problem of the color-line.”\(^1\) Over half a century after Dubois’ prediction, the color-line problem reached its pinnacle.

In 1967, the destructiveness of racism reached a climax when eighty-eight people died in race riots in at least sixty-five cities in over thirty states.\(^2\) Consequently, the federal government decided to determine the economic and social reasons underlying the tumult. President Lyndon Johnson appointed a commission, headed by Governor Otto Kerner of Illinois, to investigate “what happened, why it happened, and what could be done to prevent it from happening again.”\(^3\) In making this assessment, the Kerner Commission also examined the manner in which the white, male-dominated media had depicted minorities in its coverage of the civil disturbance. Although the media was not specifically identified as the cause of the racial unrest, the Kerner Commission concluded that television and print media failed to communicate “to the majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of living in the ghetto. They [had also failed to communicate] to whites a feeling for the difficulties and frustrations of being a Negro in the United States

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2. For example, a racial incident in Newark, New Jersey resulted from the local government’s refusal to address the long-standing housing shortage. Sean D. Cashman, *African-Americans and the Quest for Civil Rights, 1990-1991*, at 207 (1991). Instead, the city planned to demolish approximately 50 acres of slums in order to accommodate the construction of a new medical school. *Id.* This decision led to five days of rioting, in which 25 people died, 725 were injured, 1462 were arrested, and an estimated $15 million in property damage resulted. *Id.* The book states that “[p]erhaps the worst riot of all occurred in Detroit, beginning on July 23, 1967, when police raided an illegal African-American drinking club in the west side ghetto. The riot lasted five days. Governor George Romney of Michigan could not keep the peace and requested federal troops from the president. It took two airborne divisions to restore order, by which time forty-three people were dead.” *Id.*
... [and had] not shown understanding or appreciation of—and thus [had] not communicated—a sense of Negro culture, thought or history. The report concluded that unless the media became more sensitive to its portrayal of minorities, and Blacks in particular, these stereotypical images would persist.

In response to the Kerner Commission findings, the FCC promulgated regulations encouraging broadcasters to employ minorities. In promulgating these regulations, the Commission assumed that a direct relationship, a nexus, existed between minority employment and “diversity” in broadcast programming.


First, that despite incidents of sensationalism, inaccuracies, and distortions, newspapers, radio, and television, on the whole, made a real effort to give a balanced, factual account of the 1967 disorders.
Second, that despite this effort, the portrayal of the violence that occurred last summer failed to reflect accurately its scale and character. The overall effect was, we believe, an exaggeration of both mood and event.
Third, and ultimately most important, we believe that the media have thus far failed to report adequately on the causes and consequences of civil disorders and the underlying problems of race relations.

Kerner Report, supra, at 201, quoted in Ryan, supra note 3, at 276-77.

5. See Window Dressing, supra note 3, at 2.

6. Nondiscrimination Memorandum of 1968, supra note 4, paras. 22-25. The Commission stated:

The nation is confronted with a serious racial crisis. It is acknowledged that the media cannot solve that crisis, but on all sides it has been emphasized that the media can contribute greatly in many significant respects, particularly to understanding by white and black of the nature of the crisis and the possible remedial actions, and that such understanding is a vital first and continuing step. . . . The [Kerner Commission] report makes clear what is only common sense in this situation—that there must be greater use of the Negro in journalism, since the Negro journalist provides a most effective link with the ghetto: News organizations must employ enough Negroes in positions of significant responsibility to establish an effective link to Negro actions and ideas and to meet legitimate employment expectations. . . . The same considerations are applicable to the case of the Negro in specific programming. This is not a matter on which this Commission can appropriately intervene. The judgment as to whether to use one performer or another or a particular script approach in a particular program is wisely one beyond the jurisdiction of this Commission. Rather, all we do is again raise the question in context of the conscience of the broadcaster at this juncture of our national affairs.

Id.

7. See Window Dressing, supra note 3, at 2 n.18. In response to the draft report of Window Dressing, the FCC stated:

Programming is, of course, the essence of broadcast service in the public interest. Recognizing this simple and fundamental premise, the Commission in 1968 ad-
In recognition of the "dominant role" that television was beginning to play in shaping perceptions and conveying information in America, \(^8\) in 1977 the United States Civil Rights Commission conducted a study of the portrayal of minorities on network news and in dramatic programs. The study concluded that not only were minorities under-represented on television, but also that, "when they [did] appear they [were] frequently seen in token or stereotyped roles." \(^9\) The study further concluded that:

Television's portrayal of . . . minorities and the potential impact of these portrayals are issues of critical importance to the American society. To the extent that viewers' beliefs, attitudes, and behavior are affected by what they see on television, relations between the races . . . may be affected by television's limited and often stereotyped portrayals of men and women, both white and nonwhite. \(^10\)

Two years later, the United States Civil Rights Commission conducted another study \(^11\) to determine whether the portrayal of minorities on television had improved. \(^12\) This study concluded that racial
stereotyping in the electronic media had not only continued, but in some instances "actually intensified."

As the studies continued to reveal a lingering racial under-representation and stereotyping of minorities in the media industry, the FCC abandoned its race-neutral regulatory policies. Instead, the FCC attempted to increase minority ownership of broadcast facilities. These new regulatory programs hinged on the belief that increasing the number of minority-owned broadcast facilities would further diversify broadcast programming. The underlying rationale of the assumption is that membership in a particular minority group results in a similar perspective among its members, and that this perspective, when held by broadcast facility owners, culminates in greater diversity of viewpoint, thereby benefiting the public at large.

The validity of the assumption that increased minority ownership would increase diversity was hotly debated. The FCC argued that the "public convenience and interest" mandate of the Communications Act of 1934 satisfied the public interest, and the FCC is charged with serving that interest. However, the constitutional validity of this action is not so certain. See Metro Broadcasting, Inc. v. FCC, 947 U.S. 547, 548-49 (1990). Kathleen Kirby notes that "[t]he FCC has long offered a nexus between minority ownership and programming diversity ... as justification for implementing minority enhancement credit and distress sale policies." Kathleen Kirby, Note, Shouldn't the Constitution Be Color Blind? Metro Broadcasting, Inc. v. FCC, A Surprising Message on Racial Preferences, 40 Cath. U. L. Rev. 403, 413 (1991) (emphasis added); see also Mathew L. Spitzer, Justifying Minority Preferences in Broadcasting, 64 S. Cal. L. Rev. 293 (1991); Michel Rosenfeld, Metro Broadcasting Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality, 38 UCLA L. Rev. 583, 600 (1991); Samuel L. Starks, Understanding Government Affirmative Action and Metro Broadcasting, Inc. v. FCC, 41 Duke L.J. 933, 962 (1992).
DIVERSITY AND MINORITY STEREOTYPING IN TELEVISION

21. Professor Neal Devins explains that President Carter expressed a belief that past racial discrimination was, in the main, "responsible for minority under-representation in broadcasting." Neal Devins, Congress, The FCC, and the Search for the Public Trustee, LAW & CONTEMP. PROBS., Autumn 1993, at 171 (citing Telecommunication Minority Assistance Program, 1980-81 PUB. PAPERS 1703, 1704). Moreover, Devins asserts that the White House lobbied the FCC to establish the tax certificate and "distress sales" programs. Id.
Significant preference will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communication, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group. Pub. L. No. 97-259, 96 Stat. 1087 (1982) (amending 47 U.S.C. § 309(i)(3)(A)).
23. The Supreme Court has repeatedly applauded the FCC's policies as consistent with the public interest standard and the First Amendment goal of promoting diversity of viewpoint on the airwaves. See, e.g., FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978) (stating that it is not incompatible with the Communications Act "for the Commission to conclude that the maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole").
24. The newspapers, magazines, and periodicals of the 1990s are filled with reports of racial incidents. See, e.g., Alan Finder, Tension in Washington Heights, N.Y. TIMES, July 9, 1992, at A1; Marla Cone, Panel Urged to Ease Path of Minorities, L.A. TIMES, May 15, 1992, at B4; Police Guilty of Killing Black Driver, GUARDIAN, Aug. 24, 1993, at 18; Rick Bragg & Janita Poe, Miami is Calm but Angry, ST. PETERSBURG TIMES, June 27, 1991, at 1A; Dierdre Stoeltle, Nearly 700 March in Selma Protest; Police Brutality Alleged, WASH. POST, Feb. 11, 1990, at A18; Davide Kocieniewski, Poor Get Short End of Nightstick, NEWSDAY, Oct. 3, 1993, at 3; Christopher B. Daly, Boston Is Pondering Questions of Ra-
cial scientists have raised serious questions regarding the role that television has played both in increasing the level of violence and intensity of racial disharmony in America.\textsuperscript{25} An American Psychological Association study revealed that ethnic minorities are still "negatively stereotyped as criminals, dangerous characters, or victims of violence."\textsuperscript{26}

For the past three decades, the Commission has maintained that the best means to achieve "diversity of viewpoint" and to eliminate minority under-representation is through the proliferation of minority-owned broadcast facilities.\textsuperscript{27} Recently, the validity of the FCC's "public interest" rationale has come under both political and legal attack. Congress has, without sound justification and with minimal critical debate, eliminated the FCC's tax certificate program.\textsuperscript{28} Moreover,
without regard to stare decisis, the Supreme Court in its recent *Adarand* decision struck a debilitating blow to the FCC's remaining minority preference programs. These unsettling developments, when combined with the findings that suggest racial stereotyping contributes to the continued racial discord in this nation, compels a reexamination of this issue. A failure to resolve this problem will contribute to greater racial polarization. This article proposes shifting the dialogue away from a “diversity of viewpoint” debate and towards the development of a race-neutral regulatory framework that strives to abolish the continued portrayal of inaccurate and inappropriate minority “stereotyping.” In essence, this article suggests that Congress, the FCC, and the courts must augment their traditional efforts to ensure “diversity of viewpoint” with a new focus, and emphasize the harm that “minority stereotyping” imposes on society and its children.

Part I of this Article is a historical analysis of the underlying purposes and rationales of the laws, rules, regulations, and policies adopted by the federal government and the courts to ensure “diversity of viewpoint” in broadcast programming. Part II describes the research findings relating to minority stereotyping, and its debilitating impact on American society and its children, in the electronic media. The analysis includes a discussion of why the existing policies and federal programs have been unsuccessful in eliminating racial degradation on television and why “equal protection jurisprudence” fails at achieving this goal. Part III of the Article explores the establishment of a regulatory framework minimizing the effects of racial stereotyping through regulatory guidelines for non-minority broadcast owners.

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29. In *Adarand Constructors, Inc. v. Pena*, Justice Stevens argued in dissent that the majority's decision constituted a departure from the Court's equal protection jurisprudence, questioning Justice O'Connor's affirmation that the Court “[did] not depart from the fabric of the law; [it] restore[d] it.” *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2127 (1995). In assessing whether Justice O'Connor's “pronouncement [was] a faithful application of the doctrine of stare decisis,” Justice Stevens argued, “[I]t is quite wrong for the Court to suggest ... that overruling *Metro Broadcasting* merely restores the status quo ante, for the law at the time of that decision was entirely open[;] ... [the *Adarand*] decision is an unjustified departure from settled law.” *Id.*

30. The Court in *Adarand* held that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny ... [and thus] such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Id.* at 2113. “To the extent that *Metro Broadcasting* is inconsistent with this holding, the Court overruled it.” *Id.* *Adarand* is already producing a negative effect as government agencies revise or abandon existing affirmative action programs. See *In re Implementation of § 3090* of the Communications Act, *Sixth Report and Order*, 11 FCC Rcd. 136 (1995) (modifying competitive bidding rules by eliminating racial preferences that raised legal uncertainties in the aftermath of *Adarand*); see also Ann Devroy, *Rule Aiding Minority Firms to End*, WASH. POST, Sept. 22, 1995, at 1.
This discussion includes an analysis of First Amendment jurisprudence and a reassessment of the constitutional protections afforded and the freedoms guaranteed to members of the broadcasting industry. This Article leaves to others the difficult task of designing a minority preference program that meets the moving target of "equal protection" as recently defined by the Supreme Court.31

I

A Historical Perspective of Broadcast Regulation and the Quest to Achieve "Diversity"

A. Early Broadcast Regulation

In order to meaningfully eliminate racial stereotyping from television broadcasting, one must understand the nature of the media, the responsibilities of broadcasters, and the rights of the viewing public. Congress' initial efforts regulating radio communication were unobtrusive.32 The early 1900's witnessed considerable expansion of commercial broadcasting and with it, confusion and turmoil.33 The increased use of over-the-air signals brought chaos that ultimately resulted in the passage of the Radio Act of 1927 (1927 Act).34 The 1927 Act established the Federal Radio Commission and provided the reg-


33. One commentator has noted that the number of applicants for licenses increased dramatically at the same time the courts limited the regulatory power of the Secretary of Commerce to selecting "wavelengths for broadcasting," granting him "no power to refuse license applications . . . [or] to place restrictions on frequency, power, or hours of operation." Gauger, supra note 32, at 669 nn.30-31 (citing Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923) and United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926)).

34. Ch. 169, 44 Stat. 1162 (1927). Because voluntary measures and market forces failed to remedy the problems of broadcasting, then-Secretary of Commerce Herbert Hoover attempted to regulate the chaotic airwaves by expanding the Radio Act of 1912. Kurt A. Wimmer, Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform, 8 Comm/Ent L.J. 329, 421 (1986). Hoover stated that broadcasting "is probably the only industry of the United States that is unanimously in favor of having itself regulated." Id. at 420.
ulatory framework for the emerging broadcasting industry. It embodied, for the first time, the concept that the airwaves were public property and that a license would be granted only “as public convenience, interest, or necessity requires.”35

When the Communications Act of 1934 was enacted, Congress granted the newly created agency, the FCC, far broader powers than its predecessor, the Federal Radio Commission.36 The Communications Act of 1934 created a public system of permits and licenses gov-

35. The Radio Act of 1927 stated, in relevant part, that it was “intended . . . to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.” Ch. 169, § 1, 44 Stat. 1162 (1927). The Act also provided: “The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.” Id. at 1163-66. One commentator found that:

[the sponsors of the 1927 Act had in mind a specific rationale underlying the Federal Radio Commission's allocation of broadcast licenses . . . [and in] laying the groundwork for broadcasting regulation, Congress codified the theory that the 'scarcity' of broadcasting frequencies required broadcasters to act as 'public trustees' in exchange for the privilege of frequency use.

Gauger, supra note 32, at 670. As then-Secretary of Commerce Herbert Hoover stated in 1925, the ether “is a public medium, and its use must be for public benefit. The use of radio channel is justified only if there is public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public.” Allen S. Hammond, Diversity and Equal Protection in the Marketplace: The Metro Broadcasting Case in Context, 44 ARK. L. REV. 1063, 1082 n.74 (1991). During the hearing on the adoption of the 1927 Act, one representative stated, “American thought and American politics will be largely at the mercy of those who operate these stations. For publicity is the most powerful weapon that can be wielded in a republic . . .” Id. (quoting 67 CONG. REC. 5557 (1926)); see also Laura A. Petregal, Note, Unfair Treatment of the Fairness Doctrine: Arkansas AFL-CIO v. FCC, 27 CREIGHTON L. REV. 875 (1994) (The remarks made by a sponsor of the Radio Act of 1927 manifest a clear public interest standard: “[L]icenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest standard or would contribute to the development of the art.” 67 CONG. REC. 5479 (1927), quoted in Petregal, supra, at 889).


For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission,” which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of the chapter.

Id.
erning commercial broadcasting. Still, the 1934 Act retained the theory that the public owned the airwaves, and the grant of a license was limited to broadcasters committed to operating in the "public convenience, interest, or necessity." It was the FCC's recognition of the "public interest" mandate that prompted the agency to strive for diversity of ownership, believing that such ownership would ensure diversity of broadcast programming.

B. The Regulatory Quest for "Diversity of Viewpoint"

The FCC has consistently, throughout its history, embraced a regulatory philosophy that "diversification of ownership will broaden the range of programming available to the broadcast audience." The FCC has maintained that diverse programming is a constitutionally

37. See id.

Congress recognized that a decision to vest an absolute speech right in the owner of the technology (broadcasting) would result in denying the right of electronic speech to the substantial majority of the American public. Recognizing that the broadcast licensee would have control of a powerful technology relying on a scarce public resource, Congress opted to vest only a portion of the speech right in the broadcaster, reserving to the public the larger interest and speech right via access and diversity.

Hammond, supra note 35, at 1081. Professor Neal Devins explains that the concepts of "public interest" and "diversity" were embraced as early as 1929 by the Federal Radio Commission when it "[held] that a radio station's public trustee responsibilities included an affirmative obligation to make certain that a diversity of religious, political, social, and economic viewpoints 'find their way into the market of ideas.'" Devins, supra note 21, at 153 n.38 (quoting Mayflower Broadcasting, 3 F.R.C. Ann. Rep. 32, rev'd on other grounds, 37 F.2d 993 (D.C. Cir. 1929), and cert. denied, 281 U.S. 706 (1930)).

39. NBC v. United States, 319 U.S. 190, 215 (1943); see also id. at 215-16 (determining that the important factor in allocating licenses is whether the applicant for a broadcast license will serve the public interest); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 n.2 (1940) (explaining that the FCC must evaluate which broadcaster will best serve the public interest).

40. See Ellen L. Triebold, Constitutional Law—The Court Meets Halfway on Affirmative Action: Metro Broadcasting Inc. v. Federal Communications Commission, 16 J. Corp. L. 653, 655 (1991). The FCC's "public interest" efforts have been affirmed by the Supreme Court as a clearly stated mandate of the Communications Act of 1934: "Congress moved under the widespread fear that in the absence of governmental control the public interest might be subordinated to monopolist domination in the broadcast field." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

41. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 570 (1990) overruled in part by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). The emphasis on ownership has been justified by the notion that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with public interest." Id. at 571 n.16 (quoting In re Amendment of Sections, 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report
guaranteed right of the television viewing audience. Moreover, the First Amendment arguably enshrouds the FCC's "public interest" mandate with an obligation to provide viewers with the "widest possible dissemination of information from diverse and antagonistic sources." The application of the FCC's policy resulted in the promulgation of policy statements and rules calculated to minimize media concentration. In the early 1940s, the Commission prohibited any person from operating more than one television and radio station in the same community. During the 1960s, the FCC prohibited common ownership of two AM or FM stations in the same broadcast service areas. By the 1970s, the Commission limited media concentration in specific markets, regional concentration, and cross-ownership of competitive media. In the 1980s, the Commission imposed limitations on group ownership in general.

42. Associated Press v. United States, 326 U.S. 1, 20 (1945).
43. Id. See also Red Lion Broadcasting Co., v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .").
44. Many commentators disapprove of the deregulatory approach espoused by former FCC Chairman Mark Fowler. The liberalization of ownership restrictions would clearly lead to greater control of broadcast media in fewer hands. See generally Wimmer, supra note 34, at 427-28 ("The broadcast industry is already characterized by great concentration. About 72 percent of commercial stations are held by group owners. Of 748 television stations, 495 are owned by 165 entities, an average of three each.") (citations omitted).
45. Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16,065 (1943); see also NBC v. United States, 319 U.S. 190, 193 (1943).
49. See 47 C.F.R. § 76.501(a) (1977) 47 C.F.R. § 73.35(c), .240(c), .636(c) (1979).
The FCC’s interpretation of its “public interest” mandate, as it relates to First Amendment requirements, has been sanctioned by the courts:

The promotion of diverse sources of information through diversification of media ownership is thus well established as an integral part of the Commission’s public interest mandate .... The Supreme Court has recognized on several occasions the connection between diversity of ownership and the diversity of ideas and expression that is the basis of the First Amendment.\(^5\)

The “diversity of viewpoint” as a public interest policy was also embraced by Congress. In 1959, Congress enacted legislation that sought to ensure broadcasters would afford “reasonable opportunity for the discussion of conflicting views on issues of public importance.”\(^5\) Moreover, legislation enacted more than two decades later, which authorized the FCC’s use of an expedited licensing process, included language directing the Commission to continue its vigilance in preserving diversity of programming.\(^5\)

\(^{51}\) Steele v. FCC, 770 F.2d 1192, 1195 (D.C. Cir. 1985). Professor Hammond also notes that the Supreme Court has recognized congressional authority pursuant to the First Amendment to mandate diversity:

[T]he people as a whole retain their interest in free speech by radio [and other forms of broadcast] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment and ‘[i]t is the right of the viewers and listeners, not the right of the broadcasters which is paramount’. .... Congress may ... seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations.


\(^{52}\) 47 U.S.C. § 315 (1988). The obligation of broadcasters “to encourage and implement the broadcast of all sides of controversial public issues” was recognized by the FCC in 1949. Devins, supra note 21, at 153 (quoting Editorializing by Broadcast Licenses, Report of the Commission, 13 F.C.C. 1246 (1949)). This affirmative obligation, known as the “fairness doctrine,” required the adequate coverage of public issues and the provision of opposing viewpoints. Id.

\(^{53}\) In 1981, Congress amended § 309(i) of the Communications Act of 1934 and granted the FCC the authority to award broadcast licenses by lottery. 33 Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 736, 739-37 (1981) (relating to both television and radio broadcasting). In adopting this new lottery system, the House Conference Report confirmed that the resulting FCC licensing action was to “enhance[e] diversity through such structural means [to] broaden the nature and type of information and programming disseminated to the public.” H.R. CONF. REP. NO. 763, 97th Cong., 2d Sess. 43, reprinted in U.S.C.C.A.N. 2287.

Congress was intensely interested in prohibiting cross-ownership. In July 1985, hearings were held to “underline, underscore, and emphasize to people the importance of concentration and cross-ownership.” Later that year, language was included in a conference report and a letter was sent to the FCC by its oversight committee “that the cross-ownership rules are vitally important” and that the
Initially, the FCC's diversity policy focused on minimizing concentration of broadcast media ownership as the primary means of ensuring dissemination of diverse viewpoints. However, as a result of the racial disturbances of the late 1960s and the findings of the Kerner Commission, the FCC initiated race-neutral regulatory policies that sought to ensure the inclusion of minority viewpoints in broadcast media. The policies were designed to encourage broadcasters to hire minorities.

Unfortunately, ten years later it became painfully clear that the FCC's minority employment and ascertainment programs were unable to increase minority representation in the broadcasting industry. In 1977, the U.S. Civil Rights Commission released a study that tied the importance of stereotypical portrayals of minorities on television to the beliefs, attitudes, and behavior of the viewing public. The study

54. See discussion supra note 2.

55. Citing the findings of the Kerner Report, the FCC in 1968 implemented regulations to prohibit racial discrimination in broadcast employment. See In re Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, Report and Order, 18 F.C.C.2d 240 (1969) (adopting rules and reporting requirement to assure equal opportunity); In re Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, Report and Order, 60 F.C.C.2d 226, 231 (1976) (adopting a model equal employment opportunity (EEO) program). In 1976, the Commission promulgated a rule that required licensees to communicate with minority and other groups in the community in order to ascertain issues of particular importance. See In re Ascertainment of Community Problems by Broadcast Applicants, First Report and Order, 57 F.C.C.2d 418, 442-44 (1976). The “ascertainment” regulations sought to assist the licensee in providing programming that better reflected the interest of the minority community. See id. In 1960, the Commission included “minority groups” as one of several groups whose programming needs were to be met by television licensees in order to meet their public interest responsibilities. See Enbanc Programming Inquiry, Report and Statement of Policy, 44 F.C.C.2d 2303, 2314 (1960).

56. Akousa B. Evans concludes that both the race-neutral policies of the FCC and the marketplace failed to increase minority representation in the broadcasting industry. Evans, supra note 14, at 386. He argues: “Six years after the FCC's EEO policies were implemented, African-Americans and other minorities still held a small percentage of management jobs in the broadcast industry. In 1977, . . . while 64.9% of the management positions at forty selected television stations were held by white males, only 5.2% and 4.4% were held by African-American males and African-American females respectively.” Id. at 386-87.
concluded that these conditions had distinctly impacted race relations in American society.\textsuperscript{57} The study further stated:

Research is limited regarding the attitudes which blacks develop toward themselves as a result of their relative heavy television viewing behavior. Dr. Bradley Greenberg, who has done extensive research on blacks in television, found that black children identify with black television characters and rate them highly in handsomeness, friendliness, and strength. Other questions must be answered by further research. What is the impact on black children of seeing black adults portrayed so frequently as police officers, as criminals, and in a variety of service roles? What is the impact on black girls who see adult black wom[e]n who are mostly unemployed and who are frequently prostitutes? What is the effect on children of other minority groups who rarely see adults of their own ethnic background portrayed on television at all?\textsuperscript{58}

The study further concluded that:

Greenberg's research on the impact of television's portrayal of blacks on white viewers reveals that white children are more likely than black children to learn about the other race from television. \textit{Forty percent of the white children attributed their knowledge about how blacks look, talk, and dress to television}. Those white children who had the least opportunity to interact with blacks were most likely to believe that television portrayals of blacks were realistic.\textsuperscript{59}

Therefore, neither the FCC's race-neutral policies nor the private marketplace were addressing the problems of minority under-representation and the concomitant stereotyping. In an effort to confront minority under-representation, the Commission established the Minority Ownership Task Force (MOTF) as an advisory group. In 1978, the MOTF issued a report that concluded:

\textit{Acute under-representation of minorities among the owners of broadcast properties is troublesome in that it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities.}\textsuperscript{60}

\textsuperscript{57} \textit{Window Dressing, supra} note 3, at 47.

\textsuperscript{58} \textit{Id.} at 46 (citing Bradley S. Greenberg, \textit{Children's Reactions to TV Blacks, Journalism Q.}, Spring 1972, at 10).

\textsuperscript{59} \textit{Id.} at 46 (citing Bradley S. Greenberg, \textit{Children's Reaction to TV Blacks, Journalism Q.}, Spring 1972, at 11) (emphasis added).

\textsuperscript{60} \textit{Federal Communication Commission's Minority Ownership Task Force, Minority Ownership Report (1978)} [hereinafter MOTF Report], \textit{quoted in Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978)}. In April of 1977, the FCC convened a conference to analyze the reasons for the continued under-representation of minority broadcasting owners. Evans, \textit{supra} note 14, at 388. The participants identified the problem as the result of "years of racial discrimination [that]
Immediately after the issuance of the MOTF Report, the FCC announced two new policy initiatives: (1) minority preferences in tax certificates, and (2) the distress sales program. The FCC justified the new regulatory approach by resorting to its time-honored policy of created barriers," including lack of capital, inability to obtain financing, and inability to access the "Old Boy Network." 61

61. Professor Wendy M. Rogovin proffers that the new FCC initiatives were the consequence of "some fifteen years of studies conducted by Congress and various interest groups." See Wendy M. Rogovin, The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard, 42 CATH. U. L. REV. 51 (1992). One article explains that the FCC's 1978 policy initiatives grew out of both the MOTF Report and a petition filed with the Commission urging the need to implement minority ownership policies. Lorna Veraldi & Stuart A. Shorestein, Gender Preferences, 45 FED. COMM. L.J. 219 (1993). The authors also note that "the Court of Appeals in TV 9 v. FCC" ruled in 1974 "that minority ownership should be afforded merit in comparative hearings." Id. at 222.

62. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 983 (1978) [hereinafter 1978 Minority Policy Statement]. The tax certificate program provides for deferral of capital gains taxation. Id. at 983 n.19. Congress initially enacted the tax provision to encourage separate ownership of competing broadcast companies. Id. Those broadcasters owning two or more competing properties before the enactment of the legislation were exempt under a grandfather clause. Id. (citation omitted). Congress provided the Commission with the authority to issue a certificate that treats the sale of a broadcast property as a deferred capital gain if the sale allows the Commission to institute a new policy or to implement a policy change relating to the ownership of broadcast stations. 28 U.S.C. § 1071 (1988). Under the FCC's tax certificate policy, a broadcaster qualified for a deferred capital gain if it sold a broadcast facility to a business entity with at least fifty percent minority ownership. In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, Policy Statement and Notice of Proposed Rule Making, 92 F.C.C.2d 849, 853 (1982). In 1995, Congress abolished this minority preference program in response to the announced purchase of Viacom by a minority entrepreneur. See discussion supra note 40.

63. 1978 Minority Policy Statement, supra note 62, at 983. The "distress sale" policy allows a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for a hearing, to assign the license to an FCC-approved minority enterprise at a "distress sale" price. Id. As of 1991, "only thirty-eight distress sales had been approved by the FCC since their inception in 1978, and only thirteen had been approved in the preceding nine years," which constitutes "a minute fraction of the total number of broadcast stations transferred during those same years." Mary Tabor, Encouraging "Those Who Would Speak Out with a Fresh Voice" Through the Federal Communication Commission's Minority Ownership Policies, 76 IOWA L. REV. 609, 620 (1991). The FCC, based on the "primary objective of maximum diversification of ownership," also began to consider the race and ethnicity of applicants in "afford[ing] comparative merit to applicants for construction permits where minority owners were to participate in the operation of the station." 1978 Minority Policy Statement, supra note 62, at 982. In a 1965 policy statement, the FCC established two primary factors it would use to evaluate competing applicants for a broadcasting frequency: (1) "the best practicable service to the public," and (2) "a maximum of diffusion of control of the media of mass communications." Policy Statement on Comparative Broadcast Hearings, Public Notice, 1 F.C.C.2d 393, 394 (1965), discussed in Gauger, supra note 32, at 671. One commentator has observed that the 1965 Policy Statement excluded the relevance of an applicants' race, sex, ethnicity, or gender, but the D.C. Circuit, in TV 9 v. FCC, mandated that the FCC consider these factors. Gauger, supra note 32, at 671.
acting in the "public interest"; the FCC argued that "the views of racial minorities continue[d] to be inadequately represented in the broadcast media,"64 and that the failure of the airwaves to reflect the opinions of racial minorities was "detrimental" to the viewing and listening public as a whole.65 The FCC determined that the "legitimate public interest objective" of program diversity could be furthered through minority ownership of broadcast facilities.66

The concept that a "nexus" exists between minority ownership and minority programming originated with TV 9, Inc. v. FCC.67 When the Commission adopted the "nexus" theory, the resulting minority preference programs found support in Congress68 and the courts.69

64. 1978 Minority Policy Statement, supra note 62, at 980.
65. Id. at 980-81. The Commission, clothing its new regulatory policy with a "public interest" mantle, stated that "adequate representation of minority viewpoints in programming serves not only the needs and interest of the minority community but also enriches and educates the non-minority audience." Id.
66. Id. at 981.
67. 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974). The court in that decision considered the FCC's refusal to award comparative merit to a corporate applicant with black investors living in the relevant community. Id. at 935-36. The FCC claimed that "[b]lack ownership [could not] and should not be an independent comparative factor," asserting that the Communications Act was "color blind." Id. The court rejected the Commission's argument, asserting that the Constitution permits "a view of our developing national life which accords merits to Black participation" and that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." Id. at 936, 939. The court concluded that the Commission's "primary objective of diversification was consistent with awarding merit to minority applicants and, moreover, that the Commission should grant merit for Black ownership and participation if there is a "reasonable expectation" that such involvement will produce a public interest benefit. Id. at 938.

In a later decision, the Court of Appeals for the District of Columbia concluded that the FCC erred in failing to grant a black man any "weight" for his minority status in the technical requirement phase of a comparative hearing. Garett v. FCC, 513 F.2d 1056, 1063 (D.C. Cir. 1975), discussed in Gauger, supra note 32, at 674-78. The court "characterized its earlier TV 9 opinion as meaning that 'black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry' and 'that "reasonable expectation," without "advance demonstration," [of a public interest benefit from increased minority ownership] gives them relevance.'" Gauger, supra note 32, at 675 (quoting Garett, 513 F.2d at 1063 (quoting TV 9, 495 F.2d at 937-38)).
68. See H.R. Rep. No. 765, 97th Cong., 2d Sess. 37, reprinted in 1982 U.S.C.C.A.N. 2261. Congress also noted that "[t]he nexus between diversity of media ownership and diversity of programming sources has been respectfully recognized by both the Commission and the courts." Id. at 40.
69. NAACP v. Federal Power Comm'n, 425 U.S. 662, 670 (1976); Steele v. FCC, 770 F.2d 1192, 1205 (D.C. Cir. 1985) (Wald, C.J., dissenting) (arguing that the promotion of diverse sources of information through diversification of ownership is a well established public interest mandate). In NAACP v. Federal Power Comm'n, the Supreme Court inquired as to what authority, if any, the Federal Power Commission (FPC) had to prohibit employment discrimination by regulated utilities. NAACP v. Federal Power Comm'n, 425 U.S. at 670. In finding such authority lacking, the Court distinguished the FPC's role in
Others, however, questioned the legal and factual validity of the FCC minority ownership policies. The arguments and suppositions of both the proponents and opponents of the FCC's programs became the subject of heated debate between the majority and dissenting opinions in the controversial Supreme Court decision *Metro Broadcasting v. FCC*.71

Justice Brennan, writing for the majority in *Metro Broadcasting*, held that enhancing broadcast diversity constitutes an important governmental objective.72 In sanctioning the assumption that expanding ensuring diverse programming from that of the FCC, *Id.* The Court observed that the FCC's policies “can be justified as necessary to enable the FCC to satisfy its obligation under the *Communications Act of 1934* . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups.” *Id.* at 670 n.7.

70. The premise that minority ownership would result in programming unobtainable from the existing non-minority-broadcasting industry was often challenged. The D.C. Court of Appeals, in *Steele*, rebuffed such a notion:

The minority preference rests on the assumption that first, membership in an ethnic minority causes members of that minority to have distinct tastes and perspectives and, second, that these differences will consciously or unconsciously be reflected in distinctive editorial and entertainment programming. The validity of the first of these assumptions is not obvious on its face. . . . Indeed, to make such an assumption concerning an individual's taste and viewpoint would seem to us as mere indulgence in the most simplistic kind of ethnic stereotyping . . . With respect to the second assumption. . . . [t]o suggest that these dubious, ethnically-determined tastes will outweigh the economic imperative of what the audience wants to hear . . . strikes us as more than a little implausible. 770 F.2d at 1198-99.

During the Reagan Administration, the FCC abandoned its support of the minority ownership efforts. A 1980 report by the Commission claimed that ownership restrictions had produced minimal public benefit and that therefore no causal connection existed between the programs and the goals of competition and diverse viewpoints. *See* Andrea L. Johnson, *Redefining Diversity in Telecommunications: Uniform Regulatory Framework for Mass Communications*, 26 U.C. DAVIS L. REV. 87, 97 (1992) (citations omitted).

71. 497 U.S. 547 (1990). At question in *Metro Broadcasting* was the FCC's minority enhancements and distress sale policies. Separate proceedings challenging the minority ownership programs were consolidated for consideration by the Court. In *Winter Park Communications v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), a non-minority company sought review of an FCC decision granting a new license to Rainbow Broadcasting, a minority-owned firm. The D.C. Circuit had previously affirmed the FCC determination that Rainbow's minority ownership status substantially outweighed the qualifications of *Metro Broadcasting*. *Id.* at 349. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), decided by another panel of the same circuit, held improper the FCC's order approving Faith Center, Inc.'s distress sale of its television license to a minority firm. The court concluded that the FCC's actions violated Shurberg's equal protection rights under the Fifth Amendment. *Id.* at 903. The Supreme Court affirmed the *Winter Park* decision and reversed Shurberg.

72. *Metro Broadcasting*, 497 U.S. at 568. Justice Brennan argued that the benefits of broadcast diversity were not confined to minority groups but instead “redound to all members of the viewing and listening audience.” *Id.* In reaching this conclusion, the majority relied on several major cases on broadcast media and the First Amendment: FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (finding a fiduciary obligation imposed
"minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity," the majority deferred to the fact-finding of Congress and to the expertise of the FCC.\footnote{73} And while the Court found no direct correlation between minority ownership and enhanced diversity of viewpoint, the Court found it reasonable to envisage that "[the] 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."\footnote{74}

Writing for the dissent, Justice O'Connor criticized the majority for failing to determine "how one would define or measure a particular viewpoint that might be associated with race."\footnote{75} She faulted the FCC for having essentially identified "what constitutes a 'Black viewpoint,' an 'Asian viewpoint,' an 'Arab viewpoint,' and so on,"\footnote{76} arguing that "an individual's tastes, beliefs, and abilities should be assessed on their own merits," as opposed to "categorizing that individual as a member of a racial group presumed to think and behave in a particular way."\footnote{77}

on broadcasters by the Communications Act); CBS v. Democratic National Comm., 412 U.S. 94, 122 (1973) (the FCC's "public interest" standard augments important First Amendment requirements); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (the authority to regulate broadcasters is derived from the scarcity of the airwave frequencies); and NBC v. United States, 319 U.S. 190, 226 (1943) (broadcasting, unlike other media, may be regulated by the government). \textit{Metro Broadcasting}, 497 U.S. at 566-67.

\footnote{73.} \textit{Metro Broadcasting}, 497 U.S. at 579. In so holding, the Court deferred to the FCC's conclusion that a nexus existed between minority ownership and the inclusion of minority views in programming. Id.\footnote{74.} \textit{Metro Broadcasting}, 497 U.S. at 579. Professor Douglas O. Linder suggests that:

While never explicitly stated, the "broadcast diversity" that Justice Brennan had in mind must concern information about racial issues. . . . Adding to the underrepresented minority voices may facilitate understanding, vent frustration and undermine racial stereotypes—all consequences of a 'robust exchange of ideas' on racial issues. It is apparent from the FCC's policies that the "broadcast diversity" the agency wanted to increase related to racial issues, rather than public issues generally.

Douglas O. Linder, \textit{Review of Affirmative Action After Metro Broadcasting v. FCC: The Solution Almost Nobody Wanted}, 59 UMKC L. Rev. 293, 309 (1991). Professor Julian N. Eule, in a thoughtful article, analyzes \textit{Metro Broadcasting} solely from a First Amendment perspective. Julian N. Eule, \textit{Promoting Speaker Diversity: Austin and Metro Broadcasting}, 1990 Sup. Cr. Rev. 105. Noting that the world of television is "largely a white one," he suggests that the Court in \textit{Metro Broadcasting} tacitly approved a concept that allowed government to "tone down or turn up the volume of particular speakers" in order to ensure speaker diversity. \textit{Id.} at 122, 124, 127.\footnote{75.} \textit{Id.} at 614 (O'Connor, J., dissenting).\footnote{76.} \textit{Id.} at 615.\footnote{77.} \textit{Id.} at 618 (quoting Steele v. FCC, 770 F.2d 1192, 1198 (D.C. Cir. 1985), \textit{judgment vacated pending en banc rehearing}). Professor Linder observes that the Court in \textit{Metro Broadcasting} basically disagreed about "racial generalizations." Linder, \textit{supra} note 74, at
To the degree it was interpreted to require an intermediate level of scrutiny for congressionally mandated minority preference programs, Metro Broadcasting has been overruled: Adarand v. Pena held that congressional programs, like state and local programs, shall be subject to strict scrutiny. This requirement means that Congress and the FCC must now show statistical evidence of past discrimination, demonstrating a compelling governmental interest, and that any program established must be narrowly tailored to meet that interest. In sum, the Court in Adarand concluded that "Metro Broadcasting was . . . a significant departure from much of what had come before it" and as such, thought that "well-settled legal principles pointed toward a conclusion different from the one reached in Metro Broadcasting."

With the new conservative majority on the Supreme Court, and the revised "equal protection" standards as derived in Adarand, the FCC must revise its minority ownership policies to achieve its goal of ensuring "diversity of viewpoint." More importantly, the FCC must also acknowledge the continued practice of racial stereotyping in television broadcasting, and adopt a regulatory regime that addresses the problems associated with these media distortions more specifically. A recent study conducted by an Advisory Committee to the U.S. Civil Rights Commission concluded:

The news media has tremendous influence on the attitudes of viewers and readers regarding race relations in this country. The unfair portrayal of minorities in the electronic and print media has produced negative self-images of people of color, and it has bestowed upon white people an undeserved and destructive image of superiority.

314. He states, "The dissenters argued that 'essential equal protection principles' flatly 'prohibit racial generalizations.'" Id. at 314 (quoting Metro Broadcasting, 497 U.S. 619 (O'Connor, J., dissenting)). "The majority, on the other hand, condemned what it called 'impermissible stereotyping,' but approved 'predictive judgments' about the link between race and behavior." Id. at 314-15 (quoting Metro Broadcasting, 497 U.S. at 579.
78. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995). By contrast, Justice Stevens argued in dissent that the "fostering" of diversity, determined in Metro Broadcasting to constitute a compelling governmental objective, was not inconsistent with the Court's holding in Adarand. Id. at 2127. "[I]n deed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in Metro Broadcasting." Id. at 2127-28. Justice Stevens alluded to Metro Broadcasting as the genesis for the proposition that achieving diversity constitutes a compelling government interest. Id. at 2127. It was, however, Justice Powell in Regents of the Univ. of Cal. v. Bakke that found a compelling interest in the University's goal of attaining a diverse student body because of the First Amendment interests involved. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., plurality opinion).
79. Adarand Constructors, 115 S. Ct. at 2113.
80. Id. at 2113-16.
81. MINNESOTA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, STEREOTYPING OF MINORITIES BY THE NEWS MEDIA IN MINNESOTA 35 (1993) [hereinafter
The continued use by the media of "negative self-images," the study explains, substantially impedes any efforts toward eliminating racial discord.\textsuperscript{82} Acknowledging that these issues have been identified and studied for almost three decades, the Advisory Committee proposed numerous solutions.\textsuperscript{83} Most important, however, the Advisory Committee concluded with a warning to the broadcast industry,\textsuperscript{84} which it described as having the "high[est] level of unrestricted" liberties in the world:

With that freedom goes the obligation not to use that freedom to limit the freedom, liberty, or advancement opportunity of any racial, ethnic, or religious segment of the community. No differently from individual libel cases, group libel (whether intentional or not) is destructive of a free press.\textsuperscript{85}

One legal commentator notes in his discussion of the stereotypical portrayals of minorities on network programming:

The paucity of minority viewpoints over the airwaves is detrimental \ldots [but negative] stereotyping seems a worse affront to equal respect than a mere failure to afford sufficient opportunities for self-expression. Also, the combination of negative stereotypes and gross under-representation of minority viewpoints skews the information presented to the broadcast audience as a whole in a way that fosters and perpetuates prejudices against minorities.

\textbf{STEREOTYPING OF MINORITIES} (emphasis added). The study quoted the testimony of Robert Entman, a professor of journalism at Northwestern University:

While the roots of racism are varied and deep, there is a surprising source of messages that daily stimulate racial tensions: local television news. \ldots Blacks generally look more threatening than whites in crime stories and they seem more demanding and self serving in political stories. \ldots Many of the racial messages on local news are difficult to change, since they reflect a part \ldots of urban reality. \ldots It's not that blacks and white are treated differently in every respect; many \ldots measurements [are] in balance. But overall, local television presents viewers with an accumulation of negative imagery of African-Americans. By denying the historical context of high crime rates and political demands among blacks—the residue of long years of discrimination—television contributes to a racism that is more subtle than old-fashioned bigotry, but just as destructive, especially in today's tense economic political climate.\textsuperscript{83}

\textit{Id.} at 1.

\textsuperscript{82} The study found that stereotyping can adversely impact both minority and majority communities because it (1) reinforces negative stereotypes that impede equal opportunities for minorities, (2) implies that minorities make more negative contributions to the community than positive ones and therefore alienates and polarizes the minority community from the majority community, (3) impacts the potential role models for minority youth, (4) obstructs the development of self-esteem among minorities, and (5) polarizes racial and ethnic minority. \textit{Id.}

\textsuperscript{83} It recommended such actions as recruiting and hiring people of color, and supporting minority-owned broadcasting facilities with government monies through advertising. \textit{Id.} at 37-38.

\textsuperscript{84} The study described the television and print media as basically "white owned and operated." \textit{Id.} at 38.

\textsuperscript{85} \textit{Id.} at 37.
Affording a fair opportunity for self-expression to those who have been portrayed as inferiors should rank as a priority for anyone who interprets free speech as entailing the equal liberty principle.  

In pursuing its quest to ensure diversity of viewpoints, the FCC has throughout its history focused on minimizing concentration of ownership of the airwaves. When the FCC found itself confronted with racial unrest, under-representation, and stereotyping, it sought to combat the problems by defining them in terms most familiar to its “public interest” standards. The notion that the Commission’s obligation to control media concentration, and thus provide television viewers with the “widest possible dissemination of information from diverse” sources, provided a regulatory framework that was familiar to and accepted by the courts and Congress. The FCC sought to attack minority under-representation and stereotypical portrayals by diluting the control of white males over media programming. The Commission initially attempted to impact media concentration by promoting minority hiring, and then by attempting to increase minority ownership of broadcast properties.

Unfortunately, the FCC’s “concentration” concept raises equal protection implications that face new and undetermined challenges. Meanwhile, the harmful effects of racial stereotyping in television media continue—unchallenged and unabated.

II

The Impact of Racial Stereotyping and the Ineffectiveness of Current Regulatory Policy

Numerous commentators believe that the electronic media has the power to influence and thus define the cultural, political, and so-

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86. Michel Rosenfeld, supra note 18, at 626 (emphasis added). Social scientist J. L. Dates makes the following observations:

   Television of the 1990s, as a purveyor of shared cultural values, must deal with relevant issues, and present contemporary concepts and stories characteristic of America’s multicultural, multiethnic society, and do so with a balance view rather than a one-sided and dominant culture-controlled one. . . . It is my opinion that the infusion of authentic, African-American controlled images into mainstream popular culture, particularly television, could help all Americans better understand themselves.


87. The Commission has always operated on the principle that “diversification of ownership will broaden the range of programming available to the broadcast audience.” Metro Broadcasting, 497 U.S. 547.

cial mores of our society.\textsuperscript{89} It is widely acknowledged that our telecommunications regulation could be an effective tool in achieving racial equality in this country.\textsuperscript{90} These factors necessitate a comprehensive reassessment of the effectiveness of current television media policies in the elimination of minority stereotyping from our nation's airwaves.\textsuperscript{91} The escalated intensity of racial discord, and the persistent affirmation of negative imagery of minorities, compels a re-evaluation of the FCC's constitutionally-sanctioned efforts to ensure "diversity of viewpoint."\textsuperscript{92}

\begin{itemize}
\item See, e.g., Paula M. Pointdexter & Carolyn A. Stroman, \textit{Blacks and Television: A Review of the Research Literature}, 25 J. BROADCASTING 103, 103 (1981) ("Ninety-eight percent of all U.S. homes have television sets; 49 percent have more than one set. . . . The average home watches television over six hours a day [and] two-thirds of the U.S. public relies on television most as its source of news."); Carolyn A. Stroman, \textit{Television's Role in the Socialization of African American Children and Adolescents}, 60 J. NEGRO EDUC. 314, 314-15 (1991) ("[I]t is television's ability to transmit the values of the culture that makes it—together with the family, church, peers, school, and other community-based institutions—such a powerful socializing agent.").
\item See, e.g., Wimmer, \textit{supra} note 34:
Broadcasting shapes societal values and opinions to a degree unrivaled by other communications media, and has a pervasive influence on the lives of Americans. . . . [I]ts impact on racial stratification cannot be overlooked, as the social problem of inequality continues despite gains in the social position of minorities over the past decades.
\item . . . Communications regulation has tremendous potential for facilitating equality in race relations, and this role justifies careful consideration of changes in regulatory policy.
\end{itemize}
\textit{Id.} at 331, 334 (citations omitted).

\textsuperscript{91} Professor Allen Hammond observes that:
In May of 1978, the FCC concluded that the views of minorities remained inadequately represented and that the inadequacy adversely affected the public's right to diversity . . . . Whether one examines recent commentary on media stories involving race, portrayals of minorities in prime time television, or recent television programs . . . the majority-owned media and press are the object of continued and often withering criticism regarding their failure to portray blacks and other minorities fairly.

\textit{Hammond, \textit{supra} note 35, at 1084-85 (citations omitted).}

\textsuperscript{92} One commentator suggests that the potential value and role that television broadcasting could play in the lives of Americans in general, and minority children in particular, requires a regulatory approach:
The electronic media have the capacity to ease societal stratification indirectly. Although media do not confer economic benefits, they can alter modes of social interaction that limit proximity between races and close opportunities to minorities. Changing the discriminatory nature of social attitudes is critical. Once a population has been a target of discrimination, it is confined to certain roles and is denied access to scarce resources. Modern mass communications have the capability of producing 'a voluntary change in attitude or action' of an audience. This potential could have marked effects in the socialization of children, who are often exposed to television's stereotypical portrayals during ages when they are developing conceptions of social inequality. If this capability is used effectively to
A. The Sociological Findings of the Effects of Televised Racial Stereotyping

The social science literature clearly demonstrates the overwhelming presence of television viewing in the average American home. Moreover, research suggests that children, particularly black children, are by far the largest television viewers.

Children still devote the greatest proportion of their leisure time to television. In fact, many spend more time watching television than in the classroom. Children in the first year of the study reported viewing an average of 31.2 hours per week; the mean viewing frequency in Year 2 was 28.3 hour per week, and in Year 3, 29.4 hours. Race clearly is a major determinant of children's television-viewing. Black subjects watched nearly twice as much television as White subjects in all 3 years.

This trend toward greater viewing of television by minorities was reported as early as 1963 by G.A. Steiner, and has consistently been reaffirmed by research conducted in the last several decades. More importantly, this tendency toward greater exposure to television in early childhood has been identified as an important factor in the socialization of minority children.

It is the use of television in the social development of children that underscores the significance of television to black audiences and change the mindset of citizens predisposed to discriminatory attitudes, racial stratification could be decreased. Wimmer, supra note 34, at 397.

93. A 1986 Nielsen survey indicated that Blacks watch 10 percent more television than Whites. Stevina U. Evuleocha & Steve D. Ugbah, Stereotypes, Counter-stereotypes, and Black Television Images in the 1990s, 13 W. J. OF BLACK STUD. 197, 198 (1989). Moreover, the authors contend that "by the time the average child has graduated from high school, he/she would have viewed approximately 22,000 hours of TV. Since a significant percentage of this 22,000 hours of viewing show Blacks in a negative and distorted light, it is safe to assume that TV seeks to perpetuate a false sense of White superiority and a false sense of inferiority on the part of Blacks." Id.


96. See Poindexter & Stroman, supra note 89, at 108 ("blacks are among the heaviest consumers of television"); Comstock & Cobbey, Television and the Children of Ethnic Minorities, J. COMM., Winter 1979, 104, 105 ("Ethnic minority children have a distinctive orientation toward television and other mass media."); William H. Anderson Jr. & Bishetta M. Williams, TV and the Black Child: What Black Children Say About the Shows They Watch, J. BLACK PSYCHOL., Feb. 1983, 27, 28 ("[B]lack children are more profoundly influenced as a result of greater exposure to TV.").

97. Poindexter & Stroman, citing the Greenberg and Akin study of minority fourth-, sixth-, and eighth-graders, state that "black youngsters actually watched television so they could learn how different people behave, talk, dress and look. Black children were significantly more likely than white children to say they watched television for this purpose." Poindexter & Stroman, supra note 89, at 115.
underlies the great influence of television over time. Professor Stroman explains:

There are compelling reasons to believe that television's socializing effects may be greater for African American children. One reason is that the amount of time Black children spend watching television is phenomenal. Studies indicate that for some African American children weekly television viewing exceeds their parents' 40-hour work week.

Children are more vulnerable to media images because they lack real-world experience and therefore lack the necessary basis for comparison. What is disturbing is the empirical data which confirms that black children use television to acquire values, beliefs, concepts, attitudes, and basic socialization patterns. These findings suggest that further examination and analysis is needed to determine the effect of the media images and messages upon children in general, and African-American children in particular.

Social scientists have long criticized television's impact on children. Professor Stroman explains that since the introduction of televi-

98. G. Comstock et al., Television and Human Behavior (1978) (television is instrumental as a source of vicarious socialization for children that competes with other socializing agents to provide role models and information that affect children's attitudes, beliefs, and behavior).

99. Stroman, supra note 89, at 315. Much of the research literature contends that this magnitude of television viewing is the consequence of the economic and social deprivation of the African American family. See W.H. Anderson, Jr. & B.M. Williams, TV and the Black Child: What Black Children Say About the Shows They Watch, 9 J. Black Psychol. 2 (1983) (“Black families are often poor, less mobile, and less able to afford alternative forms of entertainment and babysitters, [and thus] rely more heavily on TV as a source of entertainment . . .”); Tangney & Feshbach, supra note 94, at 146 (“Socioeconomic status has also been related to television viewing.”) (citation omitted). But see Comstock & Cobbey, supra note 96, at 105 (“Television . . . plays a somewhat different role in the lives of Negroes than of whites at similar levels of income and education.”) (quoting from a study conducted by W.R. Simmons).

100. See Jannette Dates, Race, Racial Attitudes and Adolescent Perceptions of Black Television Characters, 24 J. Broadcasting 549, 549 (1980) (“In order to consolidate identity, adolescents must learn something about the adult world and appropriate roles in that world. Quite often, they turn to television for help. Adolescents sometimes experimentally emulate television personalities and behavior patterns of television characters.”); see also Renee Hobbs, Teaching Media Literacy—Yo! Are You Hip to This?, MEDIA STUD. J., Winter 1994, at 143.

101. Walter M. Gerson, Mass Media Socialization Behavior: Negro-White Differences, 45 SOCIAL FORCES 40 (1966) (black adolescents are more likely than whites to use the media to learn how to behave with members of the opposite sex); Poindeker & Stroman, supra note 89, at 115 (“[b]lack children were significantly more likely than white children to say they learned most of what they know about jobs, decision-making, problem-solving, social interaction and how to behave from television”) (citing the study conducted by Bradley S. Greenberg and Charles K. Atkin, Learning About Minorities From Television).

102. The research suggests that children can be prejudiced by the age of two to two-and-a-half, and that by the age of five, they know most racial stereotypes. See Maria E. Gutierrez, Children Like Me—Where Do We Fit In?, MEDIA STUD. J., Fall 1994, 85, 86.
DIVERSITY AND MINORITY STEREOTYPING IN TELEVISION

sion into the American culture, researchers have been evaluating and assessing the various effects of the new medium.\textsuperscript{103} Two of the "potentially negative effects" identified during early studies were the "potential of televised portrayals of minorities and women to cultivate stereotypes about these groups" and the impact on "minorities' self-concept."\textsuperscript{104} Other social scientists have "speculated" as to the influence of television on African-American children and concluded that the medium impacts negatively on their self-concept. These social scientists have found that "the exclusion of Blacks from television is destructive to Black children's self-concept because it minimizes the importance of their existence," and further, "that the television roles in which Blacks are cast communicate to Black children the negative value society places on them."\textsuperscript{105}

Moreover, television has been identified as the primary contributor to negative stereotypes. Many commentators believe that the medium serves as the "source" and "reinforcer" of negative beliefs that African-Americans hold about themselves,\textsuperscript{106} and that others hold about African-Americans.\textsuperscript{107}

Dr. C. Cosby, quoting from the Warren study, states that "[t]he image, that is, the impression, idea, and concept, of Black people in the United States is heavily influenced by the projections we see on film and on television."\textsuperscript{108} Warren's study, she notes, determined that

\begin{footnotes}
\item[103] Stroman, \textit{supra} note 89, at 317. The other potentially negative effects identified were: "(1) television's potential to incite aggressive, violent, or antisocial behavior; [and] (2) television advertising's potentially negative effects." \textit{Id.}
\item[104] \textit{Id.}
\item[105] \textit{Id.} The prevailing opinion is that television has a negative influence on African-American children in that it "may be providing examples and role models that negatively affect Black children's attitudes and behavior." \textit{Id.} at 322; see also Hammond, \textit{supra} note 35, at 1085-86 ("Criticism of the majority media's portrayal of minorities is not new.... [It] is arguably merely the continuation of an historical tendency of majority-owned popular and mass media, literature and the arts to stereotypically portray blacks and other minorities.").
\item[106] Black adolescents probably use black TV characters as "referent significant others," and thus reinforced by television characterizations, presumably perpetrate behavior exhibited by the characters. Dates, \textit{supra} note 100, at 550. "Black images of themselves had also been influenced significantly by TV. For so long, Black Americans had been conditioned to model their lives on the big time drug pushers, pimps, prostitutes, and gangsters that have predominantly represented them on TV." Evuleocha & Ugah, \textit{supra} note 93, at 203.
\item[107] ALETHA C. HUSTON ET AL., \textit{BIG WORLD, SMALL SCREEN} 22 (Gary B. Melton & Carolyn S. Schroeder eds. 1992) ("Under-representation and negative portrayals may influence the self-concepts and images of their own group for members of the affected categories and may also generate attitudes and beliefs about such groups among members of the general public.").
\item[108] COSBY, \textit{supra} note 25, at 36 (citing N. Warren, From Uncle Tom to Cliff Huxtable, Aunt Jemima to Aunt Nell: Images of Blacks in Film and the Television Industry, C. J.
these images include, “Savage African, Happy slave, Devoted servant, Corrupt politician, Irresponsible citizen, Petty thief, Social delinquent, Vicious criminal, Sexual superman, Unhappy non-white, Natural-born cook, Perfect entertainer, Superstitious churchgoer, Chicken and watermelon eater, Razor and knife ‘toter’, Uninhibited expressionist, Mentally inferior [and] Natural-born musician.” The overwhelming research literature suggests that media distortions that negatively impact the self-esteem of African American children may preclude them from achieving self-actualization or “impede their ability to realize their personal and academic potential in American society.”

The studies also conclude that “[m]inority groups are under-represented in news programming, both as broadcasters and as subjects of the news.” Research confirms that the news coverage relating to African-Americans is consistently negative, focusing solely on crime or other unpleasant characteristics. The recent Advisory Report to the U.S. Commission on Civil Rights found that “[t]he news media has tremendous influence on the attitudes of viewers... regarding race relations in this country... [and t]here is significant merit in allegations that the media presentation of news is biased when it comes to


109. Cosby, supra note 25, at 36-37. “All of the stereotypes found in literature, on the stage, and on radio are captured and reinforced by the camera’s eye.” Id. at 37 (quoting N. Warren).

110. Cosby’s study cites specific examples of such “media distortions” in various television shows that were broadcasted over a forty year span. They include, she notes, (1) “Amen,” a series that featured a church deacon that engaged in “old-style hootin and hollerin,” and “verbal bark[ing] and bit[ing]”; (2) “Amos ‘n’ Andy,” a series that engaged in total stereotyping of African Americans, including an “asexual Black woman and inferior, lazy, dumb, dishonest, and loud [Black] characters”; (3) “Benson,” a series in which Benson began as a satisfied servant who “develop[s] affection for the White folks who employed him”; (4) “Beulah,” a series depicting a friendly black maid, who so enjoyed her White employers that “she had very little life of her own”; (5) “Gimme a Break,” a series featuring a Black “sassy and gutsy” housekeeper working for a White family; (6) “Good Times,” a series illustrating “the first Black family sitcom whose famous character, J.J., was barely literate”; (7) “That’s My Mama,” a series that depicted numerous stereotypical characters with an “all-sacrificing, large, warm-hearted mammy” in an “emasculated, Black female-dominated home”; (8) “Different Strokes,” a series that depicted African American children being raised by a White male, with the children apparently having no Black relatives or friends; and (9) “Sanford and Sons,” a series that featured two “harmless and naive” Black men who lived in a junkyard. Cosby, supra note 25, at 37-38 (citing D. Bogle, Blacks in American Films and Television: An Encyclopedia (1988)).

111. See Cosby, supra note 25, at 7. Dr. Cosby also asserts that there has been a consistent and systematic effort to exclude positive images of African Americans from mainstream television, movies, books, magazines, newspapers and other mediums. Id. at 2.

112. Huston, supra note 107, at 25.

113. Id.
reporting on people or communities of color." The Advisory Report concluded by issuing words of caution in pronouncing that such "continuous biased presentations foment unrest and contribute to racial polarization."  

Much of the social science literature on the impact of negative portrayals of minorities in the television media confirms the validity of such warnings. The studies clearly suggest that these destructive images serve to create or maintain negative intergroup attitudes such as racism and prejudice.

B. The Deficiencies of Existing Regulatory Policy

The existing regulatory policy of the FCC, which acts to ensure "diversity of viewpoint," has obviously failed to address properly the compelling societal interest of eliminating racial stereotyping from television broadcasting. Television programming still maintains...
images and messages that are distorted and stereotypical. The FCC's minority ownership programs were unable to produce programming in an advertiser-supported television economy that reflected African-Americans fairly and accurately. One commentator suggests that the inaccurate programming resulted from the underlying motives of movie studios, directors, and producers in creating the early imageries of African-Americans:

Hollywood was creating a lot of excitement in America. It was also an important vehicle for assorted messages. Hollywood producers learned early that people paid to see what they wanted to see, even if it was a fantasy. So loving darkies, sambos, hefty Black maids who smiled and cooked all day, lazy Blacks who were lucky to live on a plantation taking advantage of a doting benign master, if these images were no longer to be had in real life, they were to be had on the screen. And indeed were used to reinforce lost dominance.

119. See, e.g., When It Comes To Race, Journalism's House Is a Mess, ETHNIC NEWSWATCH, CHIC. WEEKEND, Sept. 11, 1994, at 19 (“[T]here is a strong objection to many of the roles and images transmitted including the clown image of television sitcoms' "new vaudevillians," but particularly the messages of "gangsta" rappers rappin' about women as "bitches" and "hos," and about guns and violence and cops," (quoting Paul Delaney, Chairman of the Journalism Department, University of Alabama)); Hernandez, The Race Quotient, EDITOR & PUBLISHER MAG., Aug. 1994 (“We see the stereotypes played out over and over again[,] . . . most black men portrayed on TV as either brutes or clowns. That is a major part of the problem. These frames of reference resonate in our minds.”) (quoting Jannette Dates, Dean, School of Communications, Howard University); Greg Braxton, Television: Where More Isn't Much Better; African Americans Are Increasingly Welcome in Prime Time, But Some Observers Say the New Shows Fail to Rise Above Stereotypes, L.A. TIMES, Oct. 4, 1992, at 3 (discussing the Fall television season that included an unprecedented number of prime-time series featuring predominantly African-American casts, and stating, “[J]udging from the early episodes of the new shows, . . . many of the programs have already fallen into the historic trap of perpetuating stereotypes and negative images that became dominant on other shows featuring African-Americans dating back to the 1960s . . . [, and] many of the characters have slipped into 'minstrelsy.'”).

120. See Wimmer, supra note 34.

Blacks are still failing to make headway in their efforts to affect American society through media, and the deregulation policy being followed in Congress and at the FCC is among the reasons why. The roots of the relations between deregulation and lessening participation of minorities in the media lies in the fact that the marketplace cannot provide sufficient public interest programming.

... Minorities [are] foreclosed from relying on minority owners to produce minority programming, because marketplace regulation will produce greater impediments to minority entry into the telecommunications marketplace. The Commission has, in the past, relied on minority-ownership and equal employment to produce minority oriented programming. Such reliance will not continue to be viable . . .

Id. at 470-71.

121. COSBY, supra note 25, at 26 (citation omitted).
Since minorities are not empowered to produce appropriate images for the television screen, other regulatory avenues must be identified and pursued by the FCC. Social science literature provides a cogent argument for the need to reduce and eliminate racial stereotyping to ensure the psychological well-being of African-American children.

III
A Race-Neutral Regulatory Approach: The Unsettled First Amendment Issue

The importance of protecting children from unwarranted harm has long been recognized by the courts. The United States Supreme Court has acknowledged a "compelling" government interest in "safeguarding the physical and psychological well-being" of children because "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." Consequently, the courts have used this governmental interest argument to protect the "well-being of youth" by restricting the First Amendment rights of broadcasters. The social science research discussed in Part II provides a viable justification for restrictive regulations that have as their objective the reduction or elimination of racial stereotyping from television broadcasting, and provides the requisite compelling governmental

122. Even with the FCC minority preference programs in place, African-Americans own only 21 of the 1,155 television stations in the United States, a scant 1.8%. Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States, The Minority Telecommunications Development Program, NTIA, Department of Commerce at 7 (Sept. 1994). Further, Dr. Cosby explains:

In television, as in all forms of media, most African-Americans do not control the content, the acting, nor the productions of their work. Again, African-Americans are being defined by others. African-Americans' imageries are developed by the hegemonic strata within the television industry. This television hegemonic strata consist of network executives, parent entities of the television networks, sponsors, writers, and producers. They are responsible for the formulation of television African-American imageries.

Cosby, supra note 25, at 4 (citation omitted).

126. See FCC v. Pacifica Found., 438 U.S. 726 (1978) (allowing regulation of indecent broadcasting). The courts have also recognized a compelling interest in protecting children from indecent telephone messages and have allowed restrictions that sought to "shield" them from materials that were "not obscene by adult standards." Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

127. Note the critical role that social science research data has played in the on-going debate on the impact of television violence on children: "findings" from many of the
interest to withstand any judicial challenge to the regulations. Part III provides a legal analysis of First Amendment jurisprudence and concludes that racial stereotyping in broadcast media is protected speech, but proffers that the causal link between racial stereotyping on television and its overwhelming negative effects on children provides a legal basis for broadcast regulation. Part III therefore proposes the adoption of several alternative regulatory approaches to reduce stereotypical imagery. The proposals offered are “narrowly tailored,” and therefore should be able to withstand the level of scrutiny associated with the First Amendment rights of broadcasters.  

A. First Amendment Jurisprudence

The First Amendment to the United States Constitution provides that “Congress shall make no laws . . . abridging the freedom of speech, or of the press.” The objective of the First Amendment is to ensure that the government cannot prohibit speech simply because the content of the speech is unfavorable or contrary to its policies. Instead, the Constitution requires the government to remain “neutral in the marketplace of ideas.” However, the Supreme Court has held that not all speech is entitled to the protections of the First Amendment. The government has the power to regulate the content of specified classes of speech, including obscenity, libel, child pornography, and words which by their very utterance incite violence or inflict injury.

House bills aimed at regulating the electronic media professed the existence of scientific evidence demonstrating that “televised violence has a deleterious effect on children, and use[d] this information as explicit or implicit support for the legislative action proposed.” Ballard, supra note 118, at 184 n.69.

128. See Sable, 492 U.S. at 126 (government may regulate the content of constitutionally protected speech when it has established a substantial interest and has chosen the least restrictive means to further its goal); see also discussion infra notes 218-219 and accompanying text.

132. Near v. Minnesota, 238 U.S. 697, 716 (1915). The availability of First Amendment protection hinges on whether the particularized conduct constitutes speech or expression. See Cohen v. California, 403 U.S. 15, 15-26 (1971) (absent the expression of ideas or communication, there is no First Amendment protection).
In Chaplinsky v. New Hampshire, the Supreme Court held that fighting words are not accorded constitutional protection. The Court reasoned that such utterances lack significance to the exposition of ideas, have little social value, and therefore any benefit from the speech is clearly outweighed by the harm to society. The Court stated that resorting to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

In Roth v. United States, the Supreme Court held that obscenity is not protected under the First Amendment. The Court concluded, in light of the history of obscenity regulation, that the First Amendment was clearly not intended to protect all forms of speech. Justice William Brennan noted the existence of colonial laws against libel and profanity at the time the Constitution was ratified and concluded that obscenity was, in fact, related to profanity. Relying on the reasoning set forth in Chaplinsky, the Court found obscenity to be outside the area of constitutionally protected speech or press, because it lacks any redeeming social importance.

However, in Miller v. California, the Court confined state regulation of obscene materials to those "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value." The Court stressed that such a limit on state regulation of obscene material is necessary to ensure that the rights guaranteed under the First Amendment are protected. The Court recognized, however, the legitimate

137. Id.; see also Brandenburg v. Ohio, 395 U.S. 444, 446 (1969) (words directed towards inciting imminent lawless action and likely to have such an effect are not protected under the Constitution). See generally R.A.V. v. St. Paul, Minn., 505 U.S. 377 (1992) (fighting words can be regulated because of their content without violating the First Amendment). But see United States v. Eichman, 496 U.S. 310 (1990) (flagburning as a mode of expression, unlike obscenity and fighting words, enjoys full protection under the First Amendment).
139. Id.
140. Id. (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).
141. Roth, 354 U.S. at 476 (1957) (Roth was charged with mailing an obscene book and obscene circulars and advertising in violation of the federal obscenity statute).
142. Id. at 483.
143. Id. at 482-84. In 1712, the Court noted, it was a crime to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" that imitated religious services in Massachusetts. Id.
144. Id. at 484.
145. Miller v. California, 413 U.S. 15 (1973); see Sable Communications, 492 U.S. at 115.
146. Id. at 25.
interests of the states in protecting social order and morality.\textsuperscript{147} Thus, states can regulate material deemed obscene,\textsuperscript{148} as determined by the average person applying contemporary community standards.\textsuperscript{149}

Likewise, libel is not accorded First Amendment protection. In \textit{Beauharnais v. Illinois}, the Supreme Court concluded that libelous utterances are not protected under the Constitution.\textsuperscript{150} The Court stated that “[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”\textsuperscript{151}

Furthermore, in \textit{Gertz v. Welch}, the Supreme Court determined that states have a legitimate interest in compensating private individuals for harm inflicted upon them by libelous speech.\textsuperscript{152} The Court ruled that a newspaper or broadcaster publishing defamatory falsehoods about a private individual cannot claim constitutional privilege against libel.\textsuperscript{153} Unlike public figures and officials, the Court concluded, private individuals lack access to the channels of effective communication to refute false statements.\textsuperscript{154} The Court postulated that because private individuals have not “accepted public office or assumed an influential role in ordering society,” they are more vulnerable to injury than public figures and thus deserve greater access to redress from the courts.\textsuperscript{155}

In sum, First Amendment jurisprudence suggests that the government does possess the authority to proscribe certain types of speech. In addition, the courts have allowed the government to engage in content regulation of certain classes of protected First Amendment

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  \item \textsuperscript{147} \textit{Id.} at 29; see \textit{Paris Adult Theatre v. Slaton}, 413 U.S. 49, 67 (1973) (holding that states have power to regulate the unlimited display or distribution of obscene material).
  \item \textsuperscript{148} \textit{Jacobellis v. Ohio}, 378 U.S. 184, 199 (1964) (Warren, C.J. dissenting) (because states have the power to make the morally neutral judgment that commerce in obscene material has the potential of injuring the community as a whole, they may regulate obscenity).
  \item \textsuperscript{149} \textit{Miller}, 413 U.S. at 15.
  \item \textsuperscript{150} \textit{Beauharnais}, 343 U.S. at 250.
  \item \textsuperscript{151} \textit{Id.} at 256-257.
  \item \textsuperscript{152} \textit{Gertz v. Welch}, 418 U.S. 323 (1974). Gertz brought a libel action against a publisher of a magazine article that described him as a “communist-fronter,” “Leninist,” and participant in various “Marxist” and “red” activities. \textit{Id.}
  \item \textsuperscript{153} \textit{Id. But see New York Times Co. v. Sullivan}, 376 U.S. 254 (1964) (holding under the First Amendment that a public figure cannot recover damages for libel unless she proves the defendant acted with knowledge that the challenged statement was false or made with reckless disregard for the statement’s truth).
  \item \textsuperscript{154} \textit{Gertz}, 418 U.S. at 344.
  \item \textsuperscript{155} \textit{Id.} at 345.
\end{itemize}
speech. Commercial speech, which has been afforded constitutional protection, may be regulated in those instances where the government has asserted a substantial interest. Consequently, a determination as to whether commercial speech is subject to governmental regulation requires an analysis of the content of the speech.

Similarly, state governments have been allowed to proscribe child pornography because the state has a compelling interest. The Court has held that child pornography is not entitled to First Amendment protection, provided the conduct to be prohibited is adequately defined by applicable state law. Significantly, and due in part to its unique nature, broadcasting is subject to government regulation in the area of protected speech deemed by the Court to be indecent; the courts have permitted unprecedented governmental regulation of the broadcasting media because of the recognized impact television viewing has on children.

**B. Broadcast Regulation: A First Amendment Anomaly**

The extent of First Amendment protection available to certain speech varies according to the medium involved. In this context, the print medium enjoys virtually absolute protection from govern-

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159. The test for child pornography is not the same as obscenity: State regulation is limited to works that visually depict sexual conduct by children below a specific age, and the category of “sexual conduct” prohibited has to be suitably limited and described. Id. at 764; see Osborne v. Ohio, 495 U.S. 103 (1990) (holding Ohio’s prohibition against possessing and viewing child pornography in compliance with the First Amendment because the “state has a compelling interest in protecting the physical and psychological well-being of minors and in destroying a market for exploitative use of a child by penalizing those who possess and view the offending materials”).


161. See discussion infra notes 178-199 and accompanying text.

162. Pacifica, 438 U.S. at 748. The courts have held that each medium must be assessed by standards specifically suited to it. Southeastern Promotion, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (focusing on whether the medium informs as well as entertains); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (holding that movies are protected speech as a “significant medium for the communication of ideas”). For an interesting analysis of First Amendment implications relating to the disparate regulation of the electronic media spawned by new technologies, see Note, The Message in the Medium: The First Amendment on the Information Superhighway, 107 HARV. L. REV. 1062 (1994).
The courts have recognized the primacy of a publishers' First Amendment rights over others' claims of access, even where the newspaper possesses an economic monopoly and has the requisite power to exclude particular speech from its pages. Courts have recognized an infringement of First Amendment interests in situations in which government regulation has the potential of interfering with a publisher's "editorial control and judgment" regarding what information to report. Moreover, because economic and other factors may limit the total number of pages printed, forcing the publisher to print certain speech may, in effect, substitute the compelled speech for material the publisher would rather include. In addition, regulations such as the right of reply penalize controversial speech by forcing the publisher to afford space for a response. In such circumstances, the publisher may be forced to associate with speech that it finds disagreeable because others view the compelled speech as carrying the publisher's affirmation.

Broadcast speech receives the most limited form of First Amendment protection. Thus, broadcasters can lose their licenses if the FCC determines that such action will serve the public interest, convenience, and necessity. In Red Lion Broadcasting v. FCC, the Supreme Court held that a broadcast licensee does not have a constitutional right to hold a license or to monopolize a radio frequency to the exclusion of fellow citizens. Therefore, a licensee can be required to share its allotted frequency with others and to conduct itself as a fiduciary, obliged to give suitable time and attention to matters of great public concern. Such a restriction furthers the First Amendment goal of producing an informed public, capable of conducting its own affairs. Further, in light of the scarcity of broadcast frequencies, the

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163. One commentator has observed, however, that the print media experiences some limited regulatory constraints as a result of state-supported causes of action for libel, invasion of privacy, and antitrust. Wimmer, supra note 34, at 413.
165. Id. at 258.
166. Id. at 256-57.
167. Id.
169. Pacifica, 438 U.S. at 726.
170. Id.
172. Id.
173. Id. at 392. In addition, the Court stated that the granting of a license could in part be contingent on a licensee's willingness to present representative community views on controversial issues, as opposed to presenting only its own view. See Associated Press v.
Court in *Red Lion* held that the government has a duty to assist unlicensed persons in gaining access to the allocated frequencies to express their views. Consequently, broadcasters are obligated to act as public trustees.

For several reasons, the Court has found that such restrictions on broadcasting do not contravene the First Amendment. First, broadcasting is pervasive in American society. Unlike other media, it is difficult to issue warnings regarding unexpected program content because the broadcast audience is constantly “tuning in and out.” Second, and perhaps more important, broadcasting is easily accessible by children. Based upon these rationales, the government can regulate broadcasting when it has a compelling interest; and the courts have concluded that such an interest exists with respect to indecent programming.

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174. *Id.* at 400. As one commentator explains, “The trusteeship model holds that a broadcaster holds a publicly owned share of the radio spectrum for the benefit of the public, rather than for its own benefit. As such, it is expected to perform some measure of public service, in the form of nonentertainment programming, in exchange for its use of a government-granted monopoly.” Wimmer, *supra* note 34, at 412 n. 442.

175. The physical scarcity of the electromagnetic spectrum comprises one of the primary justifications for broadcast regulation: Because “the facilities of radio are not large enough to accommodate all who wish to use them,” federal regulatory decisions must allocate frequencies to further the “public interest, convenience, or necessity.” *NBC v. United States*, 319 U.S. 190, 226-27 (1943). Many legal commentators question the continued validity of the scarcity justification as the basis for regulating the broadcast media. They argue that technological innovations have substantially increased the capacity of the spectrum and that the sheer number of channels now available for programming negates the scarcity argument. *See Tabor, supra* note 63 at 629; *Ballard, supra* note 118 at 204; *Message in the Medium, supra* note 162 at 1072-74; *L. Powe, American Broadcasting and the First Amendment* 197-209 (1987). The Supreme Court has recently declined to question the validity of the doctrine. *See Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2457 (1994) (citing FCC v. League of Women Voters, 468 U.S. 364, 376 n. 11 (1984).


179. The FCC’s authority to regulate indecent speech derives from the United States Criminal Code, which provides, “Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.” 18 U.S.C. § 1464 (1982). However, § 326 of the Communications Act of 1934 provides that nothing in that chapter “shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.” 47 U.S.C. § 326 (1982). In spite of the apparent incongruity, the Supreme Court in *FCC v. Pacifica* found the statutes compatible. 438 U.S. at 737. The Court also held that the FCC’s regulations prohibiting obscene, indecent, or profane language comported with the First Amendment rights of broadcasters. *Id.* at 741.
In *Pacifica Foundation*, the Supreme Court addressed the FCC's power to protect radio listeners who wanted to keep indecent broadcasts out of their homes and away from their children. A radio station had broadcast a prerecorded monologue, which contained language unsuitable for the airwaves, at two o'clock in the afternoon, and a parent complained to the FCC. The Commission refused to impose any penalty on the station, but instead issued a warning that sanctions might result against the station if future indecent broadcasts occurred. The radio station appealed the warning to the District of Columbia Court of Appeals.

The Supreme Court agreed with the FCC's conclusion that the monologue was indecent, and found that the Commission's issuance of a warning did not violate the broadcaster's First Amendment rights. The Court concluded that the FCC had the right to bar indecent though constitutionally protected speech from the airwaves in the middle of the afternoon. Focusing on the pervasiveness of the broadcast media, the Court stated, "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."

Hence, the Court held that the government can engage in content regulation of constitutionally protected speech. Even though the Court reiterates that the most offensive words are entitled to First Amendment protection, it conceded that such offensive speech can be regulated when broadcast in the wrong context.

The Supreme Court in *Pacifica* also addressed the accessibility of broadcasting to children. It found that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant. . . . The government's interest in the well-being of its youth and in supporting par-

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181. Id.
182. Id. at 730.
184. The Supreme Court defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica*, 438 U.S. at 732.
185. Id. at 748.
186. The Court in *Pacifica* found that the monologue was broadcast in the wrong context: during the middle of the day when children were likely to be in the audience. However, had the monologue been broadcast at 2:00 a.m., it would have been constitutionally protected. Id.
ents' claim to authority in their own household justifies the regulation of otherwise protected expression."187 According to the Court, the ease with which children could gain access to indecent programming justified its regulation.188 Thus, the pervasiveness of the broadcast media and the accessibility of children to the content of broadcast programming constitutes a compelling justification for regulating, in certain contexts, constitutionally protected speech.189

The Court of Appeals for the District of Columbia recently determined the constitutionality of section 16(a) of the Public Telecommunications Act of 1992,190 a statute enacted by Congress to shield minors from indecent radio and television programs by restricting the hours within which they may be broadcast.191 In determining whether section 16(a) survived the strict scrutiny requirements of the First Amendment, the court stated that an assessment must "necessarily take into account the unique context of the broadcast medium."192 In ruling that the Act was constitutionally valid, the court concluded that the FCC's justification for regulating broadcast decency derived from a "compelling interest" in children's welfare.193 The court not only acknowledged a compelling interest in "supporting parental supervision of what children see and hear on the public airwaves," but also pronounced that the government has its "own interest in the well-being of minors [that] provides an independent justification for the regulation of broadcast indecency."194

187. Id. at 749.
188. Id. at 750.
189. The courts have concluded that the government has two "compelling interests" with regard to children: The first is the interest in helping parents supervise their children. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968) (finding that materials being regulated were obscene for minors but not for adults). The second is the interest in shielding minors from physical and psychological abuse. See New York v. Ferber, 458 U.S. 747, 756-58 (1982).
190. Pub. L. No. 102-356, 106 Stat. 949 (1992). Section 16(a) of the Act provides that the FCC must promulgate regulations to prohibit the broadcasting of indecent programming:
   (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
   (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).
192. Action for Children's Television, 58 F.3d at 660.
193. Id. at 660-61.
194. Id. at 661 (emphasis added). The court stated that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." Id. (quoting New York v. Ferber, 458 U.S. 747, 756-57 (1982)). The court rejected the argument made by the petitioners that the FCC had failed to establish a
C. First Amendment Implications of Regulating Racial Stereotyping on Television

In order to determine whether a proposal to regulate racial stereotyping meets constitutional standards, it is necessary initially to create the proper First Amendment analytical construct. The Supreme Court has held that not all types of speech receive full First Amendment protection. Therefore, as a preliminary matter, one must determine how the regulation of televised racial stereotyping would comport with pronounced constitutional standards. This analysis is complicated by the unique treatment that has historically been accorded to the broadcasting medium and the special importance that Congress and the FCC have bestowed upon the protection of young children.

1. Televised Racial Stereotyping: Protected or Unprotected Speech?

The Supreme Court has clearly pronounced that the First Amendment does not prohibit all government regulation regarding the content of speech. The oft-quoted language on the need to analyze both the content and the context of speech in order to assess its constitutional status is the statement of Mr. Justice Holmes in *Schenck v. United States*:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

"casual nexus" between indecency and any physical or psychological harm to minors, and observed, "[T]he Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech." *Id.* at 661-62. The court concluded: "[T]he Supreme Court has recognized that the Government's interest in protecting children extends beyond shielding them from physical and psychological harm. . . . [T]he Court . . . has sought to protect children from exposure to materials that would 'impair[ ] [their] ethical and moral development.'" *Id.* at 661-62 (quoting *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)).

195. See discussion *supra* note 194.
The Court has been reluctant, however, to extend the categories of unprotected speech and has never had the opportunity to consider televised racial stereotyping in a First Amendment context. Nevertheless, many legal commentators have attempted to carve out new classifications of speech that fall beyond the boundaries of constitutional protections.\(^{198}\)

The Court's jurisprudence on speech relating to violence and lawless action supports a plausible argument for classifying televised racist imagery as unprotected speech. The viability of this argument, however, requires acceptance of the correlation between racial stereotyping and racist speech.\(^{199}\)

Although one could intuitively argue that words which "incite or produce" lawless action are comparable to "racist speech," the notion by quoting Justice Holmes' language in *Gitlow v. New York*: "Every idea is an incitement . . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." *Brandenburg*, 395 U.S. at 452.

198. In an effort to determine whether the violence portrayed in the broadcasting media could be deemed unprotected speech, one commentator has argued that the Court's reasoning in classifying obscenity as unprotected should be analyzed. Ballard, *supra* note 118, at 192-95. The Court has deemed unprotected those "utterances" lacking the "exposition of ideas" with no social value as a step to truth, and in addition, Ballard concludes, has allowed the suppression of obscene material as a "public safety" measure. *Id.* at 193-94. The Court, Ballard opines, has also suggested that regulation is allowable if it furthers the state's interest in maintaining a "decent society" and has, as a consequence, permitted the regulation of material that offends the "sensibilities of unwilling recipients." *Id.* at 194-95.

At first glance, the Court's rationale of maintaining a "decent society" and protecting the "sensibilities" of the unwilling listener would appear to reach the content and context of stereotypical imagery in the broadcast media. However, as Ballard acknowledges, such a simplistic analogy and resulting supposition would ignore the Court's traditional stance regarding the sanctity of First Amendment protections. *Id.* at 195. Ballard argues that the Supreme Court believes "the First Amendment is designed to protect 'all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion.'" *Id.* (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). The notion, therefore, of successfully establishing televised racial stereotyping as a category of unprotected speech, based on theories espoused by the Court in *Chaplinsky, Paris Adult Theatre I*, and *Miller v. California* appears doubtful. The courts have even rejected the government's efforts to prohibit the use of trade names such as "Sambo's" that are clearly offensive to the great majority of the African-American community. *See* Sambo's Restaurant v. City of Ann Arbor, 663 F.2d 686, 694-95 (6th Cir. 1981).

199. In other words, the Court's reasoning regarding speech that is aimed at "inciting" violence should be applied to racist speech because both forms of speech have the potential to "incite or produce" lawless actions. *See generally Brandenburg*, 395 U.S. at 447; *Chaplinsky*, 315 U.S. at 572. Importantly, social science research has concluded that television has the potential to quell racial discord by improving intergroup attitudes and behaviors. *See* Huston et al., *supra* note 107, at 26 (Investigations have indeed concluded that "prosocial interactions and nonstereotypic portrayals can lead to cooperation, reduction in prejudice ... and good citizenship.").
Supreme Court has rejected the notion.\textsuperscript{200} In \textit{Brandenburg v. Ohio}, a Ku Klux Klan leader was convicted under an Ohio statute for “advocating” a crime of violence as a means of accomplishing “political reform.” He had attended a rally, and while standing hooded at a large, burning wooden cross shouted, “This is what we are going to do to the niggers,” and “Bury the niggers.”\textsuperscript{201} The Supreme Court held that the Ohio statute violated the First Amendment in that it prohibited the “mere advocacy” of violence, thus failing to distinguish “mere advocacy” from “incitement to imminent lawless action.”\textsuperscript{202} Therefore, speech advocating violence may only be proscribed when it is “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.”\textsuperscript{203} Because \textit{Brandenburg} requires that the danger posed by the speech be “imminent,”\textsuperscript{204} even televised racist speech would lack the necessary immediacy of reaction that the standard enunciates.

Feminist legal scholars have also embarked on the quest to carve out a new classification of unprotected speech, arguing that pornography is “immoral in a humanistic sense” because it “negatively impacts women’s status” and societal treatment.\textsuperscript{205} They contend that pornography should be regulated because it is “an institution of gender inequality” that actually harms women.\textsuperscript{206} Feminists also note that psychological studies indicate that “depictions of sexual aggression with positive consequences” may negatively influence the “viewer’s perceptions of and attitudes toward women.”\textsuperscript{207} They persuasively argue that First Amendment rights can be abridged if the speech engenders results that are harmful to society.

The Supreme Court of Canada has considered and accepted the theory that graphic sexual subordination of women leads to discrimination and even violence against women. In \textit{Regina v. Butler},\textsuperscript{208} the court evaluated, for purposes of classifying sexually explicit materials,
the effects of portraying women in degrading or dehumanizing sexual acts. Writing for the court, Justice John Sopinka stated that the court's "understanding of the harms caused by these materials ha[d] developed considerably"\textsuperscript{209} in recent years. Convinced that pornography is a form of sexual discrimination, Justice Sopinka concluded, "If true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material."\textsuperscript{210} The court indicated that "[m]aterials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on the individuals' sense of self-worth and acceptance," and therefore result in "harm, particularly to women, and therefore society as a whole."\textsuperscript{211}

The courts in this country, however, have rejected the feminists' "social harm" theory.\textsuperscript{212} In American Booksellers Ass'n v. Hudnut, the Seventh Circuit Court of Appeals held unconstitutional an Indianapolis city ordinance prohibiting "pornography" as a "discriminatory practice based on [gender]."\textsuperscript{213} The court concluded that the state's interest in sex-based equality was not so "compelling" as to warrant an exception to free speech protections. Though it acknowledged that pornography has deleterious social effects, the court rejected the social harm theory in invalidating the ordinance, and found that the First Amendment's protections reached even "insidious" speech.\textsuperscript{214}

It would appear, based on the above analysis of free speech jurisprudence, that televised racial stereotyping constitutes protected speech. Although various theories and theorists support a contrary conclusion,\textsuperscript{215} the Supreme Court has failed to embrace any of these suppositions. Moreover, case law illustrates that the Court steadfastly refuses to adopt new First Amendment exceptions.\textsuperscript{216}

\textsuperscript{209} Butler, 89 D.L.R.4th at 478.
\textsuperscript{210} Id. at 479.
\textsuperscript{211} Id. at 467.
\textsuperscript{212} American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 330.
\textsuperscript{215} Other legal commentators have urged that First Amendment protections should be bestowed guardedly, and only upon certain kinds of speech. See Jay A. Gayoso, Comment, The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves, 43 U. MIAMI L. REV. 871, 879 (1989) (noting legal scholar Alexander Meiklejohn argues that because broadcasting is an entertainment medium, it has no legitimate claim to the principles of free speech); Frederick Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 GEO. L. J. 899, 921 (1979) (arguing protected speech should be limited to "communication of a mental stimulus").
\textsuperscript{216} See discussion supra note 194.
Thus, it is necessary to analyze the limitations imposed on the First Amendment rights of broadcasters to determine the viability of any government regulation that has as its objective the reduction or elimination of negative racial imagery.\textsuperscript{217} Because of the scarcity of frequencies and broadcasters' resultant obligation to provide public service, the courts have deemed some governmental restrictions on content-based speech permissible when applied to broadcasting.\textsuperscript{218} The government has been permitted to "place limited content restraints, and impose certain affirmative obligations, on broadcast licensees"\textsuperscript{219} when such restrictions are "narrowly tailored to further a substantial governmental interest."\textsuperscript{220}

In \textit{Turner Broadcasting}, the Supreme Court explained that broadcast regulation imposing an "incidental burden on speech"\textsuperscript{221} withstands constitutional scrutiny if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."\textsuperscript{222}

The Court declared that the "narrowly tailored" aspect of the \textit{O'Brien} test did not require the "least restrictive means," but rather that "the means chosen [did] not burden substantially more speech than [was] necessary to further the government's legitimate interest."\textsuperscript{223} The Court further explained that this test is met "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."\textsuperscript{224}

\textsuperscript{217} The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (citations omitted).

\textsuperscript{218} Red Lion v. FCC, 395 U.S. 367, 388-89 (1969) (broadcasters have a unique duty to act as fiduciaries for the public); see also Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 567 (1990) (Congress has authority to impose programming constraints that serve important public needs).


\textsuperscript{221} \textit{Turner}, 114 S. Ct. at 2469 (quoting United States v. \textit{O'Brien}, 391 U.S. 367, 377 (1968)).

\textsuperscript{222} \textit{Id.}

\textsuperscript{223} \textit{Id.}

\textsuperscript{224} \textit{Id.} (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1988)).

The FCC has been regulating children’s television since the 1970s and submitted its first major statement on the issue in 1974. The 1974 Policy Statement recognized the existence of a “special obligation” to children and encouraged broadcasters to make a “meaningful effort” to provide more children’s programming.

In 1979 the FCC initiated an evaluation of the industry’s compliance with its 1974 voluntary provisions. The evaluation disclosed a “de minimus” increase in children’s programming and resulted in a Commission-initiated round of regulatory proceedings. In an effort to identify an alternative regulatory approach, the FCC issued a Notice of Proposed Rule Making, but subsequently decided to retain its

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227. Id. para. 15.

228. Id. para. 12. The 1974 Policy Statement guidelines also placed limits on advertising and asked television stations to keep programs and commercials separate. Id. paras. 46-56. The FCC’s guidelines provided for full compliance by January 1, 1976, and though the Commission expected the industry to police itself, the FCC revised its license renewal forms to obtain specific information on children’s programming and advertisement. The Commission’s actions were affirmed by the Court of Appeals for the D.C. Circuit in Action for Children's TV v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (FCC’s decision not to adopt specific regulations governing advertising and programming practices for children’s television was a reasoned exercise of its broad discretion.).


230. The 1979 Notice considered five policy options: (1) repeal the policy statement and instead rely on commercial stations, cable, and subscription television to provide additional children’s programming; (2) keep the guidelines and modify the renewal process for licensees to obtain mandatory programming requirements for specific information on children’s programming; (3) adopt mandatory programming requirements for specific amounts of ed-
policy of voluntary industry compliance. The Commission acknowledged, however, the special nature of children's television, stating that a "[b]roadcaster's public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs and interests of the child audience," because "the child audience is a unique one that warrants special programming attention from licensees." The Commission concluded that "there is a continuing duty, under the public interest standard, on each licensee to examine the program needs of the child part of the audience and to be ready to demonstrate at renewal time its attention to those needs."

In the 1980s, the Commission's efforts toward ensuring the development of children's programming waned. In keeping with the massive deregulation policies of the Reagan Administration, the FCC in its 1984 Report and Order explained that television was adequately serving the needs of children. Moreover, the Commission concluded that any additional regulation would overburden the broadcast industry and possibly reduce the quality of programming available for children. Ultimately, the courts determined that the FCC's deregulation efforts were lacking adequate justification and were therefore improper.

One court reasoned that because of the FCC's "long his-
of separate treatment of children’s television,” it could not suddenly eliminate all of its regulatory measures without some clear, precise reasoning.238

Congress also understood the importance of addressing this issue: from 1985 to 1988, numerous congressional bills were introduced proposing increased broadcast regulation.239 By 1990, Congress had enacted legislation that imposed regulatory responsibilities on the FCC.240

Congress cited the “integral part” television plays in a child’s life to justify enacting the Children’s Television Act of 1990.241 Concur-
ring with the FCC, Congress expressed a belief that young children are “unique” in that their “trusting” natures render them “vulnerable” to the messages conveyed by the television medium. Moreover, Congress explained that children “cannot distinguish conceptually between programming” and commercial messages. It was this “unique susceptibility” of children, coupled with Congress’ refusal to rely on “marketplace forces” to protect children from commercial “exploitation,” that finally prompted the articulation of a public policy.

Congress determined that the regulatory framework contained in the 1990 Act satisfied the First Amendment standards pertaining to commercial speech, and that the “proposal to limit the quantity of commercial time during children’s programming fully” met constitutional requirements. Congress reasoned that the protection of children met the requisite “substantial government interest” requirement and that the adopted regulatory approach “directly” advanced that interest; the regulation was, therefore, appropriately “narrow” and “nonintrusive.”

The 1990 Act’s passage also necessitated an analysis by Congress of the First Amendment implications associated with the requirement that broadcasters provide educational programming. In finding the statute’s provisions to be constitutional, Congress stated:

242. Id. at 6.
243. Id. The Conference Report accompanying the 1990 Act stated, “It is well established by scientific evidence that children are uniquely susceptible to the persuasive messages contained in television advertising . . . . [Children] lack the perceptual capabilities . . . . and the ability to recognize the persuasive intent that necessarily underlies all television advertising.” Id.
244. Id. at 6-7.
245. Congress argued that the three-prong test delineated by the Supreme Court in Central Hudson Gas was the appropriate standard to apply. That test requires: (1) the existence of a substantial government interest served by the restriction, (2) that the restriction directly advance that government interest, and (3) that the restriction be no more extensive than necessary to serve that government interest. Id. at 9 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 563 (1980)).
246. Id. at 9.
247. Id. Congress opined that the statutory provision requiring the FCC to consider a television licensee’s compliance with the 1990 Act during the license renewal process was also constitutionally valid: “It is well established that in exchange for ‘the free and exclusive use of a valuable part of the public domain,’ a broadcaster can be required to act as a public fiduciary, obligated to serve the needs and interests of its area.” Id. at 10 (quoting Office of Communication of United Church of Christ v. FCC, 359 F.2d 997, 1003 (D.C. Cir. 1966)).
248. 47 U.S.C. § 303(b)(a)(2) (Supp. III 1991); Educational and Informational Programming for Children, 47 C.F.R. § 73.671 (1992). The Conference Report noted the Supreme Court’s recognition of legislative power to regulate programming aimed at children, “even where the exercise of such power would be prohibited by the First Amend-
Recognition that children are a unique and special concern of the state transcends the particular nature of the medium. State action aimed at protecting children repeatedly has survived First Amendment attack whether the regulation concerned written work, cinematography or radio and television. Government has a right to 'adopt more stringent controls on communicative materials available to youths than on those available to adults.' This results from the fact that a child . . . is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees.  

Of particular importance was Congress' assertion that a broadcaster's public interest obligation included “render[ing] public service to children.” Children were described as the “bedrock” upon which the society rested. Congress reasoned, therefore, that the substantial amounts of television that children viewed obligated broadcasters, as public fiduciaries, to provide programming that served children's “informational and educational” needs:

The broadcaster's public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs of the child audience. In this regard, educational or informational programming for children is of particular importance. It seems to us that the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the 'public interest.'

In assessing whether the statute's “education and information” provisions complied with First Amendment standards applicable to broadcasting, Congress determined that the regulations served a “substantial government interest” in a “narrowly tailored” manner. Congress offered that the “welfare of our children” standard constituted the requisite “substantial” government interest. As to whether the regulatory provisions were sufficiently tailored to withstand con-
constitutional scrutiny, Congress argued in the affirmative. Because the provisions did “not exclude any programming that [did] in fact serve the educational and informational needs of children” and “the broadcaster [had] discretion to meet its public service obligation in the way it [deemed] best suited,” the 1990 Act met the applicable First Amendment standards.

In promulgating the regulations necessitated by the Children’s Television Act of 1990, the FCC concurred with the legal principles of Congress. In fact, the Commission noted that even had the proposals been “found to be content-based restrictions on speech,” they still would have been constitutionally valid because “some restrictions on content [are] permissible when applied to broadcasting.” Acknowledging the government’s substantial interest in furthering the education and welfare of children through the implementation of the statute, the FCC explained that the courts have long recognized a compelling governmental interest in “safeguarding the physical and psychological well being of a minor.”

The governmental interest in safeguarding the welfare of children has also prompted Congress and the FCC to investigate the effects of television violence. In 1969, Congress requested that the Surgeon General initiate such an investigation. The Surgeon General’s report, issued in 1972, made preliminary findings that “indicat[ed] a causal relation between viewing violence on television and aggressive behavior.” As a result, Congress directed the FCC to report on “specific positive actions taken or planned by the Commission to pro-

255. Id.
256. Id. at 12.
258. Id. para. 67 (quoting Action for Children’s Television v. FCC, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988)). The Commission also explained that its regulatory actions constituted the requisite “compelling government interest.” Id. Members of the Senate found it “difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive.” S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989).
tect children from excessive programming of violence and obscenity.\textsuperscript{262}

In the past several years, congressional interest in television violence and its effects on children has escalated.\textsuperscript{263} As one commentator has noted:

In 1993 alone, three congressional hearings spanning eight days were held to address [television violence], and no fewer than ten bills and resolutions on the topic were introduced . . . .

\ldots Attorney General Janet Reno warned that if television violence is not reduced, 'government action will be imperative . . . .'

\ldots According to a recent poll, 'nearly four out of five Americans believe violence in television entertainment programs directly contributes to the amount of violence in society,' and fifty-four percent of those polled would support government guidelines to limit televised violence . . . . \textsuperscript{264}

It is beyond question that the barrage of legislative proposals was based on the supposition that television violence had harmful effects on children. One legal commentator explains that the countless number of legislative initiatives were premised on the belief that "reducing television violence would produce some measurable societal good,"\textsuperscript{265} such as "protect[ing] children from the physical and mental harm resulting from violence contained in television programs."\textsuperscript{266} The legislative proposals justified the regulation of broadcasting, in varying degrees,\textsuperscript{267} by citing "empirical evidence [showing] that chil-


\textsuperscript{263} In response to congressional concerns, the broadcast industry (ABC, CBS, and NBC) adopted new standards to reduce television violence: violent images must be relevant to the "development of character or advancement of the plot" and may not be "gratuitous or excessive" or "depicted as glamorous or a solution to human conflict." Ballard, supra note 118, at 175-76. The major networks have also introduced the "Advance Parental Advisory" plan, which will provide varying warnings to parents that the materials to follow are too violent for children. \textit{Id.; see also} Paul Farhi, \textit{Drawing a Bead on TV Violence}, Wash. Post, Sept. 20, 1995, at F1; Paul Farhi, \textit{The Big Battle Over Kids' TV: Bert and Ernie vs. Biker Mice}, Wash. Post, Oct. 31, 1995, at D1.


\textsuperscript{265} Ballard, supra note 118, at 184.

\textsuperscript{266} S. 943, 103d Cong., 1st Sess. (1993).

\textsuperscript{267} The congressional proposals fell into five distinct categories: (1) "zoning" television violence, which prohibits violent programming during the hours children are reasonably likely to comprise a substantial portion of the audience; (2) imposing sanctions on broadcasters, which include license revocation and civil fines for failing to reduce violence; (3) requiring warnings, which include video and audio warnings that a program contains
Children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than those children not so exposed.\cite{268}

Though none of the legislative proposals were enacted, the effort mounted by the 103d Congress evinces a substantial commitment to the welfare of America's children. It is clear that when reacting to the harmful effects of television on the physical and psychological well-being of children, Congress, the FCC, and the courts act homogeneously. Most importantly, they view the "public interest" obligations of broadcasters as outweighing the traditional constitutional protections accorded by the First Amendment.

3. Regulating Televised Racial Stereotyping: A Compelling State Interest

To minimize the effects of televised negative racial imagery, Congress and the FCC must acknowledge the glaring similarities between racial stereotyping and the categories of broadcasting already deemed appropriate for regulation—sex\cite{269} and violence.\cite{270} Equally obvious is the plausible analogy between requiring accurate and positive programming relating to individuals of different ethnic and racial backgrounds\cite{271} and the congressional mandate

\begin{itemize}
\item requiring the FCC to publish lists of the most violent programming, including the sponsors of the programs;
\item requiring new television sets to include circuitry, known as the "Violence" or "V" chip, to block programming encoded with a violence warning. Ballard, \textit{supra} note 118, at 182-84.
\end{itemize}


\textit{See} discussion \textit{supra} notes 238-259.

\textit{Id.} (referring to S. 1383, 103d Cong., 1st Sess. § 2 (1993)).
to provide children with informational and educational programming.\textsuperscript{272}

Congress has justified its legislative enactments and regulatory constraints on television broadcasters by referring to the "integral part" that television plays in a child's life.\textsuperscript{273} Congress has found it necessary to exercise its legislative powers when confronted by the realities of children's television-viewing habits. Congress has observed that "by the time the average child is 18 years old, he or she has spent between 10,000 [and] 15,000 hours watching television... having spent more time watching television than he or she spends in school."\textsuperscript{274}

Social science data reveal that African-American children watch "nearly twice" as much television as white children and often acquire their "values, beliefs, concepts, attitudes and basic socialization patterns" from viewing television.\textsuperscript{275} Overwhelming research findings suggest that media distortion negatively impacts the self-esteem of African-American children and may also preclude them from achieving self-actualization.\textsuperscript{276} Studies have even suggested that the potential negative effects associated with television viewership range from "inciting violence" and "aggression," to "antisocial behavior."\textsuperscript{277} Research also reveals that "white children are more likely than black children to learn about the other race from television."\textsuperscript{278} "Forty percent of the white children" in one study "attribute[d] their knowledge" about how African-Americans "look, talk, and dress" to the images they see in their living rooms.\textsuperscript{279}

The Supreme Court has long recognized that "[o]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."\textsuperscript{280} The Court has held that the uniqueness of the medium is based on its "pervasive presence in the lives of all Americans" and its accessibility to children.\textsuperscript{281} The constitutional standards, as determined by the Court, tolerate broadcast regulation

\begin{footnotes}
\item \textsuperscript{272} See Children's Television Act of 1990, 47 U.S.C. § 303b (a)(2) (1991) (requiring broadcaster to make an effort to air programming that benefits the educational and informational needs of children); discussion supra notes 239-248 and accompanying text.
\item \textsuperscript{273} See supra note 241 and accompanying text.
\item \textsuperscript{274} See supra note 240 and accompanying text.
\item \textsuperscript{275} See supra note 3 and text accompanying notes 92-97.
\item \textsuperscript{276} See supra notes 107-108 and accompanying text.
\item \textsuperscript{277} See supra note 101.
\item \textsuperscript{278} See supra note 59 and accompanying text.
\item \textsuperscript{279} See supra note 59 and accompanying text.
\item \textsuperscript{280} Pacifica, 438 U.S. at 748.
\item \textsuperscript{281} Id. at 748-50.
\end{footnotes}
that merely imposes an "incidental burden on speech." Consequently, the government may place "limited content restraints, and impose certain affirmative obligations on broadcasters" if such restrictions are narrowly tailored and further a substantial governmental interest.

Although Congress and the FCC cannot tell a broadcaster what to program, they can prevent or modify categories of programming where a substantial governmental interest exists. Protecting children from the harms of racial stereotyping clearly constitutes the governmental interest necessary to justify the imposition of race-neutral broadcast regulations.

D. Proposed Alternative Regulatory Approaches

Congress, the courts, and the FCC have acknowledged that broadcasters have a responsibility to serve their communities, and have a particular and unique obligation to serve the special needs of children. Moreover, because television broadcasters are deemed "trustees of a valuable public resource," the government has imposed requirements and guidelines ranging from restrictions on television violence and indecency to the affirmative obligation to provide educational and informational programming. Consequently, in developing regulatory proposals to combat negative imagery effectively, it is reasonable to review and analyze the regulatory methodologies already attempted by governmental entities.

The regulatory framework devised by Congress and the FCC to provide children with programming that is educational and informa-

282. See supra note 221 and accompanying text.
283. See supra notes 218-219 and accompanying text.
284. See supra notes 245-248 and accompanying text.
285. See supra notes 192-194 and accompanying text.
287. One commentator defines "negative imagery" as "stereotypical imagery of a group of people which may induce a loss of self-esteem and a feeling of inferiority ... [and] may create negative perceptual stereotypical self-attributions ... [that] are inclusive of values, attitudes, behaviors, and standards." Cosby, supra note 25, at 8.

Professors Evuleocha and Ugbah, in discussing the portrayals of Blacks in American media, explain the intricacies of stereotyping. See supra note 93. They note that the definitions of stereotyping range from a cognitive skill (a form of mental categorizing which allows us to organize information) to the inverting of cause and effect (an effect of the subordinate position of Blacks in a racist society is represented as a single, racial characteristic—Blacks are less intelligent than Whites by nature). Id. Although not all stereotypes are bad, they conclude that "when [stereotypes] are used to serve the function of purveying bourgeois and racist ideology to the mass public throughout the world ... especially casting Blacks ... in a demeaning and less than dignified light, then there is a grave cause for concern." Evuleocha & Ugbah, supra note 93, at 199-200.
DIVERSITY AND MINORITY STEREOTYPING IN TELEVISION

The government has, within the existing constitutional framework, the authority to encourage broadcasters to air programming that contains racial and ethnic images that are balanced, factual, and appropriate as role models for African-American children.

288. See supra note 251 and accompanying text.

289. The role model theory has been rejected by the courts as violative of equal protection jurisprudence. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275-76 (1986) (rejecting the role model argument in relation to employing and retaining African-American teachers because it has no logical stopping point); Britton v. South Bend Community School Corp., 819 F.2d 766, 767-68 (7th Cir. 1987) (en banc) (role model theory leads to racial balancing), cert. denied, 484 U.S. 925 (1987). The role model theory was rejected in Wygant because the Court was not persuaded that the disparity between teachers and students constituted proof of prior racial discrimination. 476 U.S. at 294. However, when addressed in a First Amendment context, the harm to children which results from the lack of positive, accurate African-American images on television creates a substantial government interest in preventing that harm. See Tabor, supra note 63, at 630-31 (exposing children to only white role models is dangerous in an ethnically diverse society).

290. See supra notes 261-269 and accompanying text. One social scientist opines that the broadcast industry could, with little difficulty, begin the task of redefining the images of African-Americans in television programming: “Television hegemonic strata should terminate their practices of hiring, financing, and encouraging African-American writers, directors, producers, and actors to create negative imageries of African-Americans while excluding African-American writers, directors, producers, and actors who wish to create positive imageries of African-Americans.” Cosby, supra note 25, at 136-37.

Critics will raise as an issue the difficulty, if not implausibility, of determining what television imagery constitutes improper racial stereotyping. I acknowledge the complexity of the task, but note that the broadcasting industry has responded to comparable challenges in developing guidelines relating to “excessive violence.” See discussion supra note 274. As expected, the industry is addressing the problem by utilizing the talents, experience, and training of educators, social scientists, and members of its industry. See Paul Farhi, Drawing a Bead on TV Violence: Study Finds Crime-Time Shows Improve; Movies, Kids’ Programs Still a Concern, WASH. POST, Sept. 20, 1995, at F1. Farhi’s article reports on the 190-page study conducted at the behest of the broadcasting industry on the 121 TV series that aired last season. The study found that some improvements had occurred, but recommended that the networks schedule violence-laden shows after 9:00 p.m. Id. The study also recommended that the industry re-examine policies regarding promotional announcements, rethink the airing of violent theatrical movies, reduce the amount of fighting on kids’ shows, and apply advisories more consistently. Id. Of significance is Farhi’s observation that the research is “inevitably controversial because few academics agree on what precisely constitutes an act of violence.” Id.

Fashioning appropriate guidelines for determining what constitutes “racial stereotyping” will require an equivalent combined effort of industry members, social scientists, educators, and government officials. Such a collaborative undertaking has fortunately already begun. The Anti-Defamation League conducted a symposium in Washington, D.C. on June 2, 1995, entitled Children, Television & Prejudice. The program consisted of a group of distinguished panelists, who discussed the issue of televised racial stereotyping, its impacts on children, and the possible solutions. Representing the affected parties of interest were Ray Suarez (National Public Radio), Michael Benjamin (Director, Institute of Mental Health Initiatives), Dr. Helen Boehm (Vice President, Children’s Network, Fox), Dr. Janette Dates (Dean, School of Communications, Howard University), Dr. Renee Hobbs (Professor, Harvard Institute on Media Education), Dr. Valeria Lovelace (Director of Re-
In enacting legislation that imposed children's programming responsibilities on the broadcasting industry, Congress reasoned that "the use of television" in furtherance of the "development of America's children" was an integral part of a "licensee's obligation" to "operate in the public interest."291 In addition, studies have found that "television can be used effectively to convey important and positive messages about social behavior."292 Hence, research that suggests the media's portrayal of African-Americans as violent, mentally inferior, irresponsible, and corrupt, could have severe social implications for minority children293 and provides a correlative basis for government to prescribe comparable regulatory requirements.

Any effort to implement regulatory policy that assures that television programming will project balanced racial images must begin with a recognition by the executive members of the industry that a problem of racial stereotyping exists.294 The industry, in concert with educators, parents, social scientists, and federal policy makers, could then initiate a partnership providing the essential forum for defining plausible solutions. The partnership could address programming issues and identify effective ways of achieving "constructive improvements" in the home and in the schools.295

The American Psychological Association, in a 1992 report on the effects of television on children, also provided guidance in combatting the harms associated with racial stereotyping.296 The report recom-

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291. See supra note 264 and accompanying text.
294. As stated by the FCC in one of its earlier proceedings relating to the prohibition of indecent programming:
   In the final analysis, the medium of television cannot live up to its potential in serving America's children unless individual broadcasters are genuinely committed to that task, and are willing—to a considerable extent—to put profit in second place and the children in first. While government reports and regulations can correct some of the more apparent abuses, they cannot create a sense of commitment to children where it does not already exist. 1974 Policy Statement, supra note 226, para. 59.
296. Cosby, supra note 25, at 133.
mended that parents "encourage [their] children . . . to meet people from different ethnic or social backgrounds" and instruct children in "critical viewing." In her study, Dr. Cosby proposes that the development of "critical viewing skills" begins with "educators constructing curricula that will help to counter television's possible influence on elementary and high school children's self-perceptions," as well as their opinions of others.

The congressional proposals introduced to restrict, reduce, and eliminate televised violence also offer appropriate regulatory examples. In an effort to shield minors from racial stereotyping, the government could impose scheduling requirements on the hours within which racially stereotypical programs could be aired. The government could require the use of audio and video warnings before and during the applicable programs and could institute an FCC compliance procedure that would be conducted at the time each broadcast licensee applied for renewal.

297. Id.
298. Id. at 134.
299. Id. Though Dr. Cosby addresses her recommendations to both elementary and high school children, the proposal contained herein is limited to children of preschool, primary school, and elementary school age. Age-specificity is of primary importance in the area of informational programming, in that younger children are unusually susceptible to receiving and learning messages of racial distinctions. See supra note 109. For example, many preschool children rely on television for information because they cannot read or access alternative sources of information. See In re Children's Television Programming and Advertising Practices, Notice of Proposed Rule Making, 75 F.C.C.2d 138, para. 22 (1979).
300. See supra notes 275-279 and accompanying text.
301. Stereotypical programming that contains materials deemed unsuited for viewing by young children should not be broadcast between 6:00 a.m. and 9:00 p.m. on any day. See discussion supra note 199 and accompanying text.
302. The audio and video advisory warnings could be shown at the outset of each program. During the course of the program, an appropriate symbol could be placed in the corner of the screen to warn those viewers who tune in while the program is in progress that it may not be appropriate for viewing by young children. See Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 420 (1975). An advance notice of the warnings could also be submitted to network affiliates for inclusion in local TV guides and newspapers, program listings, and promotional materials. See In re Policies and Rules Concerning Children's Television Programming, Notice of Proposed Rule Making, 10 FCC Rcd. 6308 (1995).
303. See In re Policies and Rules Concerning Children's Television, Notice of Proposed Rule Making, 10 FCC Rcd. 6308 (1995). The FCC, in its pending Children's Television proceeding, has even suggested that the licensee's present obligation to file annual reports could be augmented to require that applicable data be maintained to allow parents, educators, and interest groups to play a more meaningful role in both the renewal process and ongoing monitoring efforts during the course of a station's license term. Id. Such a reporting requirement would be equally appropriate to apply in the efforts to monitor and enforce guidelines relating to racial stereotyping.
These regulatory proposals are expressly the kind of targeted governmental action required by constitutional standards. The recommendations are no more extensive than necessary to accomplish the affected governmental interest. Consequently, because they are narrowly focused, nonintrusive in nature, and distinctly limited in application to children's programs—the time limits, advisory warnings, compliance procedures, and reporting requirements are constitutionally permissible.

IV

Conclusion

Theories, beliefs and acts of racism have been legislatively and legally rejected by American society. Intuitively, one can see the existence of an interrelationship between acts of racial discrimination and racism. It has been observed that the "[p]revalence of racism or racial prejudice is likely to encourage racial discrimination. Conversely, allowing racial discrimination is likely to encourage the spread of racism and racial prejudice." Therefore, a society that condones racism is a society that will experience acts of racial discrimination. Consequently, any effort to eliminate racial discrimination without a comparable assault on its motivator, racism, will by necessity fail. This fact informs the proposition that the abolishment of racial discrimination is critical to the eradication of racial prejudice. Stated differently, because racial discrimination substantially influences the beliefs, values, and behavior of others, its destruction will effectively remove one of the sources of racism. The elimination of

304. See supra notes 230-236 and accompanying text. The proposals proffered are clearly less intrusive than the ban on editorializing at non-commercial stations that the Supreme Court held violated First Amendment protections in FCC v. League of Women Voters, 468 U.S. 364, 385 (1984). Furthermore, the proposals denote "no threat that a broadcaster would be denied permission to carry a particular program or to publish its own view." Id. at 378. The Court explained that its ruling prohibiting the ban on editorializing was "narrow" in scope and did "not hold that the Congress or the FCC is without power to regulate the content, timing or character of speech." Id. at 402.

305. In 1979, in an effort to improve TV service for children, the FCC even considered imposing a mandatory requirement that specific programming categories be provided for children by the broadcasting industry. See In re Children's Television Programming and Advertising Practices, Notice of Proposed Rule Making, 75 F.C.C.2d 138, para. 35 (1979).


307. Id. at 453.
racial stereotyping from television provides corresponding societal benefits, aiding the reduction of racial prejudice from our society.\textsuperscript{308}

Congress, the courts, the FCC, and the broadcasting industry must acknowledge the harm racial stereotyping inflicts on African-American children in particular, and the American society as a whole. It is essential that as a nation, we purge children’s television programming of racist imageries. “We must be careful that because of their youth and inexperience, children are far more trusting of and vulnerable to blatant and subliminal messages,”\textsuperscript{309} and therefore cannot distinguish conceptually between what is real and what is fatally false. Given the potential harms associated with negative racial imagery and the racial dissention and divisiveness that continues to plague the nation, it is imperative that immediate legislative and regulatory actions be taken to address this most compelling government interest.

\textsuperscript{308} Some commentators have proposed eliminating racist speech because (1) racism or racist speech is highly offensive and may therefore cause friction and possible violence; protecting the public peace therefore justifies restricting individual rights; and (2) the indignities suffered by individuals targeted with racist speech in a society that professes to embrace political and social ideals of equality justify the fashioning of appropriate legal restrictions on racial misconduct. See id. at 456.

\textsuperscript{309} 1974 Policy Statement, \textit{supra} note 226, para. 34.