

**A SQUARE PEG TRYING TO FIT INTO A ROUND HOLE: THE FEDERAL  
COMMUNICATION COMMISSION'S EQUAL EMPLOYMENT OPPORTUNITY  
REGULATIONS IN *LUTHERAN CHURCH MISSOURI-SYNOD V. FEDERAL  
COMMUNICATIONS COMMISSION***

I. INTRODUCTION

In *Lutheran Church-Missouri Synod v. Federal Communication Commission*,<sup>1</sup> the District of Columbia Circuit Court of Appeals held that the Federal Communications Commission's<sup>2</sup> equal employment regulations (EEO)<sup>3</sup> were unconstitutional.<sup>4</sup> The

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<sup>1</sup> 141 F.3d 344 (D.C. Cir. 1998), *reh'g denied*, 154 F.3d 487 (D.C. Cir. 1998), *suggestions on reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

<sup>2</sup> Federal regulation of the radio and airwaves originated with the Wireless and Ship Act ch. 379, 36 Stat. 629 (1910). In 1912 the government banned the use of radio frequencies without a government issued license from the Secretary of Commerce and Labor. ch. 287, 37 Stat. 302 (1912). The Federal Communications Commission (FCC), was created by the 1934 Communications Act. *See* 47 U.S.C. § 151 (1934).

For the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, 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 this chapter.

*Id.*

<sup>3</sup> The equal employment opportunity program. 47 C.F.R §73.2080 (1997).

<sup>4</sup> *Lutheran Church*, 141 F.3d at 354-55. The court held the EEO regulations influenced hiring, obliging the Lutheran Church-Missouri Synod (Church) to grant preference to minorities and women. The FCC's interest in diversity in programming did not rise to the level of a compelling governmental interest as required under the strict scrutiny standard as described in *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995) (invalidating a racial preference for construction contracts). *Id.* at 354.

Church challenged the application of the FCC's religious preference exemption policy<sup>5</sup> and the future effect of the EEO regulations.<sup>6</sup>

The purpose of this Note is to examine the judicial review of the FCC's quasi-judicial powers. Part II explores the FCC's EEO regulations and the appropriate standard of review for racial classifications.<sup>7</sup> Part III reviews the particular facts of this case and the holding of the court.<sup>8</sup> Finally, Part IV analyzes the court's decision as a protection of the separation of powers doctrine.<sup>9</sup>

## II. BACKGROUND

### A. Development of FCC's Current EEO Regulations

In 1969, the FCC furthered an emerging national policy against discrimination in employment by incorporating an EEO policy into FCC regulations.<sup>10</sup> The FCC currently evaluates a broadcast station's compliance with the EEO regulations<sup>11</sup> during

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<sup>5</sup> In *King's Garden, Inc. v. FCC*, 498 F.2d 51, 61 (1974), the court held the FCC's "anti-bias rules will not compromise the licensee's freedom of religious expression." The FCC applied a nexus test to determine exemptions. *Id.* A position that was not substantially connected to the program content or a position that was connected to only non-religious programming was not exempt. *Id.*

<sup>6</sup> *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 490 (D.C. Cir. 1998). The panel stated "whenever a party challenges the regulatory basis for a sanction it necessarily challenged the future effect of the regulation." *Id.*

<sup>7</sup> See *infra* Part II.A-B.

<sup>8</sup> See *infra* Part III.A-D.

<sup>9</sup> See *infra* Part IV.A-D.

<sup>10</sup> Nondiscrimination in Employment Practices 18 F.C.C.2d 240, ¶¶ 4-8, (1969) (Report and Order). In 1968, the FCC determined that a station was not serving the entire audience if a licensee practiced discrimination in employment. Nondiscrimination Employment Practices, 13 F.C.C.2d 766, ¶¶ 9, 10 (1968) (Mem. Op. and Order and Notice of Proposed Rulemaking). The FCC initially regulated compliance in response to employee complaints. *Id.* at ¶ 15. Recognizing an independent responsibility to ensure the national policy of anti-discrimination in employment, the FCC adopted rules similar to the Equal Employment Opportunity Commission to determine non-compliance and other regulations to identify the minority groups in the greatest need of assistance. In *Red Lion v. FCC*, 395 U.S. 367, 379 (1969), the Supreme Court held that licensed stations were public trustees, obliging stations to present a variety of viewpoints.

<sup>11</sup> The EEO regulations require the licensee to exercise non-discriminatory employment practices and to establish an EEO program:

- (a) General EEO policy. Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such

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the license renewal process.<sup>12</sup> In 1980, the FCC enacted procedural guidelines<sup>13</sup> to screen for license renewal applications with the least successful EEO performance records.<sup>14</sup> A station failing to meet the processing guidelines that had skill specific

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stations because of race, color, religion, national origin, or sex.

(2) EEO program. Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice. . . .

. . . .

(c) EEO program requirements. A broadcast station's equal employment opportunity program should reasonably address itself to the[se] specific areas:

(1) Disseminate its equal opportunity program to job applicants . . . .

(2) Use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever job vacancies are available in its operation. . . .

. . . .

(3) Evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area.

. . . .

(4) Undertake to offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility. . . .

. . . .

(5) Analyze its efforts to recruit, hire, and promote minorities and women and address any difficulties encountered in implementing its equal employment opportunity program. . . .

. . . .

47 C.F.R. § 73.2080 (1997).

<sup>12</sup> 47 U.S.C.A. § 308 (1998).

<sup>13</sup> The proposed guidelines were strongly opposed by the National Association of Broadcasters. EEO Guideline Modification 79 F.C.C.2d 922, ¶¶ 2-4 (1980) (Mem. Op. And Order). The National Association of Broadcasters raised three objections to the proposed guidelines. First, the Association argued that according to the Administrative Procedure Act, 5 U.S.C. § 553 (1980), the FCC was required to provide note and comment because the guidelines were substantive rather than procedural. *Id.* Second, the FCC failed to take into consideration the available workforce in the top four job categories making its determination of what constitutes discrimination unfair and unrealistic. *Id.* Finally, the new guidelines ignored the good faith efforts of the broadcasters to practice non-discriminatory employment. *Id.*

<sup>14</sup> The new FCC procedural guidelines created categories based on the size of the station and then determined the target percentage of that work force which minorities and women should represent: 1) 5 – 10 employees: 25% in the top four positions and 50% in overall work

positions could supplement its application with census information or other data to demonstrate a lack of available minorities and women with the requisite skills.<sup>15</sup>

In 1987, the FCC shifted the focus of its EEO regulations from a results-based approach to an efforts-based approach.<sup>16</sup> In effect, the shift was nothing more than illusory. While the new regulations required a station to describe in detail its plan to accomplish the hiring goals;<sup>17</sup> the regulations still required a broadcast station to meet the results-based numerical goals of minority representation in its workforce.<sup>18</sup> The FCC contends its current EEO regulations are efforts-based and are designed to deter discrimination and promote programming that reflects the viewpoints of minorities and women.<sup>19</sup>

### B. *The Standard of Review for FCC's EEO Regulations*

The United States Supreme Court has struggled with the appropriate standard of review for cases regarding race classifications.<sup>20</sup> In *Metro Broadcasting Inc. v. FCC*,<sup>21</sup>

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force; 2) 11 – 49 employees: 50% in the top four positions and the overall work force; 3) Over 50 employees automatically receive and in depth review; 4) Less than 5 employees are exempt from filing. EEO Guideline Modifications, 79 F.C.C.2d 922, ¶¶ 5-6 (1980).

A failure to achieve the listed percentages alerted the FCC to stations needing further review, although it did not automatically indicate the presence of discrimination. *Id.* at ¶¶ 7, 8. The FCC conducted an in depth review after examining the numerical data and other factors. *Id.*

A station meeting the processing guidelines established a prima facie showing of non-discrimination in employment also referred to as the “zone of reasonableness.” *Bilingual Bicultural Coalition on Mass Media Inc. v. FCC*, 595 F.2d 621, 627, n.15 (1978).

<sup>15</sup> EEO Guideline Modifications, 79 F.C.C.2d 922, ¶ 29 (1980).

<sup>16</sup> The FCC adopted a two step approach to evaluate a station’s compliance with the EEO regulations. EEO Rules, 2 F.C.C.R. 3967, ¶ 48 (1987) (Report and Order). The initial evaluation focuses on the station’s renewal application, complaints filed against the station and any other information pertaining to the station’s EEO program and policies. *Id.* A station would be required to submit additional information regarding specific areas of its EEO program that an initial evaluation found unsatisfactory. *Id.*

<sup>17</sup> A station can have a proper EEO plan in place and still be in violation of the EEO regulations for failure to meet the numerical goals. *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 351-54 (D.C. Cir. 1998). The FCC’s EEO regulation is still a results-based approach with an additional reporting requirement of what plans the station has in place to accomplish the required results. *Id.*

<sup>18</sup> EEO Rules, 2 F.C.C.R. 3967, ¶ 48 (1987) (Report and Order).

<sup>19</sup> EEO Forfeiture Guidelines, 11 F.C.C.R. 5154, ¶¶ 7-12 (1996) (Order and Notice of Proposed Rulemaking); *see also* EEO Rule and Policies, 13 F.C.C.2d 6322, ¶ 9 (1998) (Order and Policy Statement).

<sup>20</sup> The Court has applied both a strict scrutiny and an intermediate standard for review of governmental race classifications. *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 226

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the Court upheld congressional power to adopt an affirmative action plan which did not remedy past discrimination.<sup>22</sup> Applying an intermediate standard of review,<sup>23</sup> the Court characterized the FCC minority program as benign<sup>24</sup> and recognized a link between minority ownership and programming diversity.<sup>25</sup>

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(1995). A strict scrutiny standard is met if there is a compelling governmental interest and a narrowly tailored means to achieve the government's objectives. *Id.* An intermediate standard is met when an important government interest within Congress' power is substantially related to the achievement of the government's objectives. *Metro Broadcasting Inc., v. FCC*, 497 U.S. 547, 564-65 (1990), *overruled by Adarand*, 515 U.S. 200 (1995).

Until 1990, the Supreme Court decisions regarding race classifications "taken together . . . [led] to the conclusion that any person, of whatever race, ha[d] the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224; *see also* *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (plurality opinion invalidating a state medical school admission policy which reserved places for minority students); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986) (plurality opinion invalidating a school's race-based determinations of priorities for a lay-off of teachers); and *City of Richmond v. Cronson*, 488 U.S. 469 (1989) (invalidating a state apportionment to minority construction businesses); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (validating the minority business enterprise provision of the Public Works Employment Act of 1977).

<sup>21</sup> 497 U.S. 547 (1990), *overruled by Adarand*, 515 U.S. 200 (1995).

<sup>22</sup> The Court reviewed two minority preference policies: 1) an enhancement award for minority applicants in competitive proceedings for new licenses; and 2) minority distress sales which permitted a limited number of current broadcast stations to sell their license before they were denied renewal. *Id.* at 547-48. For an indepth discussion of *Metro*, see Kathleen Ann Kirby, *Shouldn't the Constitution Be Color Blind?* *Metro Broadcasting, Inc. v. FCC Transmits A Surprising Message on Racial Preferences*, 40 CATH. U. L. REV. 403, 406 (1991) ("The Court, for the first time, upheld Congress' power to adopt affirmative action plans to promote racial and ethnic diversity rather than simply to remedy past discrimination.").

<sup>23</sup> The Court held:

. . . that *benign* race-conscious measures mandated by Congress- even if the measures are not remedial in the sense of being designed to compensate victims of past government or societal discriminations- are constitutionally permissible to the extent they serve *important government objectives* within the power of Congress and are *substantially related to achievement of those objectives*.

*Metro*, 497 U.S. at 564-65 (emphasis added); *cf.* Mary Tabor, *Encouraging "Those Who Would Speak Out With Fresh Voice" Through The Federal Communications Commission's Minority Ownership Policies*, 76 IOWA L. REV. 609, 639 (1991) (claiming the intermediate level standard adopted by the Court in *Metro* did not go far enough because the Court left unanswered the constitutionality of affirmative action programs with less congressional support).

<sup>24</sup> *Metro*, 497 U.S. at 564-65. The Court labeled the FCC policies as benign "confident that an examination of the legislative scheme and its history . . . will separate benign measures from other types of racial classification." *Id.* at 565, n.12 (citing *Weinberger v. Wiesenfeld*,

Justice O'Connor's dissent<sup>26</sup> argued that the majority opinion strayed from the traditional approach<sup>27</sup> of reviewing racial classifications as permissible only if they are narrowly tailored to achieve a compelling government interest,<sup>28</sup> and that only a

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420 U.S. 636, 648, n.16) (1975)). The Court justified its classification by stating "the concept of benign race-conscious measures—even those with at least some nonremedial purposes—is as old as the Fourteenth Amendment." *Id.* at 656, n.12; *see also* Ken Feagins, *Wanted—Diversity: White Heterosexual Males Need Not Apply*, 4 WIDENER J. PUB. L. 1, 4 (1994) (describing the difference between a benign act and discriminatory act.). A benign act provides an individual access to a benefit without depriving another. *Id.* A discriminatory act is distinguished as denying an opportunity to an individual in order to grant it to another. *Id.* *But see Metro*, 497 U.S. at 609 (O'Connor, J., dissenting) (stating that "[b]enign racial classification is a contradiction in terms."). Justice Kennedy also dissented stating "[a]lthough the majority is 'confident' that it can determine when racial discrimination is benign . . . it offers no explanation as to how it will do so." *Id.* at 635 (Kennedy, J., dissenting). According to Justice Kennedy's dissent, "[p]olicies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not." *Id.*

<sup>25</sup> A "broadcasting industry with representative minority participation will produce more variation and diversity than one whose ownership is drawn from a single racially or ethnically homogenous group." *Metro*, 497 U.S. at 579. The nexus between minority ownership and diversity in programming is based on the premise that "a race-neutral means could not produce adequate broadcasting diversity." *Id.* at 589. A determination that this nexus does exist is "revealed by the historical evolution of current federal policy, both Congress and the Commission have concluded that the minority ownership programs are critical means of promoting broadcast diversity . . . [the Court] give[s] great weight to their joint determination." *Id.* at 579. The existence of a nexus is a predictive judgment because "there is no ironclad guarantee that each minority owner will contribute to diversity." *Id.* In Justice O'Connor's dissent, she describes the nexus between minority ownership and program diversity as valid only to the degree that minority owned stations provide the viewpoint the FCC determines is lacking. *Id.* at 618-19 (O'Connor, J., dissenting).

<sup>26</sup> *Id.* at 611-12 (O'Connor, J., dissenting) (arguing the majority opinion is without support from precedent and the current FCC minority preference policies fail under a strict scrutiny and intermediate standard of review).

<sup>27</sup> The Court stated:

'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.' There are two prongs to this examination. First, any racial classification 'must be justified by a compelling governmental interest.' Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'

*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (citations omitted).

<sup>28</sup> *Metro*, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination.").

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remedial race classification would require the more demanding strict scrutiny standard.<sup>29</sup> Justice O'Connor concluded that the majority opinion upholding the FCC minority preference policies lacked precedential support.<sup>30</sup>

Five years later, in *Adarand Constructors Inc. v. Peña*,<sup>31</sup> the Court overruled *Metro*<sup>32</sup> and required that race classifications be reviewed under a strict scrutiny standard.<sup>33</sup> The majority explored the development of the strict scrutiny and intermediate standard of review for state and federal governmental race classifications.<sup>34</sup> The decision in *Adarand* renders the FCC's EEO regulations unconstitutional under a strict scrutiny standard of review. *Metro's* intermediate standard of review was no longer appropriate.<sup>35</sup>

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<sup>29</sup> *Id.* at 607 (O'Connor, J., dissenting). *Contra*, Akosua Barthwell Evans, *Are Minority Preferences Necessary? Another Look at the Radio Broadcast Industry*, 8 YALE L. & POL'Y REV. 380, 411 (1990) ("Minority preference policies are necessary to address past discrimination and ensure that minority viewpoints are represented on the public airwaves."); see Theresa Brunson, *The Federal Communication Commission's Commitment to Regulating Equal Employment Opportunity in the Broadcast Industry*, 1 HOW. SCROLL 100 (1993) (finding that FCC failure to enforce EEO regulations resulted in a history of sanctioned discrimination for minorities in the broadcast industry).

<sup>30</sup> In *City of Richmond v. Cronson*, the Court held that a remedy for societal discrimination does not meet compelling interest of strict scrutiny. 488 U.S. 469, 505 (1989) (invalidating a state apportionment to minority construction businesses).

<sup>31</sup> 515 U.S. 200 (1995). In *Adarand*, the lowest bidding sub-contractor was passed over for a minority sub-contractor. *Id.* at 200. The Court held that racial classifications of this type must be reviewed under a strict scrutiny standard. *Id.* at 226.

<sup>32</sup> 497 U.S. 547 (1990).

<sup>33</sup> *Adarand*, 515 U.S. at 227. "[A]ll racial classification, imposed by whatever Federal . . . actor, must be analyzed by a reviewing court under strict scrutiny. . . . [S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling government interests. To the extent [*Metro*] is inconsistent with that holding, it is overruled." *Id.*

<sup>34</sup> The majority in *Adarand* focused on the propositions of skepticism, consistency and congruence from past cases to hold the decision in *Metro* represented "a significant departure from what came before it." *Id.* at 225-27. The Court's skepticism of racial classifications, need for consistency in application of equal protection and congruency between the State and Federal protection led to the conclusion that a justification for subjecting any person to unequal treatment under racial classifications must be "under the strictest judicial scrutiny." *Id.* at 223-24. However, according to Justice Stevens' dissenting opinion, "[i]nstead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications." *Id.* at 242 (Stevens, J., dissenting).

<sup>35</sup> See *id.* at 225-29.

After *Adarand*, the Department of Justice (D.O.J.) issued a memorandum to provide guidance to Federal agencies.<sup>36</sup> The D.O.J. Memorandum justified the use of race as operational and consistent with the compelling governmental interest required in *Adarand*.<sup>37</sup> The FCC reexamined its EEO regulations and concluded its efforts-based approach did not trigger an *Adarand* strict scrutiny review.<sup>38</sup>

### III. STATEMENT OF THE CASE

#### A. Facts

On September 29, 1989, the Lutheran Church Missouri-Synod filed an application with the FCC for renewal of its license.<sup>39</sup> The FCC ruled that the application was deficient,<sup>40</sup> and requested supplemental information regarding the recruitment of minorities and women.<sup>41</sup> The NAACP petitioned to deny renewal<sup>42</sup> alleging that the

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<sup>36</sup> Associate Attorney General John R. Schmidt, *Post-Adarand Guidance on Affirmative Action in Federal Employment* (Feb. 29, 1996), reprinted in DAILY LAB. REP. (BNA) No. 43, at D-31 (Mar. 5, 1996) [hereinafter *D.O.J. Memorandum*].

<sup>37</sup> *D.O.J. Memorandum*, supra note 36, at § 2, ¶ 5. A compelling interest that may be justified as operational providing that “decisionmakers will be exposed to the greatest possible diversity of perspectives.” *Id.* But see Kingsley R. Browne, *Non-remedial Justifications for Affirmative Action In Employment; A Critique of the Justice Department Position*, 12 LAB. LAW. 451 (1997). Neither the Congress nor Supreme Court justifies racial classification with efficiency concerns. *Id.* at 473. “Contrary to the Justice Department, employers may not circumvent this regime by the simple artifice of labeling classifications based on operational justifications ‘affirmative action.’” *Id.*

<sup>38</sup> EEO Forfeiture Guidelines, 11 F.C.C.R. 5154, ¶¶ 13-15 (1996) (Order and Notice of Proposed Rulemaking). The FCC decided that an *Adarand* review is inapplicable if the use of race is limited to expanding an existing job pool. *Id.* EEO regulations are limited to outreach and recruitment not requiring a certain number of minority employees. *Id.*; see *Federal Power Comm’n v. NAACP*, 425 U.S. 662 (1976).

The [FCC] has adopted regulations dealing with the employment practices of its regulatees . . . . These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure its licensee’s programming fairly reflects the tastes and viewpoints of minority groups. *Id.* at 670, n.7.

<sup>39</sup> The application was submitted per 47 U.S.C. § 308 (1998). The license period was February 1, 1983 to February 1, 1990. Lutheran Church-Missouri Synod, 10 F.C.C.R. 9880, ¶ 73, (1995) (Initial Decision) [hereinafter *Initial Decision*].

<sup>40</sup> The Church’s original application indicated only six hires, two white males and four white females during the renewal year. Lutheran Church-Missouri Synod, 9 F.C.C.R. 914, ¶ 7, (1994) (Hr’g Designation and Order) [hereinafter *HDO*]. The Church, citing human error, corrected the hiring information for the license period. *Id.* at ¶ 12. The Church actually hired ten full-time and four part-time positions. *Id.*

<sup>41</sup> Although the Church apparently sent referral letters to employment agencies that

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Church EEO program failed to indicate contact with minority organizations,<sup>43</sup> failed to hire or recruit a minority employee during the previous license period,<sup>44</sup> and employed only one full-time minority.<sup>45</sup> The Church responded with a defense of their EEO program and a policy of non-discrimination.<sup>46</sup>

*B. Procedural History*

The FCC renewed the Church license<sup>47</sup> with reporting sanctions<sup>48</sup> but fined the Church \$25,000.00 for its lack of candor.<sup>49</sup> On appeal, the District of Columbia Circuit

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handled referrals of minorities and women, the Church did not receive any referrals from these organizations. *Id.* at ¶ 8.

<sup>42</sup> National Association for the Advancement of Colored People ( NAACP), petitioned to deny renewal per 47 U.S.C. § 208 (1990). *See* Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988). The NAACP met the requirements of the two-part test in 47 U.S.C. § 309(d)(1),(2) (1990), to determine if an intervening party has standing. *Id.* at 1561. First, the party submits affidavits to show that it is in the public's interest to deny the station's application for renewal. *Id.* The FCC determines if a prima facie case to deny the application exists. Second, the FCC decides if there is a substantial issue of fact to support a hearing. *Id.*

The NAACP made specific allegations of fact and stated that Rev. James F DeClure was a minority listener who would be seriously aggrieved if the NAACP petition was not granted. *HDO*, 9 F.C.C.R. 914 at ¶¶ 2, 3. The NAACP was accepted as an interested party. *Id.*

<sup>43</sup> 47 C.F.R. §73.2080(b)(3) (1997) (requiring a broadcast station to communicate its EEO policy to sources of qualified applicants and to maintain continual recruiting assistance with these sources). A subsequent section suggests enlisting the aid of minority organizations for referrals. §73.2080(c)(2).

<sup>44</sup> *HDO*, 9 F.C.C.R. 914 at ¶ 7.

<sup>45</sup> NAACP argues the Church should not get minority credit for the Hispanic employee. The FCC defines minority as "Blacks not of Hispanic origin, Asians or Pacific Islanders, American Indians or Alaskan Natives and Hispanics" EEO Rules and Policies, 2 F.C.C.R. 3967 at App. C, ¶ 1.

<sup>46</sup> *HDO*, 9 F.C.C.R. 914 at ¶¶ 10, 11. The Church stated three mitigating circumstances to defend their EEO program: 1) large receipt of write in applications; 2) a reciprocal arrangement with Concordia Seminary that in exchange for rent free accommodations the Church extends positions to seminary students; and 3) management turnover. *Id.* Church supplied statistical information per processing guidelines. Data showed 5% of the Lutherans in Missouri are minorities, a listeners poll indicated that 3.7% are black and the Church reasoned .01% of the listening area are minorities with classical music training. *Id.* at ¶ 11.

<sup>47</sup> *Id.* at ¶ 38. The FCC designated the Church's application for a full hearing. *Id.* at ¶ 32; *see also Initial Decision*, 10 F.C.C.R. 9880 at ¶¶ 252-61. The ALJ determined that during the period between Feb. 1, 1983 and Aug. 3, 1987, the Church had flawed but acceptable affirmative action efforts. *Id.* at ¶ 254. Between August 3, 1987 and Jan. 2, 1990, the Church was not in compliance with 47 C.F.R. 73.2080 (1987). *Id.* However, there was not "one scintilla" of evidence that the Church had in fact discriminated against minorities and the ALJ determined a denial of the license was not warranted and recommended a forfeiture of fifty

Court of Appeals held the FCC regulations unconstitutional<sup>50</sup> and remanded the case to the FCC for a determination on whether the Commission “ha[d] authority to promulgate an employment non-discrimination rule.”<sup>51</sup>

### C. District of Columbia Circuit Court of Appeals Decision

The issue before the court was the constitutionality of the EEO regulations as applied to the Church’s renewal application.<sup>52</sup> The court held that the FCC’s “diversity in programming”<sup>53</sup> interest failed the *Adarand* strict scrutiny test<sup>54</sup> that is required for all government racial classifications.<sup>55</sup> The court held that the EEO

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thousand dollars and reporting sanctions. *Id.* The FCC issued a reporting sanction and reduced the fine to twenty-five thousand dollars. Lutheran Church-Missouri Synod, 12 F.C.C.R. 2152 (1997) (Mem. Op. and Order) [hereinafter *MO&O*].

<sup>48</sup> The Church sanction was to submit reports annually over the next 3 years containing: 1) a list of all job applicants and hires, indicating their referral or recruitment source, job title, part-time or full-time status, date of hire, sex, and race or national origin; 2) a list of all employees, indicating job title, sex, and race; and 3) a narrative statement detailing the station’s efforts to recruit minorities. *MO&O*, 12 F.C.C.R. 2152 at ¶¶ 23-24.

<sup>49</sup> *Id.* The Church displayed a lack of candor regarding a classical music requirement for applicants and the description of its renewal program. *Id.* at ¶ 25.

<sup>50</sup> See *infra* Part III.C.

<sup>51</sup> Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998). The FCC’s petition to the court for a rehearing was denied. 154 F.3d 487 (D.C. Cir. 1998), *suggestions on reh’g en banc denied*, 154 F.2d 494 (D.C. Cir. 1998). A petition for a rehearing en banc must be filed fourteen days after the decision. See Michael Botein, Comment, *Judicial Review of FCC Action*, 13 CARDOZO ARTS AND ENT. L.J. 317, 340-41 (1995). Such a hearing is disfavored by the court and “is an extremely rare form of relief to secure.” *Id.*

<sup>52</sup> *Lutheran Church*, 141 F.3d. at 356. The Court only decided whether the affirmative action portion of the EEO regulations violated the Fifth Amendment. *Id.* The Church raised issues of interference with their religious freedom under the Religious Freedom Act and the Free Exercise Clause, which the court did not think prudent to address. *Id.* The Church’s arguments that: 1) the FCC decision violated the Free Speech Clause of the First Amendment; and 2) the FCC’s failure to reexamine the *King’s Garden* religious exemption policy were not properly before the court. *Id.* at 349 n.6.

<sup>53</sup> See *id.* at 354-55. The FCC relied on the intermediate standard used in *Metro*, arguing that diversity in programming was an important interest and therefore, constitutional. *Id.* For a discussion of the standard used in *Metro*, see *supra* notes 21-23 and accompanying text.

<sup>54</sup> *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 226 (1995). The Court established a two prong test for strict scrutiny review of racial classifications. First, the basis for the racial classification must be a compelling government interest. *Id.* Second, the interest must be narrowly tailored to serve the interest. *Id.*

<sup>55</sup> *Lutheran Church*, 141 F.3d. at 356. (“The regulations could not pass the substantial relation of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny.”).

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regulations obligated the Church to “grant some degree of preference to minorities in hiring.”<sup>56</sup>

The court focused on the inherent inconsistency of the FCC’s policy toward religious exemptions,<sup>57</sup> and its interest in promoting diversity in programming. Under the FCC’s current regulations, the Church could not use religious preferences to hire a secretary<sup>58</sup> but the Church was required to use racial preferences to recruit and hire the same secretarial position to further the interest of diversity in programming.<sup>59</sup> The court refused to accept the FCC’s proposition that there exists a link between the EEO regulations and the FCC’s interest in programming diversity.<sup>60</sup>

D. *Dissent’s Reasoning from Denial of Rehearing En Banc*<sup>61</sup>

Chief Justice Edwards<sup>62</sup> suggested a rehearing to review the court’s creation of a constitutional issue where he felt none existed.<sup>63</sup> He argued that the correct standard of review was the intermediate standard used in *Metro*<sup>64</sup> stating the standard was still good law “and not overruled by the Court in *Adarand*.”<sup>65</sup> In a separate dissent, Judge

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<sup>56</sup> *Id.* at 351. The processing guidelines, serve as a quota or safe harbor, which, after a licensee’s failure to meet the numerical guidelines, triggers a review for discriminatory recruiting and hiring practices. *Id.* at 352-54; *see supra* notes 13-15 and accompanying text.

<sup>57</sup> *See supra* note 5 and accompanying text (discussing the nexus test as applied to determine exemptions).

<sup>58</sup> *King’s Garden, Inc. v. FCC*, 498 F.2d 51, 61 (1974). Under the *King’s Garden* policy, a secretarial position is not substantially connected to the religious programming of a station and therefore does not qualify as a religious exemption from the EEO regulation. *Id.*

<sup>59</sup> The court stated “[t]he FCC would thus have us believe that low-level employees manage to get their racial viewpoint on the air but lack the influence to convey their religious views. That contradiction makes a mockery out of the Commission’s contention that its EEO program requirements are designed for broadcast diversity purposes.” *Lutheran Church*, 141 F.3d at 356.

<sup>60</sup> *Id.*

<sup>61</sup> *See infra*, notes 63, 65 and accompanying text.

<sup>62</sup> Harry T. Edwards, Chief Justice of the District of Columbia Circuit Court of Appeals.

<sup>63</sup> *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d. 494, 495 (D.C. Cir. 1998). Chief Justice Edwards argued the court mis-characterized the FCC good faith attempt to ensure against racial discrimination in the broadcast industry. *Id.* He characterized the EEO regulation as an encouragement, not an obligation, to consider minority applications. *Id.* He found the FCC’s use of statistical information as one, of several factors, used to foster internal processing of renewal applications. *Id.* “The guidelines reasonably can be understood to provide nothing more than a method for allocating the agency’s investigative resources.” *Id.* at 499.

<sup>64</sup> *See supra* notes 21-23 and accompanying text.

<sup>65</sup> *Lutheran Church*, 154 F.3d at 499. The Chief Justice further stated “[b]y forcing the square peg of the Commission’s regulations into the round hole of the *Adarand* analysis,

Tatel stated that the decision takes the holding of *Adarand* “where no court has yet taken it.”<sup>66</sup>

## V. ANALYSIS

The *Adarand* decision left several questions regarding the FCC and its EEO regulations unanswered including the amount of judicial deference the Supreme Court of the United States would give to this type of congressional act.<sup>67</sup> The decision in *Lutheran Church-Missouri Synod v. Federal Communication Commission*<sup>68</sup> suggests the answer is very little.<sup>69</sup> This analysis will focus on three areas: 1) the FCC’s authority as an obstacle for judicial review in the *Lutheran Church*<sup>70</sup> case;<sup>71</sup> 2) judicial review as a protection of the separation of powers;<sup>72</sup> and 3) the future of the EEO regulations.<sup>73</sup>

### A. *The FCC’s Authority as an Obstacle for Judicial Review*

The FCC derives authority to regulate the broadcast industry from the Communications Act of 1934.<sup>74</sup> The scope of the FCC’s authority is ambiguously

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which applies only to racial classifications, the panel decision disserves the development of antidiscrimination doctrine. This serious misprision of the issues calls for rehearing en banc.”  
*Id.*

<sup>66</sup> *Id.* at 500. Justice Tatel argued that nothing in the *Adarand* case or any other affirmative action cases justifies the extension of a strict scrutiny review of outreach and recruitment programs. *Id.* at 500-01. He suggests that the court require something more than “unsupported speculation” before applying strict scrutiny. *Id.* at 503.

<sup>67</sup> S. Jenell Trigg, Comment, *The Federal Communications Commission’s Equal Employment Opportunity and the Effect of Adarand Constructors Inc. v. Pena*, 4 COM L. CONSPECTUS 237, 251-254 (1996) (suggesting *Adarand* did not completely overrule *Metro* leaving questions regarding the amount of judicial deference the Supreme Court of the United States will apply to affirmative action legislation). The author classifies the critical unresolved question as whether a diversity of voices interest rises to the level of a compelling government interest. *Id.* at 252-53.

<sup>68</sup> 141 F.3d 344 (D.C. Cir. 1998).

<sup>69</sup> Robert S. Whitman, *Affirmative Action on Campus: The Legal and Practical Challenges*, 24 J.C. & U.L. 637, 649-50 (1998) (“*Lutheran Church* illustrates the difficulty of defending affirmative action under a strict scrutiny regime. And because the D.C. Circuit Court decided it, the decision could foretell even greater hostility toward Federal-government-sponsored affirmative action programs.”).

<sup>70</sup> 141 F.3d 344 (D.C. Cir. 1998).

<sup>71</sup> See *infra* Part IV.A.

<sup>72</sup> See *infra* Part IV.B.

<sup>73</sup> See *infra* Part IV.C.

<sup>74</sup> 47 U.S.C. § 151 (1991).

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described as the public interest.<sup>75</sup> Congressional delegation of authority under public interest “leaves the widest possible area of judgement and . . . discretion to the administrator.”<sup>76</sup> In his dissent in *Mistretta v. United States*,<sup>77</sup> Justice Scalia stated “[w]hat legislative standard . . . can be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a ‘public interest’ standard?”<sup>78</sup> In *Lutheran Church*,<sup>79</sup> the court stated “the government’s formulation of the interest seems too abstract to be meaningful.”<sup>80</sup>

In *Lutheran Church*, the FCC attempted to use the public interest standard to expand the scope of its authority and retain exclusive control over the renewal of the Church’s license.<sup>81</sup> The FCC issued a modified policy statement citing *Lutheran Church* after oral arguments were presented before the District of Columbia Circuit Court of Appeals.<sup>82</sup> However, the court refused to remand the issues in the case regarding the FCC’s newly modified interpretation of religious exemptions under *King’s Garden*.<sup>83</sup>

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<sup>75</sup> In *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, n. 2 (1940), the Court adopted the FCC’s interpretation that the public interest standard is comparative and flexible:

Since the beginning of regulation . . . comparative considerations have governed the application of standards of ‘public convenience, interest, or necessity’ laid down by the law . . . the commission desires to point out that the test . . . becomes a matter of a comparative and not an absolute standard when applied to broadcasting stations . . . . The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest . . . of the individual broadcaster.

*Id.*; see also *National Broadcasters v. U.S. Columbia Broadcasting System*, 319 U.S. 190 (1943) (holding the power of the FCC under the Communications Act of 1934 was not limited to regulating technical matters). The Court recognized that the Congress purposefully left the scope of authority vague to allow the authority of the FCC to grow and adjust with the “fluid and dynamic” nature of radio. *Id.* at 219. “The Act gave the Commission not niggardly but expansive powers.” *Id.*; see also *Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367, 379 (1969).

<sup>76</sup> Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court’s Separation of Powers Wonderland*, 56 NOTRE DAME L. REV. 587, 595 (1990).

<sup>77</sup> 488 U.S. 361 (1989).

<sup>78</sup> *Id.* at 416 (Scalia, J., dissenting).

<sup>79</sup> 141 F.3d 344 (D.C. Cir. 1998).

<sup>80</sup> *Id.* at 354.

<sup>81</sup> Two months after the oral arguments, the FCC moved the court to grant a partial remand of the issues regarding its *King’s Garden* policy. See *supra* note 5 and accompanying text.

<sup>82</sup> EEO Rules and Policies, 13 F.C.C.R. 6322 at ¶ 9. “Religious broadcasters will also remain subject to [the Commission’s] rules . . . requiring broadcast licensees . . . to ensure equal employment opportunity . . . . We hereby emphasize this continuing obligation notwithstanding any suggestion to the contrary in *Lutheran Church* . . . appeal pending.” *Id.*

<sup>83</sup> *Id.* at ¶ 5. The FCC issued a modification of the *King’s Garden* policy stating “the

One reason for the refusal was the FCC Commissioner's unwillingness to make any recommendations to the court on the likely outcome "concerning the merits of the case on remand."<sup>84</sup>

In response to the FCC's modified policy statement and requested remand, the court observed "the Commission has on occasion employed some rather unusual legal tactics when it wished to avoid judicial review, but this ploy may well take the prize."<sup>85</sup> The court's refusal to remand the case frustrated the FCC's attempt to retain complete control over the case procedurally, and substantively over the EEO regulations.

The FCC raised the issue of the court's denial to remand in its petition for rehearing en banc.<sup>86</sup> The panel upheld the remand denial relying, on both the Church's opposition to a remand<sup>87</sup> and on the non-binding nature of the newly modified policy statement.<sup>88</sup> The FCC was unsuccessful in its attempt to assert its authority as a means to block judicial review.

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Commission's policy should be expanded to permit religious broadcasters to establish religious belief or affiliation as a job qualification for all stations." *Id.* at ¶ 3.

<sup>84</sup> *Lutheran Church*, 141 F.3d at 348-49. Counsel for the FCC originally stated that the modified policy statement would be applied retroactively to the Church's license renewal and the present sanctions would be vacated. *Id.* In a "letter [FCC]'s own counsel filed with the court noting that the Commissioner thought it inappropriate for the motion to remand to bind the Commissioners to vote in a particular way and thus wished to make no representations about what sort of order should ultimately be adopted." *Lutheran Church*, 154 F.3d 487, 490 n.1 (D.C. Cir. 1998). The panel suggests that even under the modified policy statement the Church would be in violation of the EEO regulations stating "the Church would thus still remain obligated to exercise racial preferences within the pool of Lutheran applicants under the Commission's EEO rules." *Id.*

<sup>85</sup> *Lutheran Church*, 141 F.3d. at 349. "[W]hatever an agency's choice among various interpretive options may be based upon, it should not be based upon the desire to win a particular lawsuit." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 519-20 (1989). Chief Justice Scalia further suggests that deference should only apply "to agency determinations made (with sufficient formality) in the regular course of the agency's business, and not in litigation." *Id.*

<sup>86</sup> *Lutheran Church*, 154 F.3d 487, 489-90 (D.C. Cir. 1998). The FCC raised two additional arguments: 1) the court was obliged to decide the Religious Freedom Reform Act issue before the Fifth Amendment issue; and 2) the court should not have applied a strict scrutiny standard. *Id.*

<sup>87</sup> *Lutheran Church*, 154 F.3d 487, 489-90 (D.C. Cir. 1998). ("If the Church had supported the Commission's motion in this case, we might have had a remand."); see Botein, *supra* note 51, at 340-34 (referring to the rehearing on banc as a "rare form of relief").

<sup>88</sup> The FCC argued the policy statement was a binding order that grew out of a rulemaking. *Id.* at 489. The court responded "we confess that we simply have no idea as to in what administrative law category the Commission policy statement 'order' falls." *Id.*

*B. Judicial Review as a Protection of the Separation of Powers*

An independent federal agency<sup>89</sup> that exercises executive, legislative and judicial power<sup>90</sup> in excess of the authority delegated to it by Congress presents a threat to the doctrine of separation of powers.<sup>91</sup> The fundamental structure of government delegates certain powers to particular branches and, through tradition and expertise, a particular branch becomes the most capable of handling its specific area of responsibility.<sup>92</sup> An agency's success rests on an internal system of checks and balances between the agency's simultaneous legislative, executive and judicial functions. An agency that acts outside its legislative authority represents an avenue for the government to act beyond the will of the people, immune from external checks on overreaching power.<sup>93</sup>

The court's holding in *Lutheran Church*<sup>94</sup> suggests that judicial review can be a valuable check<sup>95</sup> in the checks and balance system that belies the notion of separation of powers. Chief Justice Edwards' dissent to the decision against a rehearing concluded that the circuit court was "forcing the square peg of the Commission's regulations into the round hole of the *Adarand* analysis."<sup>96</sup> The judicial force exerted in *Lutheran Church*<sup>97</sup> was necessary to keep the FCC within its scope of authority under the Communications Act of 1934.<sup>98</sup>

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<sup>89</sup> The Court's ruling in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding the limitation on the President's power of removal of the commissioner of the Federal Trade Commission as constitutional), established the constitutionality of independent federal agencies.

<sup>90</sup> *Mistretta v. United States*, 488 U.S. 361 (1989) (recognizing the "twilight zone" where legislative, executive and judicial actions merge together).

<sup>91</sup> Peter S. Guryan, *Reconsidering FEC v. NRA Political Victory Fund Through a Bolstered Functionalism*, 81 CORNELL L. REV. 1338, 1346 (1996) (stating "Independent agencies do not present any constitutional infirmities as long as the balance of power between the three branches is maintained and the branches' core functions are preserved.").

<sup>92</sup> See *infra* notes 93, 94 and accompanying text.

<sup>93</sup> Schwartz, *supra* note 76, at 595; see also THE FEDERALIST NO. 51, at 356 (James Madison) (Cambridge, Mass., Belknap Press of Harvard University Press, 1961) (recognizing the Legislature as the most powerful branch of government).

<sup>94</sup> 141 F.3d 344 (D.C. Cir. 1998).

<sup>95</sup> Bernard Schwartz, "Shooting the Piano Player?" *Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 34-35 (1995) (pointing out Scalia's suggestion that the Constitution does not provide for judicial review of all constitutional claims, the decision is for the Congress to make not the Court). *Contra*, *Ralpo v. Bell*, 569 F.2d 607, 626 (D.C. Cir. 1977) (frustrating judicial review jeopardizes human rights and fundamental freedom); *Fleming v. Moberly Milk Prods.*, 160 F.2d 259, 265 (D.C. Cir. 1947) (finding an elimination of judicial power leaves only executive self-restraint).

<sup>96</sup> *Lutheran Church*, 154 F.3d 487, 500 (D.C. Cir. 1998).

<sup>97</sup> 141 F.3d 344 (D.C. Cir. 1998).

<sup>98</sup> The FCC is limited to regulate within the scope of the public interest. Under "public

In the past the Supreme Court has struggled to establish a clear standard for judicial review<sup>99</sup> in separation of powers cases.<sup>100</sup> The Court's major separation of powers decisions can be categorized as either following a formalist or functionalist<sup>101</sup> approach and the headless fourth branch of government<sup>102</sup> presents problems under either interpretation. An independent agency is contrary to the formalist, strict separation of judicial, legislative and executive power.<sup>103</sup> Under a functionalist approach, the agency's existence is permissible, but only to the degree it remains separate from the core functions of the three branches.<sup>104</sup>

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interest" its EEO racial classifications cannot represent a compelling state interest narrowly tailored to achieve a legitimate governmental objective. *Id.* at 353-57.

<sup>99</sup> Alexander Dill, *Scope of Review of Rulemaking After Chadha: A Case for the Delegation Doctrine*, 33 EMORY L.J. 953, 1024-25 (1984); see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) (stating "the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle.").

<sup>100</sup> From 1983 to the present the cases demonstrate the Court's inability to establish one standard applicable to the separation of powers cases. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the legislative veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating the provisions of the Gramm-Rudman-Hollings Act granting budget cutting authority to the Comptroller General); *Morrison v. Olson*, 487 U.S. 654 (1988) (finding the Independent Counsel provisions of the Ethics in Government Act constitutional); *Mistretta v. United States*, 488 U.S. 361 (1989) (finding the U.S. Sentencing Commission constitutional); *Clinton v. New York*, 118 S.Ct. 2091 (1998) (invalidating the presidential line-item veto).

<sup>101</sup> For purposes of this analysis the terms "formalism" and "functionalism" have the following definitions. The formalist approach uses a strict textual interpretation of the Constitution as planning that the three branches each serves a separate and unique service exclusively. The judicial, legislative and executive powers are independent and do not overlap. The functionalist approach uses a liberal, flexible interpretation of the three branches. The focus is on the core function of each branch and the degree of overlapping which is permissible. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (suggesting a premise of ordered liberty to direct the Supreme Court's approach to the separation of powers); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (suggesting movement away from formalism); Stephen L. Carter, *From Sick Chicken to Synar*, 1987 BYU L. REV. 719 (1987) (discussing evolutionary and de-evolutionary trends in the Supreme Court's separation of powers cases); Peter S. Guryan, *Reconsidering FEC v. NRA Political Victory Fund Through a Bolstered Functionalism*, 81 CORNELL L. REV. 1338 (1996) (separation of powers case law demonstrates a judicial bias against congress); see generally Schwartz, *supra* note 76 (examining the development of separation of powers jurisprudence in the formalistic Burger Court and functionalist Rehnquist Court).

<sup>102</sup> Antonin Scalia, *Historical Anomalies in Administrative Law*, SUP. CT. HIST. SOC'Y 103, 106 (Yearbook 1985).

<sup>103</sup> See Schwartz, *supra* note 76, at 604.

<sup>104</sup> Schwartz, *supra* note 95, at 15-16. The *Lutheran Church* case demonstrates the problematic nature of agencies. A formalistic approach is dependent on the existence of an

The court in *Lutheran Church* recognized that the FCC derived its authority solely from the public interest,<sup>105</sup> and that the public's interest in creating program diversity is not a compelling government interest.<sup>106</sup> The racial classifications required under the present EEO regulations fail under a strict scrutiny review for three reasons. First, the regulations are designed to remedy a societal discrimination that fails to rise to the level of a compelling government interest.<sup>107</sup> Second, there is no direct causal connection between the regulations and the governmental objective of program diversity if the hired minorities fail to impact the viewpoints expressed on the airwaves.<sup>108</sup> Lastly, the minorities who can impact on-air viewpoints may further fail to present the viewpoints that are necessary to create program diversity.<sup>109</sup>

Judicial review of the EEO regulations served as a necessary check on congressional power to regulate the broadcast industry.<sup>110</sup> The internal checks and balances within the FCC failed to produce a constitutional regulation.<sup>111</sup> The court recognized that permitting a remand to allow the application of the modified policy statement would not be sufficient, in light of the FCC's unwillingness to admit the unconstitutionality of its regulation.<sup>112</sup>

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internal system of checks and balances within an agency. *Mistretta*, 488 U.S. 361, at 419-22 (Scalia, J., dissenting). The blend of legislative, executive and judicial functions enabled the FCC to create and enforce unconstitutional EEO regulations. *Id.* A functionalist approach is dependent on an agency functioning within its authorized purpose. Schwartz, *supra* note 95, at 3-6. The FCC functions as a legislative tool to regulate the airwaves. Its EEO regulations, however, functioned like an EEOC affirmative action regulation. The FCC was not created for this function and lacks the procedural safeguards necessary to ensure the proper application of an affirmative action regulation.

<sup>105</sup> *Lutheran Church*, 141 F.3d 344, 354 (D.C. Cir. 1998). The court rejected the Department of Justice suggestion that the FCC regulations were based on diversity in programming and the prevention of employment discrimination. *Id.*

<sup>106</sup> *Id.* at 354. ("We do not think diversity can be elevated to the 'compelling' level, particularly when the Court has given every indication of wanting to cut back *Metro Broadcasting*.").

<sup>107</sup> *City of Richmond v. Cronson*, 488 U.S. 469, 505 (1989); *see supra* notes 28, 30; *see also Lutheran Church*, 141 F.3d at 355-56.

<sup>108</sup> *See supra* notes 59, 60 and the accompanying text.

<sup>109</sup> *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 618-19 (1990) (O'Connor, J., dissenting); *see supra* note 28 and accompanying text.

<sup>110</sup> *See supra* note 98 and the accompanying text.

<sup>111</sup> *See supra* note 54 and the accompanying text.

<sup>112</sup> In *Sable Communications Inc. v. FCC*, 492 U.S. 115 (1989), the Court invalidated a prohibition of indecent but not obscene adult telephone messages and stated the judiciary's duty "[t]o the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution." *Id.* at 129.

### C. *The Future for the FCC's EEO Regulations*

The future use of the FCC's race classifications is dependent on the agency's ability to find a legitimate basis to support this type of regulation within the scope of the public interest. The court in *Lutheran Church* instructed the FCC to determine if it has the "authority to promulgate an employment non-discrimination rule."<sup>113</sup> The FCC is limited to the authority granted in the Communication Act of 1934. A revision of the current regulatory scheme may present a regulation that could withstand the first prong of a strict scrutiny analysis, a compelling governmental interest, but will fail to present a narrowly tailored means under the scope of the public's interest. Without a direct nexus between the compelling interest of program diversity and the FCC's EEO regulations, there is no guarantee that even a station acting within the regulations will accomplish program diversity.<sup>114</sup>

A race-based regulation aimed at preventing discrimination in employment throughout the broadcast industry may serve a remedial purpose.<sup>115</sup> First, the FCC needs to conduct an expansive study expending time, labor and funds to produce documentation to prove past discrimination existed in the broadcast industry. Second, the FCC needs to identify the particular viewpoints that are lacking in the programming. Even accomplishing these two tasks, the main obstacle to the FCC implementing an EEO regulation based on race classifications is in establishing a legitimate link, a direct nexus, between hiring minorities and the viewpoints that result from an increase of minorities in the workforce. The FCC must demonstrate that increasing the representation of minorities in the workforce will successfully provide the lacking programming viewpoints that non-minorities failed to provide.

## V. CONCLUSION

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The panel distinguished the FCC's remand request in *Lutheran Church* from the type of remand request it granted in *Sable* on the grounds of the Commission's willingness to doubt the constitutionality of its own policy. *Lutheran Church*, 154 F.3d. 487, 489-90 (D.C. Cir. 1998).

<sup>113</sup> *Lutheran Church*, 141 F.3d at 356.

<sup>114</sup> The court in *Lutheran Church* stated the "[FCC]'s purported goal of making a single station all things to all people makes no sense." *Id.* at 355-56.

<sup>115</sup> *Metro*, 497 U.S. at 611 (O'Connor, J., dissenting) ("The FCC and Congress may yet conclude after suitable examination that narrowly tailored race-conscious measures are required to remedy discrimination that may be identified in the allocation of broadcasting licenses."); see Barthwell Evans, *supra* note 29, at 411 (finding that minority preference is necessary to address past discrimination and to ensure that minority views are represented on the airways); Brunson, *supra* note 29, at 100 (failing to enforce EEO regulations resulted in a history of sanctioned discrimination in the broadcast industry).

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It has been suggested that to allow independent agencies to exist as protectors of the separation of powers doctrine and to charge the courts with the duty of ensuring that the same agencies do not overstep their authority are two very different things.<sup>116</sup> The court's duty is particularly difficult when the authority of the agency is as broadly defined as the scope of the public's interest.<sup>117</sup> The court in *Lutheran Church*<sup>118</sup> exercised its duty by refusing to remand the case to further administrative proceedings while the appeal was pending. The FCC is an extension of the Executive branch of government, exercising authority delegated by the Legislative branch through hearings modeled after the Judicial branch. If this square peg<sup>119</sup> is to fit within the three rings of government, judicial review must ensure that the addition does not upset the balance of power between the branches of government.

**Pamela J. Holder**

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<sup>116</sup> Schwartz, *supra* note 76, at 587-96.

<sup>117</sup> *Id.*

<sup>118</sup> 141 F.3d 344 (D.C. Cir. 1998).

<sup>119</sup> *Lutheran Church*, 154 F.3d 495, 500 (Edwards, C.J., dissenting).