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SCHOOL OF LAW

## TELECOMMUNICATIONS AND BLACK AMERICANS: THE UNMEASURED AND UNTOLD MARKETPLACE FACTOR

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The focus on economics and political change during the 1986 Annual Communications Conference is most appropriate. Communications is key to economic and political change. My remarks will address various issues relating to economic and political forces that influence and limit the ability of Black Americans to participate in the economic and political aspects of spectrum management and sharing. The conclusion drawn from my remarks is that marketplace restraint by the Black consumer is the natural response to marketplace exclusion from programming, employment and ownership.

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\*/Before The Fifteenth Annual Communications Conference sponsored by The School of Communications, Howard University under the general theme of "Communications: A Key to Economic and Political Change." This paper was delivered during the plenary session at The Howard Inn on February 13, 1986. Dr. Smith teaches Communications Law. He received his J.D. from the Howard University School of Law; LL.M., S.J.D. degrees from The George Washington National Law Center. Other presenters during this session included, Dr. George Gerbner, Professor of Communications and dean of The Annenberg School of Communications, University of Pennsylvania and Dorothy Gilliam, Columnist for The Washington Post. [This paper is dedicated to Peter Lewis, who at 34 years of age, is a pioneer entrepreneur in the cellular telephone industry, See H. Vickery, Mobile-phone expert grows rich, but he's just getting started, The Washington Times, July 25, 1984, at 4B, col. 3.]

BLACKS MUST PERCEIVE TELECOMMUNICATIONS AS AN ELEMENT  
OF SOCIAL PERSUASION AND POLITICAL FORCE IN AMERICA

There came a time in the 1960's that television brought the atrocities of segregation into the living rooms of White America. Each night, newscasts carried the brutality of the police against unarmed students, men and women, mostly Black seeking to define equality that excluded them from the American Dream. America woke up. However, the question is: have Blacks as a collective group ever perceived the power of telecommunications as an element of social persuasion and as a political instrument that affects their interests?

Telecommunications is a word. It also describes an industry, an industry that is, like most, driven by principles of supply and demand; an industry that must plan on the basis of the demand of the Black consumer. The question is: to what extent does the Black consumer perceive their ultimate power to reverse marketplace forces that distort their images, misrepresents or shuns their views, rejects their values, fails to acknowledge their achievements, tracks their habits and attempts to define their tastes?

The answer to these questions requires more research. It is my position that marketplace influences with or without government regulation will not change substantially until the Black consumer is aware, or made aware of how telecommunications, directly and indirectly governs their daily lives. Increased awareness along this line urges, if not compels the

immediate attention of the leadership of predominantly Black institutions of higher learning; professional and social groups; the economic institutions in which Black's own or hold interests; and the good will of any American who shares these views.

## II

### SOCIAL OBJECTIVES OF THE ALLOCATIONS POLICY -- BLACKS EXCLUDED

Does the Federal Communications Commission (FCC) take social objectives into account in its allocations policy for private use? As you know, it has been the position of the FCC for sometime that its allocations policy is based solely on technical and economic policies. While this position has been the subject of much debate, the Black scholar has offered little to influence or refute the FCC's position. Hence, the FCC and the Courts substantially have relied on those who conclude that social concerns are irrelevant to the allocations policy.

Allocations policies determine how and when the spectrum will be offered for use for profit by the private sector. Until Benjamin L. Hooks was appointed as Commissioner to the FCC in 1973, followed by Tyrone Brown and Henry Rivera, no minorities had ever been in a position to interpret or challenge the allocations policy of the FCC. Except on rare occasions, the FCC never discussed, or considered the effects that the development of their allocations policy had on the entry of Blacks and other minorities into broadcasting.

That the FCC has ignored the social concerns of minorities in its allocations policy is hardly arguable, but more research on the subject is needed. However, it is evident that prior to the 1960's, there had been little, if any, effort by the FCC and the relevant video and aural industries to reach out and seek the views of Blacks on how the spectrum should be allocated for use and for profit. This neglect reaches back to 1934, the year Congress passed the Communications Act.

Minority Americans must stake out a role in evaluating the allocations policy of the FCC or be left behind as new technologies knock on the door of the new century. This stake will be honored if Black people include the element of telecommunications policy in their political and consumer priorities. This movement requires mass media departments and Schools of Communications in predominantly Black colleges, and all people of good will, who have supported the elevation of Blacks in America, to advance telecommunications toward the top of their agenda as this century closes. We simply can no longer defer the importance of the social effects played by the allocations policy on the use of the spectrum in which Black Americans own an interest by virtue of citizenship.

### III

#### THE INFLUENCE OF RACE AND POLITICAL AFFILIATION RELATIVE TO THE ULTIMATE GRANT OF A BROADCAST LICENSE

There is an assumption that political affiliation influences the allocations policy and ultimate grant of a broadcast license. If this

assumption is born out by fact, we need to determine the extent to which existing Black broadcasters progressed or declined during Democratic and Republican terms. It is exceedingly important that Blacks know whether race, as distinguished from economic barriers, and/or politics directly or indirectly excludes Blacks from spectrum participation.

In recent years, the FCC, and other government agencies and marketplace forces have denied the race factor. The debate has been directed to the economic factor as the sole basis for the dearth of minority broadcasters. Yet, the race factor may predominate in the marketplace to discourage minorities from an even chance to compete for spectrum use.

Research must be guided towards the action or inaction by the FCC and other governmental agencies that influence market responses that directly or indirectly influences the marketplace as it relates to minority ownership.

Words alone that there is a minority ownership policy may not be sufficient to spur an affirmative and responsive industry towards the goal of diversity. If politics is a relevant factor in the ultimate decisions of who gets to use the spectrum and who does not -- we need to know about it so that such findings, should that be the case, be presented to the Congress for evaluation, used as evidence in proper administrative adjudications and referred to on judicial review.

IV

BLACKS SHOULD COMBINE THEIR RESOURCES  
AND INVEST IN TELEVISION

By all accounts, it cannot be disputed that Blacks are pioneers in broadcasting, particularly in television. There are 1,181 television stations in America. Blacks own only eleven of these stations: 4 VHF's and 7 UHF's. The acquisition of television properties in all markets must be one of the top priorities in the Black community. Black group investments will be required at this point in time because of the inflated cost of many broadcast properties. However, if Black America is to stake out a place in the opinion market as the new century approaches, it must combine their resources and purchase or acquire interests in television, and allied technologies, such as satellite communications.

Broadcast technology must become an element of the economic civil rights movement of the 1990's. During the 1990's all major Black groups in America must discuss, assess, analyze, evaluate, combine, bid on and purchase interests in broadcast systems. New advocates must emerge towards this end committed to equality of diverse opinion as well as the profit motive.

While I have focused on broadcasting in these comments, I do not foreclose that a keen economic interest be direct toward cable franchises, and other video technologies. However, I favor television because it will not fade away as a significant social force in the foreseeable future, and because it may be the next logical investment step for existing Black radio station owners.

BLACK RADIO OWNERS NEED TO COLLECTIVELY  
TALK ABOUT THEIR FUTURE

At present there are 47 Black-owned FM radio and 87 AM stations in the nation out of a total of 9,512. These stations are the central source of news and public affairs programming in their communities. Without them, many communities in this nation would never hear about the achievements of Black people, or national and international issues that affect or in which Black Americans have an interest.

Black radio owners may be pivotal to where Black America advances in the telecommunications industry in the next century. They have not only paved the way as a matter of economic commitment, they have opened up channels of communications more valuable than the recipient of their signals may realize.

Yet, it is the view of some observers that Black radio owners are not talking about joint, cooperative ownership ventures to capture available spectrum vacancies, or possible vacancies for future use. If ever there was a need for such discussions, it is now. In my view, if existing minority broadcasters do not come together along with potential entrepreneurs and combine their capital for the acquisition of major market radio or television stations, minority ownership may never reach the level that it surely can in the marketplace.



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## VI

### WILL THE JUDICIALLY CREATED MINORITY OWNERSHIP POLICY BE UNDERCUT BY ADMINISTRATIVE LOTTO?

There are some concerns in the academic community that the judicially created minority ownership policy may be administratively undermined by the elimination of the comparative hearing process. It ought to be asserted now that should the concerns of the minority academic community be minimally true, the effect of such government action would undercut a fifteen year effort to desegregate the spectrum.

All eyes and ears must be tuned and directed towards the FCC to assess whether the concerns raised here and in other academic circles have any validity.

The ultimate question is -- assuming that comparative hearings are disfavored by the FCC -- what will be an effective substitute to assure the vitality of a minority ownership policy that is more than lip service? This is an exceedingly important question because if the minority ownership policy is relegated solely to a lottery -- the probabilities of selection may be no greater than they are today, in fact, that may be worse. We need to keep our eyes on this area.

## VII

### DEREGULATION MAY PROVE TO BE A THREAT TO THE INTERESTS OF MINORITIES AND A SUMMONS TO TAKE DIRECT CONSUMER ACTION BY THE EXERCISE OF MARKETPLACE RESTRAINT

It is not arguable that deregulation, or unregulation of telecommunications rules by the FCC has undercut minority interests in employment, ownership and programming. We are told that our destiny lies in the marketplace and not within the protective interest of government policy. Blacks have resisted this policy and Black Americans and other minorities will continue to resist the wholesale abandonment of government as a needless overseer of the equitable distribution of spectrum use by all groups in America.

Blacks must pose this question: Is deregulation a threat to the interests of minorities or a summons to take direct, selective, consumer, and political action against those who do, or would deny us access to the electromagnetic spectrum?

Deregulation does pose a threat to minorities. Like all other Americans, Blacks, who comprise one of the largest viewing groups of television and listeners to radio may find little programming that portrays their people or their communities in a positive image, or that airs controversial issues relevant to the Black community.

As this century closes, the Black consumer will become the key to the protection of minority viewpoints in the marketplace, and perhaps even the shield against the onslaught against minority ownership. In response to deregulation, the Black consumer will exercise direct marketplace restraint against broadcast, cable, and other video entities that fail to live up to equal employment opportunities, who can demonstrate no significant Black interests in its ownership ranks, and who cannot or do not demand diversity from their program suppliers.

Marketplace restraint exercised by the Black consumer will not only be exercised against broadcast, cable and other video services, the major marketplace restraint will be exercised, I think, against the corporate sponsors themselves. Such a response will occur because the civil rights movement of the new century will embrace marketplace restraint as its major weapon against marketplace neutrality, neglect,

and failure concerning Black issues. Corporate America can ill-afford the awesome response that will surely come due to its callous disregard of minority ownership, employment, and programming issues of concern to Black America.

Black capital is King in several markets in America and Queen in some and Knights in others. The Kings, Queens and Knights -- I predict -- will not and cannot tolerate a marketplace that takes Black capital for granted. The onus is on corporate America to plan its future investments in minority ownership ventures, to insist on employment opportunities in broadcast stations and in Hollywood. Deregulation is a summons to the Black and minority communities to collectively restrain their dollars against all who benefit from them without a demonstrable showing of a commitment to the principle of diversity.

## VIII

### BLACK EDUCATORS MUST FORGE NEW PATHS IN TELECOMMUNICATIONS

That there is a dearth of minority spectrum managers in government is not arguable. More research is needed to ascertain the exact number of Black spectrum managers in the history of this nation. My gut feeling is that you can count them on less than two hands. There are a dearth of minority telecommunications engineers, and economist in government and in the telecommunications industry. This, too, must

end. There is also greater awareness needed in the Black legal community of the need for more lawyers versed in Communications Law. Both government and the private sector must reverse their benign neglect of investing in minority universities with mass media and Schools of Communication because these schools offer the bridge of understanding between corporate America and the Black consumer.

I have criticised the FCC and corporate America and warned of future marketplace responses regarding the abandonment of minority ownership, employment and programming priorities. My final words are to those who are principally responsible for the education of Black lawyers, economists, engineers, journalists, cable analysts, and business school majors. It is time for all of these disciplines to come together and forge a new path in the future in telecommunications. Teachers are a key to the future -for if teachers do not understand the force of telecommunications on the liberty of minorities, students will not be in a knowledgeable position to lead the Black consumer against the benign neglect of the telecommunications industry that assumes that the Black dollar will continue to be blind to callous disregard.

The future need not be a predictable economic war against the free enterprise system. There is room for all Americans. At no time in American history has the minority community raised up against the powerful telecommunications industry through the exercise of their market power, but it may happen. It will happen, unless the minority

ownership policy of the FCC, coupled with the earnest support of corporate America takes stock of what the thinking is in the Black community.

IX

THE LEGACY OF CHARLES H. HOUSTON AND H.H. PACE:  
MARKETPLACE FAILURE vs. ALTERNATIVE APPROACHES

In 1929 when the radio was first regulated by the Radio Act of 1929, what was the obligation of radio to the diverse population of America? There was little obligation. Hence, Black lawyers, such as Dr. Charles Hamilton Houston, Vice-Dean of the Howard University School of Law, sought alternative sources to communicate the plight of Blacks in the South. Since Blacks were foreclosed from the use of radio to tell the story of racism, he proposed the use of film. Houston was not alone in this alternative sources in the private sector.

H.H. Pace, faced with the discrimination against Blacks in the the recording industry, incorporated Pace's Phonograph Company for negro voices prior to 1921, and in that year spoke about "The Making of Phonograph Records of Negro Voices," before the annual meeting of The Negro Business League. His vision was clear -- the marketplace restrained the creative nature of his people, but Pace's plan was to provide a vehicle to combat marketplace racism.

What do the Houston and Pace stories have to do with current day marketplace theories? First of all, it instructs Blacks to formulate alternative plans of action to be seen and heard by the general population and plans to speak to each other. In fact, I implore you to take it a step further to say that it compels us to pursue alternative plans of action. Secondly, it should remind Black Americans that diversity of viewpoints is a principle to be achieved when recognized as an obligation to be obeyed. Had the voices of Houston advocating the plight of Blacks in the South been aired on radio, or the voices and music of Black artists been carried over the air from the beginning of radio -- the separate but equal doctrine might have been eliminated long before the 1954 decision of Brown v. Board of Education of Topeka, Kansas, and the recording industry would have vigorously competed to acquire talented Black artist not only to record their music but to appear in films, be heard on radio, and would have no doubt been routinely introduced in early television as major attractions.

History taught Blacks long before deregulation and the current free market advocates were born that the marketplace was closed to us, if we were interested in distribution; but opened to us if we were consumers.

I submit to you that if Houston and Pace were alive today, I believe that Houston would be investigating alternative ways to get the civil rights message across the nation and Pace would be attempting

to rally Black investors to expand his recording company and enter other communication businesses. The conclusion drawn from these men is that if the Black consumer is denied access to marketplace opportunities because of marketplace neutrality -- the Black consumer will combine and dislodge this marketplace psychology by direct and selective marketplace restraint.

X

CONCLUSION

Telecommunications is not a new industry in America. Its workings are becoming understood better each day by the Black consumer. Blacks are acquiring more knowledge about telecommunications and how it influences their lives through governmental decisions and determination made by marketplace managers.

The Black consumer will begin to shift more radically in the foreseeable future toward marketplace restraints given the attitude of government to eliminate minority ownership policy and equal employment opportunity as a public interest concern. This conduct will unleash a marketplace response from the unmeasured and untold Black consumer as a protective shield to secure diversity, a revered principle of liberty.